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State aid: Commission opens in-depth investigation into new Gibraltar corporate tax regime

The European Commission has opened an in-depth investigation to verify whether the new Gibraltar corporate tax regime selectively favours certain categories of companies, in breach of EU state aid rules. The Commission will in particular examine the exemption for passive income such as royalties and interest from corporate tax. The opening of an in-depth investigation gives interested third parties an opportunity to submit comments on the measures under assessment; it does not prejudge the outcome.

The new Gibraltar corporate tax scheme was introduced by the Income Tax Act (ITA) 2010. It is based on the territorial principle: all activities deriving from or accrued in Gibraltar are taxed. However, there exists an exemption for passive income (i.e. dividends, royalties and certain types of interest), which is no longer subject to tax in Gibraltar irrespective of where the source of the income is located.

In June 2012, the Commission received a complaint from Spain about the ITA 2010, claiming that it would continue to grant a selective advantage to offshore companies through the combined effect of the territorial system and the tax exemption for passive income. Following this complaint, the Commission carried out a preliminary investigation.

At this stage, the Commission considers that the tax exemption for passive interest and royalty income may involve state aid because it departs from the general corporation tax system. This could grant a special advantage to the particular group of companies that produce this type of income. Unlike for dividends – the exemption of which can be justified by the need to avoid double taxation - the Commission has, at this stage, found no valid justification for such an exemption.

Gibraltar has recently introduced an amendment which, as of 1 July 2013, repeals the exemption for inter-company loan interest, whether from Gibraltar or abroad. Despite this change, the Commission needs to examine whether the passive interest exemption was in breach of the state aid rules during the period when it was in force.

Comments may be submitted within one month from the publication of today's decision in the EU's Official Journal.

Background

The Income Tax Act 2010 ("ITA 2010") entered into force on 1 January 2011 and replaced the former Income Tax Act 1952. On 7 June 2013, the Gibraltar authorities amended the ITA 2010 regarding the taxation of passive interest income. With the amendment, all inter-company loan (passive) interest income, both domestic and foreign-sourced, will be subject to tax if the interest received per source company exceeds £100,000 (around €118 000) per year.

The Commission examined the Gibraltar corporate tax system on various occasions in the past. In July 2001 the Commission opened an in-depth investigation under the state aid rules in respect of a specific tax regime exempting companies without any trade or business in Gibraltar and not owned by Gibraltar residents from corporate tax (see IP/01/982). Companies that fulfilled these conditions but had a physical presence in Gibraltar paid between 2-10% tax on profits. Gibraltar subsequently abolished this scheme which was considered to favour offshore companies.

In August 2002, the UK notified an envisaged corporate tax reform, applicable to all companies in Gibraltar and consisting of a payroll tax, a business property occupation tax and a registration fee. In March 2004, the Commission found that the proposed tax reform selectively favoured certain categories of companies in breach of EU state aid rules (see IP/04/404). In November 2011, the EU Court of Justice upheld the Commission's decision, concluding that the combined effect of the tax measures would create a selective advantage for "offshore companies", which have no employees and do not occupy business property in Gibraltar (case C-106/09 P).

The non-confidential version of today's decision will be published in the EU Official Journal and made available under the case number SA.34914 in the State Aid Register on the DG Competition website. New publications of state aid decisions on the internet and in the Official Journal are listed in the State Aid Weekly e-News.

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