CASE NOTE

Cases C-106/09P and C-107/09P *European Commission v. Government of Gibraltar and the United Kingdom*

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§1. INTRODUCTION

Article 107 TFEU provides that aid granted by a Member State 'in any form whatsoever' which distorts competition by favouring certain undertakings or the production of certain goods shall be incompatible with the internal market. This means that direct taxation, although falling within the ambit of Member States' fiscal autonomy, cannot escape scrutiny in light of the EU rules on state aid. Indeed, it is irrelevant whether the measure is a tax measure, since Article 107 TFEU applies to aid measures 'in any form whatsoever'.

To be termed aid, four cumulative criteria must be fulfilled.[1] The main criterion identified by the Commission was the selectivity or specificity criterion. This implied that a measure is specific or selective if it 'favours certain undertakings or the production of certain goods', unless it can be justified by 'the nature or general scheme of the system'. Therefore, the common tax system needed to be ascertained in order to determine whether the measure provided an exception to the application of the tax system in favour of certain undertakings.

Over the years, this definition of selectivity has largely survived. However, there have been some significant developments in assessing the selectivity of a tax measure.[2] In analysing the selectivity of a measure it is now necessary to ascertain the relevant reference framework first. In this light, it must be determined which undertakings are

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1 Notice of the Commission on the application of the state aid rules to measures relating to direct business taxation, [1998] OJ C 384/3. A report on its implementation has also been issued, namely in 2004: COM (2004) final 434.

2 After the 1998 notice, the material selectivity assessment has evolved (significantly) in the CJEU's judicature. The main evolution can be found chronologically in the following cases: Case C-143/99 *Adria Wien Pipeline* [2001] ECR I-8365; Case C-487/09P *British Aggregates Association* [2008] ECR I-10505; Case C-279/08P *Dutch Nox* [2008] ECR II-591; and the Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*.

in a comparable legal and factual situation in the light of the objective pursued by the tax system in question. Secondly, it needs to be determined whether or not a provision of the tax system provides a derogation or exclusion from the reference framework or a differentiation within the reference framework. Thirdly, it must be ascertained whether such a derogation or exclusion can be justified by the nature or scheme of the system.

In this case note, the CJEU's selectivity assessment will be discussed with the example of the Gibraltar case.[3] By doing so, the selectivity assessment will be reviewed from a dual angle. Firstly, there will be an analysis of the regional selectivity assessment of the General Court (GC) (since the *Gibraltar* case provides an excellent opportunity to shed some light on this notion). Next will follow an analysis of the (more debatable) material selectivity assessment of the CJEU in the *Gibraltar* judgment (note that the CJEU did not deal with the regional selectivity assessment, only the GC did).

§2. RELEVANT FACTS

A. FACTUAL BACKGROUND OF GIBRALTAR'S CORPORATE TAX REFORM

On 27 April 2002 the Government of Gibraltar announced its intention to repeal all its corporate tax laws and to introduce an entirely new corporate tax regime for all companies in Gibraltar. The new system of taxation mainly consists of a payroll tax and a business property tax (BPOT: all companies occupying property in Gibraltar will have to pay taxes).

After the United Kingdom had notified the Commission of the proposed tax reform, the Commission informed the United Kingdom of its decision to initiate a formal procedure under Article 108 TFEU.[4] In its decision, the Commission argues that the 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. The Commission finds that certain aspects of the tax reform are materially selective as well (since the tax system favours mainly low profit companies and offshore companies).

[3] The other cumulative criteria in order for a measure to qualify as state aid are (much) less debatable and will not be reviewed in this case note.

[4] [2002] OJ C 300/2.

B. PROCEDURE BEFORE THE GC

The government of Gibraltar and the United Kingdom each brought an action for annulment of the contested decision before the GC.[5] The GC upheld all the applicants' pleas in law arguing that the measure in question was neither regionally nor materially selective.

The GC considers that classification by the Commission of a tax measure as selective necessarily begins by identifying the 'normal regime' under the tax system. In relation to this 'normal' tax regime, the Commission must 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.[6]

The GC annulled the Commission's decision on the grounds that the Commission had failed to determine whether the various aspects of the tax system introduced by the reform were capable of forming a common or normal regime in its own right. In other words, the Commission failed to identify and examine the common or 'normal' tax regime from which the new taxes might derogate.[7] As a consequence, the Commission failed to follow the stages of the analytical framework and thereby went beyond the limits of its review.

C. PROCEDURE BEFORE THE CJEU

In its appeal before the CJEU, the Commission puts forward a single ground of appeal, alleging that the GC infringed Article 107 TFEU in its material selectivity assessment. The Commission mainly argued that the GC erroneously held that the Commission was obliged first to identify the 'normal' regime under the tax system and then to demonstrate that the measures in question derogated from that regime. Such an approach would disregard the possibility that a Member State may introduce a tax system which is inherently discriminatory by its very structure.[8]

§3. THE REASONING OF THE CJEU

In its judgment, the CJEU analyses whether Gibraltar's corporate tax reform confers selective advantages to certain undertakings. As to the advantages that are being allotted to offshore companies, the CJEU argues that the GC's reasoning is vitiated by an error

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5 GC Joined Cases T-211/04 and T-15/04 *Government of Gibraltar and the UK v. Commission* [2008] ECR II-3745. For comments, see P. Rossi-Maccanico, 'Gibraltar and the Unsettled Limits of Selectivity in Fiscal Aids', *European State Aid Law Quarterly* (2009), p. 63–72.

6 GC Joined Cases T-211/04 and T-15/04 *Government of Gibraltar and the UK v. Commission*, para. 143.

7 Ibid., para. 173.

8 Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 47–56.

of law. Since the bases of assessment of the new tax regime consists of the number of employees and the size of the business premises occupied, offshore regimes are not taxed at all since they have by their nature no employees and also do not occupy business property. Thus, the fact that offshore regimes are being favoured as a privileged category of taxpayers which avoid taxation on account of the specific characteristics of that group gives reason for the CJEU to conclude that those companies enjoy selective advantages.

§4. COMMENTS

A. REGIONAL SELECTIVITY ASSESSMENT IN THE GC'S AND CJEU'S CASE LAW

It is established case law that a system of regional autonomous taxation constitutes its own reference framework and is not to be regarded as a derogation from a national standard. In the *Azores* case,[9] the CJEU delivered a landmark ruling on regional selectivity. The case concerned a tax scheme which was specific to the autonomous region of the Azores. All persons subject to income or corporation tax in the Azores region enjoy a reduction in the rate of personal income tax of 20% and a 30% reduction in the rate of corporation tax.[10] The Commission took the view that the reductions in the tax rate for residents of the Azores region constitute an advantage which other undertakings wishing to carry out similar economic operations in other areas of Portugal cannot enjoy.[11]

The CJEU confirmed that it is necessary to examine whether a measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable situation. This implies that it is of particular importance to verify the reference framework, since the existence of an advantage may be established only when compared with 'normal' taxation. In regional taxation, the 'normal' tax rate is the rate in force in the geographical area constituting the reference framework. This framework does not necessarily have to overlap with the borders of the entire Member State. It is possible that an *infra*-state body enjoys sufficient autonomy in comparison with the central government of a Member State, in the sense that it is that body and not the central government which plays a key role in the political and economic environment in which undertakings operate. In that case, it is the area in which the *infra*-state body exercises its powers, and not the country as a whole, that constitutes the relevant reference framework.[12]

9 Case C-88/03 *Portugal v. Commission* [2006] ECR I-7115.
10 Ibid., para. 14.
11 Ibid., para. 20.
12 Ibid., para. 56–58.

Three situations in which the relation between state aid and regional taxation converge can be identified.[13] In the first situation, which clearly amounts to state aid, the central government unilaterally decides that the applicable national tax should be reduced within a defined geographic area. The second situation corresponds to a model for distribution of tax competences in which all the local authorities at the same level (regions, districts or others) have the autonomous power to decide the tax rate applicable in the territory within their competence. In such a situation, a measure will not confer a selective advantage because it is impossible to determine a normal tax rate capable of constituting the relevant reference framework. In the third situation, a regional or local authority adopts, in the exercise of sufficiently autonomous powers, a tax rate lower than the national rate and which is applicable only to undertakings present in the territory within its competence. In the latter situation, the legal framework to determine the selectivity of a tax measure may be limited to the geographical area concerned – where the *infra*-state body occupies a fundamental role in the definition of the political and economic environment in which the undertakings present on the territory within its competence operate.[14]

As a consequence, a lower tax rate adopted in a specific area of a Member State by a regional authority will not amount to state aid, if this regional authority has sufficient procedural, economic and political autonomy. If this is not the case, as it was in the *Azores* case, the differential regional tax measures will be subject to scrutiny in light of the EU rules on state aid.

In the *Gibraltar* case the GC annulled the Commission's decision, declaring that Gibraltar's corporate tax reform constitutes regional state aid in that it favoured undertakings which operate in Gibraltar, compared to undertakings which operate in the United Kingdom. The GC argued that all conditions of the *Azores* case are met in order to qualify Gibraltar as a sufficiently autonomous region. As a consequence, the role played by the United Kingdom in the definition of the political and economic environment in which undertakings operate in Gibraltar is not sufficient for the view to be taken that the territory of the United Kingdom constitutes the appropriate reference framework. Accordingly, the reference framework corresponds exclusively to the geographical limits of the territory of Gibraltar. This implies that no comparison can be made between the tax regime applicable to companies established in Gibraltar and that applicable to companies established in the United Kingdom for the purpose of establishing a selective advantage favouring the former.[15]

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[13] This identification has been opined by the Advocate General L.A. Geelhoed in ibid., para. 50 et seq.

[14] Ibid., para. 63–66.

[15] GC Joined Cases T-211/04 and T-15/04 *Government of Gibraltar and the UK v. Commission*, para. 114–115.

B. MATERIAL SELECTIVITY ASSESSMENT IN THE GIBRALTAR CASE

1. *General*

In the *Adria Wien Pipeline* judgment, the CJEU held that it must be determined whether a state measure favours certain undertakings or the production of certain goods in comparison with other undertakings which are in a comparable legal and factual situation in light of the objective pursued by the measure in question.

This implies that different steps need to be taken in order to qualify a measure as materially selective within the meaning of Article 107 TFEU. Firstly, the policy objective of the system in general needs to be determined. Secondly, all undertakings which are in a comparable legal and factual situation in light of that objective must be identified. Thirdly, the tax treatment of all these undertakings must be compared. If there is a differentiation in treatment, this will lead to an assumption of a selective advantage, unless it can be justified by the nature or general scheme of the system. Additionally, the CJEU ruled in the *Gibraltar* case that, even without a differential treatment as such, in that all undertakings are nominally subject to the same tax provisions, it is possible that a category of undertakings is being identified as a 'privileged category of taxpayers'. This is the case where the choice of criteria forming the basis of the tax assessment, results in favouring certain undertakings by virtue of their specific characteristics. Such a non-differential privileged treatment amounts, according to the CJEU, nonetheless to a selective advantage for those undertakings.

2. *Assessing the policy objective of the corporate tax reform*

In order to identify all undertakings which are in a legal and factual situation, it is first necessary to identify the policy objective of the system. This objective of the tax system as a whole is not to be confused with the separate issue of the objective pursued by any exemption or whether any such exemption is based on objective criteria.[16] The objective of a tax system can be for example the taxation of company profits (as in the *Paint Graphos* case).[17]

In the *Gibraltar* case, the CJEU observed that the objective of the corporate tax reform was the introduction of a general system of taxation for all companies established in Gibraltar.[18] This approach of the CJEU has been criticized by some legal practitioners, for example Mr Till-Müller Ibold, partner in EU Competition law at Cleary Gottlieb, Steen

16 Also see C. Quigley, 'Direct taxation and state aid: recent developments concerning the notion of selectivity', *Intertax* (2012), p. 115.

17 Cases C-78/08 to 80/08 *Paint Graphos*, Judgment of 8 September 2011, not yet reported, para. 54–62 (hereinafter *Paint Graphos*).

18 Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 101.

& Hamilton.[19] In this regard, Mr Müller-Ibold finds the CJEU's approach somewhat contradictory. The CJEU criticized the GC for not having used an effects based analysis, by relying on the traditional three step assessment (advantage – selective – justification): 'the Court has consistently held that Article [107(1) TFEU] *does not distinguish* between measures [...] *by reference to their causes or their aims but in relation to their effects*'.[20] But when the CJEU explained why offshore companies constitute a 'privileged category' it stated that the measure 'discriminates between companies which are in a comparable situation *with regard to the objective* of the proposed tax reform' and 'the fact that offshore companies are not taxed is *not* a *random* consequence but the bases of assessment are *specifically designed* [...] so that offshore companies have no tax base'.[21]

Mr Müller-Ibold's criticism on this approach of the CJEU is twofold. Firstly, nothing in the record before the CJEU supported the factual conclusion that measures were *specifically designed* to benefit offshore companies. Secondly, and most importantly according to Mr Müller-Ibold, suddenly the aim and objectives pursued by the measure became relevant for the assessment, contrary to the CJEU's basic proposition. What the CJEU is actually doing is to compare the proposed tax regime with a hypothetical comprehensive company tax. The Gibraltar judgment did not identify in which circumstances companies are in a comparable situation. Instead, the CJEU assumed that the reform wanted 'to introduce a general system of taxation for all companies established in Gibraltar',[22] which is not really consistent with the Gibraltar legislature's desire to rely on a more limited taxable event that is different from net income or profit (namely, a tax on the basis of the amount of employees and on business property occupation). Consequently, the basis for saying that offshore companies should have been taxed is that they could have been taxed and were not.

However, I am inclined to share the view that the perspective of abandoning a tax on profits and replacing it by a limited hybrid form may lead to the (implicit) assumption that Gibraltar sought to introduce a general system of taxation for all companies established in Gibraltar (which can be considered as a sound fiscal policy).[23] On the one hand, the effects-based doctrine merely implies that Article 107 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. An 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

19 T.-M. Ibold, 'Selectivity assessment following the Gibraltar judgment – or – I know it when I see it', speech at ERA Conference 'Tax measures as state aid. The aftermath of the *Gibraltar* case', Brussels, 22 March 2012.

20 Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 87–88.

21 Ibid., para. 106.

22 Ibid., para. 101.

23 In this regard, also see R. Luja, '(Re)shaping fiscal state aid: selected recent cases and their impact', *Intertax* (2012), p. 130.

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.[24] On the other hand, determining the policy objective of the tax system as a whole is necessary in order to identify all undertakings who find themselves in a comparable legal and factual situation. The concept of the effects-based approach and the concept of determining the policy objective of the tax system as a whole should not be confused.

3. *Identifying undertakings in a comparable legal and factual situation*

The next step in fiscal state aid review is identifying which undertakings find themselves in a comparable legal and factual situation in light of the objective pursued by the tax system. In the *Gibraltar* case this identification is rather easy to attribute since the objective of the corporate tax reform was the introduction of a general system of taxation for *all* companies established in Gibraltar. This implies that all companies in Gibraltar, including offshore companies, can be regarded as being in a comparable legal and factual situation in light of Gibraltar's tax reform.[25]

4. *Offshore companies, a 'privileged category of tax payers'*

In the *Azores* case the CJEU held that it is necessary to determine the 'normal' regime in order to determine whether a tax measure is selective. On 8 September 2011, only two months before the *Gibraltar* case, the CJEU repeated this principle:

> In order to classify a domestic tax measure as "selective", it is necessary to begin by identifying and examining the common or "normal" regime applicable in the Member State concerned. It is in relation to this common or "normal" tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation.[26]

However, in the *Gibraltar* case, the CJEU 'finetuned' this statement by holding that its previous 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

24 Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 87–88.

25 For more information on this identification test, see C. Quigley, 'Direct taxation and state aid: recent developments concerning the notion of selectivity', *Intertax* (2012), p. 116–117.

26 Cases C-78/08 to 80/08 *Paint Graphos*, para. 49.

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.[27]

The CJEU acknowledges that Gibraltar's corporation tax itself is in fact the reference framework and that there is no deviation from a common or 'normal' taxation system. The CJEU holds that the GC's approach would lead to the consequence that national tax rules would fall 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 or in fact. Those considerations apply particularly with regard to a tax system which, 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.

The bases of assessment, payroll tax and PBOT, which are applicable to all companies, imposed *de facto* no tax liability on offshore companies. This achieves the same result as a derogation from the normal regime. Thus, the criteria forming the basis of assessment were such as to describe offshore companies as a privileged category within a certain tax regime. The CJEU holds that it must therefore be possible to describe such a regime as favouring 'certain undertakings or the production of certain goods' within the meaning of Article 107 TFEU. In that regard, the CJEU stressed that the fact that offshore companies were not taxed is not a random consequence, but the inevitable consequence of the fact that the bases of assessment were specifically designed so that offshore companies have no tax base.[28]

5. *State aid and combatting harmful tax competition: convergence or conflict?*

Globalization has encouraged countries to assess continually their tax systems, and public expenditures with a view to making adjustments were appropriate to improve the 'fiscal climate' for investment. However, globalization has also had the negative effect of opening up new ways by which companies and individuals can minimize and avoid taxes and in which countries can exploit these new opportunities by developing tax policies aimed primarily at diverting financial and other geographically mobile capital. These actions induce potential distortions in the patterns of trade and investment and reduce global welfare.[29] A large number of states use tax incentives in order to attract foreign undertakings. Those states generally offer foreign undertakings zero or minimal taxation, combined with few regulatory or administrative constraints. Those jurisdictions are

27 Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 91.
28 Ibid., para. 104–106.
29 Harmful Tax Competition: An emerging global issue, OECD Report 1998, www.oecd.org/dataoecd/33/0/1904176.pdf (last visited 1 July 2012), para. 21–22.

classically classified as tax havens and constitute one of the crucial aspects of the concept of harmful tax competition.[30]

The European Union has therefore adopted measures in order to control and maintain tax competition. The aim is not to eliminate tax competition, but to preserve tax competition (creating a level playing field between states). As regards direct taxation, the Commission decided to adopt a new approach by proposing what is generally called a 'tax package',[31] comprising a set of measures to combat harmful tax competition. Those measures included a code of conduct,[32] whose purpose was to improve transparency in the tax sector through the introduction of a system for the Member States to share information with each other. The code of conduct is not a legally binding instrument, but it clearly does have political force. By adopting this code, the Member States have undertaken to roll back existing tax measures that constitute harmful tax competition.

From the *Gibraltar* case, the question emerges whether the EU rules on state aid constitute a suitable instrument in order to tackle harmful competition, and if so, what limits should be applied to it in light of the Member States' competence in fiscal matters.

The preamble of the code of conduct emphasizes that the code is a political commitment and does not affect the Member States' rights and obligations or the respective spheres of competence of the Member States and the Union. The code concerns those measures which affect in a significant way the location of business activity within the Union. A tax measure which provides for a significantly lower level of taxation – including zero taxation – than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and, therefore, covered by the code.[33] The code is designed to tackle harmful tax measures which favour foreign undertakings or capital.

On the other hand, the EU rules on state aid are designed to preserve competition between undertakings and to prevent distortion of competition between Member States through the grant of tax measures which favour certain undertakings or goods to the detriment of others. Additionally, the rules on state aid seek to protect the internal market against the artificial closing of borders through harmful state aid.

In this regard it is noteworthy to mention the Opinion of Advocate General Jääskinen in the *Gibraltar* case in which he clearly tried to dissuade the CJEU from following the Commission's argumentation. He argued that:

> harmful institutional or tax competition between Member States clearly does not fall within the mechanism for controlling state aid established by the Treaty, even though there are cases where measures are liable to amount both to harmful tax competition and to state

30 Ibid., para 47.

31 Conclusions of the 'Ecofin' Council Meeting on 1 December 1997 concerning taxation policy, [1998] OJ C 2/1.

32 Resolution of the Council and the representatives of the Governments of the Member States meeting with the Council of 1 December 1997 on a code of conduct for business taxation, [1998] OJ C2/2 (hereinafter code of conduct).

33 Articles A and B of the code of conduct.

> aid incompatible with the common market. However, the legitimate objective of combating harmful tax competition cannot justify distortion of the European Union's legal framework established in the area of competition law applicable to State aid, or even the adoption of ad hoc solutions conflicting with the rule of law as enshrined in Article 2 TEU.[34]

The Advocate General stated that there is hardly any doubt that the Gibraltan legislature has sought to equip itself with a system of unfair tax competition vis-à-vis the Member States. Inasmuch as EU law does not have a harmonized tax system, the reference framework must remain the national reference framework or the one identified in accordance with the *Azores* case. Consequently, he opined to the CJEU that, if it considers that Gibraltar may in itself constitute an appropriate reference framework, it should adhere to the traditional analysis of an advantage and selectivity.[35]

In other words, the Advocate General, while agreeing with the Commission's wish to strengthen the fight against harmful taxation within the EU, is of the opinion that an innovative interpretation of Article 107 TFEU cannot be used for such a purpose. The creation of such an ad hoc method is designed to enable the Commission to combat bad fiscal and economic practices, without that being connected to the state aid rules in the strict sense.[36]

§5. CONCLUSION

The CJEU's landmark ruling in the *Gibraltar* case may have some serious consequences for Member States' fiscal sovereignty, for offshore companies and for the assessment of tax measures as state aid in general.

The GC correctly held that Gibraltar's corporate tax reform is not regionally selective. Indeed, all conditions of the *Azores* case are met in order to qualify Gibraltar as a sufficiently autonomous region. Accordingly, the reference framework corresponds exclusively to the geographical limits of the territory of Gibraltar. This implies that no comparison can be made between the tax regime applicable to companies established in Gibraltar and that applicable to companies established in the United Kingdom for the purpose of establishing a selective advantage favouring the former.

More controversial, is the CJEU's material selectivity assessment. According to some legal scholars' opinions,[37] the CJEU 'exceeded' expectations: rather than finetuning existing case law, the CJEU suggested a potentially far reaching new approach by introducing a new concept of a 'privileged category of taxpayers'. However, the present author is not of the belief that the CJEU intended to introduce a new concept. The CJEU

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34 Opinion of Advocate General N. Jääskinen in Cases C-106/09P and C-107/09P *Commission v. Government of Gibraltar*, para. 134.

35 Ibid., para. 174–175.

36 Ibid., para. 171.

37 See Müller-Ibold's criticism on this approach (fn. 19).

used these words to describe the effect of the measure and to show that the effect was not random by contrasting it with the effect of the tax rules on profit where unprofitable companies pay no tax. A tax system based on profits is characterized by its randomness: it cannot be predicted in advance which companies will not turn out to be profitable (and as a consequence, will not be liable to tax). An offshore regime on the contrary, such as in the *Gibraltar* case, is not random: offshore companies are favoured by the very nature of the tax and will never be liable to tax. This approach implies that a measure can be materially selective if the bases of assessment are specifically designed in such a way that a specific category of taxpayers have no tax base. This achieves the same result as a derogation from the 'normal' regime.

This new approach may in particular have consequences for the interaction between state aid and combatting harmful tax competition. One cannot but agree with the Opinion of Advocate General Jääskinen in the *Gibraltar* case with regard to this topic. The CJEU should be careful not to interpret the EU rules on state aid too broadly. These rules are not intended to tackle harmful tax competition. Such an interpretation would overly restrict the Member States' tax competition vis-à-vis the other Member States. It is unfortunate that the CJEU did not clarify this issue in its judgment.

The *Gibraltar* case indicated (once again) that the application of the EU rules on state aid in tax matters becomes increasingly difficult and raises decisive issues. The *Gibraltar* case has been the latest, but definitely not the last word on this extremely complex matter.