apply to lift the stay, particularly if the determination of ancillaries is subject to delay.

Orders accordingly.

[2010–12 Gib LR 100]

EUROPEAN COMMISSION and KINGDOM OF SPAIN v. GOVERNMENTS OF GIBRALTAR and UNITED KINGDOM

COURT OF JUSTICE OF THE EUROPEAN UNION (Skouris, President; Judges Tizzano, Rodrigues, Lenaerts, Bonichot, Prechal (Presidents of Chambers), Rosas, Sciemann, Juhász, Danwitz (Rapporteur), Šváby, Berger, Jarašiūnas): February 18th, 2010

European Community Law—competition law—State aid—selective advantage—selective advantage of proposed tax regime, contrary to art. 107(2) TFEU, for Commission to prove by comparison with "normal" system of taxation for Member State/autonomous region—Commission not required to demonstrate advantageous exceptions from general rules of proposed tax regime—sufficient that proposed basis of assessment distinguishes between comparable undertakings, conferring advantages on certain undertakings when compared with previous regime

The Governments of Gibraltar and the United Kingdom, applied to the Court of First Instance (since November 30th, 2009, the General Court) to annul the decision of the European Commission that Gibraltar's proposed corporate tax reforms infringed the State aid provisions of art. 87(1) EC (art. 107(1) TFEU).

Gibraltar had announced its intention to repeal all its corporate tax laws and introduce a new tax regime for companies registered in Gibraltar. Together with the United Kingdom, it notified the Commission of its proposals. These included the introduction of a payroll tax payable by companies with employees in Gibraltar, a business property occupation tax ("BPOT") payable by companies occupying property in Gibraltar, and a registration fee that was greater for income-generating companies than those generating no income. The payroll and BPOT taxes were payable only by profit-making companies and capped at 15% of profits.

The Commission decided to initiate a formal procedure to review the proposals and invited comments from interested parties. That decision

included a preliminary assessment that questioned, *inter alia*, the compliance of the proposed payroll and BPOT tax with State aid law, referring to the effective exemption from taxation of companies without employees in Gibraltar and those not making any profit. Offshore companies were not, at that stage, mentioned as enjoying a selective advantage. Spain commented that the proposals would advantageously favour offshore companies by applying to them a zero rate of tax. The Commission forwarded those observations to the United Kingdom, which sent its own comments to the Commission, but did not at that stage adopt a position on Spain's argument. In its final decision ("the contested decision"), the Commission found that the proposals infringed art. 87(1) EC (art. 107(1) TFEU) and could not be implemented as, first, the payroll tax and BPOT favoured companies making no profit secondly, the 15% tax limit favoured companies with low profits relative to the number of employees, and thirdly, the tax reforms conferred a material selective advantage on offshore companies with no physical presence in Gibraltar, as they would incur no corporate tax liability. The Commission had previously produced an internal notice relating to State aid in the field of taxation that had given common examples of selective advantage and stated that tax measures open to all economic agents would not fall within the definition of State aid.

Gibraltar and the United Kingdom applied to the Court of First Instance ("the General Court") to annul the contested decision. It set it aside on the basis that the proposed tax regime was not regionally or materially selective. The court concluded, *inter alia*, that the Commission had been required to identify the "normal" corporate tax regime and then find derogations from it that created selective advantages, not merely identify the selective effects of the new regime, and had failed to do so. It further concluded that the "normal" regime to be used in assessing selectivity was the proposed general regime and not the previous corporate tax structure in Gibraltar.

On appeal, the Commission submitted that (a) its appeal was admissible as it sought to set aside judgment without seeking to change the subject-matter of the proceedings, in accordance with the Rules of Procedure of the Court of Justice, art. 113; (b) the General Court had erred in finding that the proposed tax measures, payable only by profit-making undertakings, did not confer a selective advantage contrary to art. 87(1) EC (art. 107(1) TFEU); (c) the court had further erred in finding that the proposed tax advantages for offshore companies did not confer a selective advantage by focusing on the regulatory technique used rather than its selective effects; (d) in determining selective advantage by reference to a framework of "normal" taxation, it had been entitled to compare the proposed tax regime with its predecessor, rather than identifying advantageous derogations from newly proposed general rules; it was sufficient to demonstrate that the basis for assessment under the new policy would favour offshore undertakings, whatever regulatory technique was used to achieve that effect, notwithstanding the general competence of Member States to set their own tax policies; (e) its notice had not been unqualified,

had not given rise to any legitimate expectation precluding its decision, and had not exempted any tax regime from State aid law; (f) the Commission's previous decision-making practice was incapable of affecting or precluding its current application of State aid law; (g) it had not been required to consider any justifications for the selective advantage, as none had been given by the respondents and the proposed regime *de facto* differentiated between undertakings in a manner incapable of justification; and (h) the Commission had given the respondents the opportunity to respond to its preliminary assessment and the observations of interested parties, had not been required to comment on those observations in advance of its final decision, and had not breached the respondents' rights of defence.

Spain submitted, in support of the Commission, that (a) the zero rate of tax for offshore companies had conferred a material selective advantage on offshore undertakings; and (b) the Commission had not been required to consider any justifications for the selective advantage, as none had been given by the respondents and the proposed regime *de facto* differentiated between undertakings in a manner which could not be justified.

Gibraltar and the United Kingdom submitted in reply that (a) the General Court had correctly found that the proposed measures by which tax was payable only by profit-making undertakings did not confer a selective advantage contrary to art. 87(1) EC (art. 107(1) TFEU); (b) it had correctly found that the proposed tax advantages for offshore companies did not confer a selective advantage and rightly focused on its regulatory technique; (c) it had correctly found that, in determining selective advantage by reference to a framework of "normal" taxation, the Commission had not been entitled to compare the proposed tax regime with its predecessor and, in so doing, had failed to identify advantageous derogations from the newly proposed general rules; to hold otherwise would contravene the competence of Member States to set their own tax policies; (d) the Commission's notice had given rise to a legitimate expectation that Member States would be competent to spread tax burdens as they saw fit, that also barred its final decision; (e) the Commission's previous decision-making practice also gave rise to a legitimate expectation that precluded its final decision; (f) the Commission should have considered the justifications for the proposed tax regime even though none had been put forward by the parties; and (g) the Commission had breached their rights of defence, not giving them a full opportunity to respond, by not explicitly mentioning offshore companies in its preliminary report or indicating its view of the observations of the interested parties before making its final decision.

Ireland submitted that the Commission's appeal was inadmissible, as it went beyond the scope of the contested decision and the decision under appeal, contrary to the Rules of Procedure of the Court of Justice, art. 113.

Held, quashing the judgment of the General Court and giving final judgment against the respondents:

(1) The Commission's appeal was admissible as it sought to set aside judgment without seeking to change the subject-matter of the proceedings in accordance with the Rules of Procedure of the Court of Justice, art. 113 (para. 66).

(2) The proposed tax policy conferred a selective advantage on offshore companies registered in Gibraltar, contrary to the State aid provisions of art. 87(1) EC (art. 107(2) TFEU). General tax measures making taxes payable only by profit-making undertakings and measures capping the taxation of profits, that applied to all economic operators without distinction, could not confer a selective advantage. However, the effect of the proposals as a whole was to confer a selective advantage on offshore companies. Selective advantage was to be determined by comparison with the "normal" system of taxation, but that did not require the Commission to demonstrate derogations from the current tax regime in favour of a "certain undertaking." Otherwise, a tax system without exemptions would, whatever its selective effects, be exempted from State aid requirements. In the present case, the advantage arose not from any exemptions but from the basis of assessment itself, in differentiating between offshore and resident companies. Since the proposals applied different tax burdens to different undertakings in comparable positions, by reason of the basis of assessment, they conferred a selective advantage contrary to State aid law. In those circumstances, the Commission had been entitled to use the former tax regime of Gibraltar as the "normal" system of taxation by which to assess selective advantage. This also followed from Gibraltar's status as an autonomous region, having its own fiscal competence. It had devised its own tax reforms and had, from a constitutional perspective, a political and administrative status separate from the United Kingdom; the tax reform had been devised without the United Kingdom being able to intervene directly as regards its content; and the financial consequences for Gibraltar of introducing the tax reform would not be offset by aid or subsidies from the United Kingdom. Contrary to the findings of the General Court, the proposed tax regime conferred direct financial advantages on offshore companies registered in Gibraltar by distinguishing between offshore and resident companies in its basis of assessment, thereby infringing art. 87(1) EC (art. 107(2) TFEU), notwithstanding the general competence of Gibraltar to spread tax burdens across different factors of production or economic sectors. The judgment of the General Court would, therefore, be quashed and final judgment given against the respondents (paras. 77–120).

(3) Further, the Commission's decision would not be set aside on the ground that it was contrary to the Commission's notice relating to State aid in the field of taxation. The notice was an administrative document capable of giving rise to a legitimate expectation, but was not unreserved in its recognition of State competence to decide the spread of tax burdens and did not exempt tax policies from State aid law. The notice did not preclude their decision that the proposed tax regime, by distinguishing

between offshore and resident companies in its basis of assessment, infringed art. 87(1) EC (art. 107(2) TFEU) (paras. 128–134).

(4) Additionally, the Commission's decision could not be set aside on the ground that it departed from its established decision-making practice. Whether proposed measures infringed State aid law was to be decided solely on the basis of art. 87(1) EC (art. 107(2) TFEU), and not in the light of any previous decision-making practice of the Commission (paras. 135–136).

(5) Moreover, the Commission had not been required to examine whether the selective advantages enjoyed by offshore companies under the proposed tax regime might be justified by the nature and general scheme of the tax system. Although the Commission was required to conduct a diligent and impartial examination of all the evidence, it was for the Member States and autonomous regions to justify any differentiation between undertakings. In the present case, the respondents had failed to do so at the notification, investigation, and first instance stages, and could not now complain that the proposals were justified (paras. 143–152).

(6) Further, the Commission had not breached the respondents' rights of defence. They had been given the opportunity to respond to the preliminary assessment of the Commission and the observations of the interested parties. The Commission had not been required by Regulation (EC) No. 659/1999, art. 6(1) explicitly to refer to offshore companies in its preliminary assessment or to indicate its view of the contributions of the interested parties before adopting a line of argument in its final decision. It had properly expressed its doubts about the compatibility of the proposals with State aid law by referring to non-resident companies escaping taxation by having no employees in Gibraltar, and the respondents had been afforded their rights of defence (paras. 165–182).

(7) The court considered that as the proposed tax reforms would be materially selective, it was unnecessary to consider whether the Commission was also correct to find them regionally selective (paras. 183–188).

Cases cited:

(1) *Adria-Wien Pipeline GmbH* v. *Finanzlandesdirektion für Kärnten (Case C-143/99)*, [2001] ECR I–8365; [2002] All E.R. (EC) 306, [2002] 1 C.M.L.R. 1103, referred to.

(2) *Air Liquide Industries Belgium S.A.* v. *Ville de Seraing (Joined Cases C-393/04 & C-41/05)*, [2006] ECR I–5293; [2006] 3 C.M.L.R. 667, referred to.

(3) *Belgium* v. *Commission (Case 234/84)*, [1986] ECR 2263; [1988] 2 C.M.L.R. 331, referred to.

(4) *Belgium* v. *Commission (Case 40/85*), [1986] ECR 2321; [1988] 2 C.M.L.R. 301, referred to.

(5) *Belgium* v. *Commission (Case C-142/87)*, [1990] ECR I–959; [1991] 3 C.M.L.R. 213, referred to.

(6) *British Aggregates Assn.* v. *Commission (Case C-487/06 P)*, [2008] ECR I–10515, referred to.
(7) *Comitato "Venezia vuole vivere"* v. *Commission (Joined Cases C-71/09 P, C-73/09 P & C-76/09)*, unreported, referred to.
(8) *Commission* v. *Gibraltar Govt. (Joined Cases C-106/09 P & C-107/09 P)*, unreported, referred to.
(9) *Commission* v. *Netherlands (Case C-279/08 P)*, unreported, referred to.
(10) *Commission* v. *Sytraval & Brink's France SARL (Case C-367/95 P)*, [1998] ECR I–1719, referred to.
(11) *Diputación Foral de Vizcaya* v. *Commission (Joined Cases C-465/09 P to C-470/09 P)*, unreported, referred to.
(12) *ESF Elbe-Stahlwerke Feralpi* v. *Commission (Case T-6/99)*, [2001] ECR II–1523, referred to.
(13) *Falck SpA* v. *Commission (Joined Cases C-74/00 P & C-75/00 P)*, [2002] ECR I–7869, referred to.
(14) *Ferriere Nord SpA* v. *Commission (Case T-176/01)*, [2004] ECR II–3931; [2005] All E.R. (EC) 851, referred to.
(15) *France* v. *Commission (Case C-301/87)*, [1990] ECR I–307, referred to.
(16) *Freistaat Sachsen* v. *Commission (Case C-459/10 P)*, unreported, referred to.
(17) *Germany* v. *Commission (Case C-288/96)*, [2000] ECR I–8237, referred to.
(18) *Germany* v. *Commission (Case C-156/98)*, [2000] ECR I–6857, referred to.
(19) *Italy* v. *Commission (Case C-364/90)*, [1993] ECR I–2097, referred to.
(20) *Italy* v. *Commission (Case C-372/97)*, [2004] ECR I–3679, referred to.
(21) *Italy* v. *Commission (Case C-66/02)*, [2005] ECR I–10901, referred to.
(22) *Ministero dell'Economia e della Finanze* v. *Banco Exterior de España (Case C-387/92)*, [1994] ECR I–877; [1994] 3 C.M.L.R. 473, referred to.
(23) *Ministero dell'Economia e della Finanze* v. *Paint Graphos Soc. coop. arl (Joined Cases C-78/08 to C-80/08)*, unreported, referred to.
(24) *Netherlands* v. *Commission (Case C-159/01)*, [2004] ECR I–4461, referred to.
(25) *Netherlands Antilles* v. *Council (Case C-159/98 P(R))*, [1998] ECR I–4147, referred to.
(26) *Portugal* v. *Commission (Azores) (Case C-88/03)*, [2006] ECR I–7115; [2006] 3 CMLR 1215, followed.
(27) *Salzgitter A.G.* v. *Commission (Case C-182/99)*, [2003] ECR I–10761, referred to.

Legislation construed:

Treaty Establishing the European Community (Consolidated Version), OJ 2002 (325/33), art. 87(1) EC (art. 107(1) TFEU):

"Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market."

art. 88(2)–(3) EC (art. 108(2)–(3) TFEU):

"2. If, after giving notice to the parties concerned to submit their comments, the Commission finds that aid granted by a State or through State resources is not compatible with the common market having regard to Article 87, or that such aid is being misused, it shall decide that the State concerned shall abolish or alter such aid within a period of time to be determined by the Commission . . . On application by a Member State, the Council may, acting unanimously, decide that aid which that State is granting or intends to grant shall be considered to be compatible with the common market, in derogation from the provisions of Article 87 or from the regulations provided for in Article 89, if such a decision is justified by exceptional circumstances. If, as regards the aid in question, the Commission has already initiated the procedure provided for in the first subparagraph of this paragraph, the fact that the State concerned has made its application to the Council shall have the effect of suspending that procedure until the Council has made its attitude known. If, however, the Council has not made its attitude known within three months of the said application being made, the Commission shall give its decision on the case.

3. The Commission shall be informed, in sufficient time to enable it to submit its comments, of any plans to grant or alter aid. If it considers that any such plan is not compatible with the common market having regard to Article 87, it shall without delay initiate the procedure provided for in paragraph 2. The Member State concerned shall not put its proposed measures into effect until this procedure has resulted in a final decision."

Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty (O.J. 1999, L. 83/1), art. 6: The relevant terms of this article are set out at para. 2.

Commission Decision (EC) 2005/261 on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform (O.J. 2007, L. 85/1), recital 163: The relevant terms of this recital are set out at para. 19.

art. 1: The relevant terms of this article are set out at para. 22.

Rules of Procedure of the Court of Justice of the European Communities of 19 June 1991 (O.J. 1991, L. 176/7) (as amended), art. 113:

"1. An appeal may seek:

— to set aside, in whole or in part, the decision of the General Court;

— the same form of order, in whole or in part, as that sought at first instance and shall not seek a different form of order.

2. The subject-matter of the proceedings before the General Court may not be changed in the appeal."

R. Lyal, *V. Di Bucci* and *N. Khan* for the European Commission;
N. Díaz Abad and *J.M. Rodríguez Cárcamo* for the Kingdom of Spain;
J. Temple Lang, *M. Llamas* and *A. Petersen* for the Government of Gibraltar;
I. Rao, *D. Anderson, Q.C.* and *Ms. M. Gray* for the United Kingdom;
D. O'Hagan and *B. Doherty* for Ireland.

1 **SKOURIS, PRESIDENT,** delivering the judgment of the court: By their appeals, the Commission of the European Communities and the Kingdom of Spain seek to have set aside the judgment of the Court of First Instance of the European Communities (now the General Court) of December 18th, 2008 in *Gibraltar Govt.* v. *Commission (Joined Cases T-211/04 & T-215/04)* ([2008] ECR II–3745) (the judgment under appeal), by which that court annulled Commission Decision 2005/261/EC on the aid scheme which the United Kingdom is planning to implement as regards the Government of Gibraltar Corporation Tax Reform (OJ 2005 L 85, p.1: "the contested decision").

LEGAL CONTEXT

2 Article 6 of Council Regulation (EC) No. 659/1999, laying down detailed rules for the application of art. 88 EC (art. 108 TFEU) (OJ 1999 L 83/1), provides (OJ 1999 L 83/4–5):

"**Formal investigation procedure**

1. The 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. The decision shall call upon the Member State concerned and upon other interested parties to submit comments within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period.

2. The comments received shall be submitted to the Member State concerned. If an interested party so requests, on grounds of potential

damage, its identity shall be withheld from the Member State concerned. The Member State concerned may reply to the comments submitted within a prescribed period which shall normally not exceed one month. In duly justified cases, the Commission may extend the prescribed period."

FACTS

Background to the Government of Gibraltar's reform of corporate tax

3 On July 11th, 2001, the Commission decided to initiate the formal investigation procedure under art. 88(2) EC (art. 108(2) TFEU) in respect of two corporate tax measures applied in Gibraltar, respectively concerning "exempt companies" (OJ 2002 C 26/13) and "qualifying companies" (OJ 2002 C 26/9).

4 In order to qualify for exempt company status, a company had to meet a number of conditions. Those conditions included the prohibition of carrying on or transacting any trade or business in Gibraltar, other than with other exempt or qualifying companies. With some exceptions, an exempt company was exempted from payment of income tax in Gibraltar and was liable only to taxation at a fixed sum of £225 per annum.

5 The conditions for the grant of qualifying company status were, essentially, identical to those necessary for exempt company status. Qualifying companies paid tax at a rate negotiated with the Gibraltar tax authorities of between 2% and 10% of profits.

6 By judgment of April 30th, 2002 in *Gibraltar Govt.* v. *Commission (Joined Cases T-195/01 & T-207/01)* ([2002] ECR II-2309; [2002] All E.R. (EC) 838; [2002] 2 C.M.L.R. 826), the General Court, first, annulled the decision initiating the formal investigation procedure relating to exempt companies on the ground that the Commission had classified the entire scheme relating to such companies as new aid and, secondly, dismissed the application for annulment of the decision to initiate the procedure relating to qualifying companies.

7 The procedure relating to exempt companies resulted in the Commission's decision of January 19th, 2005 to propose appropriate measures, which were accepted by the United Kingdom on February 18th, 2005 (OJ 2005 C 228/9). Following the procedure relating to qualifying companies, on March 30th, 2004 the Commission adopted Decision 2005/77/EC on the aid scheme implemented by the United Kingdom in favour of Gibraltar qualifying companies (OJ 2005 L 29/24), by which it declared the regime relating to those companies incompatible with the common market.

The Government of Gibraltar's reform of corporate tax

8 On April 27th, 2002, without prejudice to whether or not the tax regimes relating to exempt companies and to qualifying companies constituted State aid, the Government of Gibraltar announced its intention to repeal all its corporate tax laws and introduce an entirely new corporate tax regime for all companies in Gibraltar. This reform of corporate tax by the Government of Gibraltar forms the subject-matter of the present dispute.

9 By letter of August 12th, 2002, the United Kingdom of Great Britain and Northern Ireland notified the Commission, pursuant to art. 88(3) EC (art. 108(3) TFEU), of the proposed reform of corporate tax ("the proposed tax reform") which the Government of Gibraltar planned to introduce.

10 In order to be implemented by the Government of Gibraltar, the proposed tax reform had first to be passed by the Gibraltar House of Assembly. As part of the reform, the legislation governing exempt companies and qualifying companies up until that time was to be repealed with immediate effect.

11 The proposed tax reform comprises, as is apparent from the judgment under appeal, a system of taxation applicable to all companies established in Gibraltar and a top-up (or penalty) tax applicable solely to companies in the financial services sector and to utilities, which include undertakings operating in the telecommunications, electricity and water sectors.

12 The features of the system of taxation that would be introduced under that proposal are set out as follows in paras. 21–25 of the judgment under appeal:

> "21 The system of taxation that is introduced by the reform and will be applicable to all companies established in Gibraltar consists of a payroll tax, a business property occupation tax and a registration fee:
>
> *payroll tax*: all Gibraltar companies will be liable to a payroll tax in the amount of £3,000 per employee each year; every 'employer' in Gibraltar will be required to pay payroll tax in respect of the total number of its full-time and part-time 'employees' who are 'employed in Gibraltar;' the legislation relating to the tax reform will define the abovementioned terms;
>
> *business property occupation tax ("BPOT")*: all companies occupying property in Gibraltar for business purposes will have to pay a tax on the occupation of that property at a rate equivalent to a percentage of their liability to the general rates charged on property in Gibraltar;

registration fee: all Gibraltar companies will have to pay an annual registration fee, of £150 per annum in the case of companies not intended to generate income and of £300 per annum in the case of companies intended to generate income.

22 Liability to payroll tax together with BPOT will be capped at 15% of profits. The effect of this cap is that companies will pay payroll tax and BPOT only if they make a profit, and in an amount not exceeding 15% of profits . . .

23 Certain activities, namely financial services and activities of utilities, will be subject to a top-up (or penalty) tax on profits generated by them. The top-up tax will apply only to profits that can be allocated to those activities.

24 Thus, financial services companies will be charged, in addition to payroll tax and BPOT, a top-up (or penalty) tax on profits from financial services activities at a rate of between 4% and 6% of profits (calculated in accordance with internationally accepted accounting standards); such companies will have their tax liability (payroll tax, BPOT and top-up tax) capped, in aggregate, at 15% of profits.

25 Utility companies will be charged, in addition to payroll tax and BPOT, a top-up (or penalty) tax on profits from their activities at the rate of 35% of profits (calculated in accordance with internationally accepted accounting standards). Such companies will be permitted to deduct payroll tax and BPOT from their liability to top-up tax. Although utility companies will also have their annual liability to payroll tax and BPOT capped, in aggregate, at 15% of profits, the operation of the utilities top-up tax will ensure that these companies always pay a tax equal to 35% of profits."

THE ADMINISTRATIVE PROCEDURE AND THE CONTESTED DECISION

13 After the United Kingdom had notified the Commission of the proposed tax reform, the Commission, by letter of October 16th, 2002, informed the United Kingdom of its decision to initiate the procedure laid down in art. 88(2) EC (art. 108(2) TFEU) ("the decision to initiate the formal procedure") and invited interested parties to submit comments (OJ 2002 C 300/2).

14 That decision refers to para. 9 of the Commission notice on the application of the State aid rules to measures relating to direct business taxation (OJ 1998 C 384/3: "the notice relating to State aid in the field of taxation"). In paras. 29–33 and 37–44 of the decision, the Commission lists four elements of the proposed tax reform which it regards as conferring materially selective advantages, namely, the requirement to make a profit, which confers advantages on companies that make no

profit; the various tax caps, conferring advantages on those companies to which they apply; exemption from tax for undertakings based in certain areas of Gibraltar; and, lastly, exemption of interest received in respect of loans granted for certain purposes. Offshore companies are not mentioned as enjoying a selective advantage.

15 In para. 60(f) of the decision to initiate the formal procedure, the Commission requests the United Kingdom to provide the following information:

> "An estimate of the number, size and type of activity of:
>
> (a) companies that will make no profit and consequently escape liability for payroll tax and BPOT;
>
> (b) profit-making companies with no employees (i.e. zero assessable employee units); and
>
> (c) profit-making companies with less than one employee (excluding those with zero)."

16 The Commission received comments from the United Kingdom, the Confederación Española de Organizaciones Empresariales (Spanish Confederation of Business Organisations), the Ålands Landskapsstyrelse (Åland Executive (Finland)), the Kingdom of Spain and the Government of Gibraltar.

17 The Kingdom of Spain stated, in point 3 of its comments submitted to the Commission on January 3rd, 2003:

> "In addition to these comments endorsing the objections raised by the Commission, which are sufficient on their own fundamentally to call into question the validity of the reform proposed by the United Kingdom on behalf of the Gibraltar Government, we consider it essential that the assessment of the compatibility of the scheme should take due account of the real economic and tax context of the jurisdiction proposing it.
>
> The proposed tax reform comprises some highly peculiar features, such as the following:
>
> For the 28,800 companies not liable to the top-up taxes referred to in (a) above, the proposed tax system is not in fact an overall corporation tax on business profits but a combination of various individual taxes (payroll tax, business property occupation tax, registration fee) subject to ceilings which render the tax liability extremely small or non-existent (it is not for nothing that the proposal is referred to in Gibraltar as 'zero rate tax').
>
> Bearing in mind that most of the 28,800 companies registered can be regarded as letterbox or asset management companies, provided

> that these companies generated profits they would be liable to £3,000 per employee, per year. Since most of them will have only one employee (an accountant or auditor), usually part-time, they would pay only a maximum of £3,000 per year in tax if they do not occupy property (which is usually the case), because they would not then have to pay the [BPOT];
>
> . . .
>
> Offshore companies would remain outside the scope of two of the new taxes: around 8,000 companies without any physical presence in Gibraltar would thus be exempt;
>
> This is a tax reform which comprises a wide range of peculiarities and leaves intact the tax situation of businesses with no staff or premises in Gibraltar."

18 The Commission forwarded those observations to the United Kingdom, which sent its own comments to the Commission by letter of February 13th, 2003 but did not adopt a position on the Kingdom of Spain's arguments concerning the tax treatment of offshore companies.

19 In recital 163 of the contested decision, the Commission concluded that—

> "[the proposed tax reform] constitutes a scheme of State aid within the meaning of Article 87(1) of the EC Treaty. None of the derogations provided for in Article 87(2) or Article 87(3) apply. Therefore the United Kingdom is not authorised to implement the reform."

20 According to the Commission, as is apparent from recitals 98–152 of the contested decision, the proposed tax reform is both regionally and materially selective. It is regionally selective since it provides for a system of corporate taxation under which companies in Gibraltar are taxed, in general, at a lower rate than those in the United Kingdom (recital 127 of the contested decision).

21 The Commission finds that certain aspects of the proposed tax reform are materially selective. Thus, the following are selective from that viewpoint: first, the requirement to make a profit before incurring liability to payroll tax and BPOT, since that requirement favours companies which make no profit (recitals 128–133 of the contested decision), and secondly, the cap limiting liability to payroll tax and BPOT to 15% of profits, since that cap favours companies which, for the tax year in question, have profits that are low in relation to the number of employees and occupation of business property (recitals 134–141 of the contested decision). Thirdly, and lastly, imposition of a payroll tax and BPOT is also materially selective, since both taxes inherently favour offshore companies which have no real physical presence in Gibraltar and which, as a consequence,

do not incur corporate tax (recitals 142–144 and 147–151 of the contested decision).

22 Article 1 of the operative part of the contested decision provides:

> "The proposals notified by the United Kingdom for the reform of the system of corporate taxation in Gibraltar constitute a scheme of State aid that is incompatible with the common market.
>
> Those proposals may accordingly not be implemented."

THE PROCEEDINGS AT FIRST INSTANCE AND THE JUDGMENT UNDER APPEAL

23 By applications lodged at the Court Registry on June 9th, 2004, the Government of Gibraltar, in *Case T-211/04* ([2008] ECR II–3745), and the United Kingdom, in *Case T-215/04* ([2008] ECR II–3745), each brought an action for annulment of the contested decision.

24 Those applicants essentially put forward three identical pleas in law in each of the cases. The first and second pleas relate to errors of law and assessment regarding, respectively, application of the criterion of regional selectivity and the criterion of material selectivity. The third plea relates to breach of essential procedural requirements in the context of investigation of the third aspect of the proposed tax reform, concerning offshore companies. The latter plea subdivides into two parts, of which the first, concerning breach of the right to a fair hearing, is put forward by both the United Kingdom and the Government of Gibraltar, and the second, concerning an error in the statement of reasons, is put forward only by the Government of Gibraltar.

25 By orders of the President of the Third Chamber of the General Court of December 14th, 2004 and February 15th, 2005, leave was granted to the United Kingdom to intervene in support of the form of order sought by the Government of Gibraltar in *Case T-211/04* ([2008] ECR II–3745), and to the Kingdom of Spain to intervene in support of the form of order sought by the Commission in *Case T-215/04* ([2008] ECR II–3745).

26 The General Court upheld the applicants' first plea relating to regional selectivity and also the second plea relating to material selectivity. As a result, the court did not examine the third plea alleging breach of essential procedural requirements.

PROCEDURE BEFORE THE COURT OF JUSTICE AND FORMS OF ORDER SOUGHT

27 By order of the President of the Court of June 26th, 2009, *Commission* v. *Gibraltar Govt. (C-106/09 P & C-107/09 P)* (8) were joined for the purposes of the written and oral procedure and of the judgment.

28 By order of the President of the Court of September 25th, 2009, Ireland was granted leave to intervene in the present cases in support of the forms of order sought by the United Kingdom and the Government of Gibraltar.

29 In its appeal, the Commission claims that the court should:

(a) set aside the judgment under appeal;

(b) dismiss the applications for annulment lodged by the Government of Gibraltar and by the United Kingdom; and

(c) order the Government of Gibraltar and the United Kingdom to pay the costs;

(d) in the alternative:

(i) refer the cases back to the General Court for reconsideration; and

(ii) reserve the costs of the proceedings at first instance and on appeal.

30 In its appeal, the Kingdom of Spain claims that the court should:

(a) set aside the judgment under appeal;

(b) declare the contested decision to be lawful; and

(c) order the respondents to pay the costs.

31 The Government of Gibraltar contends that the court should:

(a) dismiss the appeals brought by the Commission and the Kingdom of Spain; and

(b) order the Commission and the Kingdom of Spain to pay the costs of the Government of Gibraltar.

32 The United Kingdom contends that the court should:

(a) dismiss the appeals brought by the Commission and the Kingdom of Spain; and

(b) order the Commission and the Kingdom of Spain to pay the costs.

33 Ireland contends that the court should:

(a) dismiss the appeal brought by the Commission; and

(b) order the Commission to pay the costs.

THE APPEALS

34 The Commission puts forward a single ground of appeal, alleging infringement of art. 87(1) EC (art. 107(1) TFEU). That ground, relating to the General Court's conclusions with regard to material selectivity of the proposed tax reform, is divided into six parts. The Kingdom of Spain puts forward 11 grounds of appeal, which may be divided into three groups, relating, first, to the regional selectivity of that proposal and to the status of Gibraltar (the first 7 grounds and the 9th ground), secondly, to material selectivity (the 8th ground) and, lastly, to the proceedings before the General Court (the 10th and 11th grounds).

35 It is appropriate to examine first of all the grounds of appeal relating to material selectivity, that is to say, the single ground put forward by the Commission and the 8th ground put forward by the Kingdom of Spain.

The Commission's single ground of appeal and the 8th ground of appeal of the Kingdom of Spain

Grounds of the judgment under appeal

36 Before examining the contested decision, the General Court sets out in paras. 143–146 of the judgment under appeal the analytical framework to be observed by the Commission when considering whether a scheme of tax aid is selective. In that regard, the General Court considers that classification by the Commission of a tax measure as selective necessarily means that it begins by identifying the "normal" regime under the tax system. In relation to this "normal" tax regime, the Commission must, secondly, assess and determine whether any advantage granted by the tax measure at issue is selective, by demonstrating that the measure derogates from that "normal" regime. In a third stage, it is necessary to assess whether, in the event of such derogations, the measure leading to differentiation between undertakings may none the less not be "selective," when the differentiation arises from the nature or general scheme of the system of charges of which it forms part.

37 The General Court states that the Commission cannot omit those first two stages of the review of the selectivity of the measure in question, as otherwise the Commission would be assuming the role of the Member State with regard to determining that State's tax system and the 'normal' regime under that system. With regard to determining the tax system at issue, the General Court considers that, as European Union law currently stands, direct taxation falls within the competence of the Member States. Thus it is solely the latter, and infra-State bodies having fiscal autonomy, that have competence to devise the systems of corporate taxation which they consider the best suited to the needs of their economies.

38 In para. 148 of the judgment under appeal, the court recalls that in the contested decision—

> "the Commission concluded that three aspects of the tax system introduced by the [proposed tax reform] confer selective advantages on the companies benefiting therefrom and may therefore constitute State aid, namely (a) the requirement that a company must make a profit before it becomes liable to payroll tax and BPOT, (b) the cap limiting liability to payroll tax and BPOT to 15% of profits, and (c) the inherent nature of the payroll tax and BPOT."

39 Next the court examines the contested decision in the light of the analytical framework set out in paras. 143–146 of the judgment under appeal.

40 In that regard, the court finds, in para. 170 of the judgment under appeal, in the light of the explanations provided by the Government of Gibraltar and the United Kingdom, according to which the elements of the proposed tax reform together constitute a tax system in its own right which should be treated as being the "normal" tax regime, that—

> "the Commission could not forgo performance of its duty, as described in paragraph 143 [of the judgment under appeal], to begin by identifying the . . . 'normal' regime under the notified tax system and, if necessary, to challenge the Gibraltar authorities' description of that regime."

The court holds, in paras. 171–174 of the judgment under appeal, that the Commission failed to follow the stages of that analytical framework and thereby, in the light of the competence of States in tax matters, went beyond the limits of its review.

41 Furthermore, the court also states, in para. 175 of the judgment under appeal, that—

> "apart from the Commission's failure . . . to observe the analytical framework relating to the determination of selectivity, neither the considerations set out in the contested decision . . . nor the arguments put forward by the Commission and the Kingdom of Spain in the course of the . . . proceedings are sufficient to call into question the validity of the definition of the . . . 'normal' regime under the notified tax system."

42 In this connection, the court holds, first, in paras. 176–178 of the judgment under appeal, that the Commission has not succeeded in demonstrating that the condition for tax liability, namely that a company must make a profit, and the capping of tax at 15% of profits, are to be regarded as derogations and that the tax regime must therefore be regarded as selective.

43 Secondly, the court finds, in paras. 179–181 of the judgment under appeal, that neither the fact that the Commission considers that tax system to be "hybrid" nor the fact that an undertaking which does not have a "physical presence" in Gibraltar is not liable to payroll tax and BPOT is sufficient to demonstrate that the tax regime in question is selective.

44 Thirdly, according to paras. 182–184 of the judgment under appeal, the Commission's comments regarding the various criteria adopted under the regime at issue in order to determine an undertaking's tax liability are too vague to cast doubt on the Gibraltar authorities' definition of what constitutes the "normal" regime under the proposed tax reform.

45 The court concludes, in para. 185 of the judgment under appeal, that none of the aspects of the proposed tax reform identified by the Commission can be considered to confer a selective advantage for the purposes of art. 87(1) EC (art. 107(1) TFEU), since the Commission has not demonstrated to the requisite legal standard that they constitute derogations from the "normal" tax regime.

46 Lastly, the court states, in para. 186 of the judgment under appeal—

> "that the comparison of the alleged effects of the tax system introduced by the [proposed tax] reform with the effects of the tax system preceding it, as drawn by the Commission in Table 1 and recital 150 of the contested decision, cannot be accepted in this instance for the purposes of applying art. 87(1)EC."

Arguments of the parties

47 In its appeal, the Commission puts forward a single ground of appeal, alleging infringement of art. 87(1) EC (art. 107(1) TFEU) and based on the General Court's examination of material selectivity. This ground is divided into six parts.

48 In the first part of this ground of appeal, the Commission claims that the General Court erred in assessing the relationship between art. 87(1) EC (art. 107(1) TFEU) and the scope of the competence of the Member States in tax matters. The Commission considers in that respect that the powers of Member States with regard to tax matters are subject to the constraints imposed by European Union law, in particular by art. 87(1) EC (art. 107(1) TFEU), and that the mere fact that a national rule falls within the area of tax law does not mean that it does not have to comply with art. 87 EC (art. 107 TFEU), since that article defines State measures not by reference to their causes or aims but in relation to their effects.

49 In the second part of its single ground of appeal, the Commission claims that the General Court erroneously held that the Commission was obliged first to identify the "normal" regime under the tax system contained in the proposed reform and then to demonstrate that the

measures in question derogated from that regime. Such an approach disregards the possibility that a Member State may introduce a tax system which is inherently discriminatory by its very structure. Through judicious selection of the criteria to be applied in its allegedly "normal" system of taxation, Gibraltar produced to a large extent the effects of a scheme which manifestly incorporates State aid for certain categories of undertaking.

50 In the third part of its single ground of appeal, the Commission claims that the General Court infringed the principles relating to the interpretation of the concept of State aid, according to which national measures must be assessed on the basis of their effects and not in the light of the objective pursued or a certain regulatory technique.

51 In the fourth part of this ground of appeal, the Commission maintains that the approach adopted by the court leads to the outcome that all the features of a tax system, no matter how much they favour certain beneficiaries, are automatically part of that system, not a derogation, and therefore escape the application of State aid rules.

52 In the fifth part of this ground of appeal, the Commission complains that the court wrongly held that the Commission had failed both to identify the "normal" tax regime and to demonstrate that specific features of the proposed tax reform constituted derogations from that system. In fact, the Commission clearly and consistently identified the notified tax system as being based on the taxation of labour and of the occupation of business property. Also, the Commission notes that the ground on which the court annulled the contested decision is based not on a lack of reasoning but on an error of law.

53 In the sixth part of its single ground of appeal, the Commission claims that the court failed to assess the three elements of selectivity identified in the contested decision, by not examining the Commission's findings concerning the concrete effects of the proposed tax reform, namely that it produces different taxation levels for different sectors of the Gibraltar economy and confers a selective advantage on offshore undertakings, which have no employees and occupy no property in Gibraltar.

54 Even though the court did reproduce the relevant parts of the contested decision in paras. 156–162 of the judgment under appeal, it did not take any position on the selective aspects of the proposed tax reform thus identified. The court failed to acknowledge, in para. 186 of the judgment under appeal, the relevance of the comparison of the proposed tax reform with the previous tax system. It should be pointed out that the Commission had noted, referring to the previous system, that the scheme examined in the contested decision sought to perpetuate the previous situation, producing the same effects although using a different technique.

Thus the court's approach gives decisive weight to fiscal technique over an assessment in the light of a measure's effects.

55 The Kingdom of Spain claims, in its eighth ground of appeal, that the General Court was wrong to hold that the criterion of material selectivity was not satisfied. The vast majority of undertakings established in Gibraltar (28,798 of the 29,000 companies) may end up with a zero rate of taxation. Consequently, the regime classified by the court as being general is in fact a special regime creating "de facto selectivity."

56 In its response to the Commission's appeal, the Kingdom of Spain supports the ground of appeal put forward by the Commission. It states that the real objective pursued by the proposed tax reform is to continue to attract foreign capital, the holders of which are seeking to avoid the normal tax systems to which they would be subject in their country of origin. Moreover, since the analysis of a corporate tax is an exercise requiring a complex economic assessment, the court was wrong to replace the Commission's economic assessment with its own assessment with regard to the selective elements identified by the Commission in the contested decision.

57 The Government of Gibraltar and the United Kingdom maintain, first of all, that the court was right to reject the approach taken by the Commission in the contested decision. That approach is incorrect and is opposite to the approach normally taken by the Commission, as contained in particular in the notice relating to State aid in the field of taxation. That new approach would lead to the removal of the fiscal sovereignty enjoyed by Member States under the EC Treaty and under the consistent case-law of the Court of Justice and would open the door to harmonization of direct taxation by the Commission.

58 As regards the first part of the Commission's single ground of appeal, the Government of Gibraltar and the United Kingdom consider that it challenges Member States' competence in tax matters and is based on a misreading of the judgment under appeal in that the court did not disregard the limitation of the fiscal sovereignty of Member States by European Union law.

59 They submit likewise that, in its argument in support of the second part of the single ground of appeal, the Commission challenges the fiscal sovereignty of Member States. The mere fact that a tax regime creates an advantage for some companies is not sufficient in itself for that regime to be regarded as selective, since it is necessary first of all to identify the normal regime. That is corroborated by the notice relating to State aid in the field of taxation, which is binding on the Commission in accordance with the principle of the protection of legitimate expectations.

60 In the third part of its single ground of appeal, the Commission also misreads the judgment under appeal in claiming that the court held that the Commission should take into account the objectives claimed by the national or regional authorities rather than examine the actual content of the rules at issue.

61 The Commission's argument, in the fourth part of its single ground of appeal, that a "normal" tax system may not apply more than one tax criterion is also irreconcilable with the fiscal sovereignty of Member States. Member States should be free to adopt the taxes that they consider most appropriate for their needs and to choose whatever basis of assessment they wish, including in their tax rules the normal and necessary provisions concerning the ability of taxpayers to pay that are a common feature of taxes. The fact that a tax regime meets more than one objective is completely legitimate.

62 Also, the argument underlying the fifth part of the Commission's single ground of appeal is incorrect. There is nothing inconsistent in a tax system based on the use of more than one basis of assessment that also includes provisions about tax payers' ability to pay. Moreover, the Commission's assertion that it performed a three-step analysis is incorrect.

63 Lastly, with regard to the sixth part of the single ground of appeal, the Government of Gibraltar and the United Kingdom maintain that the Commission's argument that the tax system is to be regarded as selective since the "offshore" economy is not taxed is incorrect. In every tax system, companies that do not have a tax base as defined by the national tax system do not pay tax under that system. Thus, the Commission's argument amounts to imposing on Member States, despite their fiscal sovereignty, the Commission's view as to which basis of assessment is appropriate. The mere fact that different companies may pay different amounts of tax is not sufficient to establish that the proposed tax reform is selective.

64 With regard to the eighth ground of appeal put forward by the Kingdom of Spain, concerning the material selectivity of the proposed tax reform, the Government of Gibraltar and the United Kingdom submit, first of all, that the mere fact that some companies do not pay tax is not sufficient to conclude that their tax treatment is selective and to consider that those companies receive State aid. Moreover, determining the elements that constitute the tax base is a matter that falls within the fiscal sovereignty of Member States. The tax authorities are in particular not obliged to use either revenue or profit as a basis of assessment. Also, the Government of Gibraltar and the United Kingdom submit that the three-step assessment of a tax measure, as provided for in the notice relating to State aid in the field of taxation and adopted by the court in the judgment under appeal, is necessary in order to identify the selective advantages

procured by that measure. Lastly, as regards the Kingdom of Spain's statement that 28,798 of the 29,000 companies established in Gibraltar may, as a result of the proposed tax reform, end up with a "zero rate" of taxation, the United Kingdom doubts whether those figures are accurate. The Government of Gibraltar, without taking a specific position on the Kingdom of Spain's statement, contends that it is difficult to estimate how many companies would remain established in Gibraltar when the proposed tax reform is introduced, and points out in its response that, currently, out of the 24,000 companies registered in Gibraltar, around 3,000 are "exempt" companies under the former tax regime, approximately 260 are utility or financial services companies and 18,000 are inactive companies holding assets.

65 Ireland, intervening in support of the form of order sought by the United Kingdom in *Commission* v. *Gibraltar Govt.* (*Joined Cases C-106/09 P & C-107/09 P*) (8), submits that the Commission's appeal should be declared inadmissible to the extent that it goes beyond the scope of both the contested decision and the judgment under appeal. Ireland considers that, in the first part of its single ground of appeal, the Commission seeks to impose on Member States the burden of proof as regards demonstrating that the nature and structure of their tax systems are compliant with European Union law. Moreover, it observes that the Commission seeks to base its arguments in this regard on the principle of non-discrimination, whereas the rules on State aid do not find their origin in that principle but in the concept of fair competition in the common market. With regard to the other parts of the Commission's single ground of appeal, Ireland contends that the Commission is bound, in accordance with the principles of legal certainty and legitimate expectations, by its notice relating to State aid in the field of taxation. To regard a tax system as being inherently discriminatory by reason of its effects, without being able to identify a normal rate of tax, would conflict with established case-law and the fiscal sovereignty of the Member States. Moreover, it is not sufficient, in particular, to classify a tax system as "hybrid" and conclude from this that undertakings treated favourably under that system are in receipt of State aid.

Findings of the court

66 Contrary to what Ireland contends, the Commission's single ground of appeal is admissible since, in accordance with art. 113 of the Rules of Procedure of the Court of Justice, it seeks to set aside the judgment under appeal without seeking to change the subject-matter of the proceedings before the General Court. To that end, the Commission complains that the General Court infringed art. 87 EC (art. 107 TFEU) in that it wrongly held that none of the three elements identified in the contested decision as being selective confers selective advantages.

67 It is necessary to reject from the outset the Commission's complaint, contained in the second part of its single ground of appeal, by which it alleges that the General Court wrongly relied on the notice relating to State aid in the field of taxation, the content of which it misconstrued.

68 Having regard to the reference, in paras. 143 and 146 of the judgment under appeal, to that notice, suffice it to state that the General Court did not draw any factual or legal conclusion from it, as is apparent from the use of the words "as the Commission itself states" and "furthermore" in those paragraphs, but relied, in order to substantiate its approach as set out in paras. 143–146 of the judgment under appeal, on the case-law of the Court of Justice and the allocation of competence in tax matters between the European Union and the Member States.

69 In those circumstances, the Commission's complaint against that reference to the notice relating to State aid in the field of taxation is ineffective (see, to that effect, *Salzgitter A.G.* v. *Commission (Case C-182/99)* (27) ([2003] ECR I–10761, at paras. 54–55)), and so it is unnecessary to consider the content and scope of that notice at this stage.

70 In order to examine the Commission's single ground of appeal and the Kingdom of Spain's eighth ground of appeal it is appropriate to recall the case-law of the Court of Justice relating to the concept of selective advantage in tax matters.

71 According to settled case-law, the definition of aid is more general than that of a subsidy, given that it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effect (see *Adria-Wien Pipeline GmbH* v. *Finanzlandesdirektion für Kärnten (Case C-143/99)* (1) ([2001] ECR I–8365, at para. 38), and *Ministero dell'Economia e della Finanze* v. *Paint Graphos Soc. coop. arl (Joined Cases C-78/08 to C-80/08)* (23) (unreported, at para. 45 and the case-law cited)).

72 Consequently, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of art. 87(1) EC (art. 107(1) TFEU) (see *Ministero dell'Economia e della Finanze* v. *Banco Exterior de España (Case C-387/92)* (22) ([1994] ECR I–877, at para. 14), and *Ministero dell'Economia e della Finanze* v. *Paint Graphos Soc. coop. arl (Joined Cases C-78/08 to C-80/08)* (unreported, at para. 46 and the case-law cited)).

73 On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of art. 87 EC (art. 107 TFEU) (see, to that effect, *Germany* v. *Commission (Case C-156/98)* (18) ([2000] ECR I–6857, at para. 22), and *Air Liquide Industries Belgium S.A.* v. *Ville de Seraing (Joined Cases C-393/04 & C-41/05)* (2) ([2006] ECR I–5293, at para. 32 and the case-law cited)).

74 It is therefore necessary to determine whether the proposed tax reform is selective, selectivity being a constituent factor in the concept of State aid (see *Portugal* v. *Commission (Azores) (Case C-88/03)* (26) ([2006] ECR I–7115, at para. 54)).

75 As regards appraisal of the condition of selectivity, it is clear from settled case-law that art. 87(1) EC (art. 107(1) TFEU) requires assessment of whether, under a particular legal regime, a national measure is such as to favour "certain undertakings or the production of certain goods" in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (*Adria-Wien Pipeline GmbH* v. *Finanzlandesdirektion für Kärnten (Case C-143/99)* (1) ([2001] ECR I–8365, at para. 41), and *British Aggregates Assoc.* v. *Commission (Case C-487/06 P)* (6) ([2008] ECR I–10515, at para. 82 and the case-law cited)).

76 In the light of that case-law, it should be considered whether the General Court infringed art. 87(1) EC (art. 107(1) TFEU), as interpreted by the Court of Justice, in ruling that none of the three elements identified in the contested decision confers selective advantages.

(a) *The requirement to make a profit and the capping of tax*

77 The General Court concluded with regard to the first two selective elements of the measure at issue that were identified in the contested decision, namely the fact that payroll tax and BPOT are payable only where the taxable person makes a profit and that the amount of tax is capped in respect of both those bases of assessment at 15% of the profits, that the Commission had not succeeded in demonstrating that those elements confer selective advantages.

78 That conclusion of the General Court is not vitiated by an error of law.

79 As was noted in para. 73 above, only selective advantages, and not advantages resulting from a general measure applicable without distinction to all economic operators, fall within the concept of State aid.

80 The requirement to make a profit and the capping of taxation of profits are *per se* general measures applicable without distinction to all

economic operators and are therefore not liable to confer selective advantages.

81 The Commission's contention that the profit criterion is alien to the inherent logic of a system of taxation founded on the payroll tax and BPOT does not mean that that criterion, which is in itself neutral, becomes selective.

82 The General Court committed no error in law in ruling that the requirement to make a profit and the capping of tax at 15% of profits do not confer selective advantages.

83 The advantages alleged by the Commission resulting from measures applicable without distinction to all economic operators, namely the requirement to make a profit, which would benefit unprofitable operators, and those resulting from the capping of tax, which would benefit very profitable operators, do not mean that the tax regime under consideration can be regarded as entailing selective effects. Those effects are not such that they favour "certain undertakings" or "the production of certain goods" within the meaning of art. 87(1) EC, but are merely the consequence of the random event that the undertaking in question is unprofitable or very profitable during the period of assessment.

84 It follows from the foregoing that the complaints against the General Court's conclusion that the Commission did not succeed in demonstrating that the first two elements identified in the contested decision, namely the requirement to make a profit and the capping of tax at 15% of profits, confer selective advantages must be rejected.

(b) *Advantages accruing to offshore companies*

85 The General Court concluded, in para. 185 of the judgment under appeal, that there are no selective advantages for offshore companies. It found that the Commission, having failed to observe the analytical framework relating to the determination of the tax measure's selectivity, as outlined in paras. 143–146 of the judgment under appeal and referred to in paras. 36–37 above, did not succeed in demonstrating that offshore companies, which by their nature have no physical presence in Gibraltar, enjoy selective advantages.

86 That reasoning is vitiated by an error of law.

87 First, it is appropriate to recall that the court has consistently held that art. 87(1) EC (art. 107(1) TFEU) does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see *British Aggregates Assn.* v. *Commission (Case C-487/06 P)* (6) ([2008] ECR I–10515, at paras. 85 and 89 and the

case-law cited), and *Commission* v. *Netherlands (Case C-279/08 P)* (9) (unreported, at para. 51)).

88 The General Court's approach, based solely on a regard for the regulatory technique used by the proposed tax reform, does not allow the effects of the tax measure in question to be considered and excludes from the outset any possibility that the fact that no tax liability is incurred by offshore companies may be classified as a "selective advantage." That approach is therefore at variance with the case-law cited in para. 87 above.

89 Secondly, the General Court's approach also disregards the case-law cited in para. 71 above, according to which the existence of a selective advantage for an undertaking entails mitigation of the charges which are normally included in its budget.

90 The court admittedly held in *Portugal* v. *Commission (Azores) (Case C-88/03)* (26) ([2006] ECR I–7115, at para. 56) that the determination of the reference framework has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with "normal" taxation.

91 However, contrary to the General Court's reasoning and the proposition put forward by the Government of Gibraltar and the United Kingdom, that case-law does not make the classification of a tax system as "selective" conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, liable to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings.

92 Such an interpretation of the selectivity criterion would require, contrary to the case-law cited in para. 87 above, that in order for a tax system to be classifiable as "selective" it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid merely because they were adopted under a different regulatory technique although they produce the same effects in law and/or in fact.

93 Those considerations apply particularly with regard to a tax system which, as in the present case, instead of laying down general rules applying to all undertakings, from which a derogation is made for certain undertakings, achieves the same result by adjusting and combining the tax rules in such a way that their very application results in a different tax burden for different undertakings.

94 Thirdly, the General Court was wrong in criticizing the Commission, in paras. 184–186 of the judgment under appeal, for not demonstrating the existence of a selective advantage for offshore companies, having failed to

identify in the contested decision a reference framework for establishing the existence of a selective advantage.

95 It should be noted in that respect that, contrary to what the General Court held with regard to recitals 143, 144 and 150 of the contested decision, it is apparent from those recitals that the Commission examined the existence of selective advantages for offshore companies in the light of the tax regime at issue, which formally applies to all undertakings. It is thus apparent that the contested decision identifies that regime as a reference framework in relation to which offshore companies are, in fact, favoured.

96 Lastly, the Commission, contrary to what the General Court held, did demonstrate to the requisite legal standard in the contested decision that offshore companies enjoy, in the light of that reference framework, selective advantages within the meaning of the case-law cited in para. 75 above.

97 It is true that, in the absence of European Union rules governing the matter, it falls within the competence of the Member States, or of infra-State bodies having fiscal autonomy, to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors, as the General Court held in para. 146 of the judgment under appeal.

98 However, the General Court failed to assess the regime at issue as a whole and did not take into account the factors on which the Commission based its assessment of the regime at issue in the contested decision.

99 In that respect, it is necessary to recall the permanent features of the regime at issue as described in paras. 21–25 of the judgment under appeal.

100 The features of that regime are, first, a combination of the payroll tax and BPOT as the sole bases of assessment, together with the requirement to make a profit, the tax on which is capped at 15%, and second, the absence of a generally applicable basis of assessment providing for the taxation of all companies covered by that regime.

101 In view of the features of that regime, outlined in the preceding paragraph, it is apparent that the regime at issue, by combining those bases, even though they are founded on criteria that are in themselves of a general nature, in practice discriminates between companies which are in a comparable situation with regard to the objective of the proposed tax reform, namely to introduce a general system of taxation for all companies established in Gibraltar.

102 Combining those bases of assessment not only results in taxation according to the number of employees and the size of the business premises occupied, but also, due to the absence of other bases of

assessment, excludes from the outset any taxation of offshore companies, since they have no employees and also do not occupy business property.

103 Admittedly, according to the case-law cited in para. 73 above, a different tax burden resulting from the application of a "general" tax regime is not sufficient on its own to establish the selectivity of taxation for the purposes of art. 87(1) EC (art. 107(1) TFEU).

104 Thus, the criteria forming the basis of assessment which are adopted by a tax system must also, in order to be capable of being recognised as conferring selective advantages, be such as to characterize the recipient undertakings, by virtue of the properties which are specific to them, as a privileged category, thus permitting such a regime to be described as favouring "certain" undertakings or the production of "certain" goods within the meaning of art. 87(1) EC (art. 107(1) TFEU).

105 That is specifically the case here.

106 In that regard, it should be observed that the fact that offshore companies are not taxed is not a random consequence of the regime at issue, but the inevitable consequence of the fact that the bases of assessment are specifically designed so that offshore companies, which by their nature have no employees and do not occupy business premises, have no tax base under the bases of assessment adopted in the proposed tax reform.

107 Thus, the fact that offshore companies, which constitute a group of companies with regard to the bases of assessment adopted in the proposed tax reform, avoid taxation precisely on account of the specific features characteristic of that group gives reason to conclude that those companies enjoy selective advantages.

108 It follows from all the foregoing that the General Court erred in law in finding that the proposed tax reform does not confer selective advantages, for the purposes of art. 87(1) EC (art. 107(1) TFEU), on offshore companies.

109 Consequently, the Commission's single ground of appeal and the eighth ground of appeal of the Kingdom of Spain are well founded on this point, and so the judgment under appeal must be set aside on that basis.

110 It follows that there is no longer any need to examine the Kingdom of Spain's first seven grounds of appeal or its ninth ground of appeal, relating to regional selectivity and to the status of Gibraltar. Nor is it necessary to examine the Kingdom of Spain's 10th and 11th grounds of appeal, relating to the proceedings before the General Court.

THE ACTIONS BEFORE THE GENERAL COURT

111 As provided in the second sentence of the first paragraph of art. 61 of the Statute of the Court of Justice of the European Union, the Court of Justice, when it quashes a decision of the General Court, may give final judgment in the matter where the state of the proceedings so permits.

112 In the circumstances, the court considers that the actions for annulment of the contested decision brought by the applicants at first instance are ready for judgment and that final judgment should be given on them.

113 It is appropriate, therefore, to consider the actions brought before the General Court by the Government of Gibraltar and the United Kingdom.

114 The applicants at first instance essentially put forward three pleas in law. The first plea and the second plea, which subdivide into three parts, allege errors concerning application of the criteria of regional and material selectivity respectively. The third plea alleges breach of essential procedural requirements in the context of the Commission's investigation with regard to offshore companies. That plea is subdivided into two parts, of which the first, concerning breach of the rights of the defence, is put forward both by the Government of Gibraltar and by the United Kingdom and the second, concerning an error in the statement of reasons, is put forward solely by the Government of Gibraltar.

115 It is appropriate to deal first with the three parts of the second plea, concerning material selectivity, and the second part of the Government of Gibraltar's third plea, also concerning a matter relating to material selectivity. The first part of the third plea, relating to the rights of defence, must be examined second. Lastly, a ruling must be given on the first plea, relating to regional selectivity.

The second plea of the Government of Gibraltar and the United Kingdom, and the second part of the Government of Gibraltar's third plea

116 The second plea put forward by the applicants at first instance, relating to material selectivity, comprises three parts. By the first part, the applicants complain that the Commission departed from its decision-making practice and from the notice relating to State aid in the field of taxation. By the second part, which is the only part on which the General Court gave a ruling in the judgment under appeal, the applicants claim that none of the three elements identified in the contested decision confers selective advantages. Lastly, the third part seeks to demonstrate that that decision disregarded the fact that any selective advantages are, in any event, justified by the nature and general scheme of the tax system at

issue. By the second part of its third plea, the Government of Gibraltar alleges an error in the statement of reasons for the contested decision.

The second part of the second plea

117 With regard to the complaints raised in the second part of the second plea, relating to the classification of the three elements identified in the contested decision, it is apparent from the considerations set out in paras. 86–110 above that the Commission does not infringe art. 87(1) EC (art. 107(1) TFEU) in finding, in the contested decision, that the tax regime at issue confers selective advantages.

118 Although it is clear from paras. 77–84 above that the General Court did not err in law in concluding that the first two elements identified in the contested decision, namely the requirement to make a profit and the capping of tax at 15% of profits, do not confer selective advantages, the fact remains that the Commission was correct in finding, as regards the third element identified in the contested decision, concerning the tax treatment of offshore companies, that such companies do enjoy such advantages.

119 While, according to the contested decision, the tax regime at issue confers selective advantages, that conclusion is justified to a sufficient legal standard by the existence of selective advantages for offshore companies, without it being necessary in addition that the other two elements identified in that decision as being selective also confer selective advantages (see, to that effect, *Italy* v. *Commission (Case C-66/02)* (21) ([2005] ECR I–10901, at para. 98)). Consequently, the second part of the second plea is ineffective.

120 The second part of the second plea put forward by the Government of Gibraltar and the United Kingdom at first instance against the contested decision must therefore be rejected.

The second part of the third plea, put forward by the Government of Gibraltar

121 It is necessary to reject from the outset the second part of the Government of Gibraltar's third plea, which alleges an error in the reasoning in that the Commission did not state which companies constitute the "large offshore sector" referred to by recital 143 of the contested decision, failing to identify an individual company, a number of individual companies or an economic sector that would allegedly benefit from the proposed tax reform.

122 In that connection, it is sufficient to note that the Court of Justice has consistently held that the Commission may, in the case of an aid scheme, confine itself to examining the general characteristics of the

scheme in question, without being required to examine each particular case in which it applies, in order to determine whether that scheme comprises aid elements (*Comitato "Venezia vuole vivere"* v. *Commission (Joined Cases C-71/09 P, C-73/09 P & C-76/09)* (7) (unreported, at para. 130 and the case-law cited)).

The first part of the second plea

(a) *Arguments of the parties*

123 By the first part of their second plea, the applicants at first instance complain that in the contested decision the Commission departed from the notice relating to State aid in the field of taxation. The Government of Gibraltar also claims that the decision is not consistent with the Commission's decision-making practice.

124 As regards the purport of the notice relating to State aid in the field of taxation, the applicants submit that it is clear from para. 13 of that notice that Member States have the power to decide on the economic policy which they consider most appropriate and, in particular, to spread the tax burden as they see fit across the different factors of production. Moreover, according to paras. 9 and 16 of the notice, it is necessary for the Commission to establish that a tax measure provides, in favour of certain undertakings in the Member States, an exception to the application of the tax system, which means that the common system applicable, from which a derogation is then made, must first be determined. Lastly, according to para. 14 of the notice, the fact that some firms or some sectors benefit more than others from a particular tax measure does not mean that the measure is caught by the State aid rules.

125 The approach taken by the Commission in the contested decision with regard to the advantages enjoyed by offshore companies is inconsistent with the guidance contained in that notice. By departing from the notice, the Commission infringed the principle of the protection of legitimate expectations.

126 In support of the complaint, raised solely by the Government of Gibraltar, that the Commission introduced a new material selectivity principle which was not consistent with its previous decision-making practice, the Government of Gibraltar lists several Commission decisions.

127 The Commission contends that the applicants at first instance misread the notice relating to State aid in the field of taxation. It also contends that it has not derogated from its decision-making practice and that the approach taken in the contested decision is consistent with the case-law of the Court of Justice.

(b) *Findings of the court*

128 With regard, first, to the complaint that, in the contested decision, the Commission departed from the notice relating to State aid in the field of taxation, it should be observed that that notice, which, being an internal measure adopted by the administration, cannot be regarded as a rule of law, nevertheless forms rules of practice from which the administration may not depart in an individual case without giving reasons which are compatible with the principle of equal treatment (see, with regard to the guidelines on State aid, the judgment of June 9th, 2011 in *Diputación Foral de Vizcaya* v. *Commission (Joined Cases C-465/09 P to C-470/09 P)* (11) (unreported, at para. 120 and the case-law cited)).

129 Thus, it is necessary to consider whether the Commission did in fact depart from that notice, so far as the investigation of the selectivity of the scheme at issue was concerned.

130 In that regard, it should be stated first of all that, contrary to what the applicants at first instance claim, para. 13 of that notice cannot be construed as exempting the power of Member States to spread the tax burden across the different factors of production from all scrutiny under the rules on State aid. Paragraph 13 merely explains that "[t]ax measures which are open to all economic agents" do not constitute State aid, whilst, in the present case, the tax advantages enjoyed by offshore companies are not in fact open to all economic agents, as is clear from para. 102 above.

131 Also, as regards paras. 9 and 16 of the notice relating to State aid in the field of taxation, it should be pointed out that, contrary to what the applicants at first instance claim, it does not follow from those paragraphs that the existence of an advantage can be shown only by establishing a derogation from a normal tax regime.

132 Paragraph 9 only gives examples of selective advantages which are common. Paragraph 16 explains that advantages resulting from an apparently general measure may none the less be recognised as being selective. This finding is supported by para. 13 of the notice, which is the first paragraph to address the distinction between State aid and general measures and which clearly states that the latter must be "effectively open to all firms on an equal access basis, and [that] they may not de facto be reduced in scope."

133 Lastly, the argument put forward by the applicants at first instance that the Commission departed from the notice relating to State aid in the field of taxation is not supported by para. 14 of that notice either. It is already clear from the words "does not necessarily mean that they are caught by the competition rules governing State aid" that that paragraph is not intended to exclude certain measures categorically from application of the rules on State aid.

134 Therefore, the complaint that, in the contested decision, the Commission departed from the notice relating to State aid in the field of taxation must be rejected.

135 Secondly, the Government of Gibraltar's complaint that, in the contested decision, the Commission departed from its decision-making practice must be rejected.

136 In that regard, it is sufficient to observe that, according to case-law, the question whether a measure constitutes State aid must be assessed solely in the context of art. 87(1) EC (art. 107(1) TFEU) and not in the light of an alleged earlier decision-making practice of the Commission (see, to that effect, the judgment of July 21st, 2011 in *Freistaat Sachsen* v. *Commission (Case C-459/10 P)* (16) (unreported, at para. 50)).

137 In the light of the foregoing, the first part of the second plea must be rejected.

The third part of the second plea

(a) *Arguments of the parties*

138 By the third part of their second plea, the applicants at first instance claim in essence that the Commission infringed art. 87(1) EC (art. 107(1) TFEU) by not considering that the selective advantage for offshore companies was justified by the nature and general scheme of the system.

139 According to those parties, the features of the proposed tax reform are the result of a necessarily small tax administration in Gibraltar and of Gibraltar's small tax base which imposes limitations that are unavoidable and inherent in the functioning and effectiveness of Gibraltar's tax system.

140 The use of employment and business property occupation as bases of assessment is the logical choice in the light of Gibraltar's specific circumstances since such a tax regime will create a simple, easily verified tax which is cheap to collect and which is similar to other taxes which the small Gibraltar tax administration has experience in collecting. The Government of Gibraltar also argues that as a consequence of the proposed tax reform all trading companies will be taxed. The fact that non-trading companies, which merely hold assets, will not be taxed corresponds to the norm for tax systems.

141 According to the Commission, supported by the Kingdom of Spain, the selective advantages enjoyed by offshore companies cannot be justified by the nature or general scheme of the proposed tax reform, since that reform consists, by its very nature, in the creation of a system which, *de facto*, introduces different rates of taxation for different types of undertakings.

142 Although the proposed tax reform may represent a reasonable strategic choice by the Government of Gibraltar, it is nonetheless selective. Furthermore, the applicants at first instance do not explain to what extent it is necessary, in order to avoid the over-taxation of many small undertakings, to tax some of those undertakings and not others, without taking into account the ability of such undertakings to pay tax. Nor can the argument that the Government of Gibraltar needed to have a simple tax that could be verified effectively justify a large number of companies in Gibraltar being exempt from tax.

(b) *Findings of the court*

143 In assessing the third part of the second plea put forward by the applicants at first instance, it is important to note that the contested decision does not deal with the question whether the advantage enjoyed by offshore companies might be justified by the nature and general scheme of the tax system.

144 Thus, it must be considered whether the Commission should have adopted a position, in the contested decision, on whether the selective advantage enjoyed by offshore companies might be justified by the nature and general scheme of the tax system.

145 According to well-established case-law, the concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, *prima facie* selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see, to that effect, *inter alia*, *Adria-Wien Pipeline GmbH* v. *Finanzlandesdirektion für Kärnten (Case C-143/99)* (1) ([2001] ECR I–8365, at para. 42); *Portugal* v. *Commission (Azores) (Case C-88/03)* (26) ([2006] ECR I–7115, at para. 52); and *British Aggregates Assn.* v. *Commission (Case C-487/06 P)* (6) ([2008] ECR I–10515, at para. 83)).

146 It is for the Member State which has introduced such a differentiation between undertakings in relation to charges to show that it is actually justified by the nature and general scheme of the system in question (*Netherlands* v. *Commission (Case C-159/01)* (24) ([2004] ECR I–4461, at para. 43), and *Commission* v. *Netherlands (Case C-279/08 P)* (9) (unreported, at para. 77)).

147 A Member State which seeks to be allowed to grant aid by way of derogation from the Treaty rules has a duty to collaborate with the Commission. In pursuance of that duty, it must in particular provide all the information necessary to enable the Commission to verify that the conditions for the derogation sought are fulfilled (see *Italy* v. *Commission (Case C-364/90)* (19) ([1993] ECR I–2097, at para. 20), and *Italy* v. *Commission (Case C-372/97)* (20) ([2004] ECR I–3679, at para. 81)).

148 Lastly, it should be noted that the Commission is required, in the interests of sound administration of the rules relating to State aid, to conduct a diligent and impartial examination of the evidence at its disposal (see, *inter alia*, *Commission* v. *Sytraval & Brink's France SARL (Case C-367/95 P)* (10) ([1998] ECR I–1719, at para. 62)).

149 It should be pointed out in that regard, first, that the United Kingdom did not, either in the notification of the proposed tax reform or at the stage of its formal investigation, adduce any justification for the selective advantages enjoyed by offshore companies. It is common ground that when the proposed tax reform was formally investigated the United Kingdom did not adopt a position on the Kingdom of Spain's arguments concerning those advantages.

150 Secondly, the applicants did not at first instance claim in their actions before the General Court that the Commission had at its disposal evidence on the basis of which it should have examined, in the contested decision, possible justification for the selective advantage enjoyed by offshore companies.

151 Hence, it must be concluded that there was no reason for the Commission to examine whether the selective advantages enjoyed by offshore companies might be justified by the nature and general scheme of the tax system, so the Commission cannot be criticized for not having addressed that point in the contested decision.

152 In those circumstances, it is necessary to reject the argument put forward by the applicants at first instance that the Commission infringed art. 87(1) EC by not considering that the selective advantage for offshore companies was justified by the nature and general scheme of the system.

153 Accordingly, the third part of the second plea must be rejected.

154 In the light of all of the foregoing, the whole of the second plea and also the second part of the third plea, put forward by the Government of Gibraltar, must be rejected.

The United Kingdom's third plea and the first part of the Government of Gibraltar's third plea, alleging breach of the rights of the defence

155 The United Kingdom and the Government of Gibraltar, the former in its third plea, and the latter in the first part of its third plea, raised before the General Court against the contested decision, claim a breach of their rights of defence.

Arguments of the parties

156 The Government of Gibraltar and the United Kingdom claim that the Commission infringed their rights of defence in that it raised for the first time in the contested decision the issue of material selectivity from the viewpoint of the allegedly favourable treatment of offshore companies, that issue being different in nature from those examined during the preliminary assessment made in the decision to initiate the formal procedure.

157 In carrying out an investigation of State aid, the Commission must take account of the legitimate expectations which the parties concerned may entertain as a result of what was said in the decision to initiate the formal procedure, meaning that it will not base its final decision on considerations in regard to which, in the light of those indications, the parties concerned would not have considered that they must express a view. In that regard, the applicants at first instance refer, *inter alia*, to *ESF Elbe-Stahlwerke Feralpi* v. *Commission (Case T-6/99)* (12) ([2001] ECR II–1523, at para. 126), and to *Ferriere Nord SpA* v. *Commission Case (T-176/01)* (14) ([2004] ECR II–3931, at para. 88).

158 Neither the question addressed to the United Kingdom in para. 60(f) of that decision, concerning companies that make no profit or have no employees, nor the fact that the Kingdom of Spain referred to the offshore sector in its observations lodged following the decision to initiate the formal procedure gave the Government of Gibraltar or the United Kingdom reason to suppose that the Commission would also examine material selectivity from the viewpoint of the treatment of offshore companies.

159 First, that question was not related to the detailed analysis of the proposed tax reform contained in paras. 2–59 of the decision to initiate the formal procedure. Secondly, the Kingdom of Spain's observations were of a purely formal nature and the Commission at no time intimated that it regarded that factor as relevant for its investigation.

160 If the Commission had duly drawn their attention to the aspect of the tax treatment of offshore companies, the outcome of the investigation procedure could have been different.

161 The Commission, supported by the Kingdom of Spain, considers that the rights of defence of the Government of Gibraltar and of the United Kingdom were not infringed.

162 Its principal submission is that the question of the selective nature of the taxation of offshore companies was raised both in para. 60(f) of the decision to initiate the formal procedure and by the Kingdom of Spain in its observations in connection with the formal investigation procedure, upon which the Government of Gibraltar and the United Kingdom had the opportunity to express their views.

163 The Commission's alternative submission is that the outcome of the procedure would not have been different even if the rights of defence of the Government of Gibraltar and of the United Kingdom had been infringed.

Findings of the court

164 It is appropriate to consider first of all whether the United Kingdom's rights of defence were infringed.

165 According to established case-law, observance of the rights of the defence, during the formal investigation procedure under art. 88(2) EC (art. 108(2) TFEU), requires the Member State concerned to be placed in a position in which it may effectively make known its views on the truth and relevance of the facts and circumstances alleged and on the documents obtained by the Commission to support its claim that there has been infringement of European Union law (see, to that effect, *Belgium* v. *Commission (Case 40/85)* (4) ([1986] ECR 2321, at para. 28), and *Belgium* v. *Commission (Case 234/84)* (3) ([1986] ECR 2263, at para. 27)), as well as on the observations submitted by interested third parties in accordance with art. 88(2) EC (art. 108(2) TFEU). In so far as the Member State has not been afforded the opportunity to comment on those observations, the Commission may not use them in its decision against that State (see *France* v. *Commission (Case C-301/87)* (15) ([1990] ECR I–307, at para. 30); *Belgium* v. *Commission (Case C-142/87)* (5) ([1990] ECR I–959, at para. 47); and *Germany* v. *Commission (Case C-288/96)* (17) ([2000] ECR I–8237, at para. 100)).

166 In that regard, it is common ground in the present case that the United Kingdom did have the opportunity to make known its views on the truth and relevance of the facts and circumstances alleged and on the observations submitted by interested third parties, such as, here, those of the Kingdom of Spain, and so the obligations under the case-law cited in the preceding paragraph were met.

167 In so far as the United Kingdom contends that it was not able to make known its views effectively since, first, the preliminary assessment included in the decision to initiate the formal procedure did not contain any considerations with regard to offshore companies and, secondly, the Commission did not, in its discussions with the Government of Gibraltar and the United Kingdom during the formal investigation procedure, state that it considered that offshore companies enjoyed selective advantages, its arguments cannot succeed.

168 With regard, first, to the fact that the preliminary assessment did not contain any considerations with regard to offshore companies, it should be noted that it is true that the Commission is required to express its doubts clearly as to the compatibility of the aid when it initiates a formal

investigation procedure, in order to allow the Member State and other parties concerned to respond as fully as possible (judgment of May 8th, 2008 in *Ferriere Nord SpA* v. *Commission (Case T-176/01)* (14) ([2004] ECR II–3931, at para. 92)).

169 However, the mere fact that the preliminary assessment of the proposed tax reform notified did not contain any considerations with regard to offshore companies cannot constitute a factor capable of giving rise to a legitimate expectation on the part of the United Kingdom that the Commission would limit its investigation solely to the aspects considered in those preliminary assessments. Similarly, that fact does not mean that the Commission failed to meet its obligation to express its doubts clearly.

170 First of all, para. 60(f) of the decision to initiate the formal procedure contained questions relating specifically to that sector even though the word "offshore" was not used.

171 Consequently, the United Kingdom was given sufficient warning, in the actual decision to initiate the procedure, that the detailed investigation during the formal procedure for investigation of the proposed tax reform might also relate to sectors which escape taxation by having no employees and not requiring the occupation of property.

172 Also, the assessment which is included, in accordance with art. 6(1) of Regulation (EC) No. 659/1999, in the decision to initiate the formal procedure is, as the wording of that provision makes clear, only a "preliminary assessment," marking the start of the formal investigation procedure and above all affording interested parties the opportunity to put forward their views effectively.

173 In order, *inter alia*, to ensure the effectiveness of that opportunity, the Commission cannot be prevented, in its final decision at the end of the formal investigation procedure, from supplementing its "preliminary" assessment by adopting the point of view expressed by those interested parties.

174 In those circumstances, the conclusion must be drawn that the mere fact that the preliminary assessment of the proposed tax reform notified did not contain specific considerations concerning offshore companies does not lead to a breach of the United Kingdom's rights of defence.

175 Secondly, contrary to the United Kingdom's contention, the Kingdom of Spain's observations during the formal investigation procedure do not only contain purely factual arguments, but seek specifically to demonstrate that the proposed tax reform notified is also selective because it favours offshore companies enjoying total tax exemption.

176 The Commission submitted those observations to the United Kingdom, which set out its comments in its letter of February 13th, 2003 but did not adopt a position with regard to offshore companies.

177 The United Kingdom, in contending that it was not able to put forward its views effectively because the Commission had not intimated that it attached importance to the Kingdom of Spain's observations, adopts a line of argument which amounts to obliging the Commission to adopt a position, during the formal investigation procedure, on the comments received by the interested parties.

178 The existence of such an obligation is not apparent from Regulation (EC) No. 659/1999. Article 6(2) of that regulation only requires the Commission to submit to the Member State concerned the comments received during the formal procedure, a requirement which the Commission fully complied with in the present case.

179 In the light of the above, the United Kingdom's third plea, alleging infringement of its rights of defence, must be rejected, and there is no need to consider whether, had it not been for the irregularity alleged, the outcome of the procedure might have been different, which is a condition to be met in order for an infringement of the rights of the defence to result in annulment of the contested decision (see *France* v. *Commission (Case C-301/87)* (15) ([1990] ECR I-307, at para. 31); *Belgium* v. *Commission (Case C-142/87)* (5) ([1990] ECR I–959, at para. 48); and *Germany* v. *Commission (Case C-288/96)* (17) ([2000] ECR I–8237, at para. 101)).

180 With regard to the rights of defence of the Government of Gibraltar, it should be noted first of all that the latter had the opportunity to submit comments to the Commission, and that it took that opportunity. Since the Government of Gibraltar puts forward in essence the same arguments as the United Kingdom, it is sufficient to note that the latter's rights of defence have not been infringed and so the same applies with regard to those of the Government of Gibraltar. The procedural rights of the Government of Gibraltar are, in any event, less extensive than those of the United Kingdom as the Member State concerned in the formal investigation procedure, in accordance with art. 88(2) EC (art. 88(2) TFEU).

181 In that regard, it is clear from the case-law of the court that interested parties other than the Member State concerned, such as in the present case the Government of Gibraltar, have, in the procedure for reviewing State aid, only the opportunity to send to the Commission all information intended for the guidance of the latter with regard to its future action and they cannot themselves seek to engage in an adversarial debate with the Commission in the same way as is offered to that Member State (see *Commission* v. *Sytraval and Brink's France SARL (Case C-367/95 P)* (10) ([1998] ECR I–1719, at para. 59), and *Falck SpA* v. *Commission*

(Joined Cases C-74/00 P & C-75/00 P) (13) ([2002] ECR I–7869, at paras. 80 and 82)).

182 In the light of all of the foregoing, the United Kingdom's third plea and the first part of the Government of Gibraltar's third plea must be rejected as unfounded.

The first plea, relating to regional selectivity

183 The applicants at first instance claim, in their first plea, that the contested decision infringed art. 87(1) EC (art. 107(1) TFEU) in that it concluded that the proposed tax reform was regionally selective.

184 In that regard, it is clear from paras. 86–108 above that the proposed tax reform is materially selective in that it confers selective advantages on offshore companies.

185 That finding is sufficient in itself to substantiate the operative part of the contested decision, which states that the proposed tax reform constitutes a scheme of State aid within the meaning of art. 87(1) EC (art. 107(1) TFEU) which the United Kingdom is not authorized to implement.

186 In those circumstances, as the applicants' first plea, relating to regional selectivity, does not call into question the existence of material selective advantages, it cannot form grounds for even partial annulment of the contested decision (see, by analogy, the order of the President of the Court in *Netherlands Antilles* v. *Council (Case C-159/98 P(R))* (25) ([1998] ECR I–4147, at para. 111)).

187 Thus, the conclusion must be drawn that the first plea, even supposing it were founded, cannot result in annulment of the contested decision and is therefore ineffective.

188 In the light of all the foregoing, the actions brought by the Government of Gibraltar and the United Kingdom must be dismissed in their entirety.

COSTS

189 Under the first paragraph of art. 122 of the Rules of Procedure, where the appeal is well founded and the court itself gives final judgment in the case, the court shall make a decision as to costs. Article 69 of the Rules of Procedure, applicable to appeal proceedings by virtue of art. 118 thereof, provides in para. 2 that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first sub-paragraph of art. 69(4) provides that the Member States which intervene in the proceedings are to bear their own costs.

190 Since the appeals of the Commission and of the Kingdom of Spain have been upheld and the actions of the Government of Gibraltar and of

the United Kingdom against the contested decision have been dismissed, the Government of Gibraltar and the United Kingdom must be ordered, in accordance with the forms of order sought by the Commission and the Kingdom of Spain, to bear, in addition to their own costs, the costs incurred by the Commission and the Kingdom of Spain on appeal and by the Commission at first instance.

191 The Kingdom of Spain and Ireland as interveners before the General Court and the Court of Justice, respectively, must each bear their own costs.

192 On those grounds, the court (Grand Chamber) hereby:

1. sets aside the judgment of the Court of First Instance of the European Communities of December 18th, 2008 in *Gibraltar Govt.* v. *Commission (Joined Cases T-211/04 & T-215/04)* ([2002] ECR II–3745);

2. dismisses the action brought by the Government of Gibraltar and the action brought by the United Kingdom of Great Britain and Northern Ireland;

3. orders the Government of Gibraltar and the United Kingdom of Great Britain and Northern Ireland to bear, in addition to their own costs, the costs incurred by the European Commission and the Kingdom of Spain on appeal and by the European Commission at first instance; and

4. orders the Kingdom of Spain and Ireland as interveners before the Court of First Instance of the European Communities and before the Court of Justice of the European Union, respectively, to bear their own costs.

Appeal allowed.
