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Court of Justice of the EU rules that Gibraltar is treated as part of the UK when providing services in the EU internal market

The Queen (Gibraltar Betting & Gaming Association Ltd) v. HMRC and HM Treasury
C-591/15

Article by David Bowden

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Executive speed read summary

The UK Government in the Finance Act 2014 changed the way that remote gambling was taxed. Previously operators outside the UK did not pay the 15% remote gaming duty. This was changed in the FA 2014 when a 'place of supply' principle was enacted. The Gibraltar Betting and Gaming Association represents remote gambling operators in Gibraltar. It claimed that the 15% duty was incompatible with the right to provide services in the EU internal market under the Treaty of the Functioning of the EU. The High Court referred a number of questions to the Court of Justice of the EU. After a hearing and delivery of an Advocate General's opinion the full Grand Chamber gave a ruling that the provision of services by operators established in Gibraltar to persons established in the UK constitutes under EU law a purely domestic situation confined in all respects within the UK. It noted that Gibraltar had a special legal position due to its status as a free port. However even though the CJEU had previously ruled that Gibraltar did not form part of the UK, it said this fact was not decisive in determining whether 2 territories must, for the purposes of the applicability of the provisions on the 4 EU freedoms, be treated as a single member state. The case will now return to the High Court in London for it to apply this ruling.

The Queen (Gibraltar Betting and Gaming Association Limited) v. HMRC and HM Treasury
The Governments of Gibraltar, the United Kingdom, the Kingdom of the Belgians, the Kingdom of Spain, the Czech Republic, the Republic of Ireland, the Republic of Portugal and the European Commission intervening
C-591/15 *13 June 2017*
Court of Justice of the European Union – Grand Chamber (Judges Lenaerts, Tizzano, Ilešič, Bay Larsen, von Danwitz, Malenovský, Bonichot, Arabadjiev, Toader, Vajda, Rodin, Biltgen and Jürimäe).
Advocate-General Maciej Szpunar

What duties does the UK levy on gambling?
There are 7 UK gambling duties:

- general betting duty,
- pool betting duty,
- remote gaming duty,
- gaming duty,
- bingo duty,
- lottery duty, and
- machine games duty.

This case solely concerns remote gaming duty

What are the facts?
The Gibraltar Betting and Gaming Association ('GBGA') is a trade association based in Gibraltar whose members are primarily Gibraltar-based gambling providers who provide remote gambling services to customers in the UK and elsewhere. At least 55% of the remote gambling services provided to UK based customers are provided by companies based in Gibraltar and approaching 90% of the economic activity by UK based customers in the UK remote gambling market did not pay any excise duty to the UK exchequer.

The GBGA applied for judicial review of a new tax regime relating to remote gambling introduced in the UK by the Finance Act 2014. Under this new regime, a duty was charged on participation in remote gaming whether the providers of those services were established in the UK or anywhere else in the word. Under the old regime providers established in Gibraltar had paid no tax in the UK at all on the provision of such services. The effect of the new regime is that Gibraltar providers would pay tax in both the UK and Gibraltar on the same business activity with UK persons.

GBGA had previously brought a judicial review claim which was directed to a new regulatory framework that required companies to obtain a licence in order to provide remote gaming services to UK consumers. The previous judicial review **[2014] EWHC 3236 (Admin)** was dismissed on the grounds that the new regulatory framework was justified under EU law as having a legitimate aim and was neither disproportionate nor discriminatory. However that judicial review judgment did not deal with the issue of whether a company established outside the EU could rely on EU law to avoid the impact of UK legislation.

In this case, GBGA claimed that the new UK tax regime was incompatible with article 56. All parties accepted that this new regulatory framework engaged article 56 of the Treaty on the Functioning of the EU (TFEU).

CJEU rules that Gibraltar is treated with the UK when providing services in the EU internal market

The Queen (Gibraltar Betting & Gaming Association Ltd) v. HMRC and HM Treasury - C-591/15

What is the status of Gibraltar?

Gibraltar was ceded by the King of Spain to the British Crown by the Treaty of Utrecht concluded on 13 July 1713. Gibraltar is a colony of the British Crown but it does not form part of the United Kingdom. The system of governance for Gibraltar is set out in the Gibraltar Constitution Order 2006 under which executive authority is vested in a Governor appointed by the Queen and for certain domestic matters in Her Majesty's Government of Gibraltar. Legislative authority is vested in the Queen and in the Parliament of Gibraltar, whose members are elected every four years by the Gibraltar electorate.

In international law, Gibraltar is classified as a non-self-governing territory within the meaning of Article 73 of the Charter of the United Nations. In contrast for EU law purposes, Gibraltar is a European territory for whose external relations a Member State is responsible within the meaning of article 355(3) of the TFEU. Under article 29 of the 1972 Act of Accession (by which the UK, Denmark and Ireland joined the then EEC) Gibraltar is outside the EU customs union.

There is a further carve-out for Gibraltar for VAT and agriculture in article 28 of the 1972 Act of Accession:

> '*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*.'

What was the position before the UK Finance Act 2014?

Providers of remote gambling services established in the UK paid tax at the rate of 15% on their gross profits irrespective of where their customers lived. The tax was based on a '*place of supply'* principle. Providers of remote gambling services established in Gibraltar paid no tax in the UK on gambling services provided to persons established in the UK.

What does the UK Finance Act 2014 provide?

The Finance Act 2014 introduces a '*place of consumption'* principle so that gambling is taxed wherever providers are based. Providers offering gambling services to UK customers pay tax on such services to the UK Treasury at a rate of 15% of the provider's profits.

The Finance Act 2014 provides as follows:

- Section 154 defines '*remote gaming'* as '*gaming in which persons participate by the use of (a) the internet, (b)telephone, (c) television, (d) radio, or (e) any other kind of electronic or other technology for facilitating communication*'.
- Section 188(1)(a) defines '*gaming*' as '*playing a game of chance for a prize'*.
- Section 155(1) provides that an excise duty known as '*remote gaming duty'* is to be charged on a '*chargeable person's participation in remote gaming under arrangements between that person and another person'*.
- By section 155(2) a '*chargeable person'* is defined as including '*any UK person'*.
- By section 186(1) a '*UK person'* is defined as '*an individual who usually lives in the United Kingdom*' or '*a body corporate which is legally constituted in the United Kingdom'*.
- Section 157 provides that '*remote gaming duty'* is chargeable at the rate of 15% of '*the gaming provider's profits*' on remote gaming for an accounting period. This is broadly stakes received less winnings paid out.
- By section 162 a '*gaming provider is liable for any remote gaming duty charged on the provider's profits on remote gaming for an accounting period*.'

Gaming operators must keep appropriate records to enable them to verify whether customers usually live in the UK or not. Operators must check the customer's address (on a bank/credit card statement or driving licence) or a customer's contact telephone number. If there are 2 or more indicators of a UK location operators must treat that customer as a UK person and submit a return to HMRC.

What happened in the High Court in England?

By his reserved judgment Charles J sitting in the Administrative Court on 14 July 2015 **[2015] EWHC 1863 (Admin)** decided to refer a number of questions on TFEU article 56 to the CJEU for a preliminary ruling.

What questions were referred by the High Court to the CJEU?

The High Court referred only 1 question but it was divided into 3 alternative sub-questions with 2 corollaries. The High Court asked the CJEU *whether* for the purposes of article 56 of the TFEU and in the light of the constitutional relationship between Gibraltar and the United Kingdom:

- Gibraltar and the UK are to be treated as if they were part of a single Member State for the purposes of EU law such that article 56 does not apply (save to the extent that it can apply to an internal measure)?
- Alternatively, having regard to article 355(3) of the TFEU, Gibraltar has constitutional status of a separate territory to the UK within the EU such that the provision of services between Gibraltar and the UK is to be treated as intra-EU trade for the purposes of article 56 of the TFEU?
- Alternatively, is Gibraltar to be treated as a 3rd 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, is the constitutional relationship between Gibraltar and the UK to be treated in some other way for the purposes of article 56 of the TFEU?
- Do national measures of taxation that have features such as those found in the new tax regime constitute a restriction on the right to the free movement of services for the purposes of article 56 of the TFEU?
- If so, are the aims of the this new tax regime, which the High Court has found domestic measures, legitimate aims, which are capable of justifying the restriction on the right to free movement of services under article 56 of the TFEU?

What authorities are referred to in the Advocate-General's opinion?
These 3 prior CJEU authorities are relevant in this case:

Commission v. UK **C-30/01**
(CJEU, Grand Chamber, Judges Iglesias, Puissochet, Wathelet, Schintgen, Gulmann, Edward, la Pergola, Jann, Skouris, Macken, Colneric, von Bahr and Cunha Rodrigues. Advocate General Tizzano)
The European Commission sought a declaration from the CJEU that the UK had failed in respect of Gibraltar to adopt a number of laws to comply with a series of EU internal market EU measures relating to the free movement of goods. The CJEU held that the exclusion of Gibraltar from the EU customs territory implied that neither the Treaty rules on free movement of goods nor the rules of secondary EU legislation intended, as regards free movement of goods, to ensure approximation of the laws, regulations and administrative provisions of the member states pursuant to articles 114 and 115 of the TFEU, were applicable to it. Gibraltar is excluded from the EU's customs territory. Gibraltar must be considered as a 3rd country for the purposes of the EU provisions on free movement of goods.

Jersey Produce Marketing Organisation Ltd v. Jersey **C-293/02**
(CJEU, Grand Chamber, Judges Skouris, Timmermans, Rosas, Malenovský, Puissochet, Schintgen, Colneric, von Bahr, Arestis, Borg Barthet, Ileŝiĉ, Kluĉka and Lõhmus. Advocate General Philippe Léger)
For the purposes of the application of the Treaty of Accession to the EEC, Jersey and the UK were to be treated as part of one member state. The levy payable by potato producers, calculated by reference to the quantities of potatoes produced and exported to the UK, amounted to a charge imposed on goods despatched from one region to another in the same member state. The Jersey Potato Export Marketing Scheme Act 2001 was liable to interfere with the export of potatoes to UK markets resulting in a distinction between the treatment of Jersey's domestic and export trades in such a way as to confer an advantage on the domestic market. It followed that any exports to the UK that were subsequently re-exported to other member states could ultimately be subject to the same detrimental effect.

Carbonati Apuani Srl v. Comune di Carrara **C-72/03**
(CJEU, 1st Chamber, Judges Jann, Rosas, von Bahr, de Lapuerta and Lenaerts. Advocate General Maduro)
A charge arose when marble left Carbonati's area within the territory of a member state without distinguishing marble for use within Italy and that intended for use in other member states with the result that it affected trade between member states contrary to Article 23. In determining the nature of the charge having equivalent effect to a customs duty, both the size of the authority levying the charge and the fact that it only involved one type of goods were irrelevant.

What opinion did Advocate General Szpunar give?
A hearing was held in this case on 4 October 2016. After this hearing Advocate General Szpunar handed down his written reserved opinion on 19 January 2017. He concluded that he proposed that the CJEU answered the referred questions from the High Court in the following manner: '*The United Kingdom of Great Britain and Northern Ireland and Gibraltar are to be considered as a single Member State for the purposes of the application of Article 56 TFEU.*'

What ruling did the Grand Chamber give?
The Grand Chamber agreed with the opinion of their Advocate General.

What is the conclusion reached?
The Grand Chamber starts by noting that it was '*appropriate to observe at the outset that EU law is applicable to the Member States pursuant to Article 52(1)*' of the TFEU and that the '*territorial scope of the Treaties is specified in Article 355 TFEU*'. It goes on to say that Article 355(3) provides that '*the provisions of the Treaties are to apply to the European territories for whose external relations a Member State is responsible'* and that '*Gibraltar is a European territory for whose external relations a Member State, namely the United Kingdom, is responsible, and that EU law is applicable to that territory pursuant to Article 355(3)*'.

The Grand Chamber agrees that Gibraltar has a '*special legal position'* due to its '*status as a free port'* but that **'***freedom to provide services, enshrined in Article 56 TFEU, is not one of those exceptions'*. The Grand Chamber said it had to decide under EU law whether '*the provision of services by operators established in Gibraltar to persons established in the UK constitutes' a situation which was 'confined in all respects*' within a single EU member state. It noted that it had previously held that '*Gibraltar does not form part of the UK*' but it said that this '*fact is not, however, decisive in determining whether 2 territories must, for the purposes of the applicability of the provisions on the 4 freedoms, be treated as a single member state'*.

It noted that in *Jersey Produce Marketing* that the Channel Islands, Isle of Man and the UK '*must be treated as a single member state'* even though '*those islands do not form part of the UK'*. It went on to note that '*EU rules on customs matters and quantitative restrictions'* were to apply to the Channel Islands and to the Isle of Man '*under the same conditions as they apply to the UK'*. Further the Grand Chamber said that there was '*no other factor that could justify the conclusion that relations between Gibraltar and the UK*' might be regarded under Art 56 of TFEU as '*akin to those existing between two member states*'.

To emphasise the point the Grand Chamber stressed that to **'***treat trade between Gibraltar and the United Kingdom in the same way as trade between Member States would be tantamount to denying the connection'* that is recognised in Article 355(3) of the TFEU '*between that territory and that Member State*'. It noted that it was '*common ground'* that the UK had '*assumed obligations towards the other Member States under the Treaties so far the application and transposition of EU law in the territory of Gibraltar*' was concerned.

For this reason the Grand Chamber concluded that it followed that '*the provision of services by operators established in Gibraltar to persons established in the United Kingdom constitutes, under EU law, a situation confined in all respects within a single Member State*.'

The Grand Chamber looked at what it had ruled previously in relation to the Republic of France and her overseas departments. It said that the CJEU had '*simply intended to recognise that those departments form part of that Member State and that EU law was to apply automatically to those territories, after the expiry of the two-year period referred to in Article 227(2) of that Treaty*'. As to Gibraltar, the Grand Chamber said that it was '*common ground that Gibraltar is classified as a non-self-governing territory'* under Article 73 of the UN Charter.

Concluding on the referred question under article 56 of the TFEU the Grand Chamber ruled that **'***it merely concludes that, since EU law is applicable to that territory as European territory for whose external relations a Member State, namely the United Kingdom, is responsible, 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'*. It also unequivocally stated that this '*interpretation cannot be understood as undermining the separate and distinct status of Gibraltar'*.

What will happen next with this case?
The case will go back to the High Court for it to apply the Grand Chamber ruling. There may be other domestic points of law that the GBGA wish to take. There may also be appeals domestically to the Court of Appeal or beyond.

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