

Fisher v HMRC: EU Law issues and their Wider Impact

Rory Mullan

1. The decision in *Fisher* raises a number of points of EU law of potential significance in the context of how EU law applies and importantly when it applies¹.
2. In the context of tax planning and day to day dealings with HMRC, perhaps the most the significant portion of the decision in this area was the confirmation that the charge on a transferor under the transfer of assets abroad code involved a breach of EU law.
3. A more esoteric consideration concerned the application of EU law to UK nationals setting up businesses in Gibraltar. Although ostensibly of interest to those with assets and interests in Gibraltar, the point is likely to of relevance to trusts and companies established in the Isle of Man and the Channel Islands.

Confirmation that the charge under section 739 ICTA 1988 / 720 ITA 2007 is contrary to EU law (paragraphs 642 to

Restriction on freedom of establishment

4. The tribunal found a restriction on the right of establishment by reason of the UK resident taxpayer being charged to UK tax on the profits of the Gibraltar company and being charged at a higher personal rate (paragraph 649).

Query: where AF's rights of establishment (exercised indirectly through a UK company) not also restricted by the tax charges on her fellow shareholders in the UK company?

¹ The EU law issues themselves are described as issue 2 and are dealt with in paragraph 547 to 839.

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Justifications

5. Having identified, the restriction the Court went on to consider justifications and proportionality which were the principal arguments for HMRC on compatibility of the TOAA charge lay.
6. The Tribunal accepted that arguments based on balanced allocation of taxing power and fiscal cohesion (referred to in HMRC's statement of case but not advanced at the hearing). The former is about taxing activities within a state's territory: the TOAA charge is about taxing activities outside a state's territory. As for fiscal cohesion, it was not in point as there was no tax advantage which the TOAA charge was offsetting.
7. That left the fight against tax avoidance where HMRC did raise an argument, albeit one based upon the specific status of Gibraltar as not being another Member State.
8. The Tribunal accepted that the Gibraltar company was a real operation such that there was no question that it fell within the artificial arrangements envisaged by 'avoidance' as understood in EU law terms.
9. It also accepted that the narrow EU formulation of tax avoidance differed from the meaning of that terms as a matter of UK law:

665. The justification put forward by HMRC of preventing tax avoidance by the movement of profits generated in the UK to Gibraltar does not amount to a valid justification in our view. As the appellants point out they are being taxed on profits 40 generated in Gibraltar. This illustrates in our view that the provisions are not targeted at deterring the movement of profits made in the UK but that they operate to dissuade establishing in Gibraltar to take advantage of tax advantages there. It follows from Cadbury-Schweppes that this behaviour does not amount to avoidance in European law terms and that the justification of fighting against tax avoidance understood in those terms does not serve to justify the TOAA legislation which is cast in far wider terms.

Proportionality

10. This was sufficient to dispose of the issue, but the Tribunal went on to consider

proportionality: that the provisions are appropriate to the legitimate aim being pursued and do not go farther than necessary to achieve that aim.

11. HMRC's argument that the targets of the legislation (those who could not benefit from the motive defence) rendered it proportionate. The Tribunal rejected this on the basis that the EU meaning of avoidance was much narrower than the UK meaning in the motive defence – so that the provisions were too widely applied (paragraph 669).

Query: does section 742A ITA 2007 meet this objection? Are the provisions now EU compliant? If so what is the legitimate justification? What about proportionality and the scope of the charge?

Free movement of capital

12. The Tribunal accepted almost without comment that if the provisions restricted the right of establishment they also restricted the right to free movement of capital (paragraph 673).

Conforming interpretation

13. The Appellants argued that reduction of tax liabilities as a result of the exercise of EU rights (which are given paramount importance by Parliament under the European Communities Act 1972) should be construed as tax mitigation rather than tax avoidance for the purposes of the motive defence.
14. They had argued that by extension the interpretation should be applied consistently so that if one of the Appellants had an EU defence, the reinterpreted motive defence should be open to all of them.
15. Although the Tribunal accepted that a conforming interpretation could be applied, it rejected the idea that it could be relief upon by anyone not exercising EU law rights and would have more limited application in the context of third countries (paragraph 681).
16. A subsidiary question concerned the extent to which a conforming interpretation

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applied. The Tribunal accepted that it would apply for all UK law purposes, but considered that the extent of the interpretation was that it only applied to persons exercising EU law rights (paragraph 689).

Query: if two people are taxed differently by reference to their nationality does that amount to discrimination? If so, is it contrary to (i) EU law (ii) the European Convention on Human Rights? Is there any wider impact - what of other motive defences?

Relying on EU law

17. Although the Tribunal agreed that the TOAA provisions were an unjustified restriction on the EU freedoms of movement and therefore contrary to Article 49 and 63 TFEU an issue arose as to whether the Applicants could rely on those treaty provisions given that the transfer was to Gibraltar which was not a Member State per se.
18. This raised two questions: (i) leaving aside Gibraltar's constitutional position, was the situation one which was wholly internal to the UK? (ii) Did Gibraltar's constitutional position change this?

Wholly internal matters

19. The Appellants approached the issue as one relating to the scope of the principle that EU law can have no application in relation to matters which are wholly internal to a Member State. In contrast, the HMRC approach had a greater focus on the construction of the relevant treaty provisions, with particular emphasis being placed on the references to Member States in those provisions.
20. The Appellants placed particular emphasis on the teleological approach to EU construction of EU treaty provisions which requires particular regard to be had to the context in which the provision applies and consideration to be given to its application in the context of EU law as a whole.
21. The Tribunal, however, took as its starting point that the drafting of the Treaty contemplated movements between Member States and considered the case law to consider if it showed any divergence from that starting point (paragraph 570).

22. The approach of the Tribunal in its decision was to consider the cases as a whole, rather than to focus on the particular parts of those decisions to which it was referred (contrast the approach of Green J in *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport* [2014] EWHC 3236 (Admin) on the Gibraltar issue).
23. This had the unfortunate consequence that many of the cases were considered on their facts without regard to particular statements of principle. It also had consequence that for the most part the Tribunal restricted the relevance of the cited cases to their facts
24. The Tribunal concluded that in order to show that an EU law right is in point there must be "a cross border element which is intrinsic to that right". The wholly internal issue was simply another way of saying that a person did not have a right under EU law (paragraph 608).

Query: how does a person exercise the right of establishment? What cross border elements would be intrinsic to it?

25. This being the case the fact that the Gibraltar company provided services throughout the EU did not mean that the Appellants were exercising their right of establishment under EU law.
26. Similarly, the fact that the Gibraltar company employed non-UK employees was not relevant to the right of establishment.
27. On these points, the Tribunal appeared to assume that it was necessary to give the "wholly internal movement" principle some weight:

621. We feel reassured in this conclusion given that as a matter of principle it is difficult to see how the concept of a "wholly internal" situation could ever be applicable if it were enough to show that the establishment was providing services to other Member States and/or was engaging workers who were exercising free movement rights. There would be no reason to restrict such a principle to the actual provision of services and it would have to extend to potential provision of services (or to free movement of the establishment's workers). In principle any business could provide services across the EU or employ workers who had exercised free movement rights. The establishment of any business within a Member State would therefore engage European law

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rights just because the establishment had the potential to provide services or to engage workers who had exercised free movement rights and the concept of a wholly internal situation in relation to freedom of establishment would be rendered meaningless.

Query: is it necessary to demonstrate that the “wholly internal” situation will exist? Would there be no reason to restrict the principle to the actual provision of services?

28. Another argument concerned the appellant PF who had moved to Spain in the course of setting up and running the business in Gibraltar. The Tribunal considered crucial in this respect that he not established in one part of the UK from Spain.

Query: is it really crucial?

29. The Tribunal's reasoning at paragraph 629 is difficult to follow but appears to be that there was no restriction on his right of establishment by reason of his having moved to Spain. He was not in a worse position as a result of having moved to Spain.
30. In this respect, the Tribunal appeared to be accepting the HMRC position that the identification of a restriction on freedom of movement was intrinsically linked with the question of whether a matter is wholly internal.
31. In contrast, the Tribunal accepted that AF, who had previously moved to the UK from Ireland could rely on EU treaty rights. In that respect, the Tribunal was heavily influenced by the decision of the CJEU in *Walloon*. It accepted that AF's position was analogous to foreign nationals resident in Belgium whose rights of establishment were held to be infringed as between different Belgian regions, so that she could rely on EU law:

“640. The relevance of Anne Fisher's nationality is not so much that by virtue of it she has exercised free movement or freedom of establishment rights into the UK, but that her rights as a national of one Member State to establish in a Member State other than that of her origin (and in this case a particular part of the “UK”) are preserved not extinguished”.

Query: is this what Walloon says?

The Gibraltar question

32. The second issue was whether the position of Gibraltar under EU law meant that EU provisions could be relied upon.
33. The Tribunal accepted that the matter was not *acte clair* but declined to make a reference, stating:

We are in favour of not deciding to make a reference to CJEU now and in favour of making a decision in respect of Stephen Fisher and Peter Fisher now. If the decision is favourable then there is no need for a reference (HMRC do not seek one). If it is not favourable, then it would on appeal (assuming permission to appeal were granted) be open to the Upper Tribunal to make a reference (if it agreed the issue was not acte claire) and that Tribunal would on seeing the grounds of appeal be in a better position to assess the likelihood of the appellants winning on the domestic law arguments and therefore how worthwhile it was referring the question to the CJEU.

Query: why did the Tribunal not revisit this issue after it had made its conclusions on the other matters? Is it satisfactory for the Tribunal to decide a case involving substantial amounts of tax in circumstances where it acknowledges the law is unclear?

34. The Tribunal concluded that EU law rights were not engaged as between the UK and Gibraltar, largely by reference to the relevant treaty provision which applies the treaties to Gibraltar, stating:

There is nothing to suggest from the wording of the freedom of establishment and freedom to move capital articles that when read purposively in conjunction with Article 299(4) that they would create rights as between the Member State and the external territory for whose relations the Member State is responsible for.

35. Since the hearing Advocate General Jääskinen appears to have suggested in C-24/12 X BV that a different approach is appropriate (at paragraph 48 albeit dealing with the Netherland Antilles).
36. More relevantly, Green J has considered the same issue in *Gibraltar Betting & Gaming Association Ltd v Secretary of State for Culture, Media & Sport* [2014] EWHC

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3236 (Admin) (which Oliver Marre will address in his talk) albeit in the context of freedom to provide services. He reached a different conclusion, which is not without its own difficulties, concluding that Gibraltar was a third country.

37. In his judgment, he considered the decision in *Fisher* in two paragraphs and noted that:

“There is also no detailed discussion of the case law on the application of the freedoms to relations between a Member State and a territory for which it is responsible”.

38. This was despite the same cases being referred to in both judgments.

Wider implications

39. The confirmation that the TOAA provisions are contrary to EU law is a welcome confirmation of an analysis which has been accepted for some time.
40. A more problematic issue will be the question of limitation for those who may seek to recover payment of tax paid to HMRC under section 739 ICTA 1988 and/or section 720 ITA 2007.
41. The Gibraltar issue will need to be decided by the CJEU – as acknowledged by Green J and the Tribunal. It is, however, of relevance in the context of how EU law can be relied upon in relation to the Isle of Man and the Channel Islands.
42. This jurisdictions may be in a stronger position *vis a vis* free movement of capital in which context they would seem to be third countries (see *Prunus*). A more problematic point, however, is whether the textual analysis of the treaty provisions which was pushed for by HMRC would restrict the ability to rely on treaty rights in those situations.

11 November 2014