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# The Gibraltar Question: The View from the High Court[1]

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## 1. The Gibraltar Question

1.1. Issue 2(b) of the *Fisher* judgment. Heard February 2013. Judgment August 2014.

1.2. Issue 3 of the High Court judgment on an application for J.R.: *Gibraltar Betting & Gaming Association Ltd v SoS for Culture Media & Sport ("J.R.")*. Heard 23 & 24 September 2014. Judgment 10 October 2014.

2. Gibraltar is a "European territory for whose external relations a Member State is responsible". The issue is how such a territory is to be dealt with under the EC Treaty.

## 3. Intervening in FTT cases

3.1. HMGoG sought to "intervene" in *Fisher*. (HMGoG – since – accepted as intervener in *J.R.*)

3.2. There is no specific provision for this under the FTT Rules[3].

3.3. The Tribunal had a choice:

3.3.1. To refuse HMGoG any part in proceedings;

3.3.2. To permit HMGoG to make submissions under Rule 9(4): the Tribunal said yes.

3.3.3. To make HMGoG a "party" under Rule 9(3): the Tribunal said no.

3.4. Consequences going forward:

3.4.1. Appeal?

3.4.2. European Court?

## 4. Acte clair? / Reference to CJEU?

4.1. *Acte clair* means clear and free from doubt so as not to require a reference to the CJEU.

4.1.1. See *CILFIT* C283/81: "so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other member states and to the court of justice."

4.2. *Fisher* – held not acte clair: see paras 767, 774. Necessary to determine appeal for S Fisher and P Fisher. But no reference:

> *784. HMRC say that even if the Tribunal dismisses the appeals in terms of the UK law arguments alone and if it considers there is a reasonable prospect of its decision in this respect being successfully appealed this would be a factor counting against a reference at this stage.*

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[2] Counsel for HMGoG in *Fisher* appeal.

[3] SI 2009 No 273 as amended.

*785. This point is of more significance in our view. We think it is relevant to the exercise of our discretion that there are number of issues, before getting to the Gibraltar issue which, if resolved in the appellants' favour, would mean there would be no need to seek a reference on the issue. (These are all of the domestic law issues set out under Issue 1 and the EU connections issue). If the appellants were to be successful on any of these points no reference on the Gibraltar question would be required.*

4.3. *J.R.* – held "…a finely balanced conclusion…this would have been, *par excellence*, a question for the CJEU had it been necessary for it to be resolved in order to determine the application…"

5. **What the High Court said about *Fisher***

5.1. *J.R.* judgment para 259:

> *"The Tribunal [in Fisher] examined the case law but stated that it was of little assistance by way of guidance. It did reject the argument…that Gibraltar should be equated with a separate Member State such that the free movement of capital and establishment rules could apply. There is however no detailed analysis of the possibility that even if there was no flow between Member States there could nonetheless be collateral or indirect effects. 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 was responsible."*

6. **What the High Court decided in the *J.R***

6.1. Not *acte clair* but not <u>necessary to decide</u> definitively for the *J.R* decision (cf. *Fisher*). Nevertheless, significant analysis.

6.2. The case of *DHSS v Barr* [1991] 1-3497 was relevant.

6.2.1. This was Isle of Man case with q. being whether IoM / UK matters were "purely internal". Held not, see AG's opinion at 22: "…not wholly internal to a Member State for…the IoM is not part of the United Kingdom".

6.2.2. In *Fisher*, the judge had merely noted: "…HMRC say the case turned on Article 4 of the Accession protocol." (In fact, AG also at 22 says: "<u>Moreover</u>, Article 4 manifestly applies…").

6.3. The case of *Pereira Roque*[1998] ECR I-4636 was relevant.

6.3.1. This held that the Channel Islands are not MS of their own, so movement is not that between two Member States, but "nothing in the judgment…treats the Channel Islands and the UK as a single Member State". So, can be treated as a third country, not wholly internal.

6.4. The case of *Comm v UK* [2003] ECR I-9481 was relevant.

6.4.1. Good imported into Gibraltar were held not to be in free circulation in a Member State. Of this the judge in the *J.R.* said: "…the ruling was based upon Gibraltar being legally and politically separate from the UK…"

6.5. *Jersey Potatoes* [2005] ECR I-9580 was relevant:

6.5.1. Here, the judge noted that the Court had said "the UK and the [Channel] Islands are, as a rule, to be regarded as a single Member State", but noted that this was said

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6.5.2. in the context of "the express provisions of the Protocol…" which governed the workings of the customs union and should be seen to be limited to that extent.

6.5.3. The judge in the *J.R.* went on to say: "the Protocol was an express provision dealing with the application of a particular set of rules…" and should not be treated as governing all UK/Jersey relations or all UK/overseas territory relations.

6.6. *Prunus* [2011] ECR I-3357 is relevant:

6.6.1. Freedoms of movement which apply to third countries apply to overseas territories.

6.6.2. The judge in the *J.R.* held that nothing turns on the fact that in *Prunus* the OCT was a British OCT and the MS was France, not Britain. See also *XBV* below.

6.7. The AG's opinion in *XBV and TBG* (June 2014) C-24/12 and C-27/12 is persuasive.

6.7.1. This states: "…if an exceptional rule were created for dealings between a members state and its own OCT a distortion would result…this is because MS would not have to respect the same rules with regard to their own OCTs as the other MS…This…is supported by *Prunus*…Thus, movements of capital between the Netherlands and the Netherlands Antilles … do not represent a purely internal situation."

6.7.2. The CJEU itself did not address the point. However, the judge in the *J.R.* said in his view the question is no longer really to be regarded as "open".

6.7.3. The judge in the *J.R.* also noted that the UK government had argued before the Human Rights Court that Gibraltar is not part of the UK. This was "indicative" but does not "per se prove the point".

6.8. The conclusion was the Gibraltar is not a MS of its own. Nor is it part of the UK. Therefore relations are "to be treated as relations between a MS and a third country…"

7. *Fisher*, of course, decided the matter was "wholly internal".

8. **In view of the comments of the HC judge, where are we now?**

8.1. Almost certainly HC view to be preferred.

8.2. Relevance of HC decision beyond Gibraltar: see case law relied on was IoM / Channel Islands case law.

8.3. There is therefore strong authority for free movement of capital applying on the basis of MS / Third Country analysis (if not two MS).

8.4. Once a matter is not wholly internal, the door is open to "collateral / indirect effect on trade between MS": see paras 261-264 of *J.R.* judgment.

8.4.1. In the case of *Fisher*, e.g. providing services to other MS from Gibraltar or employing nationals of other MS: both arguments made by the Appellants but not accepted.

8.4.2. There are further arguments to be made as to the application of free movement of goods even if no collateral / indirect effect on trade between two MS. The *J.R.* did not need to consider this. Does it apply as between Third Country and MS? See *Prunus:* Treaty applies to OCTs "in their capacity as non-Member States".

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