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ORDER OF THE COURT (Second Chamber)

(*)

(Reference for a preliminary ruling — Article 99 of the Rules of Procedure of the Court of Justice — Article 355(3) TFEU — Status of Gibraltar — Article 49 TFEU — Article 63 TFEU — Freedom of establishment — Free movement of capital — Purely internal situation)

In Case C-192/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom), made by decision of 24 March 2016, received at the Court on 6 April 2016, in the proceedings

Stephen Fisher,

Anne Fisher,

Peter Fisher

v

Commissioners for Her Majesty's Revenue and Customs,

intervening parties:

Her Majesty's Government of Gibraltar,

THE COURT (Second Chamber),

composed of M. Ilešič (Rapporteur), President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jarašič, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- S. Fisher, A. Fisher and P. Fisher, by R. Mullan and H. Brown, Barristers, and by S. Bedford, advisor,
- Her Majesty's Government of Gibraltar, by M. Llamas QC,
- the United Kingdom Government, by D. Robertson and S. Simmons, acting as Agents, and by D. Ewart QC, and O. Jones, Barrister,
- the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, assisted by P. Vlaeminck and R. Verbeke, advocaten,

- the Spanish Government, by M.A. Sampol Pucurull and A. Rubio González, acting as Agents,
- the European Commission, by R. Lyal and J. Samnadda, acting as Agents,

having decided, after hearing the Advocate General, to give a decision by reasoned order, pursuant to Article 99 of the Rules of Procedure of the Court of Justice,

makes the following

Order

1 This request for a preliminary ruling concerns the interpretation of Article 355(3) TFEU, and of Article 49 TFEU and Article 63 TFEU.

2 The request has been made in proceedings between, on the one hand, Mr Stephen Fisher, Mrs Anne Fisher and Mr Peter Fisher and, on the other, the Commissioners for Her Majesty's Revenue & Customs (HMRC) (United Kingdom) concerning a tax assessment notice sent to them by HMRC for the period from 2000 to 2008.

Legal context

International law

3 Chapter XI of the Charter of the United Nations, signed in San Francisco on 26 June 1945, entitled 'Declaration regarding Non-Self-Governing Territories', includes Article 73, which provides as follows:

'Members of the United Nations which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government recognise the principle that the interests of the inhabitants of these territories are paramount and accept as a sacred trust the obligation to promote to the utmost, within the system of international peace and security established by the present Charter, the well-being of the inhabitants of these territories ...'

The status of Gibraltar

4 Gibraltar is a colony of the British Crown. It does not form part of the United Kingdom.

5 Under international law, Gibraltar is classified as a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations.

6 Under EU law, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of Article 355(3) TFEU and to which the provisions of the Treaties apply. The Act concerning the conditions of accession of the Kingdom of Denmark, the Republic of Ireland and the United Kingdom of Great Britain and Northern Ireland and the adjustments to the Treaties (OJ 1972 L 73, p. 14) ('the 1972 Act of Accession') provides, however, that certain parts of the Treaty are not to apply to Gibraltar.

7 Article 28 of the 1972 Act of Accession provides as follows:

'Acts of the institutions of the Community relating to the products in Annex II to the EEC Treaty and the products subject, on importation into the Community, to specific rules as a result of the implementation of the common agricultural policy, as well as the acts on the harmonisation of legislation of Member States concerning turnover taxes, shall not apply to Gibraltar unless the

Council, acting unanimously on a proposal from the Commission, provides otherwise.'

8 Under Article 29 of the 1972 Act of Accession, in conjunction with Annex I, Section I, point 4, thereto, Gibraltar does not form part of the EU customs territory.

The dispute in the main proceedings and the questions referred for a preliminary ruling

9 At the time of the facts in the main proceedings, Mr Stephen Fisher and his wife, Mrs Anne Fisher, resided in the United Kingdom where they were habitually resident. Mr P. Fisher ceased to reside in the United Kingdom in July 2004. Mr S. Fisher and Mr P. Fisher are British nationals, while Mrs A. Fisher is of Irish nationality.

10 In 1998, the Fisher family were the 100% shareholders in Stan James (Abingdon) Limited ('SJA'), established in the United Kingdom. That company carried on a bookmaking trade which, since 1999, included operating retail betting shops, taking bets by telephone ('telebetting') and supplying odds to independent bookmakers. It also had a branch in Gibraltar with six employees taking bets from Germany, Ireland and Spain.

11 In 1999 bookmakers established in the United Kingdom were required under the Betting and Gaming Duties Act 1981 to account for betting duty on bets placed with them which, in practice, was financed by a 9% charge to customers, in addition to the amount staked. It was possible for a bet to be placed by a customer in the United Kingdom with a bookmaker established in another State, in which case there would be no liability for that duty. Bookmakers established in another State were prohibited from advertising in the United Kingdom or sharing resources with an entity in the United Kingdom in order to take bets.

12 From July 1999 SJA began taking bets from United Kingdom-based customers through its Gibraltar-based branch. On 29 February 2000 SJA transferred its telebetting business, including the Gibraltar branch, to a company incorporated and resident in Gibraltar, Stan James Gibraltar Limited ('SJG'), in which the Fisher family were the 100% shareholders.

13 By the contested tax assessment notices covering the period from 2000 to 2008, Mr S. Fisher, Mr P. Fisher and Mrs A. Fisher were charged income tax in the United Kingdom for the commercial profits made by SJG. Those tax assessment notices were drawn up under the provisions of Section 739 of the Income and Corporation Taxes Act 1988 which is aimed at preventing tax avoidance by individuals by means of a transfer of assets as a result of which income becomes payable to a person outside the United Kingdom. Where those provisions apply, the transferor is liable to pay tax on the income of the person established outside the United Kingdom, regardless of whether such income was received by him, provided that he had power to enjoy it and he resided in the United Kingdom.

14 The First-tier Tribunal (Tax Chamber) (United Kingdom) considered that those provisions were applicable in the present case and that no defence under national law, relied on by the applicants, could succeed. The applicants, however, argued that, by virtue of the principles laid down in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), any charge to income tax in circumstances such as those in the present case was an unlawful restriction on their right to freedom of establishment guaranteed by Article 49 TFEU and/or their right to free movement of capital under Article 63 TFEU.

15 The court of first instance found that Mr S. Fisher and Mr P. Fisher could not rely on Article 49 TFEU and/or Article 63 TFEU, since SJG was established in Gibraltar and the transfer took place between Gibraltar and the United Kingdom, so that the situation in the main proceedings

does not constitute a cross-border situation to which EU law applies. Mrs A. Fisher, for her part, could rely on those provisions by reason of her being an Irish national and that, as a consequence, the charge at issue could not apply as against her. Both Mr S. Fisher and Mr P. Fisher, and the HMRC appealed against the decision at first instance.

16 The referring court before which the appeal was brought considers that the resolution of the issues raised before it in relation to the exercise of the freedom of establishment and of free movement of capital by British nationals between Gibraltar and the United Kingdom depends, inter alia, on the status of Gibraltar under EU law and the position of Gibraltar with regard to the United Kingdom under that law, and in particular Articles 49 and 63 TFEU, in conjunction with Article 355(3) TFEU. It makes it clear that it is not asking the Court about the compatibility of legislation such as the United Kingdom's legislation at issue in the main proceedings with EU law, since it considers itself capable of ruling on the case in the main proceedings once the questions referred have been answered.

17 In those circumstances, the Upper Tribunal (Tax and Chancery Chamber) (United Kingdom) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) For the purposes of Article 49 TFEU (freedom of establishment) and in the light of the constitutional relationship between Gibraltar and the United Kingdom:

(a) are Gibraltar and the United Kingdom to be treated as if they were part of a single Member State ... for the purposes of EU law and if so, does that have the consequence that Article 49 TFEU has no application as between the United Kingdom and Gibraltar save to the extent that it can apply to an internal measure, or alternatively, ... for the purposes of Article 49 TFEU, taken individually, so that that article does not apply save to the extent that it can apply to an internal measure?

Alternatively,

(b) having regard to Article 355(3) TFEU, does Gibraltar have the constitutional status of a separate territory to the United Kingdom within the European Union such that either ... the exercise of the right of establishment as between Gibraltar and the UK is to be treated as intra-EU trade for the purposes of Article 49 TFEU, or ... Article 49 TFEU applies to prohibit restrictions on the exercise of the right of establishment by nationals in the UK in Gibraltar (as a separate entity)?

Alternatively,

(c) is Gibraltar to be treated as a third country or territory with the effect that EU law is only engaged in respect of trade between the two in circumstances where EU law has effect between a Member State and a non-Member State?

Alternatively,

(d) is the constitutional relationship between Gibraltar and the United Kingdom to be treated in some other way for the purposes of Article 49 TFEU?

(2) How, if at all, [do the answers] to the above questions differ when considered in the context of Article 63 TFEU (and consequently as regards the freedom of movement of capital) rather than Article 49 TFEU?'

Consideration of the questions referred

18 Pursuant to Article 99 of the Court's Rules of Procedure, where the answer to a question referred to the Court for a preliminary ruling may be clearly deduced from existing case-law, the Court may at any time, on a proposal from the Judge-Rapporteur and after hearing the Advocate General, give its decision by reasoned order.

19 That provision must be applied in the present case.

20 By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, is to be interpreted as meaning that the exercise of the freedom of establishment or of free movement of capital by British nationals between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

21 At the outset, it must be noted that the referring court, which has the task of determining, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (judgment of 27 June 2017, *Congregación de Escuelas Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 24 and the case-law cited), is not asking the Court about the compatibility with EU law of legislation such as the United Kingdom's legislation at issue in the main proceedings, on the basis of which the contested tax assessment notices were adopted, or about the issue of whether there is, in circumstances such as those in the main proceedings, any connection with EU law, so that Articles 49 and 63 TFEU would be applicable in the present case, those checks being a matter for that court.

22 It merely seeks clarification on the relationship between the United Kingdom and Gibraltar vis-à-vis EU law in order to determine whether those two territories must be regarded as being a single Member State for the purposes of Articles 49 and 63 TFEU.

23 In those circumstances, it must be stated that the Court has already held, in paragraph 56 of the judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, (C-591/15, EU:C:2017:449), that Article 355(3) TFEU, in conjunction with Article 56 TFEU, is to be interpreted as meaning that the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

24 In that regard, it should be noted, first, that although the referring court refers, in its order for reference, to Articles 49 and 63 TFEU, and to Article 355(3) TFEU, it nevertheless appears from that order that the facts in the main proceedings occurred between 2000 and 2008, and thus pre-date the entry into force of the Treaty of Lisbon. That said, the content of those provisions corresponds, in any event, to that of Articles 43 and 56 EC, and to Article 299(4) EC, applicable before the entry into force of that treaty.

25 Secondly, it is settled case-law that both Article 56 TFEU, guaranteeing the freedom to provide services, and Articles 49 and 63 TFEU, relating, respectively, to the freedom of establishment and to free movement of capital, do not apply to a situation which is confined in all respects within a single Member State (see, to that effect, judgments of 15 November 2016, *Ullens de Schooten*, C-268/15, EU:C:2016:874, paragraph 47 and the case-law cited, and of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C-591/15, EU:C:2017:449, paragraph 33).

26 Thirdly, Articles 49 and 63 TFEU, like Article 56 TFEU which was at issue in the case giving rise to the judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15,

EU:C:2017:449), apply to the territory of Gibraltar by virtue of Article 355(3) TFEU. The exclusions of the territory of Gibraltar from the application of Union acts in certain areas of law, laid down in the 1972 Act of Accession, do not relate to the freedom of establishment or to free movement of capital, guaranteed by Articles 49 and 63 TFEU.

27 In those circumstances, it is not possible to accept an interpretation of Article 355(3) TFEU, in conjunction with Articles 49 and 63 TFEU, which differs from the one accepted by the Court with regard to Article 355(3), in conjunction with Article 56 TFEU, in the judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15, EU:C:2017:449).

28 In that regard, the Court stated, in paragraph 36 of that judgment that the fact that Gibraltar is not part of the United Kingdom is not decisive in determining whether those two territories must, for the purposes of the applicability of the provisions on the four freedoms, be treated as a single Member State.

29 To that end, the Court examined, in the first place, the conditions in which Article 56 TFEU applies to the territory of Gibraltar so as to conclude, in paragraph 39 of that judgment, that, since Article 355(3) TFEU extends the applicability of the provisions of EU law to the territory of Gibraltar, subject to exclusions which are not relevant with regard to the freedom to provide services, Article 56 applies to that territory under the same conditions as it applies to the United Kingdom.

30 The same must be true with regard to Articles 49 and 63 TFEU which, by virtue of Article 355(3) TFEU, as was pointed out in paragraph 26 above, apply to the territory of Gibraltar. In that respect it is irrelevant that Articles 49 and 63 TFEU apply to the United Kingdom as a Member State and to Gibraltar as a European territory for whose external relations a Member State is responsible for the purposes of Article 355(3) TFEU (see, by analogy, judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C-591/15, EU:C:2017:449, paragraph 40 and the case-law cited).

31 In the second place, the Court stated that there is no other factor that could justify the conclusion that relations between Gibraltar and the United Kingdom may be regarded, for the purposes of Article 56 TFEU which applies to both those territories, as akin to those existing between two Member States, pointing out in that respect that to treat trade between Gibraltar and the United Kingdom in the same way as trade between two Member States would be tantamount to denying the connection, recognised in Article 355(3) TFEU, between that territory and that Member State (see, to that effect, judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C-591/15, EU:C:2017:449, paragraphs 41 and 42). Such an assessment holds equally true for Articles 49 and 63 TFEU.

32 It follows from the foregoing that Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, is to be interpreted as meaning that the exercise of the freedom of establishment or of free movement of capital by British nationals between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

33 That interpretation cannot be called into question by the Government of Gibraltar's arguments that such a conclusion would undermine the objective laid down in Article 26 TFEU of ensuring the functioning of the internal market, as well as the objective of integrating Gibraltar into that market, which, according to that Government, Article 355(3) TFEU seeks to attain.

34 According to the actual wording of Article 26(2) TFEU, the internal market is to comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties, Articles 49 and 63 TFEU constituting

such provisions with regard to the freedom of establishment and to free movement of capital. As was recalled in paragraph 25 above, in order for Article 49 TFEU or Article 63 TFEU to apply to a particular situation, there must be a foreign element.

35 That interpretation does not, in any event, render Articles 49 and 63 TFEU inapplicable to the territory of Gibraltar. Those provisions remain fully applicable to that territory by virtue of Article 355(3) TFEU under the same conditions, including those requiring a foreign element, as those laid down for any other EU territory to which those provisions apply (see, by analogy, judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C-591/15, EU:C:2017:449, paragraph 47).

36 Nor do the considerations relating to the status of Gibraltar under national constitutional law or under international law undermine that interpretation, as the Court already pointed out, in essence, in paragraphs 49 to 55 of its judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association* (C-591/15, EU:C:2017:449).

37 As regards, in particular, the arguments taken from international law, the Court recalled that it is accepted that Gibraltar is classified as a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations. The interpretation of Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, provided in point 32 above, has no effect on the status of the territory of Gibraltar under international law, and cannot be understood as undermining the separate and distinct status of that territory (see, by analogy, judgment of 13 June 2017, *The Gibraltar Betting and Gaming Association*, C-591/15, EU:C:2017:449, paragraphs 52 and 54).

38 It follows from all the foregoing that the answer to the questions referred is that Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, is to be interpreted as meaning that the exercise of the freedom of establishment or of free movement of capital by British nationals between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

Costs

39 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 355(3) TFEU, in conjunction with Article 49 TFEU or Article 63 TFEU, is to be interpreted as meaning that the exercise of the freedom of establishment or of free movement of capital by British nationals between the United Kingdom and Gibraltar constitutes, as a matter of EU law, a situation confined in all respects within a single Member State.

Luxembourg, 12 October 2017.

A. Calot Escobar

M. Ilešić?

Registrar

President of the Second Chamber

* Language of the case: English.