## ECJ Judgments published after 4 October 2018 (or added to selection after that date):

1. 20 March **1997**, Case C-24/95 (Land Rheinland Pfalz v **Alcan** Deutschland GmbH) (excerpt)
2. 15 December **2005**, Case C-148/04 (**Unicredito** Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1) (excerpt)
3. 17 November **2009**, Case C-169/08 (Presidente del Consiglio dei Ministri v **Regione Sardegna**)
4. 21 December **2016**, Joined Cases C-164/15P & C-165/15P) (European Commission v **Aer Lingus** Ltd [(C-164/15P] and **Ryanair** Designated Activity Company [C-165/15 P]) (excerpt)
5. 28 June **2018**, Case C-203/16P (Dirk **Andres** v European Commission)
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7. 24 October 2018, Case C-602/17 (Benoît **Sauvage**, Kristel **Lejeune** v État belge)
8. 22 November 2018, Case C-575/17 (**Sofina** SA, Rebelco SA, Sidro SA v Ministre de l'Action et des Comptes publics)
9. 22 November 2018, Case C-625/17 (Voralberger Landes- und **Hypothekenbank** AG v Finanzamt Feldkirch)
10. 22 November 2018, Case C-679/17 (Vlaams Gewest v Johannes **Huijbrechts**)
11. 6 December 2018, 16 May 2019, Case C-480/17 (Frank **Montag** v Finanzamt Köln-Mitte)
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22. 24 September 2019, Joined Cases T-755/15 & T -759/15 (Grand Duchy of Luxembourg (T-755/15) and **Fiat** Chrysler Finance Europe (T-759/15) v European Commission)
23. 24 September 2019, Joined Cases T-760/15 & -636/16 (Kingdom of the Netherlands (T-760/15), **Starbucks** Corp., Starbucks Manufacturing Emea BV (T-636/16) v European Commission)
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32. 3 March 2020, Case C-482/18 (**Google Ireland** Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága)
33. 2 April 2020, Case C-458/18 ('**GVC Services (Bulgaria)**' EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika'- Sofia) *[F]*
34. 30 April 2020, Joined Cases C-168/19 & C-169/19 (HB (C-168/19), IC (C-169/1) v Istituto nazionale della previdenza sociale (**INPS**))
35. 30 April 2020, Case C-565/18 (**Société Générale** S.A. v Agenzia delle Entrate - Direzione Regionale Lombardia Ufficio Contenzioso) *[F]*
36. 6 October 2020, Joined Cases C-245/19 & C-246/19) (**État** du Grand-duché de **Luxembourg** v B (C-245/19), B, C, D, F. C. (C-246/19), Other party: A) *[F]*
37. 8 October 2020, Case C-558/19 (Impresa **Pizzarotti** & C SPA Italia Sucursala Cluj v Agentia Nationala de Administrare Fiscala – Directia Generala de Administrare a Marilor Contribuabili) *[F]*

# EC Court of Justice, 20 March 1997*

# Case C-24/95

# *Land Rheinland Pfalz v Alcan Deutschland GmbH*

| | |
|---|---|
| *The Court:* | *G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida and J. L. Murray (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann (Rapporteur), H. Ragnemalm and M. Wathelet, Judges* |
| *Advocate General:* | *F. G. Jacobs* |

*Extract*

On those grounds,

THE COURT,

in answer to the questions referred to it by the Bundesverwaltungsgericht by order of 28 September 1994, hereby rules:

**1. Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the authority has allowed the time-limit laid down for that purpose under national law in the interest of legal certainty to elapse.**

**2. Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even if the competent authority is responsible for the illegality of the aid decision to such a degree that revocation appears to be a breach of good faith towards the recipient, where the latter could not have had a legitimate expectation that the aid was lawful because the procedure laid down in Article 93 of the Treaty had not been followed.**

**3. Community law requires the competent authority to revoke a decision granting unlawful aid, in accordance with a final decision of the Commission declaring the aid incompatible with the common market and ordering recovery, even where such recovery is excluded by national law because the gain no longer exists, in the absence of bad faith on the part of the recipient of the aid.**

* Language of the case: German.

# EC Court of Justice, 15 December 2005[*]

## Case C-148/04

## *Unicredito Italiano SpA v Agenzia delle Entrate, Ufficio Genova 1*

*Second Chamber:* *C. W. A. Timmermans, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, G. Arestis and J. Klucka, Judges*

*Advocate General:* *C. Stix-Hackl*

*Extract*

107. As for the authorisations which, according to the applicant in the main proceedings, were granted by the Banca d'Italia for each operation involving the tax reduction for banks, it is sufficient to remember that only the Commission is entitled to examine the compatibility of aid with the common market, so that a diligent economic operator cannot have a legitimate expectation with regard to a decision which was not made by that institution.

108. Finally, it cannot usefully be argued that, since the banks concerned took account of the aid granted by means of the tax reduction when assessing the feasibility of their operations, recovery of that aid infringes the principle of the protection of legitimate expectations.

109. The recovery of aid granted contrary to the procedure laid down in Article 88(3) EC constitutes a foreseeable risk for the operator benefiting from it.

110. In addition, and as pointed out by the Commission, the undertakings in receipt of unlawful aid generally take account of that aid when making economic decisions and the subsequent recovery of that aid does, generally speaking, have an adverse effect on their finances. If such a situation were to prevent recovery, in virtually all cases the aid would remain ultimately in the possession of the beneficiaries and the control of State aid at Community level would be ineffective.

111. In the light of the above considerations, Unicredito cannot therefore claim that the recipient of unlawful aid may rely on exceptional circumstances on the basis of which it might legitimately have expected the aid to be lawful (see *Demesa and Territorio Histórico de Álava* v *Commission*, cited above, paragraph 51).

112. As a result, it must be held that the complaint alleging infringement of the principles of legal certainty and the protection of legitimate expectations is unfounded.

c. The complaint alleging infringement of the principle of proportionality

113. The withdrawal of unlawful aid by recovery is the logical consequence of the finding that it is unlawful. That recovery for the purpose of re-establishing the previously existing situation cannot, in principle, be regarded as disproportionate to the objectives of the Treaty provisions on State aid. By repaying, the recipient forfeits the advantage which it had enjoyed over its competitors on the market, and the situation prior to payment of the aid is restored (Case C-372/97 *Italy* v *Commission*, cited above, paragraphs 103 and 104, and the case-law cited).

114. It would not be right to determine the amounts to be repaid in the light of various operations which could have been implemented by the undertakings if they had not opted for the type of operation which was coupled with the aid.

115. That choice was made in the knowledge of the risk of recovery of aid granted contrary to the procedure laid down in Article 88(3) EC.

116. Those undertakings could have avoided that risk by opting immediately for operations structured in other ways.

117. In addition, in circumstances such as those in the case in the main proceedings, re-establishing the status quo ante means returning, as far as possible, to the situation which would have prevailed if the operations at issue had been carried out without the tax reduction.

* Language of the case: Italian.

118. That does not imply reconstructing past events differently on the basis of hypothetical elements such as the choices, often numerous, which could have been made by the operators concerned, since the choices actually made with the aid might prove to be irreversible.

119. Re-establishing the status quo ante merely enables account to be taken, at the stage of recovery of the aid by the national authorities, of tax treatment which may be more favourable than the ordinary treatment which, in the absence of unlawful aid and in accordance with domestic rules which are compatible with Community law, would have been granted on the basis of the operation actually carried out.

120. The complaint alleging infringement of the principle of proportionality is therefore unfounded.

# EU Court of Justice, 17 November 2009*

# Case C-169/08

# *Presidente del Consiglio dei Ministri v Regione Sardegna*

*Grand Chamber:* *V. Skouris, President, K. Lenaerts, J.-C. Bonichot, P. Lindh and C. Toader (Rapporteur), Presidents of Chambers, C.W.A. Timmermans, A. Rosas, P. Kuris, E. Juhász, G. Arestis, A. Borg Barthet, A. Ó Caoimh and L. Bay Larsen, Judges*

*Advocate General:* *J. Kokott*

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1. This reference for a preliminary ruling concerns the interpretation of Articles 49 EC and 87 EC.

2. The reference was made in proceedings between the President of the Council of Ministers and the Region of Sardinia regarding the establishment by that region of a tax on stopovers for tourist purposes by aircraft used for the private transportation of persons, or by recreational craft, to be imposed only on operators whose tax domicile is outside the territory of that Region.

## National legal framework

### *The Italian Constitution*

3. The first paragraph of Article 117 of the Italian Constitution provides:

> 'Legislative power shall be exercised by the State and the Regions in accordance with the Constitution and within the limits set by Community law and international obligations.'

### *National legislation*

4. The first paragraph of Article 743 of the Sea and Air Navigation Code (Codice della navigazione) gives the following definition of aircraft:

> '"Aircraft" means any machine intended for the transportation by air of persons or things.'

5. In Article 1(2) of the Recreational Sailing Code (Codice della nautica da diporto), introduced by Legislative Decree No 171 (Decreto legislativo n. 171) of 18 July 2005, recreational sailing is defined as follows:

* Language of the case: Italian.

'For the purposes of this Code, recreational sailing means sailing in maritime and inland waters for sporting or leisure purposes and without a view to profit.'

6. Article 2(1) of the Recreational Sailing Code concerns the commercial use of recreational craft, which it defines as follows:

'1. Recreational craft are used for commercial purposes where:
a. they are the subject of a contract of leasing or chartering;
b. they are used for professional training in recreational sailing;
c. they are used by diving and sub-aqua training centres as support craft for persons practising underwater diving for sports or leisure purposes.
…'

*Regional legislation*

7. Law No 4 of the Region of Sardinia of 11 May 2006 laying down miscellaneous provisions on revenue, reclassification of costs, social policy and development, as amended by Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007 laying down provisions for the preparation of the annual and long-term budget of the Region – 2007 Finance Law ('Regional Law No 4/2006') contains an Article 4, entitled 'Regional tax on stopovers for tourist purposes by aircraft or recreational craft', which provides as follows:

'1. From 2006, a regional tax on stopovers for tourist purposes by aircraft or recreational craft shall be established.
2. The pre-conditions for the tax shall be the following:
a. stopovers in the period between 1 June and 30 September at airfields in the territory of the region by general aviation aircraft, as referred to in Article 743 et seq. of the Sea and Air Navigation Code, used for the private transport of persons;
b. stopovers in the period between 1 June and 30 September in harbours, berths and mooring places situated in the territory of the region and at rigged moorings in territorial waters along the coasts of Sardinia by recreational craft, as referred to in Legislative Decree No 171 of 18 July 2005 (Recreational Sailing Code) or, in any event, by craft used for recreational purposes, of a length exceeding 14 metres, measured in accordance with the EN/ISO/DIS 8666 harmonised standards, as provided for in Article 3(b) of that legislative decree.
3. The persons liable for the tax shall be the natural or legal persons who operate the aircraft for the purposes of Article 874 et seq. of the Sea and Air Navigation Code, or who operate the recreational craft for the purposes of Article 265 et seq. of the Sea and Air Navigation Code, and whose tax domicile is outside the territory of the region.
4. The regional tax provided for in paragraph 2(a) shall be payable in respect of each stopover, and that provided for in paragraph 2(b) shall be payable annually.
…
6. The following shall be exempt from the tax:
a. vessels which make a stopover in order to take part in sporting regattas, rallies of vintage and monotype boats and in sailing events, including non-competitive sailing events, where the organisers have given the maritime authorities advance notification of the event; ARASE (Agenzia della Regione autonoma della Sardegna per le entrate; Revenue Office of the Autonomous Region of Sardinia) must be informed, before the berthing, that such notification has been given;
b. recreational craft which are moored throughout the year at harbour installations of the region;
c. technical stops, limited to the time necessary for those purposes.
The procedure for certification of the grounds of the exemption shall be laid down by specific measure of ARASE.
7. The tax shall be paid:
a. in the case of aircraft referred to in paragraph 2(a), at the time of landing;
b. within 24 hours of the arrival of the recreational craft in harbours, berths and mooring places, or at rigged moorings, along the coasts of Sardinia;
in accordance with procedures to be laid down by measure of ARASE.
…'

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

8. By two actions brought before the Corte costituzionale, the first in 2006 and the second in 2007, the President of the Council of Ministers raised questions concerning the constitutionality of laws in relation not only

to Article 4 of Regional Law No 4/2006 but also to Articles 2 and 3 of that law and to Article 5 of Law No 2 of 29 May 2007, both in the original version and as amended. All those provisions establish regional taxes.

9. With regard to Article 4 of Regional Law No 4/2006, the applicant in the main proceedings submitted in particular that that provision does not comply with the requirements of Community law, which are binding upon the legislature in Italy pursuant to the first paragraph of Article 117 of the Italian Constitution. In support of those actions, the applicant alleged (i) infringement of Articles 49 EC and 81 EC, read in conjunction with Articles 3(1)(g) EC and 10 EC, and (ii) infringement of Article 87 EC.

10. In judgment No 102 of 15 April 2008, the Corte costituzionale, after joining the above two actions, ruled on the questions of constitutionality raised in the 2006 action and on some of the questions of that nature raised in the 2007 action. With regard, in particular, to Article 4 of Regional Law No 4/2006, which is the subject of the 2007 action, the Corte costituzionale declared inadmissible or unfounded the questions of constitutionality which had been raised in relation to constitutional provisions other than the first paragraph of Article 117. It therefore decided to disjoin the proceedings relating to that provision and to stay those proceedings until the date of delivery of the judgment of the Court of Justice on the reference for a preliminary ruling made in the order for reference. In addition, with regard to the alleged infringement of Articles 3(1)(g) EC, 10 EC and 81 EC, the Corte costituzionale considered it appropriate to reserve its right to rule subsequently.

11. In the order for reference, the Corte costituzionale makes a number of points relating to the admissibility of its reference for a preliminary ruling with regard, first, to its status as a 'court or tribunal' within the meaning of Article 234 EC and, secondly, to the relevance of the questions referred for the purposes of resolving the case before it.

12. The Corte costituzionale states first that the concept of 'court or tribunal' within the meaning of Article 234 EC must be construed on the basis of Community law and not inferred from the status under national law of the body making the reference, and that the Corte costituzionale satisfies all the conditions required in order to be permitted to make a reference for a preliminary ruling.

13. With regard to the relevance of the questions referred, the Corte costituzionale states that, in direct actions for constitutional review, the provisions of Community law 'serve as interstitial rules by reference to which the conformity of the regional legislation with the first paragraph of Article 117 of the Constitution can properly be tested ... or which, more specifically, make it possible in practice to apply the limits laid down in the first paragraph of Article 117 of the Constitution ... with the result that a regional provision held to be incompatible with such Community provisions will be declared unconstitutional'.

14. With regard to the substance of the questions referred, the Corte costituzionale states that Article 4 of Regional Law No 4/2006 falls within the scope of the Community provisions referred to in paragraph 9 of the present judgment. Being applicable to natural and legal persons, it covers undertakings which operate recreational craft or aircraft in the general aviation sector used for the private transportation of persons.

15. The Corte costituzionale adds that, by imposing a tax on undertakings which do not have their tax domicile in Sardinia, Article 4 of Regional Law No 4/2006 appears to discriminate against such undertakings as compared with undertakings which carry out the same activity but are not required to pay the tax solely because they have their tax domicile in Sardinia, and that, as a consequence, it appears to increase the cost of the services provided to the detriment of non-resident undertakings.

16. Furthermore, the Corte costituzionale entertains certain doubts regarding the justifications put forward by the Region of Sardinia, which maintains, first, that those non-resident undertakings benefit from regional and local public services, in the same way as undertakings which have their tax domicile in that region, but without contributing to the funding of those services and, secondly, that it is necessary to offset the additional costs borne by undertakings domiciled in the Region of Sardinia, on account of the geographical and economic features associated with the fact that the Region of Sardinia is an island.

17. With regard, inter alia, to the alleged infringement of Article 87 EC, the Corte costituzionale states that the issue arises as to whether the economic competitive advantage accruing to undertakings which have their tax domicile in Sardinia as a result of the fact that they are not liable to pay the regional tax on stopovers comes within the notion of State aid, given that that advantage derives not from the grant of a tax concession but indirectly from the lower costs borne by those undertakings as compared with undertakings established outside the territory of the region.

18. In those circumstances, the Corte costituzionale decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law No 4/2006], under which the regional tax on stopovers for tourist purposes by aircraft is levied only on undertakings, operating aircraft which they use for the transport of persons in the course of "general business aviation" activities, which have their tax domicile outside the territory of the Region of Sardinia?

2. Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by aircraft only on undertakings, operating aircraft which they use for the transport of persons in the course of "general business aviation" activities, which have their tax domicile outside the territory of the Region of Sardinia, constitute, within the meaning of Article 87 EC, State aid to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?

3. Is Article 49 EC to be interpreted as precluding the application of a rule, such as that laid down in Article 4 of [Regional Law 4/2006], under which the regional tax on stopovers for tourist purposes by recreational craft is levied only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations involve making such craft available to third parties?

4. Does Article 4 of [Regional Law No 4/2006], by providing for the imposition of the regional tax on stopovers for tourist purposes by recreational craft only on undertakings, operating recreational craft, which have their tax domicile outside the territory of the Region of Sardinia and whose commercial operations consist in making such craft available to third parties constitute, within the meaning of Article 87 EC, State aid to undertakings carrying on the same activities which have their tax domicile in the Region of Sardinia?'

**Questions referred for a preliminary ruling**

*First and third questions, concerning Article 49 EC*

19. By its first and third questions, which should be examined together, the referring court asks, essentially, whether Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as Article 4 of Regional Law No 4/2006, which provides for the imposition of a regional tax in the event of stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, where that tax is imposed only on undertakings which have their tax domicile outside the territory of the region.

*Conditions for the application of Article 49 EC*

20. In order to reply to such a question, it must first be determined whether Regional Law No 4/2006 falls within the scope of the freedom to provide services under Article 50 EC.

21. As is clear from the wording of Article 4 of Regional Law No 4/2006, the tax at issue in the main proceedings applies to stopovers for tourist purposes by general aviation aircraft used for the private transport of persons (Article 4(2)(a) of that law), or by recreational craft or craft used for recreational purposes to the extent that those craft exceed 14m in length (Article 4(2)(b) of that law).

22. Accordingly, the regional tax on stopovers does not apply to civil transport undertakings which carry persons or goods. The referring court states that the tax applies inter alia to undertakings operating aircraft in order to carry out air transport operations free of charge for reasons connected with their business activities. With regard to recreational craft, the referring court adds that the tax applies inter alia to undertakings whose activity consists in making those craft available to third parties in return for remuneration.

23. In that regard, it should be borne in mind that, according to the case-law of the Court, the concept of 'services' within the meaning of Article 50 EC implies that they are ordinarily provided for remuneration and that the remuneration constitutes consideration for the service in question and is agreed upon between the provider and the recipient of the service (see Case 263/86 *Humbel and Edel* [1988] ECR 5365, paragraph 17; Case C-109/92 *Wirth* [1993] ECR I-6447, paragraph 15; and Case C-355/00 *Freskot* [2003] ECR I-5263, paragraphs 54 and 55).

24. In the present case, the regional tax on stopovers, as is apparent from the observations of the Region of Sardinia, applies to operators of means of transport which travel to the territory of the region and not to undertakings which carry out their activity in that region. However, as was stated by the Advocate General in point 34 of her Opinion, it cannot be inferred from the sole fact that the tax in question does not apply to the provision of transport services that the tax legislation at issue in the main proceedings has no connection at all with the freedom to provide services.

25. It follows from well-established case-law that, whilst the third paragraph of Article 50 EC refers only to the active provision of services – where the provider moves to the beneficiary of the services – that also includes the freedom of the persons for whom the services are intended, including tourists, to go to another Member State, where the provider is, in order to enjoy the services there (see, inter alia, Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 10 and 16; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-6849, paragraph 36; and Case C-318/05 *Commission* v *Germany* [2007] ECR. I-6957, paragraph 65).

26. In the main proceedings, as the Advocate General stated in point 37 of her Opinion, persons operating a means of transport and the users of such transport receive a number of services on the territory of the Region of Sardinia, such as the services provided at the airports and ports. Consequently, the stopover is a necessary condition for receiving such services and the regional tax on stopovers has a certain link with their provision.

27. With regard to the regional tax on stopovers by recreational craft, it should in addition be pointed out that this also applies to the undertakings operating such recreational craft and, inter alia, to those whose commercial operations consist in making such craft available to third parties for remuneration. Thus, by enacting Regional Law No 4/2006, the Sardinian legislature established a direct tax on the provision of services within the meaning of Article 50 EC.

28. Finally, as was pointed out by the Commission of the European Communities, the services on which the regional tax on stopovers has an impact may have a cross-border character since, in the first place, that tax is likely to affect the ability of undertakings established in Sardinia to offer stopover services at the airports and ports to nationals of, or undertakings established in, another Member State and, in the second place, it affects the operations of outsider undertakings having their seat in a Member State other than the Italian Republic and operating recreational craft in Sardinia.

The existence of a restriction on the freedom to provide services

29. With regard to the question whether the legislation at issue in the main proceedings constitutes a restriction on the freedom to provide services, it should be borne in mind at the outset that, in the field of freedom to provide services, a national tax measure restricting that freedom may constitute a prohibited measure, whether it was adopted by the State itself or by a local authority (see, inter alia, Joined Cases C-544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I-7723, paragraph 28 and the case-law cited).

30. In the present case, it is common ground that the regional tax on stopovers is imposed on operators of aircraft or recreational craft having their tax domicile outside the territory of the region and that the chargeable event for tax purposes is the stopover of the aircraft or recreational craft in that territory. Even though, admittedly, that tax is applicable only in a particular part of a Member State, it applies to stopovers by the aircraft and recreational craft in question irrespective of whether they come from another region of Italy or from another Member State. In those circumstances, the regional character of the tax does not mean by definition that it cannot impinge on the freedom to provide services (see, by analogy, Case C-72/03 *Carbonati Apuani* [2004] ECR I-8027, paragraph 26).

31. The application of that tax legislation makes the services concerned more costly for the persons liable for that tax, who have their tax domicile outside the territory of the region and who are established in other Member States, than they are for operators established in that territory.

32. Such legislation introduces an additional cost for stopovers made by aircraft or boats operated by persons having their tax domicile outside the territory of the region and established in other Member States, and thus creates an advantage for some categories of undertaking established in that territory (see Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 25; Case C-250/06 *United Pan-Europe Communications Belgium and Others* [2007] ECR I-11135, paragraph 37; and Case C-212/06 *Government of the French Community and Walloon Government* [2008] ECR I-1683, paragraph 50).

33. However, the Region of Sardinia states that, in view of the nature and objectives of the regional tax on stopovers, which was introduced for the protection of the environment, residents and non-residents are not in an objectively comparable situation and, accordingly, the fact that they are treated differently does not constitute a restriction on the freedom to provide services, according to the case-law of the Court and, in particular, the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225. Whereas residents, by financing the activities of the Region of Sardinia through general taxation and, in particular, through income tax revenues, part of which fall within the regional budget, contribute to the resources to be used for conservation purposes, restoration and the protection of environmental assets, non-resident undertakings behave like environmental 'free riders', by using the resources without paying towards the costs of those activities.

34. In that regard, the Court has indeed accepted, in relation to direct taxation, that the situation of residents and the situation of non-residents in a given Member State are not generally comparable, since there are objective differences between them, both from the point of view of the source of the income and from the point of view of their ability to pay tax or the possibility of account being taken of their personal and family circumstances (see, inter alia, *Schumacker*, paragraphs 31 to 33, and Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 59).

35. However, in order for the comparison of the situation of the taxpayers to be carried out, the specific characteristics of the relevant tax must be taken into account. Accordingly, a difference in treatment as between residents and non-residents may constitute a restriction on the freedom to provide services prohibited by Article 49 EC where there is no objective difference in the situation, with regard to the tax levy in question, which would justify different treatment between the various categories of taxpayer (see, to that effect, *Renneberg*, paragraph 60).

36. That is notably the case with the tax at issue in the main proceedings. As stated by the Commission, the obligation to pay that tax arises on account of stopovers made by aircraft used for the private transport of persons or by pleasure boats and not because of the financial situation of the taxpayers concerned.

37. It follows that, in terms of the consequences for the environment, all natural and legal persons who receive the services in question are – contrary to the contentions of the Region of Sardinia – in an objectively comparable situation with regard to that tax, irrespective of the place where they reside or are established.

38. The fact that taxpayers in Sardinia contribute, through general taxation and, in particular, income tax, to the environmental protection activities undertaken by the Region of Sardinia, is irrelevant for the purposes of comparing the situation of residents with that of non-residents in relation to the regional tax on stopovers. As the Advocate General stated in point 87 of her Opinion, that tax is not of the same nature and does not pursue the same objectives as the other taxes paid by Sardinian taxpayers, which serve above all to fund the State budget in a general way and thereby to finance all regional activities.

39. It follows from the above that there is nothing in the documents before the Court to support a finding that residents and non-residents are not in an objectively comparable situation with regard to the regional tax on stopovers. The tax legislation at issue in the main proceedings therefore constitutes a restriction on the freedom to provide services in that it taxes only operators of aircraft used for the private transport of persons, or of pleasure boats, who have their tax domicile outside the territory of the region, without imposing the same tax on the operators established in that territory.

The possible justification of the legislation at issue in the main proceedings

– The justification related to the requirements of environmental protection and the protection of public health

40. The Region of Sardegna submits that, even admitting that the regional tax on stopovers constitutes a measure restricting the freedom to provide services, such a tax is justified on public interest grounds and, in particular, by environmental protection requirements which can be regarded as ‘public health’ grounds as expressly referred to in Article 46(1) EC.

41. In particular, justification for that tax is said to be found in a new regional policy for the protection of the environment and countryside of Sardinia. Under that policy, according to the Region of Sardinia, there are plans for a series of levies designed, first, to discourage squandering of the environmental and coastal landscape heritage and, secondly, to finance expensive measures to restore coastal areas. Such a tax can also be justified by the ‘polluter pays’ principle since, indirectly, it is imposed on the operators of the means of transport which are one of the sources of pollution.

42. In that regard, it should be borne in mind that, according to settled case-law, irrespective of the existence of a legitimate objective which serves overriding reasons relating to the public interest, a restriction on the fundamental freedoms guaranteed by the EC Treaty may be justified only if the relevant measure is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to attain that objective (see Case C-150/04 *Commission* v *Denmark* [2007] ECR I–1163, paragraph 46; *Government of the French Community and Walloon Government*, paragraph 55; and Case C-222/07 *UTECA* [2009] ECR I-0000, paragraph 25). Furthermore, national legislation is appropriate to ensuring attainment of the objective pursued only if it genuinely reflects a concern to attain it in a consistent and systematic manner (Case C-169/07 *Hartlauer* [2009] ECR I-0000, paragraph 55).

43. In the present case, it should be pointed out that, even if the reasons given by the Region of Sardinia could justify the establishment of the regional tax on stopovers, they cannot justify the way in which it is implemented and, in particular, the fact that operators whose tax domicile is outside the territory of the region – who are the only persons liable to pay that tax – are treated differently.

44. It is clear that those implementing rules, which entail a restriction on the freedom to provide services within the meaning of Article 49 EC, are not appropriate or necessary for the attainment of those general objectives. As the Advocate General stated in points 73 and 74 of her Opinion, even if it is accepted that private aircraft and recreational craft making stopovers in Sardinia constitute a source of pollution, that pollution is caused regardless of where those aircraft and boats come from and, in particular, it is not linked to the tax domicile of those operators. The aircraft and boats of residents and non-residents alike contribute to environmental damage.

45. Accordingly, the restriction on the freedom to provide services which is brought about by the tax legislation at issue in the main proceedings cannot be justified on grounds relating to environmental protection since the basis for applying the regional tax on stopovers introduced by that legislation is a distinction between persons which is unrelated to that environmental objective. Nor can such a restriction be justified on public health grounds, since the Region of Sardinia has not provided any evidence which would make it possible to hold that that legislation is intended to protect public health.

– The justification related to cohesion of the tax system

46. In its observations, the Region of Sardinia, in order to justify the tax legislation at issue in the main proceedings, relies on the need to preserve the cohesion of its tax system. The regional tax on stopovers, imposed only on persons who have their tax domicile outside the territory of the region, is said to be justified by the fact that residents of the region pay other taxes which contribute to operations for the protection of the Sardinian environment.

47. In that regard, it should be borne in mind that the Court has acknowledged that the need to preserve the cohesion of a tax system may justify a restriction on the fundamental freedoms guaranteed by the Treaty, but has pointed out that such a justification requires a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see, inter alia, Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-0000, paragraphs 71 and 72).

48. As was stated in paragraph 38 of the present judgment, the regional tax on stopovers does not pursue the same objectives as the taxes paid by taxpayers who are resident in Sardinia, which serve to fund the State budget in a general way and thereby to finance all the activities of the Region of Sardinia. The non-imposition of that tax on those residents cannot therefore be regarded as offsetting the other taxes imposed on them.

49. It follows from those considerations that the restriction on the freedom to provide services which is brought about by the tax legislation at issue in the main proceedings cannot be justified on grounds of the cohesion of the tax system of the Region of Sardinia.

50. In those circumstances, the answer to the first and third questions is that Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as that provided for under Article 4 of Regional Law No 4/2006, which establishes a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on undertakings whose tax domicile is outside the territory of the region.

*Second and fourth questions relating to Article 87 EC*

51. By its second and fourth questions, which should be examined together, the referring court asks whether Article 87 EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a regional tax on stopovers, such as that provided for under Article 4 of Regional Law No 4/2006, to be imposed only on operators whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.

52. It should be recalled at the outset that, according to the case-law of the Court, for a measure to be categorised as State aid within the meaning of the Treaty, each of the four cumulative conditions laid down in Article 87(1) EC must be fulfilled. First, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer an advantage on

the recipient; fourth, it must distort or threaten to distort competition (see, in particular, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraphs 38 and 39 and the case-law cited).

53. In the present case, it is common ground that the tax at issue in the main proceedings satisfies the second and fourth criteria since it applies to services provided in connection with stopovers by aircraft and recreational craft, which concern intra-Community trade, and that such a tax, by giving an economic advantage to operators established in Sardinia, as indicated in paragraph 32 of the present judgment, can distort competition.

54. The questions relating to the interpretation of Article 87 EC thus concern the application of the two remaining criteria for categorising the regional tax on stopovers as State aid. The Region of Sardinia maintains that the tax cannot be regarded as State aid, both because it does not involve the use of State resources and because it is selective in nature. The Commission contends, in its written observations, that the tax satisfies all the criteria set out in Article 87 EC.

Use of State resources

55. According to the Region of Sardinia, the legislation at issue in the main proceedings does not involve any intervention using regional resources. There is no renunciation of regional revenue, since the resident undertakings already contribute to environmental expenditure through the revenue deriving from the taxes paid by them. The regional tax on stopovers increases that revenue by extending the obligation to pay towards protecting the environment to those who, as non-residents, do not contribute to that expenditure through general taxes.

56. In that regard, it should be noted that, according to settled case-law of the Court, the notion of aid can encompass not only positive benefits such as subsidies, loans or direct investment in the capital of enterprises, but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which therefore, without being subsidies in the strict sense of the word, are of the same character and have the same effect (see Case C-156/98 *Germany* v *Commission* [2000] ECR I-6857, paragraph 25, and Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 123 and the case-law cited).

57. As stated by the Commission, tax legislation such as that at issue in the main proceedings, which grants certain undertakings exclusion from the obligation to pay the tax in question, constitutes State aid, even if it does not involve the transfer of State resources, since it involves the renunciation by the authorities concerned of tax revenue which they would normally have received (*Germany* v *Commission*, paragraphs 26 to 28).

58. As a consequence, the fact that the provision made under the tax legislation at issue in the main proceedings is not the grant of a subsidy, but rather the exclusion from the obligation to pay the tax in question of operators of aircraft used for the private transport of persons, or of recreational craft, who have their tax domicile in the territory of the region, means that that exclusion from tax liability may be regarded as constituting State aid.

The selective nature of the tax legislation at issue in the main proceedings

59. According to the Region of Sardinia, the difference in treatment as between resident undertakings and non-resident undertakings does not constitute a selective advantage. The tax legislation at issue in the main proceedings is not selective from a geographic perspective because, in accordance with the interpretation of the Court in Case C-88/03 *Portugal* v *Commission* [2006] ECR I–7115, the framework for reference in which the 'general nature' of the measure should be assessed is that of the infra-State body, if it enjoys sufficient autonomy. That is so in the case in the main proceedings, since the Region of Sardinia has autonomous powers conferred on it by a statute having the authority of constitutional law which authorises it to establish its own taxes. In addition, in accordance with the more general principle of equal treatment in the area of taxation, that legislation taxes differently situations which are legally and factually distinct.

60. In that regard, it does indeed follow from the case-law relied upon by the defendant in the main proceedings that, with regard to a measure adopted not by the national legislature, but by an infra-State body, such a measure is not selective for the purposes of Article 87(1) EC solely on the ground that it confers an advantage only in the part of the national territory in which the measure applies (see *Portugal* v *Commission*, paragraphs 53 and 57, and Joined Cases C-428/06 to C-434/06 *UGT-Rioja and Others* [2008] ECR I-6747, paragraphs 47 and 48).

61. However, it also follows from that case-law that, in order to determine whether a measure is selective, where it is adopted by an infra-State body which enjoys autonomy vis-à-vis the central government of the kind enjoyed by the Region of Sardinia, it is necessary to determine whether, with regard to the objective pursued by that measure, it constitutes an advantage for certain undertakings as compared with others which, within the legal framework in which that body exercises its competences, are in a comparable legal and factual situation (see Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 41, and *Portugal* v *Commission*, paragraphs 56 and 58).

62. Thus it must therefore be established whether, having regard to the characteristics of the regional tax on stopovers, the undertakings having their tax domicile outside the territory of the region are, with reference to the legal framework in question, in a factual and legal situation comparable with that of undertakings which are established in that territory.

63. As is clear from paragraphs 36 and 37 of the present judgment, it must be held that, in the light of the nature and objectives of that tax, all the natural and legal persons who receive stopover services in Sardinia are, contrary to what is argued by the defendant in the main proceedings, in an objectively comparable situation, irrespective of their place of residence or the place where they are established. It follows that the measure cannot be regarded as general, since it does not apply to all operators of aircraft or pleasure boats which make a stopover in Sardinia.

64. Accordingly, tax legislation such as that at issue in the main proceedings constitutes a State aid measure in favour of undertakings established in Sardinia.

65. It is for the referring court to draw the appropriate inferences from that conclusion.

66. In those circumstances, the answer to the second and fourth questions is that Article 87(1) EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a tax on stopovers, such as that at issue in the main proceedings, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.

**Costs**

67. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. Article 49 EC must be interpreted as precluding tax legislation, adopted by a regional authority, such as that provided for under Article 4 of Law No 4 of the Region of Sardinia of 11 May 2006 (Miscellaneous provisions on revenue, reclassification of costs, social policy and development) as amended by Article 3(3) of Law No 2 of the Region of Sardinia of 29 May 2007 (Provisions for the preparation of the annual and long-term budget of the Region – 2007 Finance Law), which establishes a regional tax on stopovers for tourist purposes by aircraft used for the private transport of persons, or by recreational craft, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region.**

**2. Article 87(1) EC must be interpreted as meaning that tax legislation, adopted by a regional authority, which establishes a tax on stopovers, such as that at issue in the main proceedings, to be imposed only on natural and legal persons whose tax domicile is outside the territory of the region, constitutes a State aid measure in favour of undertakings established in that territory.**

# EU Court of Justice, 21 December 2016*

## Joined cases C-164/15 P and C-165/15 P

## *European Commission v Aer Lingus Ltd and Ryanair Designated Activity Company*

*Third Chamber:* *L. Bay Larsen, President of the Chamber, M. Vilaras (Rapporteur), J. Malenovský, M. Safjan and D. Šváby, Judges*
*Advocate General:* *P. Mengozzi*

*Extract*

93. With regard, in particular, to unlawful aid granted in the form of a tax advantage, it is also the Court's settled case-law that recovery of aid means that the transactions actually carried out by the recipients of the aid in question must be subject to the tax treatment which the recipients would have received in the absence of the unlawful aid (see, to that effect, judgment of 15 December 2005, Unicredito Italiano, C-148/04, EU:C:2005:774, paragraph 119).

94. In the present cases, the tax advantage conferred by ATT consisted, according to the decision at issue, in the application during the period in question of different tax rates, which had the effect of conferring a benefit on airlines in Ireland that had to pay the EUR 2 tax rate by comparison with other airlines that had to pay EUR 10 per passenger during the same period. Aer Lingus and Ryanair have failed to demonstrate that, in so far as it establishes the existence of State aid within the meaning of Article 107(1) TFEU, that decision is vitiated by unlawfulness.

95. In those circumstances, in the light of the considerations set out in paragraphs 89 to 93 above, it must be concluded that restitution of the advantage procured by the aid measure, as identified by the decision at issue, required the Irish tax authorities to recover from the beneficiaries of the lower rate of ATT the difference between the amount of ATT which, in the absence of unlawful aid, should have been paid in respect of each of the flights in question, namely the amount of ATT at the higher rate, and the amount of ATT actually paid — in other words, the amount calculated on the basis of the lower rate of ATT.

96. Accordingly, it must be found that, in the present cases, repayment of the aid called for the recovery of a sum of EUR 8 per passenger for each of the flights concerned, as the Commission stated in Article 4 of the decision at issue.

97. The considerations set out in paragraphs 104 to 123 of the Aer Lingus judgment and paragraphs 120 to 149 of the Ryanair judgment cannot justify, contrary to the view reached by the General Court, any different conclusion.

98. In so far as, under the applicable Irish legislation, airlines were directly liable for ATT, it is of little consequence, in the circumstances of the present cases, that that tax was classified under Irish law as 'excise duty'. For the same reason, the question whether, from a technical point of view, ATT is to be classified as a direct or indirect tax is irrelevant.

99. Equally irrelevant, as regards the question of the recovery of the aid, is the notion of 'economic passing on' referred to in paragraph 91 of the Aer Lingus judgment and paragraph 123 of the Ryanair judgment, respectively. The General Court stated in that connection, as regards flights subject to the lower rate of EUR 2 per passenger, that for the purpose of assessing the 'economic passing on', it was necessary to determine to what extent the airlines concerned actually retained the economic advantage arising from the application of the lower rate.

100. As is apparent from paragraphs 92 and 93 above, the recovery of aid entails the restitution of the advantage procured by the aid for the beneficiary, not the restitution of the economic benefit that may have been conferred by the aid as a result of the exploitation of the advantage. There is therefore no need to examine whether and to what extent those airlines actually utilised the economic advantage arising from the application of the lower rate.

101. The considerations of the General Court set out in paragraphs 92 to 105 of the Aer Lingus judgment and paragraphs 124 to 136 of the Ryanair judgment disclose the same confusion between the advantage obtained

* Language of the case: English.

as a result of the effect of the lower rate of ATT and the benefit which the aid recipients derived or could have derived from that advantage.

102. Indeed, contrary to the view expressed by the General Court in paragraph 105 of the Aer Lingus judgment and paragraph 136 of the Ryanair judgment, the advantage, as identified by the Commission in the decision at issue, did not consist in the fact that the airlines subject to the lower rate were able to 'offer more competitive prices'. It consisted, quite simply, in the fact that those companies had to pay a lower rate of ATT than they would have had to pay if their flights had been subject to the higher rate of ATT. The question whether that advantage enabled them to offer more competitive ticket prices, or whether they exploited that advantage differently, relates to the assessment of any benefit they were able to accrue from the exploitation of the advantage granted; that assessment is irrelevant to the recovery of the aid.

# EU Court of Justice, 28 June 2018*

## Case C-203/16 P

## *Dirk Andres v European Commission*

*Second Chamber:* *M. Ilesic, President of the Chamber, A. Rosas, C. Toader, A. Prechal and E. Jarasiunas (Rapporteur), Judges*
*Advocate General:* *N. Wahl*

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1. By his appeal, Dirk Andres, acting as liquidator in the insolvency of Heitkamp BauHolding GmbH ('HBH') seeks, primarily, annulment of the judgment of the General Court of the European Union of 4 February 2016, *Heitkamp BauHolding* v *Commission* (T-287/11, 'the judgment under appeal', EU:T:2016:60), in so far as, by that judgment, the General Court rejected as unfounded HBH's action for the annulment of Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany - Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel) (OJ 2011 L 235, p. 26, 'the contested decision'), and the annulment of that decision.

2. By its cross-appeal, the European Commission asks the Court to set aside the judgment under appeal in so far as, by that judgment, the General Court dismissed the plea of inadmissibility which it had raised against that action and, consequently, to dismiss the action at first instance as inadmissible.

### Background to the dispute and the contested decision

3. The facts giving rise to the dispute and the contested decision, as set out in paragraphs 1 to 35 of the judgment under appeal, may be summarised as follows.

*German law*

4. In Germany, pursuant to Paragraph 10d(2) of the Einkommensteuergesetz (Law on income tax, 'the EStG'), losses made in the course of a tax year may be carried forward to later tax years, with the result that the losses in question may be subtracted from the taxable income of the following years ('the loss carry-forward rule'). Pursuant to Paragraph 8(1) of the Körperschaftsteuergesetz (Law on corporation tax; 'the KStG'), the loss carry-forward rule applies to undertakings subject to corporation tax.

5. The possibility of carrying losses forward led to the acquisition, for the sole purpose of tax savings, of undertakings which had ceased trading, but whose losses could still be carried forward. In order to prevent such transactions, considered to be unlawful, the German legislature, in 1997, inserted Paragraph 8(4) into the KStG, which restricts the possibility of carrying forward losses to those companies legally and economically identical to those which incurred the losses.

* Language of the case: German.

6. Paragraph 8(4) of the KStG was repealed with effect from 1 January 2008 by the Unternehmensteuerreformgesetz (Business Taxation Reform Act). That law inserted a new Paragraph 8c(1) into the KStG ('the rule governing the forfeiture of losses') which limits or excludes the possibility of carrying forward losses where 25% or more of the shares in a company are acquired ('the prejudicial acquisition of a shareholding'). Under that provision, if, within a period of five years, 25% to 50% of the subscribed share capital, membership rights, ownership rights or voting rights is transferred, unused losses are forfeited on a pro rata basis. Moreover, unused losses are forfeited if more than 50% of the share capital, membership rights, ownership rights or voting rights is transferred to an acquirer.

7. No exception to the rule governing the forfeiture of losses was envisaged. The tax authorities were entitled, however, in the event of a prejudicial acquisition of a shareholding whose purpose was to reorganise an undertaking in difficulty, to grant tax relief based on considerations of equity, pursuant to a decree of the Bundesministerium der Finanzen (Federal Ministry of Finance, Germany) of 27 March 2003.

8. In June 2009, the Bürgerentlastungsgesetz Krankenversicherung (Law on Citizens' Relief - Health Insurance Fund), inserted subparagraph 1a into Paragraph 8c of the KStG ('the restructuring clause' or 'the measure at issue'). Pursuant to that new provision, an entity may carry losses forward, even in the event of a prejudicial acquisition of a shareholding within the meaning of Paragraph 8c(1) of the KStG, provided that: (i) the acquisition serves the purpose of restructuring the corporate entity, (ii) the company is, or is likely to be, insolvent or over-indebted at the time of the acquisition, (iii) the company's fundamental business structures are preserved, which essentially entails the safeguarding of jobs, a significant injection of business assets, or write-off of debts which are still recoverable, (iv) the company does not change its sector of activity during the five years following the acquisition, and (v) the company had not ceased operation at the time of the acquisition.

9. The disputed measure came into force on 10 July 2009 and was applicable retroactively from 1 January 2008, the date of entry into force of the rule governing the forfeiture of losses.

*The contested decision*

10. In Article 1 of the contested decision, the Commission found that 'the State aid granted unlawfully on the basis of Paragraph 8c(1a) of the [KStG], unlawfully put into effect by [the Federal Republic of Germany] …, is incompatible with the internal market'.

11. For the purposes of the classification of the restructuring clause as State aid within the meaning of Article 107(1) TFEU, the Commission found, inter alia, that that clause created an exception to the rule established by Paragraph 8c(1) of the KStG, which provided for the forfeiture of losses not used by companies whose ownership had changed, and that that clause was therefore liable to confer a selective advantage on companies that met the requirements for benefiting therefrom, which was not justified by the nature or general scheme of the tax system, since the purpose of the measure at issue was to tackle problems due to the economic and financial crisis, an objective which was extrinsic to that system. In Articles 2 and 3 of that decision, the Commission nevertheless found that some individual aid granted under that scheme was, subject to compliance with certain conditions, compatible with the internal market.

12. In Article 4 of the contested decision, the Commission ordered the Federal Republic of Germany to recover from the beneficiaries the incompatible aid granted under the scheme referred to in Article 1 of that decision. Pursuant to Article 6 of the latter, that Member State was required, in particular, to provide the Commission with a list of those beneficiaries.

*Background to the dispute*

13. HBH is a company which has been at risk of insolvency since 2008. On 20 February 2009, its parent company acquired the shares therein in order to merge with it for the purposes of its restructuring. On the date of the transaction, HBH met the conditions for application of the restructuring clause. That is clear from the binding information of 11 November 2009 issued by the Finanzamt Herne (Herne tax office, Germany) ('the binding information'). Furthermore, on 29 April 2010, HBH received from the Herne tax office a notice of advance payment relating to corporation tax for the 2009 tax year, which took account of the losses carried forward pursuant to the restructuring clause.

14. By letter of 24 February 2010, the Commission informed the Federal Republic of Germany of its decision to initiate the formal investigation procedure provided for under Article 108(2) TFEU in respect of the measure at issue. By letter of 30 April 2010, the Federal Ministry of Finance ordered the German tax authorities to stop applying that measure.

15. On 27 December 2010, the notice of advance payment of 29 April 2010 was replaced by a new notice of advance payment relating to corporation tax for the 2009 tax year which did not take account of the restructuring clause. In January 2011, HBH inter alia received notices of advance payment relating to corporation tax on the subsequent tax years and which also disregarded the restructuring clause. On 1 April 2011, it received a notice of advance payment relating to corporation tax for the 2009 tax year. Since Paragraph 8c(1a) of the KStG was not applicable, it was not able to carry forward the losses existing on 31 December 2008.

16. On 19 April 2011, the Herne tax office annulled the binding information.

17. On 22 July 2011, the Federal Republic of Germany sent the Commission the list of undertakings which had benefited from the measure at issue. It also sent the Commission a list of companies for which binding information concerning the application of the restructuring clause had been annulled, which included HBH.

**The procedure before the General Court and the judgment under appeal**

18. By application lodged at the Registry of the General Court on 6 June 2011, HBH brought an action for annulment of the contested decision.

19. By a separate document lodged at the Court Registry on 16 September 2011, the Commission raised an objection of inadmissibility under Article 114 of the Rules of Procedure of the General Court of 2 May 1991.

20. On 29 August 2011, the Federal Republic of Germany applied for leave to intervene in support of the form of order sought by HBH. That application was granted by order of the President of the Second Chamber of the General Court of 5 October 2011.

21. Consideration of the objection of inadmissibility was reserved for the final judgment, in accordance with Article 114(4) of those Rules of Procedure, by order of the Court of 21 May 2014.

22. In support of its action, HBH relied on two pleas in law: first, that the measure at issue was not prima facie selective and, second, that it was justified by the nature or general scheme of the system.

23. By the judgment under appeal, the General Court, on the one hand, dismissed the objection of inadmissibility; it held that HBH was directly and individually concerned by the contested decision on the ground, in essence, that it had, before the adoption of the decision to initiate the formal investigation procedure, an acquired right to a tax saving, certified by the German tax authorities, and had, in addition, an interest in bringing proceedings. The General Court further dismissed the action of HBH as unfounded.

**Forms of order sought and procedure before the Court of Justice**

24. By its appeal, HBH claims that the Court should:
- set aside points 2 and 3 of the operative part of the judgment under appeal, and the contested decision;
- in the alternative, annul points 2 and 3 of the operative part of the judgment under appeal and refer the case back to the General Court;
- order the Commission to pay the costs.

25. The Commission claims that the Court should dismiss the appeal and order HBH to pay the costs.

26. By its cross-appeal, the Commission claims that the Court should:
- set aside point 1 of the operative part of the judgment under appeal;
- dismiss the action brought at first instance as inadmissible;
- dismiss the appeal;
- set aside point 3 of the operative part of the judgment under appeal ordering the Commission to pay a third of its costs; and
- order HBH to pay the costs of the proceedings before the Court of Justice and before the General Court.

27. HBH contends that the cross-appeal should be dismissed and that the Commission should be ordered to pay the costs.

28. At the hearing, the Federal Republic of Germany presented oral observations, from which it is apparent that it supports HBH's heads of claim seeking dismissal of the cross-appeal, annulment of the judgment under appeal in so far as it dismissed the action at first instance as unfounded, and annulment of the contested decision.

## The cross-appeal

29. Since the cross-appeal relates to the admissibility of the action at first instance, a question which must be resolved before turning to the merits raised by the main appeal, it is appropriate to examine it first.

*Arguments of the parties*

30. The Commission submits that, in paragraphs 50 to 79 of the judgment under appeal, the General Court erred in law in its interpretation of the concept of individual concern within the meaning of Article 263, fourth paragraph, TFEU.

31. First, referring to the judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570), and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368), the Commission submits that the relevant criterion for establishing whether an applicant is individually concerned by a Commission decision declaring an aid scheme incompatible with the internal market lies in whether the applicant is an actual or potential recipient of aid granted under the scheme. Only actual recipients are individually concerned by such a decision.

32. In paragraphs 62, 70 and 74 of the judgment under appeal, the General Court based its decision not on that case-law, but on judgments which are not relevant to the present case. None of the circumstances which led to the conclusion, in the cases which gave rise to the judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission* (11/82, EU:C:1985:18); of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416); of 17 September 2009, *Commission* v  (C-519/07 P, EU:C:2009:556); of 27 February 2014, *Stichting Woonpunt and Others* v *Commission* (C-132/12 P, EU:C:2014:100); and of 27 February 2014, *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105), on which the General Court relies in those paragraphs, that the applicants were individually concerned, are material in the present case.

33. Thus, contrary to what the General Court stated at paragraphs 63 and 74 of the judgment under appeal, the assessment of the admissibility of the action at first instance does not depend on the 'factual and legal situation' of HBH or the existence of an 'acquired right', but exclusively on whether HBH did indeed receive aid under the aid scheme in question. Paragraphs 75 and 76 of the judgment under appeal are also allegedly flawed in that, by the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368), on which the General Court relied in paragraph 76 of that judgment, it can only be inferred that it is irrelevant, for the purposes of assessing individual concern, that the Commission's decision is accompanied by a recovery order of aid actually granted.

34. Secondly, the Commission notes that the determining factor used by the General Court, in its analysis of the 'factual and legal situation' of HBH, in order to establish that it is individually concerned by the contested decision, is the existence of an 'acquired right' referred to at paragraph 74 of the judgment under appeal. If that 'acquired right' were to be understood as an acquired right within the meaning of EU law, then the General Court erred in law. Such a right can be afforded only pursuant to the principle of the protection of legitimate expectations and, according to the case-law of the Court, the benefit of that protection is excluded in principle as regards aid granted in breach of the obligation of notification laid down in Article 108(3) TFEU.

35. Thirdly, on the basis of that observation, the Commission submits that, in the event that, by 'acquired right', the Court was concerned with a right acquired under national law, it also erred in law, since the benefit derived from a right acquired under national law is, in the circumstances of the present case, also contrary to the case-law excluding, in the case of aid granted in breach of Article 108(3) TFEU, the benefit derived from such a right.

36. Point 1 of the operative part of the judgment under appeal should therefore be set aside and, since HBH is not an actual beneficiary of the aid scheme in question, the application at first instance should be dismissed as inadmissible.

37. HBH and the Federal Republic of Germany submit that the cross-appeal is unfounded.

*Findings of the Court*

38. Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

39. In the present case, first, it is common ground that, as the General Court observed in paragraph 57 of the judgment under appeal, the contested decision is addressed solely to the Federal Republic of Germany. Moreover, as is apparent from paragraphs 58 to 79 of that judgment, whereas HBH was directly and individually concerned by that decision, and thus by virtue of the second situation referred to in that provision, the General Court held that HBH had locus standi.

40. By the first part of its single ground of appeal, the Commission submits, in essence, that, in paragraphs 62, 63, 70 and 74 to 77 of the judgment under appeal, the General Court erred in law in assessing the condition of admissibility of HBH's action in the light of the latter's factual and legal situation, whereas the only relevant criterion was whether it was an actual or potential recipient of the aid scheme in question.

41. According to the settled case-law of the Court, persons other than those to whom a decision is addressed may claim to be individually concerned only if the decision affects them by reason of certain attributes peculiar to them or by reason of circumstances in which they are differentiated from all other persons and if, by virtue of those factors, it distinguishes them individually in the same way as the person addressed (judgments of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 107, and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 57).

42. The possibility of determining more or less precisely the number, or even the identity, of the persons to whom a measure applies by no means implies that it must be regarded as being of individual concern to them as long as that measure is applied by virtue of an objective legal or factual situation defined by it (judgments of 16 March 1978, *Unicme and Others* v *Council*, 123/77, EU:C:1978:73, paragraph 16, and of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 47 and the case-law cited).

43. Thus, the Court stated that an undertaking cannot, as a general rule, contest a decision of the Commission which prohibits a sectoral aid scheme if it is concerned by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme. Such a decision is, vis-à-vis such an undertaking, a measure of general application covering situations which are determined objectively and entails legal effects for a class of persons envisaged in a general and abstract manner (see judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraph 33 and the case-law cited, and of 19 December 2013, *Telefónica* v *Commission*, C-274/12 P, EU:C:2013:852, paragraph 49).

44. In contrast, where the decision affects a group of persons who were identified or identifiable when that measure was adopted by reason of criteria specific to the members of the group, those persons might be individually concerned by that measure inasmuch as they form part of a limited class of traders (judgments of 13 March 2008, Commission v Infront WM, C-125/06 P, EU:C:2008:159, paragraph 71 and the case-law cited, and of 27 February 2014, *Stichting Woonpunt and Others* v *Commission*, C-132/12 P, EU:C:2014:100, paragraph 59).

45. Thus, the actual recipients of individual aid granted under an aid scheme of which the Commission has ordered the recovery are, accordingly, individually concerned within the meaning of the fourth paragraph of Article 263 TFEU (see, to that effect, judgment of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraphs 34 and 35; see, also, judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 53).

46. Admittedly, as argued by the Commission, it follows from that case-law that the Court, on the one hand, acknowledges that the actual recipients of individual aid granted under an aid scheme incompatible with the internal market are individually concerned by a Commission decision declaring that scheme incompatible with the internal market and ordering its recovery, and, on the other hand, precludes an applicant from being regarded as individually concerned merely because it is a potential beneficiary of the scheme. However, it cannot be inferred, as the Commission claims, that, where a Commission decision declaring an aid scheme incompatible with the internal market is at issue, the only relevant criterion for the purpose of determining whether an applicant is individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by such a decision, is whether the applicant is an actual or potential recipient of aid granted under the scheme.

47. As also noted, in essence, by the Advocate General in points 57, 59, 67 and 68 of his Opinion, the case-law cited in paragraphs 43 and 45 of the present judgment, in the specific context of State aid, is merely a specific expression of the relevant legal test for assessing individual concern, within the meaning of the fourth paragraph of Article 263 TFEU, stemming from the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17). According to that judgment, an applicant is individually concerned by a decision addressed to another person where that decision affects them by reason of certain attributes which are peculiar to them, or

by reason of circumstances in which they are differentiated from all other persons (see also, in the field of State aid, judgments of 19 October 2000, *Italy and Sardegna Lines* v *Commission*, C-15/98 and C-105/99, EU:C:2000:570, paragraph 32, and of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 52, and, in other fields, judgments of 17 January 1985, *Piraiki-Patraiki and Others* v *Commission*, 11/82, EU:C:1985:18, paragraphs 11, 19 and 31, and of 13 March 2018, *European Union Copper Task Force* v *Commission*, C-384/16 P, EU:C:2018:176, paragraph 93).

48. Consequently, the fact that an applicant may fall within or outside the category of actual or potential recipients of individual aid granted under an aid scheme declared incompatible with the internal market by a Commission decision is not decisive as regards determining whether the applicant is individually concerned by that decision, where it is in any event established that the applicant is otherwise affected by it by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons.

49. It follows from the foregoing that it is without erring in law that, after setting out, in paragraphs 60 to 62 of the judgment under appeal, the case-law set out in paragraphs 41 to 44 of the present judgment, the General Court, in paragraph 63 of the judgment under appeal, committed 'to determine whether, given its legal and factual situation, [HBH] must be regarded as being individually concerned by the contested decision'.

50. It also follows that it is without erring in law that, in paragraphs 62, 70 and 74 of the judgment under appeal, the General Court, in support of its analysis, relied on the judgments referred to in paragraph 32 of the present judgment, since they all consist in applying the criterion of individual concern laid down in the judgment of 15 July 1963, Plaumann v Commission (25/62, EU:C:1963:17), in circumstances where, as in the present case, the specific expression of that case-law, taking the form of a distinction between the actual and potential recipients of individual aid granted under an aid scheme declared incompatible with the internal market, did not appear relevant.

51. Likewise, nor did the General Court err in law, in paragraphs 75 and 76 of the judgment under appeal, in rejecting the Commission's argument that only an advantage effectively granted through State resources could establish that HBH was individually concerned on the basis of the judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission* (C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368). As has already been stated in paragraph 47 of present judgment, in order to establish that an applicant is individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by a Commission decision declaring an aid scheme incompatible with the internal market, the relevant criterion is whether the applicant is affected by that decision by reason of certain attributes which are peculiar to it or a factual situation which differentiates it from all other persons, which the General Court also correctly recalled in paragraph 76 of the judgment under appeal.

52. Consequently, since the first part of the single ground of appeal of the cross-appeal is unfounded, it must be rejected.

53. As regards the second and third parts of that single ground of appeal, it should be recalled that, in them, the Commission alleges that the General Court, in paragraph 74 of the judgment under appeal, erred in law in holding that HBH was individually concerned on the ground that that company had had an 'acquired right' to receive aid under the measure at issue.

54. In that respect, it should be noted that, in paragraph 74 of that judgment, the General Court stated in particular that 'in the present case, … it was found that, because of the particularities of the German tax legislation, [HBH] had an acquired right to a tax saving, certified by the German tax authorities …, that circumstance setting it apart from other operators which are concerned only as potential beneficiaries of the measure at issue', referring in that respect to paragraph 68 of the judgment.

55. In paragraph 68 of that judgment, the General Court found that the circumstances which it had identified in paragraphs 66 and 67 of that judgment as characterising HBH's legal and factual situation within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17), had been certified by the German tax authorities, in particular by means of binding information. Those circumstances consisted, on the one hand, in the fact that, prior to the initiation of the formal investigation procedure by the Commission, HBH had a right, under German legislation, to carry its losses forward where the conditions stipulated by the restructuring clause were satisfied and, on the other, in the fact that, during 2009, HBH made taxable profits from which it claims to have deducted the losses carried forward under the restructuring clause.

56. It concluded, in paragraph 69 of the judgment under appeal, that, 'pursuant to the German legislation, it was certain that, at the close of the 2009 tax year, [HBH] would have made a tax saving, which it was, moreover, able to quantify precisely', since 'the German authorities had no discretion with regard to the application

of the measure at issue, the realisation of that tax saving was only a matter of time, under the detailed rules for the implementation of the tax system'. In point 69, it stated that, consequently, HBH 'had an acquired right, certified by the German authorities before the adoption of the opening decision and, subsequently, of the contested decision, to the application of that tax saving, which, had it not been for those decisions, would have crystallised as a result of the issue of a tax assessment authorising the loss carry-forward and the consequent posting thereof to the applicant's balance sheet' and that it 'was, therefore, easily identifiable by the German tax authorities and the Commission'.

57. It concluded, in paragraph 70 of the judgment under appeal, that HBH 'may not be regarded solely as an undertaking concerned by the contested decision because it belongs to the sector in question and because of its status as a potential beneficiary, but must rather be seen as being part of a closed category of traders, who were identified or at least readily identifiable at the time of the adoption of the contested decision, within the meaning of the judgment [of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17)]'.

58. It is thus apparent from a reading of the relevant passages of the judgment under appeal that the use by the General Court, in paragraph 74 of that judgment, of the words 'acquired right' was intended only to refer briefly to HBH's specific factual and legal situation, making it possible to regard it as being individually concerned by the contested decision within the meaning of the judgment of 15 July 1963, *Plaumann* v *Commission* (25/62, EU:C:1963:17).

59. Since the second and third parts of the single ground of appeal are thus based on a misreading of the judgment under appeal, they must be rejected as unfounded, and, accordingly, the cross-appeal must be dismissed in its entirety.

**The main appeal**

60. In support of its appeal, HBH relies on two grounds, the first alleging infringement of the obligation to state reasons to which the General Court is subject, and the second alleging infringement of Article 107 TFEU. The second ground of appeal must be examined first of all.

*Arguments of the parties*

61. By its second ground of appeal, HBH submits, first, that the General Court infringed Article 107 TFEU in that, in confirming the Commission's position that the rule governing the forfeiture of losses constitutes the relevant reference framework in the present case, it established that reference framework incorrectly. In paragraphs 103 and 106 of the judgment under appeal, the General Court, first of all, correctly identified the general tax scheme, namely the loss carry-forward rule. However, it is the rule governing the forfeiture of losses provided for in Paragraph 8c(1) of the KStG and, therefore, the exception to the general scheme, that it accepted as constituting the applicable common or normal tax regime for the purposes of assessing the condition relating to selectivity. It incorrectly failed to take account of the loss carry-forward rule. By classifying an exception to the general tax system as a 'reference framework', the General Court erred in law or, at the very least, distorted the evidence submitted to it or national law.

62. Establishing the common or normal tax regime by combining the basic rule and the exception also constitutes an error of law, especially since the rules which the General Court is alleged to have combined in paragraph 104 of the judgment under appeal do not fall on the same legal footing, the loss carry-forward rule constituting an expression of the constitutional principle of taxation according to ability to pay.

63. Furthermore, it is clear from paragraphs 104 and 107 of the judgment under appeal that the General Court, in its identification of the reference framework, also conflated the first and second stages of the examination of the condition relating to selectivity and thus incorrectly applied the case-law.

64. Secondly, the General Court infringed Article 107 TFEU in its review of the a priori selective nature of the measure at issue. On the one hand, it erred in law in holding that the legal and factual situation of the undertakings requiring restructuring and that of the healthy companies were comparable. In particular, the objective, pursued by all provisions relating to taxation, of generating tax revenue does not suffice to give rise to the comparability of the situations of the operators concerned.

65. On the other hand, the restructuring clause is a general measure. Paragraph 141 of the judgment under appeal conflicts with the case-law according to which the only relevant factor for the purposes of assessing the general nature of a measure is whether it applies irrespective of the nature or scope of the business of the undertaking or if its application requires the undertaking to change its activity.

66. Thirdly, the General Court is alleged to have infringed Article 107 TFEU in rejecting the justification for the restructuring clause. In paragraphs 158 to 160 and 164 to 166 of the judgment under appeal, it incorrectly held that the purpose of that clause is to promote the restructuring of undertakings in difficulty and concluded that that objective was extrinsic to the tax system. In paragraphs 166 to 170 of that judgment, it also rejected the justification based on the principle of taxation according to ability to pay.

67. HBH also submits that the second ground of appeal is admissible, since it raises only questions of law. In particular, it does not relate to the assessment of facts, but to the application of erroneous criteria in order to determine the reference framework and the legal characterisation of the facts by the General Court, which is subject to review by the Court in the context of an appeal.

68. The Commission contends, primarily, that the second ground of appeal is inadmissible. The first and third parts thereof relate to the determination of national law, and thus also matters of fact. In any event, in so far as, by the first part of that ground of appeal, HBH criticises the General Court for having determined the reference framework by taking account of a regulation applicable only to a specific group of companies, it is based on a misreading of paragraphs 103 to 109 of the judgment under appeal. It follows that the General Court merely identified the law applicable to all undertakings, insofar as economic identity and continuity are the decisive factor in respect of the carry-forward of losses, and they are issues of fact.

69. Consequently, the second part of the second ground of appeal is also inadmissible. On the one hand, the issue of the comparability of the situation of economic operators and that of identifying the relevant objective in that regard are questions of fact. On the other, the General Court erred in law in declaring admissible the argument which was submitted to it by HBH concerning the classification of the contested measure as a general measure, since it could not be regarded as an expansion of the first part of the first plea raised before it.

70. In the alternative, the second ground of appeal is unfounded. First of all, the argument put forward by HBH regarding the definition of the reference framework is not supported either by German law or by the documents submitted to the Court. In addition, the German legislature itself established the rule governing the forfeiture of losses as being the new basic rule. The General Court did not therefore err in stating that, further to the introduction of Paragraph 8c(1) of the KStG, the abolition of the loss carry-forward rule in the event of a prejudicial acquisition of a shareholding is the new rule of principle of German tax law.

71. Secondly, HBH's argument relating to the alleged lack of comparability of the situation of the relevant traders stems from a misreading of the judgment under appeal. On the one hand, from the point of view of the change in economic identity, there is no difference between companies requiring restructuring and those which require no such restructuring.

72. On the other hand, the restructuring clause is not a general measure, but a selective measure. In that regard, the judgment of 7 November 2014, Autogrill España v Commission (T-219/10, EU:T:2014:939), does not effectively support the position of HBH.

73. Thirdly, the General Court correctly established, in its unappealable assessment of the facts, that the purpose of the restructuring clause is to help struggling businesses. In any event, the argument that the purpose of that clause is to prevent excessive taxation is ineffective, since the General Court, at paragraphs 167 to 173 of the judgment under appeal, found that there was no justification even if that objective is retained. Furthermore, the General Court also correctly rejected the arguments based on German constitutional law and fictitious profits.

74. The Federal Republic of Germany submits that the General Court, like the Commission, erred in law when determining the reference framework. Referring to the judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P et C-107/09 P, EU:C:2011:732), and of 21 December 2016, *Commission* v *World Duty Free and Others* (C-20/15 P et C-21/15 P, EU:C:2016:981), that Member State notes that, in order to classify a measure as 'selective', the Commission must first identify the normal tax regime applicable in the Member State concerned and then demonstrate that the measure under examination differentiates between undertakings which, in the light of the objective pursued by that regime, find themselves in a comparable factual and legal situation. For those purposes, an approach based solely on the regulatory technique cannot be accepted.

75. In the present case, however, the Commission's approach was based solely on the regulatory technique; the General Court, in failing to call it into question even though it is contrary to the case-law of the Court, erred in law. Thus, in the judgment under appeal, the General Court correctly recorded the content and scope of the relevant tax provisions, but gave them an incorrect legal characterisation.

*Findings of the Court*

76. By the first part of its second ground of appeal, HBH, supported by the Federal Republic of Germany, submits, in essence, that the General Court, in paragraphs 103 to 107 of the judgment under appeal, incorrectly determined the reference framework within which the selectivity of the measure at issue was to be examined.

77. Since the Commission objected to the admissibility of that first limb, on the ground that it concerned questions of fact, it should be noted that, admittedly, the assessment of facts and evidence does not constitute, save where the clear sense of the facts and evidence has been distorted, a question of law which is subject, as such, to review by the Court of Justice in the context of an appeal. However, where the General Court has determined or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn therefrom (judgments of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 78 and the case-law cited, and of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 97).

78. Thus, with respect to the assessment, in the context of an appeal, of the General Court's findings on national law, which, in the field of State aid, constitute findings of fact, the Court of Justice has jurisdiction only to determine whether that law was distorted (see, to that effect, judgments of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 79 and the case-law cited, and of 20 December 2017, *Comunidad Autónoma del País Vasco and Others* v *Commission*, C-66/16 P to C-69/16 P, EU:C:2017:999, paragraph 98). By contrast, since the assessment, in the context of an appeal, of the legal classification which has been given to that national law by the General Court in the light of a provision of EU law constitutes a question of law, it falls within the jurisdiction of the Court of Justice (see, to that effect, judgments of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 83, and of 21 December 2016, *Commission* v *Hansestadt Lübeck* C-524/14 P, EU:C:2016:971, paragraphs 61 to 63).

79. In the present case, it must be stated that, by that first part, HBH is not disputing the content or the scope of national law as found by the General Court, but rather the classification as a 'reference framework' which, like the Commission in the contested decision, the General Court gave to the rule governing the forfeiture of losses.

80. However, the concept of 'reference framework' refers to the first step of the assessment of the condition relating to the selectivity of the advantage, which, according to the case-law of the Court, is a constituent factor in the concept of 'State aid' within the meaning of Article 107(1) TFEU (judgments of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 74 and the case-law cited, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54).

81. Since the purpose of HBH's line of argument is to call into question the legal characterisation of the facts by the General Court, the first part of the second ground of appeal is admissible.

82. On the merits, it should be recalled that, according to the Court's settled case-law, classification of a national measure as 'State aid', within the meaning of Article 107(1) TFEU, requires all the following conditions to be fulfilled. First, there must be an intervention by the State or through State resources. Second, the intervention must be liable to affect trade between Member States. Third, it must confer a selective advantage on the recipient. Fourth, it must distort or threaten to distort competition (judgments of 10 June 2010, *Fallimento Traghetti del Mediterraneo*, C-140/09, EU:C:2010:335, paragraph 31 and the case-law cited, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53 and the case-law cited).

83. So far as concerns the condition relating to the selectivity of the advantage, it is clear from settled case-law that, in order to assess that condition, it is necessary to determine whether, under a particular legal regime, the national measure in question is such as to favour 'certain undertakings or the production of certain goods' over others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and which are accordingly subject to different treatment that can, in essence, be classified as discriminatory (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 54 and the case-law cited).

84. Further, where the measure at issue is conceived as an aid scheme and not as individual aid, it is for the Commission to establish that that measure, although it confers an advantage of general application, confers the benefit of that advantage exclusively on certain undertakings or certain business sectors (judgment of

21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 55 and the case-law cited).

85. As regards, in particular, national measures that confer a tax advantage, it must be recalled that a measure of that nature which, although not involving the transfer of State resources, places the recipients in a more favourable position than other taxpayers is capable of procuring a selective advantage for the recipients and, consequently, constitutes State aid, within the meaning of Article 107(1) TFEU. On the other hand, a tax advantage resulting from a general measure applicable without distinction to all economic operators does not constitute aid within the meaning of that provision (see, to that effect, judgment of 15 November 2011, *Commission* and *Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 72 and 73 and the case-law cited; see, also, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56).

86. In that context, in order to classify a national tax measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (see to that effect, inter alia, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57 and the case-law cited).

87. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned, thirdly, is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see, to that effect, judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 52; see also judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58 and the case-law cited).

88. The examination of the selectivity condition therefore implies, in principle, the determination, first, of the reference framework within which the measure concerned falls, that determination being of greater importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56, and of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 55).

89. Thus, the determination of the set of undertakings which are in a comparable factual and legal situation depends on the prior definition of the legal regime in the light of whose objective it is necessary, where applicable, to examine whether the factual and legal situation of the undertakings favoured by the measure in question is comparable with that of those which are not (judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 60).

90. However, the classification of a tax system as 'selective' is not conditional upon that system being designed in such a way that undertakings which might enjoy a selective advantage are, in general, subject to the same tax burden as other undertakings but benefit from derogating provisions, so that the selective advantage may be identified as being the difference between the normal tax burden and that borne by those former undertakings (judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 91).

91. Such an interpretation of the selectivity criterion would require that in order for a tax system to be classifiable as 'selective' it must be designed in accordance with a certain regulatory technique; the consequence of this would be that national tax rules fall from the outset outside the scope of control of State aid on account of the sole fact that they were adopted under a different regulatory technique although, by adjusting and combining various tax rules, they produce the same effects in law and/or in fact. It therefore conflicts with settled case-law that Article 107(1) TFEU does not distinguish between measures of State intervention by reference to their causes or their aims but defines them in relation to their effects, and thus independently of the techniques used (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 87, 92 and 93 and the case-law cited).

92. If, on the basis of that case-law, the use of a regulatory technique cannot enable national tax rules to escape from the outset the scrutiny concerning State aid provided for under the FEU Treaty, resorting to the regulatory technique used is not sufficient to define the relevant reference framework for the purposes of assessing the condition relating to selectivity, except in order to ensure that the form of State intervention prevails decisively over its effects. Consequently, as also noted, in essence, by the Advocate General in point 108 of his Opinion, the regulatory technique used cannot be decisive for the purposes of determining the reference framework.

93. However, it also follows from that case-law that while, for the purposes of establishing the selectivity of a tax measure, the regulatory technique used is not decisive, with the result that it is not always necessary for it to derogate from a common tax system, the fact that it is a derogation as a result of the use of that regulatory technique is relevant for those purposes where it follows that two categories of operators are distinguished and a priori treated differently, namely those covered by the derogation and those which are covered by the ordinary taxation regime, even though those two categories are in a comparable situation with regard to the objective pursued by that system (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 77).

94. Further, it must be recalled that the fact that only taxpayers satisfying the conditions for the application of a measure may benefit from the measure does not, in itself, make it selective (judgments of 29 March 2012, *3M Italia*, C-417/10, EU:C:2012:184, paragraph 42, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59).

95. It is in the light of those considerations that the Court must examine whether, as maintained by HBH and the Federal Republic of Germany, the General Court disregarded, in the present case, Article 107(1) TFEU, as interpreted by the Court of Justice, in holding that the Commission had not erred in holding that the relevant reference framework for assessing the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses.

96. In that regard, it should be noted that, in paragraph 103 of the judgment under appeal, the General Court noted that 'in the contested decision, the Commission established … the rule governing the forfeiture of losses as being the general rule in respect of which it was appropriate to examine whether there was a distinction between the undertakings that were in a comparable factual and legal situation, while [HBH] refers to the more general rule of loss carry-forward, which applies to all taxation'.

97. It also pointed out, in paragraph 104 of that judgment, that 'it is open to all undertakings to make use of the loss carry-forward rule in the context of the levying of corporation tax' and that 'the rule governing the forfeiture of losses restricts the use of that option in the event of the acquisition of a shareholding equal to or greater than 25% of the share capital and withdraws it in the event of the acquisition of more than 50% of the share capital', stating that 'the latter rule therefore applies systematically to all cases of a change of ownership of 25% or more of a company's share capital, without drawing any distinction on the basis of the nature or characteristics of the undertakings concerned'.

98. In paragraph 105 of that judgment, the General Court additionally stated 'furthermore, the restructuring clause is worded in the form of an exception to the rule governing the forfeiture of losses and applies only to those well-defined situations which are subject to that rule'.

99. In paragraph 106 of that judgment, it concluded that 'it is clear that the rule governing the forfeiture of losses, like the loss carry-forward rule, is part of the legislative framework in the context of which the measure at issue arises', that 'in other words, the general loss carry-forward rule, as limited by the rule governing the forfeiture of losses, constitutes the relevant legal framework in the present case, and [that] it is precisely within that framework that it is appropriate to check whether the measure at issue differentiates between operators in a comparable factual and legal situation'.

100. In paragraph 107 of the judgment under appeal, the General Court held that 'the Commission did not err when, while noting the existence of a more general rule, namely the loss carry-forward rule, it determined that the legislative framework of reference established in order to assess the selectivity of the measure at issue was constituted by the rule governing the forfeiture of losses'.

101. As submitted by HBH and the Federal Republic of Germany, that reasoning led the General Court to classify incorrectly the rule governing the forfeiture of losses as the reference framework within the meaning of the case-law on Article 107(1) TFEU, while excluding from that reference framework the general rule of loss carry-forward.

102. It is apparent from that reasoning that, although the General Court found that there was a general tax rule applicable to all undertakings subject to corporation tax, namely the loss carry-forward rule, it held, however, that the Commission did not err in taking the view that the relevant reference framework for the purposes of examining the selective nature of the measure at issue was constituted only by the rule governing the forfeiture of losses, despite the fact that it was not disputed that that rule was itself an exception to the loss carry-forward rule and even though an overall examination of the content of those provisions should have made it possible to find that the restructuring clause's effect was to define a situation falling under the general loss carry-forward rule.

103. As also noted, in essence, by the Advocate General in point 109 of his Opinion, it follows from the case-law of the Court, recalled in paragraphs 90 to 93 of the present judgment, that the selectivity of a tax measure cannot be precisely assessed on the basis of a reference framework consisting of some provisions that have been artificially taken from a broader legislative framework. Therefore, by thus excluding from the relevant reference framework in the present case the general rule of loss carry-forward, manifestly the General Court defined it too narrowly.

104. To the extent that, in reaching that conclusion, the Court relied on the fact that the measure at issue was worded in the form of an exception to the rule governing the forfeiture of losses, it should be recalled that, as has already been pointed out in paragraph 92 of the present judgment, the regulatory technique used cannot be decisive for the purposes of the determination of the reference framework.

105. In addition, any argument in support of the judgment under appeal cannot, in this case, be based on the judgment of 18 July 2013, *P* (C-6/12, EU:C:2013:525), since, in that judgment, the Court did not rule on what should constitute the reference framework in the case before it.

106. It follows from all of the foregoing that the first part of HBH's second ground of appeal is well founded, without it being necessary to examine the second part of the argument put forward to support it. It should also be noted that it is on the basis of its flawed legal assessment – that the Commission did not err in holding that the relevant reference framework in the present case for the purposes of assessing the selectivity of the measure at issue was made up only of the rule governing the forfeiture of losses – that the General Court analysed the submissions made to it by HBH, seeking to show, on the one hand, the lack of a priori selectivity of the measure at issue and, on the other hand, the justification of the measure by the nature and overall structure of the tax system.

107. As is apparent from the case-law referred to in paragraphs 83 and 86 to 89 of the present judgment, an error in the determination of the reference framework against which the selectivity of the measure should be assessed necessarily vitiates the whole of the analysis of the condition relating to selectivity. In those circumstances, the Court must uphold the appeal and set aside points 2 and 3 of the operative part of the judgment under appeal, without it being necessary to examine the second and third parts of the second ground of appeal, or the first ground of appeal.

**The action before the General Court**

108. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

109. That is the case here. In those circumstances, it is sufficient to note that it is apparent from the grounds set out in paragraphs 82 to 107 of the present judgment that the first limb of the first plea of HBH's action before the General Court, in so far as it seeks to establish that the Commission erred in its determination of the relevant reference framework for the purposes of assessing the selectivity of the measure at issue, in that it defined it as being made up only of the rule governing the forfeiture of losses, is well founded. The selective nature of the measure at issue having thus been assessed by the Commission against a reference framework which was incorrectly determined, it is necessary to annul the contested decision.

**Costs**

110. …

111. ...

112. …

113. …

114. …

On those grounds,

the Court (Second Chamber)

hereby:

**1. Dismisses the cross-appeal;**
**2. Annuls points 2 and 3 of the operative part of the judgment of the General Court of the European Union of 4 February 2016, *Heitkamp BauHolding* v *Commission* (T-287/11, EU:T:2016:60);**
**3. Annuls Commission Decision 2011/527/EU of 26 January 2011 on State aid C 7/10 (ex CP 250/09 and NN 5/10) implemented by Germany - Scheme for the carry-forward of tax losses in the case of restructuring of companies in difficulty (Sanierungsklausel);**
**4. Orders the European Commission to pay, in addition to its own costs, the costs incurred by Dirk Andres, acting as liquidator in the insolvency of Heitkamp BauHolding GmbH, relating both to the proceedings at first instance and on appeal;**
**5. Orders the Federal Republic of Germany to bear its own costs relating to the appeal proceedings.**

# EU Court of Justice, 20 September 2018*

## Case C-510/16

## *Carrefour Hypermarchés SAS, Fnac Paris, Fnac Direct, Relay Fnac, Codirep, FNAT Périphérie v Ministre des Finances et des Comptes publics*

*Fourth Chamber:* *T. von Danwitz (Rapporteur), President of the Chamber, C. Vajda, E. Juhász, K. Jürimäe and C. Lycourgos, Judges*
*Advocate General:* *N. Wahl*

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1. This request for a preliminary ruling concerns the interpretation of Article 108(3) TFEU and of Article 4 of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation (EC) No 659/1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 2004 L 140, p. 1 and corrigendum OJ 2005 L 25, p. 74).

2. This request has been made in proceedings between Carrefour Hypermarchés SAS, Fnac Paris, Fnac Direct, Relais Fnac, Codirep, and Fnac Périphérie, on the one hand, and the ministre des Finances et des Comptes publics (Minister of Finance and Public Accounts, France), on the other, concerning the reimbursement of a tax on the sale or hire of video recordings paid by those companies.

### Legal context

*Regulation (EC) No 659/1999*

3. Article 1 of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1), provides:

> 'For the purposes of this Regulation:
> a. "aid" shall mean any measure fulfilling all the criteria laid down in Article [107(1) TFEU];
> b. "existing aid" shall mean:
> i. … all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;
> ii. authorised aid, that is to say, aid schemes and individual aid which have been authorised by the Commission or by the Council;
> …
> c. "new aid" shall mean all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid;
> …'

*Regulation No 794/2004*

4. According to recital 4 of Regulation No 794/2004:

> 'In the interests of legal certainty it is appropriate to make it clear that small increases of up to 20% of the original budget of an aid scheme, in particular to take account of the effects of inflation, should not need

* Language of the case: French.

to be notified to the Commission as they are unlikely to affect the Commission's original assessment of the compatibility of the scheme, provided that the other conditions of the aid scheme remain unchanged.'

5. Article 4 of that regulation, entitled 'Simplified notification procedure for certain alterations to existing aid', provides:

> '1. For the purposes of Article 1(c) of Regulation (No 659/1999), an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.
> 2. The following alterations to existing aid shall be notified on the simplified notification form set out in Annex II:
> a. increases in the budget of an authorised aid scheme exceeding 20%;
> …'

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

6. By Decision C(2006) 832 final of 22 March (State aid NN 84/2004 and N 95/2004 – France, Aid schemes for the film and audiovisual industry) ('the 2006 Decision'), the Commission declared several French aid schemes for the film and audiovisual industry established by the French Republic to be compatible with the internal market. These schemes are financed by the Centre national du cinéma et de l'image animée (National Centre for Cinema and the Moving Image, 'the CNC'); the budget of this body is mainly derived from three taxes, namely the tax on cinema tickets, the tax on television services and the tax on the sale or hire of video recordings for the private use of the public (together, 'the three taxes').

7. By Decision C(2007) 3230 final of 10 July 2007 (State aid N 192/2007 – France, Amendment of NN 84/2004 – Support for cinema and audiovisual production in France – Modernisation of the TV sector contribution to support the cinema and audiovisual industry) ('the 2007 decision'), the Commission approved an amendment to the method of financing such aid schemes following a reform of the tax on television services.

8. The applicants in the main proceedings sought the repayment of tax paid on the sale or hire of video recordings for the private use of the public; Carrefour Hypermarchés did so in respect of 2008 and 2009 and the other companies in respect of the years 2009 to 2011. They maintain that the tax was levied in breach of Article 108(3) TFEU, in so far as the French Republic did not notify the Commission of the increase between 2007 and 2011 in the aggregate revenue from the three taxes ('the material period'). According to the applicants in the main proceedings, who rely on a report by the Cour des comptes (Court of Auditors, France) drawn up in August 2012 on the management and financing of the CNC ('the Court of Auditors' report'), that increase resulted in a substantial change in the method for financing aid schemes, exceeding the 20% threshold fixed in Article 4 of Regulation No 794/2004.

9. In this context, the referring court states that, while the 2007 decision refers to projections according to which the reform of the tax on television services, the primary cause of the increase in CNC resources during the material period, could, at best, lead to an increase of EUR 16.5 million per year in the revenue from that tax, this increase, in reality, according to the Court of Auditors, amounted to an average of EUR 67 million during that period. The Commission thus based the 2007 decision on projections which subsequently proved to be inaccurate.

10. It is in that context that the Conseil d'État (Council of State, France) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. In a situation in which an aid scheme is financed by allocated resources, where a Member State has regularly notified the Commission of legal changes having a significant impact on that scheme prior to their implementation, and in particular of changes relating to the method by which the scheme is financed, does a substantial increase in revenue from fiscal resources allocated to the scheme, compared to the projections submitted to the European Commission, constitute a significant change within the meaning of Article 88(3) of the EC Treaty, now Article 108 TFEU, which would require a new notification to be made?
> 2. In the same situation, how is Article 4 of Regulation No 794/2004 to be applied, pursuant to which an increase in the original budget of an existing aid scheme exceeding 20% constitutes a change to that aid scheme and, in particular:
> a. how does it combine with the obligation to notify the Commission in advance of an aid scheme, laid down in Article 88(3) of the EC Treaty, now Article 108 TFEU;

b. if exceeding the 20% threshold of the original budget of an existing aid scheme provided for under Article 4 of Regulation No 794/2004 requires a new notification, must that threshold be assessed in relation to the amount of expenditure allocated or to the expenditure actually granted to the beneficiaries, excluding the sums placed in the reserve or those having been made subject to a levy for the benefit of the State;

c. assuming that compliance with the 20% threshold must be assessed in relation to the expenditure dedicated to the aid scheme, must such an assessment be made by comparing the overall level of expenditure in the approval decision with the overall budget subsequently allocated to all aid schemes granted by the body responsible for such allocations, or by comparing the levels notified under each of the categories of aid identified in that decision with that body's corresponding budget heading?'

**Consideration of the questions referred**

*Admissibility*

11. The Italian Government argues that the questions are hypothetical and, therefore, inadmissible.

12. By those questions, the referring court seeks, in essence, to determine whether the three taxes were levied, during the period at issue, in breach of Article 108(3) TFEU. Those questions arose in the course of a dispute concerning a claim for a refund of one of those taxes, namely the tax on the sale or hire of video recordings for the private use of the public. That court starts, moreover, from the premiss that the tax in fact constitutes an integral part of an aid measure within the meaning of Article 107(1) TFEU. In those circumstances, those have a direct connection with the subject matter of the dispute in the main proceedings and are therefore not purely hypothetical. Accordingly, the questions referred for a preliminary ruling are admissible.

*Substance*

13. By its questions, which must be examined together, the referring court asks, in essence, whether a significant increase in taxes to fund various authorised aid schemes when compared to projections notified to the Commission, such as that at issue in the main proceedings, constitutes an alteration to existing aid, within the meaning of Article 1(c) of Regulation No 659/1999 and of the first sentence of Article 4(1) of Regulation No 794/2004, read in the light of Article 108(3) TFEU. In that regard, it asks the Court, in particular, how the 20% threshold laid down in the second sentence of Article 4(1) of that regulation should be assessed and whether that threshold must be assessed in relation to the revenue earmarked for the aid schemes concerned or in relation to the aid actually allocated.

14. It should be noted at the outset that the Court has consistently held that taxes do not fall within the scope of the provisions of the Treaty relating to State aid unless they constitute the method of financing an aid measure, so that they form an integral part of that measure. Where the method of financing aid by means of a tax forms an integral part of the aid measure, the consequences of a failure by national authorities to comply with the last sentence of Article 108(3) TFEU must also apply to that aspect of the aid, so that the national authorities are required, in principle, to repay taxes levied in breach of EU law (see, to that effect, judgments of 13 January 2005, *Streekgewest*, C-174/02, EU:C:2005:10, paragraphs 16, 24 and 25; of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 35; of 7 September 2006, *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paragraph 43 and the case-law cited, and of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 65 and the case-law cited).

15. In so far as the referring court refers, in the wording of its questions to the Court, to 'an aid scheme' which is 'financed by resources', it is necessary to understand the questions referred as being based on the premiss that the three taxes formed, during the period at issue, an integral part of the aid schemes concerned.

16. Admittedly, in its second question, the referring court distinguishes between CNC revenue earmarked for the aid schemes concerned in the main proceedings and the expenditure actually allocated to the beneficiaries of these schemes, and refers to reserve funds and levies for the benefit of the general budget of the State. However, while such items might also prove to be relevant for examining whether the three taxes formed, during the period at issue, an integral part of those schemes, the referring court only raises them in order to ask the Court as to their relevance in the context of the examination of compliance with the 20% threshold provided for in the second sentence of Article 4(1) of Regulation No 794/2004.

17. In that regard, it should be recalled that, in the context of the cooperation between the Court and the national courts established by Article 267 TFEU, it is solely for the national court, before which the dispute has

been brought and which must assume responsibility for the subsequent judicial decision, to determine 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 (judgments of 23 January 2018, *F. Hoffmann-La Roche and Others*, C-179/16, EU:C:2018:25, paragraph 44, and of 29 May 2018, *Liga van Moskeeën en Islamitische Organisaties Provincie Antwerpen and Others*, C-426/16, EU:C:2018:335, paragraph 30 and the case-law cited). The Court may, however, provide the referring court with an interpretation of EU law that may be of use to it in assessing the validity of the premiss on which those questions are based (see, to that effect, judgment of 26 May 2016, *Bookit*, C-607/14, EU:C:2016:355, paragraphs 22 to 28).

18. Before the Court, the French Government has argued that, during the period at issue, the three taxes did not form an integral part of the aid schemes at issue in the main proceedings on the grounds, in particular, that there was no correlation between the revenue from those taxes and the amount of aid allocated and that, unlike that revenue, that amount had not increased. While accepting that national law lays down a binding provision hypothecating that revenue to the budget of the CNC, the body which aims to finance such schemes, the French Government further argued, inter alia, that the surplus resulting from the difference between the revenue generated by the three taxes and the aid actually allocated was used to replenish a reserve fund, and was used by the CNC for purposes other than the financing of such schemes and gave rise to levies, pursuant to a vote of the French Parliament, accruing to the general budget of the State. The applicants in the main proceedings and the Commission dispute that argument.

19. It should be noted that, according to settled case-law, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated to the financing of the aid and has a direct impact on the amount of the aid and, consequently, on the assessment of the compatibility of that aid with the internal market (judgments of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraph 99 and the case-law cited, and of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraph 68).

20. The Court has, moreover, already held that, where the body responsible for granting aid financed by a tax has the discretion to allocate the revenue from that tax to measures other than those having all the features of aid within the meaning of Article 107(1) TFEU, such a circumstance is likely to exclude the existence of hypothecation between the tax and the aid. In cases involving such discretion, the revenue from the tax does not directly affect the amount of the advantage granted to the beneficiaries of that aid. However, such a hypothecation may exist where the revenue from the tax is wholly and exclusively allocated for the grant of aid, even where that aid is of different types (see, to that effect, judgments of 13 January 2005, *Pape*, C-175/02, EU:C:2005:11, paragraph 16; of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 55, and of 22 December 2008, *Régie Networks*, C-333/07, EU:C:2008:764, paragraphs102 and 104).

21. It is also apparent from the case-law of the Court that there may be no such hypothecation when the amount of aid is determined solely on the basis of objective criteria, not related to the allocated revenue, and subject to an absolute statutory ceiling (see, to that effect, judgment of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 52).

22. Thus, the Court has held, in particular, that there was no hypothecation between the tax and the aid granted in a case where the amount of the aid was determined according to criteria unrelated to the allocated tax revenue and where national legislation provided that any surplus in relation to this aid had to be reallocated, as appropriate, to a reserve fund or the treasury, that revenue also being the subject of an absolute ceiling, with the result that any surplus is also reallocated to the State's general budget (see, to that effect, judgment of 10 November 2016, DTS *Distribuidora de Televisión Digital* v *Commission*, C-449/14 P, EU:C:2016:848, paragraphs 70 to 72).

23. In the present case, it is for the referring court to verify the validity of its assumption that the three taxes formed, during the period at issue, an integral part of the aid schemes at issue in the main proceedings in the light of the elements set out in paragraphs 16 to 22 above. In that regard, that court must, in particular, examine whether the placing in reserve of part of the revenues of the CNC had the effect of re-allocating the amount concerned to a measure other than those having all the features of aid within the meaning of Article 107(1) TFEU and assess the potential impact of the reallocation of part of these revenues to the general State budget during the period in question on the existence of hypothecation between the taxes and these schemes.

24. That having been clarified, the questions referred will be examined on the assumption that the three taxes formed, during the period at issue, an integral part of the aid schemes at issue in the main proceedings (see, by

analogy, judgments of 25 October 2017, *Polbud - Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 26 to 28, and of 17 April 2018, *B and Vomero*, C-316/16 et C-424/16, EU:C:2018:256, paragraph 42).

25. In that respect, it must be noted that, in the context of the State aid control system established by Articles 107 and 108 TFEU, the procedure differs according to whether the aid is existing aid or new aid. Whereas existing aid may, in accordance with Article 108(1) TFEU, be lawfully implemented so long as the Commission has made no finding of incompatibility, Article 108(3) TFEU provides that plans to grant or alter existing aid must be notified, in due time, to the Commission and may not be implemented until the procedure has led to a final decision (see, to that effect, judgments of 18 July 2013, P, C-6/12, EU:C:2013:525, paragraph 36 and the case-law cited; and of 27 June 2017, *Congregación de Escuelas oficiales Pías Provincia Betania*, C-74/16, EU:C:2017:496, paragraph 86).

26. Article 1(c) of Regulation No 659/1999 defines new aid as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'. On the other hand, Article 4(1) of Regulation No 794/2004 provides that 'for the purposes of Article 1(c) of Regulation [No 659/1999], an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'. The second sentence of Article 4(1) of that regulation provides: 'however an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid'.

27. In order to provide a useful answer to the referring court, it is therefore necessary to determine what is to be understood by the expression 'original budget of an existing aid scheme', within the meaning of that provision, and whether, in the present case, the increase in the aggregate revenue from the three taxes must be regarded as an increase in the original budget of aid schemes requiring that it be notified to the Commission.

28. In this respect, the concept of 'budget of an aid scheme' within the meaning of Article 4(1) of Regulation No 794/2004, in the absence of a definition in the relevant legislation, must be determined by referring to the usual meaning of that concept in everyday language, while also taking into account the context in which it is used and the objectives pursued by the rules of which it is part (see, by analogy, judgment of 12 June 2018, *Louboutin and Christian Louboutin*, C-163/16, EU:C:2018:423, paragraph 20 and the case-law cited).

29. According to its usual meaning, the term 'budget' means the amounts available to an entity for the purposes of its expenditure.

30. As regards the context in which the concept is used and the objective pursued by Article 4(1) of Regulation No 794/2004, it must be stated that that provision implements the system of prior control established by Article 108(3) TFEU over proposals for alterations to existing aid, under which the Commission is required to examine the compatibility of the planned aid with the internal market (see, to that effect, judgment of 12 February 2008, *CELF and Ministre de la Culture et de la Communication*, C-199/06, EU:C:2008:79, paragraphs 37 and 38). The aim of that system of prior control is that only aid that is compatible with the internal market should be implemented (see, to that effect, judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26, and of 19 July 2016, *Kotnik and Others*, C-526/14, EU:C:2016:570, paragraph 36).

31. In that regard, the Court has already held that, in order to be able to examine whether an aid scheme planned by a Member State can be considered compatible with the internal market, the Commission must be able to assess the effects of the scheme on competition on the basis, in particular, of the budget allocated by the Member State to that scheme, and that, therefore, the obligation to mention, in the notifications, the estimates of the total amounts of the planned aid is inherent in the system of prior review of State aid measures (see, to that effect, order of 22 March 2012, *Italy* v *Commission*, C-200/11 P, not published, EU:C:2012:165, paragraphs 47 to 49).

32. In addition, it should be recalled that, according to the Court's settled case-law, the Commission may, in the case of an aid scheme, confine itself to examining the general characteristics of the scheme in question and is not required to examine each particular case in which it applies (judgments of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P and C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 130, and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 122).

33. Thus, even in the case of an aid granted in breach of Article 108(3) TFEU, the Commission's review may be confined to general features of this scheme and need not cover the aid which was actually paid (see, to that effect, judgment of 29 April 2004, *Greece* v *Commission*, C-278/00, EU:C:2004:239, paragraphs 21 and 24).

34. In those circumstances, the concept of 'budget of an aid scheme' within the meaning of Article 4(1) of Regulation No 794/2004 cannot be regarded as being limited to the amount of aid actually allocated, since that amount is known only after the implementation of the aid scheme concerned. In the light of prior control established by Article 108(3) TFEU, that concept must, on the contrary, be interpreted as referring to the budgetary provision (see, to that effect, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraphs 40 and 41), that is to say, the amounts available to the body responsible for granting aid for that purpose, as notified to the Commission by the Member State concerned and approved by the Commission.

35. In the case of aid schemes financed by allocated taxes, it is the revenue from those taxes that is made available to the body responsible for the implementation of the scheme concerned which thus constitutes the 'budget' of the scheme, within the meaning of Article 4(1) of Regulation No 794/2004.

36. Since the aid schemes at issue in the main proceedings, which have been authorised by the decisions of 2006 and 2007, fall within the concept of 'existing aid', within the meaning of Article 1(b)(ii) of Regulation No 659/1999, it is necessary to determine whether the Commission, by those decisions, approved the increase in the aggregate revenue from the three taxes during the period in question.

37. In this respect, it should be noted that, as they are derogations from the general principle of incompatibility of State aid with the internal market, laid down in Article 107(1) TFEU, Commission decisions authorising an aid scheme must be interpreted strictly (see, to that effect, judgments of 29 April 2004, *Germany* v *Commission*, C-277/00, EU:C:2004:238, paragraphs 20 and 24, and of 14 October 2010, *Nuova Agricast and Cofra* v *Commission*, C-67/09 P, EU:C:2010:607, paragraph 74).

38. Furthermore, according to the settled case-law of the Court, in order to interpret such Commission decisions, it is appropriate not only to examine their actual text, but also to refer to the notification made by the Member State concerned (see, to that effect, judgments of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 31, and of 16 December 2010, *Kahla Thüringen Porzellan* v *Commission*, C-537/08 P, EU:C:2010:769, paragraph 44, and order of 22 March 2012, *Italy* v *Commission*, C-200/11 P, not published, EU:C:2012:165, paragraph 27). Thus, the Court has already held that the scope of a decision approving an aid scheme is, in principle, limited by the budget indicated by the Member State in its notification letter, even if the budget has not been included in the text of the decision itself (see, to that effect, order of 22 March 2012, *Italy* v *Commission*, C-200/11 P, not published, EU:C:2012:165, paragraphs 26 and 27).

39. In the present case, the 2006 and 2007 decisions expressly reproduce the projections of the revenue generated by the three taxes which were notified by the French authorities to the Commission as the budget of the aid schemes in question. As regards, more specifically, the decision of 2007, that decision explicitly refers to the estimates of those authorities regarding the consequences of the reform of the tax on television services, which is the primary cause of the overall increase in the revenue from the three taxes during the period at issue. Paragraph 9 of that decision states that, according to those estimates, the reform 'might ultimately yield, for [the] period [2009 to 2011], an increase in the support account of 2 to 3% (between EUR 11 million and EUR 16.5 million) per year'. Similarly, in paragraph 20 of that decision, those estimates were again referred to by the Commission when it assessed the impact of that reform on the compatibility of the aid scheme at issue with the internal market.

40. In those circumstances, it is clear from the 2006 and 2007 decisions that the revenue generated by the three taxes is an element on which the Commission based its approval of the aid schemes at issue and that it did not authorise an increase in that revenue beyond that contained in the projections notified to the Commission. Accordingly, having regard to the case-law cited in paragraphs 31, 37 and 38 above, it must be held that the scope of the authorisations to implement those same schemes granted by those decisions is limited, as regards the revenue from the three taxes, to the increase as notified to the Commission.

41. According to the information provided by the referring court, the actual increase in the overall revenue from the three taxes during the period in question was well in excess of the projections submitted to the Commission, namely EUR 16.5 million per year, and increased, according to the report of the Court of Auditors cited by that court, to an average of EUR 67 million during this period. In so far as such an increase in the budget compared to the budget approved by the Commission is capable of influencing the assessment of the compatibility of the aid in question with the internal market, it constitutes an alteration other than a modification of a purely formal or administrative nature within the meaning of the first sentence of Article 4(1) of Regulation No 794/2004. Such an alteration, save where it remains below the 20% threshold laid down in the second sentence of Article 4(1) of that regulation, is, therefore, an alteration to existing aid, within the meaning of Article 1(c) of Regulation No 659/1999.

42. Since the referring court has doubts, in that regard, as to the relevance of the fact that that increase is not due to a statutory alteration to the aid schemes at issue in the main proceedings, it must be recalled that the first sentence of Article 4(1) of Regulation No 794/2004 defines the concept of 'alterations to existing aid' broadly, as covering 'any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the [internal] market'. As follows from the words 'any change', that definition cannot be limited to statutory alterations to State aid schemes.

43. Furthermore, that provision must be interpreted in the light of the objective of the system of prior control that it implements, which is, as has been recalled in paragraph 30 above, to ensure that only compatible aid be implemented. However, an increase in the budget of a scheme may have an influence on the assessment of its compatibility with the internal market, irrespective of whether or not this alteration is due to a statutory alteration to the aid scheme concerned.

44. Nor does the need to observe the principle of legal certainty preclude that an increase in the budget of an aid scheme, compared to the budget approved by the Commission, be considered, in circumstances such as those at issue in the main proceedings, to be an alteration to existing aid within the meaning of Article 108(3) TFEU.

45. Indeed, it is apparent from recital 4 of Regulation No 794/2004 that it is precisely for reasons of legal certainty that the second sentence of Article 4(1) of the Regulation lays down a precise threshold below which an increase in the budget of an aid scheme is not considered to be an alteration to existing aid. In fixing this threshold at the fairly high level of 20%, this provision provides for a safety margin that takes sufficient account of uncertainties related to the application of prior control established by Article 108(3) TFEU to aid schemes whose budget fluctuates, such as those at issue in the main proceedings.

46. Moreover, the Court has already held that a Member State may not rely on the principle of legal certainty to disregard information it has provided to the Commission in the framework of the notification of an aid scheme and which determines the scope of the Commission decision authorising that scheme, but must, on the contrary, take this information into account and ensure that the scheme is implemented in accordance with it (see, to that effect, judgment of 16 December 2010, *Kahla Thüringen Porzellan* v *Commission*, C-537/08 P, EU:C:2010:769, paragraph 47).

47. In addition, it should be noted that, in the present case, in the Commission document entitled 'Authorisation for State aid pursuant to Articles 87 and 88 of the EC Treaty - Cases where the Commission raises no objections' and published in the *Official Journal of the European Union* (OJ 2007 C 246, p. 1), the projections of the French authorities regarding the increase of revenue generated by the three taxes following the reform of the tax on television services were presented as the budget of the authorised aid. In the system of prior control established by Article 108(3) TFEU, neither the Member State concerned nor the beneficiary of an aid scheme can reasonably plead a legitimate expectation that the authority of an authorisation decision will extend beyond the description of the measure as published in the *Official Journal of the European Union* (see, to that effect, judgment of 14 October 2010, *Nuova Agricast and Cofra* v *Commission*, C-67/09 P, EU:C:2010:607, paragraphs 72 to 74).

48. The referring court is also unsure what lessons should be drawn, for the present case, from the judgment of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), in which the Court held, in essence, that the extension of the field of activity of a public establishment which benefited from aid granted by the State under legislation predating the entry into force of the EEC Treaty could not be regarded as an alteration to existing aid, since the extension did not affect the system of aid established by that legislation.

49. However, that case-law cannot be applied by analogy to the case at issue in the main proceedings. Indeed, the extension of the scope of activities of the beneficiary of the aid in question in the case which gave rise to the judgment of 9 August 1994, *Namur-Les assurances du crédit* (C-44/93, EU:C:1994:311), which did not affect the aid scheme established by the legislation concerned, is not comparable to the budget increase of the aid schemes at issue in the main proceedings, since it was that increase alone that directly affected the aid schemes in question.

50. It follows that an increase in the revenue from taxes financing several authorised aid schemes when compared to the projections notified to the Commission, such as that at issue in the main proceedings, constitutes an alteration to existing aid, within the meaning of Article 1(c) of Regulation No 659/1999 and of the first sentence of Article 4(1) of Regulation No 794/2004, read in the light of Article 108(3) TFEU, unless such an increase remains below the 20% threshold laid down in the second sentence of Article 4(1) of the latter regulation.

51. As regards the calculation of that threshold in circumstances such as those at issue in the main proceedings, it is clear from the wording of the second sentence of Article 4(1) of Regulation No 794/2004 that an increase in the 'original budget' of an existing aid scheme by up to 20% is not to be considered an alteration to existing aid. Therefore, the 20% threshold provided for in that provision refers to the 'original budget' of the aid scheme concerned, namely the budget of the scheme as approved by the Commission.

52. Moreover, it is apparent from paragraphs 28 to 35 above that, where, as in the present case, an existing aid scheme is financed by allocated taxes, the original budget of that scheme is determined on the basis of the projections of the allocated tax revenue, as authorised by the Commission. Therefore, an excess over the 20% threshold provided for in that provision must be assessed in relation to that revenue and not to the aid actually allocated.

53. In the present case, it is clear from the 2006 and 2007 decisions that the Commission authorised, as regards the annual revenue from the three taxes, a maximum amount of approximately EUR 557 million. It is apparent from the report of the Court of Auditors, to which the referring court refers in its request for a preliminary ruling, that, during the period at issue, the amount of the annual revenue from these taxes increased to around EUR 806 million in 2011, in particular due to the significant increase in revenue from the tax on television services, which rose from EUR 362 million in 2007 to EUR 631 million in 2011. Thus, it is apparent that the increase in the budget for the aid schemes at issue in the main proceedings during that period, compared to the budget approved in the 2006 and 2007 decisions, is well above the 20% threshold; however, the year during which that threshold was exceeded must be determined by the referring court.

54. As regards, in that respect, the placing in reserve of part of the CNC's revenue, mentioned by the referring court, it seems clear from the documents available to the Court that it did not have the effect of re-allocating the amount concerned to a measure other than those having all the features of aid within the meaning of Article 107(1) TFEU; the referring court must nevertheless verify whether this is the case.

55. In the absence of such a reallocation which would allow the revenue from the three taxes to be withheld from the budget of the aid schemes involved, the placing in reserve of that aid leaves that revenue available to the body responsible for the implementation of those schemes for the purposes of payment of individual aid, the only effect of that placing in reserve being, as the Commission pointed out at the hearing, to postpone the payment. Since that revenue still comes from this budget, such a placing in reserve is not, in itself, capable of calling into question the exceeding of the 20% threshold provided for in the second sentence of Article 4(1) of Regulation No 794/2004.

56. As regards the levies for the benefit of the general budget of the State, also mentioned by the referring court, it should be noted that, according to the information in the file available to the Court, it appears that, during the period at issue, only EUR 20 million was reallocated to the budget by the French parliament in December 2010 in respect of the year 2011. In view of the information contained in the report of the Court of Auditors, referred to in paragraph 53 above, it seems that, even taking account of that reallocation, the increase in the budget for the aid schemes at issue in the main proceedings during that period, compared to the budget approved in the decisions of 2006 and 2007, would exceed the 20% threshold.

57. Therefore, subject to verification by the referring court, it appears that the mere placing in reserve of part of the revenue of the CNC, without reallocation of the amount concerned for purposes other than the granting of aid, and the levy for the benefit of the general State budget during the period at issue, are not such as to call into question the existence of an increase in the budget of the aid schemes at issue in the main proceedings during this period, compared to the authorised budget in the decisions of 2006 and 2007, which was greater than the 20% threshold laid down in the second sentence of Article 4(1) of Regulation No 794/2004.

58. As is apparent from paragraph 23 above, that conclusion is, however, without prejudice to any finding to be made by the referring court concerning the placing in reserve of part of the CNC's revenue and the levy for the benefit of the general State budget during the period at issue when it examines the existence of hypothecation between the three taxes and the aid schemes in question.

59. Thus, subject to that verification, under the system of prior control established by Article 108(3) TFEU, an increase in the budget of those schemes compared to the budget approved by the Commission, such as that at issue in the main proceedings, should have been notified to the Commission in due time, that is to say, as soon as the French authorities could reasonably have foreseen that the 20% threshold would be exceeded.

60. In the light of all the foregoing considerations, the answer to the questions referred is that an increase in the revenue from taxes financing several authorised aid schemes when compared to projections notified to the Commission, such as that at issue in the main proceedings, constitutes an alteration to existing aid, within

the meaning of Article 1(c) of Regulation No 659/1999 and of the first sentence of Article 4(1) of Regulation No 794/2004, read in the light of Article 108(3) TFEU, unless that increase remains below the 20% threshold laid down in the second sentence of Article 4(1) of that regulation. This threshold must be assessed, in a situation such as that at issue in the main proceedings, in relation to the revenue earmarked for the aid schemes concerned and not to the aid actually allocated.

**The limitation of the temporal effects of the present judgment**

61. As regards the effects of a preliminary ruling, it should be noted that, in accordance with settled case-law, the interpretation which the Court, in the exercise of the jurisdiction conferred upon it by Article 267 TFEU, gives to a rule of EU law clarifies and, where necessary, defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its entry into force. It follows that the rule as thus interpreted may and must be applied by the courts to legal relationships arising and established before the judgment ruling on the request for interpretation, provided that in other respects the conditions are satisfied for bringing, before the courts having jurisdiction, an action relating to the application of that rule (judgment of 29 September 2015, *Gmina Wroc³aw*, C-276/14, EU:C:2015:635, paragraph 44 and the case-law cited).

62. It is only quite exceptionally that the Court may, in application of the general principle of legal certainty inherent in the EU legal order, be led to restrict the possibility for a person to rely on a provision which the Court has interpreted, with a view to calling into question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned acted in good faith and that there is a risk of serious difficulties (judgment of 29 September 2015, *Gmina Wroc³aw*, C-276/14, EU:C:2015:635, paragraph 45 and the case-law cited).

63. In the present case, the French Government does not demonstrate that a finding by the referring court, following the present judgment, that there is a breach of Article 108(3) TFEU would entail a risk of serious difficulties.

64. Accordingly, and without it being necessary to determine whether the criterion relating to the good faith of those concerned has been fulfilled, there is no need to limit the temporal effects of the present judgment.

**Costs**

65. …

On those grounds,

the Court (Fourth Chamber)

hereby rules:

**An increase in the revenue from taxes financing several authorised aid schemes, when compared to projections notified to the Commission, such as that at issue in the main proceedings, constitutes an alteration to existing aid, within the meaning of Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] and of the first sentence of Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999, read in the light of Article 108(3) TFEU, unless that increase remains below the 20% threshold laid down in the second sentence of Article 4(1) of that regulation. This threshold must be assessed, in a situation such as that at issue in the main proceedings, in relation to the revenue earmarked for the aid schemes concerned and not to the aid actually allocated.**

# EU Court of Justice, 24 October 2018*

# Case C-602/17

# *Benoît Sauvage, Kristel Lejeune v État belge*

*Sixth Chamber:* *A. Arabadjiev, President of the Second Chamber, acting as President of the Sixth Chamber, C. G. Fernlund (Rapporteur), and S. Rodin, Judges*

*Advocate General:* *M. Campos Sánchez-Bordona*

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1. This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2. The request has been made in proceedings between Mr Benoît Sauvage and Ms Kristel Lejeune, on the one hand, and the Belgian tax authorities, on the other, regarding those authorities' decision to tax the portion of Mr Sauvage's remuneration from Luxembourg relating to his employment and corresponding to the days on which he actually carried out his activity as an employed person outside Luxembourgish territory.

## Legal context

### *The Belgium-Luxembourg Convention*

3. The Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and capital, and the final protocol relating thereto, signed in Luxembourg on 17 September 1970, as amended by the supplementary agreement signed at Brussels on 11 December 2002 ('the Belgium-Luxembourg Convention'), provides in Article 15(1) and (3):

> '1. Without prejudice to the provisions of Articles 16, 18, 19, and 20, salaries, wages and other similar remuneration that a resident of a Contracting State receives in respect of employment shall be taxable only in that State unless the employment is pursued in the other Contracting State. If the employment is pursued there, such remuneration as is derived therefrom may be taxed in that other State.
> …
> 3. By way of derogation from paragraphs 1 and 2 and subject to the condition referred to in paragraph 1, remuneration in respect of employment pursued on board a ship, an aircraft or a railway or road vehicle used for international traffic, or on board a boat used in respect of internal navigation for the purpose of international traffic, are regarded as relating to an activity pursued in the Contracting State in which the place of effective management of that company is situated and are taxable in that State.'

4. Article 23(2)(1) of that Convention, which sets out the method for avoiding the double taxation of income from Luxembourg received by Belgian residents, is worded as follows:

> 'Income earned in Luxembourg — with the exception of the income referred to in subparagraphs 2 and 3 — and capital situated in Luxembourg, which are taxable in that State under the preceding articles, shall be exempt from tax in Belgium. That exemption shall not limit Belgium's right to take the income and capital thus exempted into account when determining the rate of tax.'

5. According to point 8 of the final protocol to that Convention:

> 'For the purposes of Article 15(1) and (2), employment is pursued in the other Contracting State when the activity on account of which the salaries, wages and other remuneration are paid is in fact performed in

* Language of the case: French.

that other State, that is to say, when the employee is physically present in that other State to pursue that activity.'

*Belgian law*

6. Article 3 of the Income Tax Code 1992 provides:

'Residents of the Kingdom shall be liable to personal income tax.'

7. Article 5 of that code provides:

'Residents of the Kingdom shall be liable to individual income tax on all their taxable income covered by this code, even if part of that income has been generated or received abroad.'

8. Article 155 of the code states:

'Income exempted under international conventions for the avoidance of double taxation shall be taken into account for the purposes of calculating tax, but the tax shall be reduced according to the proportion of the overall income represented by the exempted income …'

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

9. Mr Sauvage and Ms Lejeune are resident in Belgium, where they are subject to personal income tax on their worldwide income. Mr Sauvage is employed in a company established in Luxembourg. His position as a financial consultant means that he has to go on brief missions and attend meetings on behalf of his employer outside Luxembourg.

10. For the tax years 2007 to 2009, Mr Sauvage declared his salary as taxable income in Belgium, but he also declared all of that income as exempt from income tax, subject to the maintenance of progressive rates of tax.

11. Following a check on the place of performance of Mr Sauvage's employment, the Belgian tax authorities adjusted the taxable bases relating to those three tax years. They held that, by virtue of Article 15(1) of the Belgium-Luxembourg Convention, the part of the remuneration relating to Mr Sauvage's employment in Luxembourg which corresponded to the days on which he was actually carrying out his activity as an employed person outside Luxembourg was taxable in Belgium.

12. Mr Sauvage and Ms Lejeune appealed against the decisions of that authority affecting them. Following the rejection of those appeals by the tax authorities, the applicants brought an action before the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), by which they challenged the authorities' interpretation of Article 15(1) of that Convention.

13. Before that court, Mr Sauvage and Ms Lejeune argued, primarily, that Article 15(1) must be interpreted as meaning that a limited number of occasional business trips did not restrict the exclusive power of taxation of the State of the source of the income, since the activity concerned was pursued mostly in that State and the services provided outside that State were part of the paid employment in Luxembourg. In the alternative, Mr Sauvage and Ms Lejeune claimed that the freedom of movement of workers and the freedom to provide services guaranteed by the FEU Treaty had been infringed.

14. The referring court states, in essence, that the tax scheme in question deters Belgian residents in circumstances such as those of Mr Sauvage from accepting jobs in a Member State other than the Kingdom of Belgium which entail missions abroad. However, where a Belgian resident is employed on board a means of transport used in international traffic by a company with its place of effective management in Luxembourg, Article 15(3) of the Belgium-Luxembourg Convention provides that all his income relating to such employment is exempt from tax in Belgium, even when the activity in respect of which such income is paid is carried out outside Luxembourg.

15. In those circumstances the Tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 15(1) of the [Belgium-Luxembourg] Convention, interpreted (i) as allowing a restriction on the power of taxation of the source State in respect of the remuneration of an employee residing in Belgium and performing his activity for a Luxembourgish employer in proportion to the activity performed on Luxembourgish territory, (ii) as allowing a power of taxation to be attributed to the State of residence in respect of the amount of remuneration relating to the activity performed outside Luxembourgish territory, (iii) as requiring the employee to be permanently and every day physically present at the seat of his employer when it is not disputed that he regularly travels there as the result of a judicial assessment, conducted with flexibility, on the basis of objective and verifiable evidence and (iv) as requiring courts and tribunals to evaluate the existence and relevance of the services provided there and elsewhere, day by day, with a view to establishing a proportion over 220 business days, infringe Article 45 [TFEU] in that it constitutes a tax hindrance which discourages cross-border activities and breaches the general principle of legal certainty in that it does not provide for a stable and secure regime of exemption of the entirety of the remuneration received by a Belgian resident employed by an employer whose place of effective management is situated in the Grand Duchy of Luxembourg and places him at risk of double taxation of all or part of his income and subjects him to an unpredictable, legally uncertain regime?'

**Consideration of the question referred**

16. As a preliminary point, it should be noted that the Belgian Government argues that it is not for the Court of Justice to rule on the conformity of national law or conventional law with EU law. According to that government, the Court may, however, provide the national courts with the elements of interpretation of EU law that will enable them to resolve the legal problems before them.

17. In that connection, it must be stated that the Court admittedly does not have jurisdiction, under Article 267 TFEU, to rule on a possible infringement, by a contracting Member State, of provisions of bilateral conventions entered into by the Member States, which are designed to eliminate or to mitigate the negative effects of the coexistence of national tax regimes. Nor may the Court examine the relationship between a national measure and the provisions of a double taxation convention, such as the bilateral tax convention at issue in the main proceedings, since that question does not fall within the scope of the interpretation of EU law (judgment of 16 July 2009, *Damseaux*, C-128/08, EU:C:2009:471, paragraph 22).

18. However, when a tax scheme under a convention for the avoidance of double taxation forms part of the legal framework applicable to a case and has been presented as such by the national court, the Court must take it into account in order to give an interpretation of EU law which will be of use to the national court (judgment of 19 January 2006, *Bouanich*, C-265/04, EU:C:2006:51, paragraph 51).

19. In the present case, the tax scheme under the Belgium-Luxembourg Convention forms part of the legal framework applicable to the main proceedings and has been presented as such by the national court. Therefore, in order to provide an interpretation of EU law which will be of use to the national court, it is necessary to take it into account.

20. As regards the tax treatment that arises from the Belgium-Luxembourg Convention, it should be pointed out that the question referred is based on the premiss that, under that agreement, the exemption from Belgian tax of the income from Luxembourg of a Belgian resident relating to employment in Luxembourg is conditional upon the physical presence of that resident in Luxembourg. Thus, if the activity in respect of which such income is paid is actually carried out outside that State, the taxation of the related income is a matter for the Kingdom of Belgium.

21. Therefore, it must be considered that, by its question, the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident, which arises in another Member State and relates to employment in that State, subject to the condition that the activity in respect of which the income is paid is actually carried out in that Member State.

22. According to settled case-law, in the absence of unifying or harmonising measures for the elimination of double taxation at EU level, the Member States retain competence for determining the criteria for taxation on income and capital with a view to eliminating double taxation by means, inter alia, of international agreements. In that context, the Member States are free to determine, in the framework of bilateral conventions for the avoidance of double taxation, the connecting factors for the purpose of allocating powers of taxation (judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 41 and the case-law cited).

23. To that end, it is not unreasonable for the Member States to use the criteria followed in international tax practice (see, to that effect, judgments of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 31, and of 16 July 2009, *Damseaux*, C-128/08, EU:C:2009:471, paragraph 30 and the case-law cited).

24. However, the allocation of powers of taxation mentioned in paragraph 22 of this judgment does not allow Member States to apply measures contrary to the freedoms of movement guaranteed by the FEU Treaty. As far

as concerns the exercise of the power of taxation so allocated by bilateral conventions for the avoidance of double taxation, the Member States must comply with EU rules and, more particularly, observe the principle of equal treatment (judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 94, and of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 42 and the case-law cited).

25. In the present case, it should be noted that, in order to prevent the same income from employment in Luxembourg being taxed both in the State of residence of the employee, namely the Kingdom of Belgium, and in the source State of that income, namely the Grand Duchy of Luxembourg, Article 15 of the Belgium-Luxembourg Convention –– essentially reproducing the provisions of the Model Tax Convention on Income and on Capital drawn up by the Organisation for Economic Cooperation and Development –– allocates powers of taxation, as regards that income, between those two Contracting States.

26. In this context, the Court finds, first, that it is apparent from the documents before it that the income of a Belgian resident relating to employment in Luxembourg, where the activity in respect of which such income is paid is actually carried out outside Luxembourg, is not subject to a different treatment from income relating to employment in Belgium. Thus, it appears that the alleged disadvantage is linked (i) to the choice of the States party to the Belgium-Luxembourg Convention of a connecting factor as regards the allocation of their powers of taxation with respect to the employment income in question and (ii) to the more favourable tax treatment to which taxable employment income is subject in Luxembourg, rather than to a less favourable tax treatment of that income by the Kingdom of Belgium.

27. As has been stated in paragraph 22 of this judgment, Member States are free to determine the connecting factors for the purpose of allocating powers of taxation. Consequently, the mere fact that it has been decided to make the taxing power of the State of the source of the income dependent on the physical presence of a resident in the territory of that State does not constitute discrimination or different treatment prohibited by virtue of the free movement of workers (see, to that effect, judgment of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 30).

28. Moreover, the objective of a convention for the avoidance of double taxation is to prevent the same income from being taxed in each of the contracting parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one contracting State is no higher than that to which he or she would be subject in the other contracting State (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 44 and the case-law cited). Therefore, a less favourable tax treatment, which stems from the allocation of powers of taxation between the Kingdom of Belgium, as the State of residence of the taxpayer, and the Grand Duchy of Luxembourg, as the State of the source of the employment income concerned, and from the differences existing between the tax schemes of those two States, cannot be regarded as constituting discrimination or a difference in treatment prohibited by virtue of the free movement of workers.

29. Secondly, the fact that income relating to employment in Luxembourg, which is paid to a Belgian resident and corresponds to those days on which the activity that gave rise to the payment of that income was actually carried out outside Luxembourg, is subject to tax in Belgium cannot be regarded as treating that resident less favourably than a Belgian resident employed in Belgium, who, either on an occasional or regular basis, actually carries out his activity outside Belgium: the employment income of the latter is taxed by Belgium in its entirety, whereas the income of the former is taxed by that State only in so far as the activity which gave rise to the payment of such income has actually been carried out outside Luxembourg.

30. Thirdly, it cannot be said that a Belgian resident, who is employed in Luxembourg and whose employment is, on either an occasional or regular basis, effectively exercised outside that State is treated less favourably than a Belgian resident in employment in Luxembourg whose presence in Luxembourg is essential and who, consequently, only pursues his activity as an employed person in the territory of that State. Indeed, both of those residents benefit from the exemption laid down by the Belgium-Luxembourg Convention and the Belgian national legislation so far as concerns their income relating to days on which their employment is actually performed in Luxembourg.

31. As the referring court has stated, Article 15(3) of the Belgium-Luxembourg Convention provides that income of a Belgian resident from employment on board a means of transport used in international traffic by a company with its place of effective management in Luxembourg is exempt from tax in Belgium, even where the activity which gave rise to the payment of such income was not actually carried out in Luxembourg. By contrast, a resident of Belgium in a situation such as that of Mr Sauvage is taxed in Belgium if the activity which gave rise to the payment of the income concerned is not actually carried out in Luxembourg.

32. It should be noted in that regard that the fact of choosing different connecting factors depending on whether or not the employment is characterised by high mobility at international level cannot be regarded as constituting discrimination or a difference in treatment prohibited by virtue of the free movement of workers. First, as follows from paragraph 22 of this judgment, that choice falls, in the absence of unifying or harmonising measures designed to eliminate double taxation at EU level, to the Member States concerned, and, moreover, is in accordance with international tax practice. Second, residents in employment entailing a high level of mobility at international level, because of the very nature of that employment, are not, in any event, in a situation that is objectively comparable to that of a resident in a situation such as that of Mr Sauvage.

33. Finally, the mere fact that the right to a tax advantage is contingent upon the taxpayer providing evidence that the conditions for that right are met, or the fact that there may be a degree of uncertainty as to the determination of the tax burden at the beginning of a tax year, cannot, of themselves, constitute an obstacle within the meaning of EU law.

34. Indeed, in the first place, it is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided and the material and formal conditions which must be respected to obtain a tax advantage (see, to that effect, judgments of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 37, and of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 47).

35. Member States' tax authorities are thus entitled to require the taxpayer to provide the evidence that they consider necessary for a correct application of the tax and for the purpose of determining whether the conditions for a tax advantage provided for by the tax scheme concerned are fulfilled and, consequently, whether that advantage must be granted (see, to that effect, judgments of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 45, and of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 52).

36. In the second place, as the results of a tax year can, in principle, be determined only at the end of the tax year concerned, the fact that it is not possible to predict the final tax burden of a tax year with certainty at the start of that year is inherent in tax systems.

37. In the light of the foregoing considerations, the answer to the question referred is that Article 45 TFEU must be interpreted as meaning that it does not preclude a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident which arises in another Member State and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.

**Costs**

38. …

On those grounds,

the Court (Sixth Chamber)

hereby rules:

**Article 45 TFEU must be interpreted as meaning that it does not preclude a tax scheme of a Member State under a tax convention for the avoidance of double taxation, such as that at issue in the main proceedings, which makes the exemption of the income of a resident which arises in another Member State and relates to employment in that State subject to the condition that the activity in respect of which the income is paid is actually performed in that State.**

*In this case, no Opinion of the Advocate General was issued.*

# EU Court of Justice, 22 November 2018*

## Case C-575/17

## *Sofina SA, Rebelco SA, Sidro SA v Ministre de l'Action et des Comptes publics*

*Fifth Chamber:* *K. Lenaerts, President of the Court, acting as President of the Fifth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges*

*Advocate General:* *M. Wathelet*

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1. This request for a preliminary ruling concerns the interpretation of Articles 63 and 65 TFEU.

2. The request was made in the context of a dispute between, on the one hand, Sofina SA, Rebelco SA and Sidro SA, companies incorporated under Belgian law, and, on the other, the Ministre de l'Action et des Comptes publics (Minister for the Public Sector and Public Accounts, France) regarding the latter's refusal to reimburse the withholding tax levied on the dividends paid to those companies between 2008 and 2011.

### Legal context

*French law*

3. Under Article 38(1) of the Code général des impôts (French General Tax Code) ('CGI'):

'… the taxable profit is the net profit, calculated on the basis of the results of all transactions of every kind performed by undertakings, including, in particular, all transfers of assets, either during or at the end of operations.'

4. Article 39(1) of the CGI states:

'The net profit is established after deduction of all charges …'

5. Article 119*bis*(2) of the CGI provides in particular that the income referred to in Articles 108 to 117*bis* of the CGI gives rise to the levying of a withholding tax, the rate of which is fixed in Article 187 of that code when such income is received by persons who have their tax residence or registered office in France.

6. Dividends are included in the income referred to in Articles 108 to 117*bis* of the CGI.

7. In the version applicable at the material time, Article 187(1) of the CGI sets the rate of withholding tax at 25%.

* Language of the case: French.

8. In the version applicable until 21 September 2011, the third subparagraph of Article 209(1) of the CGI stated:

> '… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward to subsequent financial years.'

9. Since 21 September 2011, the third subparagraph of Article 209(1) of the CGI has been worded as follows:

> '… If a loss is sustained during a financial year, it shall be treated as a charge in the following financial year and shall be deducted from the profit recorded for that year up to a maximum amount of [EUR] 1 000 000 increased by 60% of the amount corresponding to the taxable profit for that year exceeding the first amount. If that profit is insufficient for the deduction to be made in full, the excess loss shall be carried forward under the same conditions to subsequent financial years. The same shall apply to the portion of the excess not eligible for deduction under the first sentence of this subparagraph.'

*The France-Belgium Tax Convention*

10. Article 15(1) and (2) of the Convention signed in Brussels on 10 March 1964 between France and Belgium seeking to avoid double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax, as amended by the Additional Agreements of 15 February 1971, 8 February 1999, 12 December 2008 and 7 July 2009 ('the France-Belgium Tax Convention'), states:

> '1. Dividends originating in a Contracting State which are paid to a resident of the other Contracting State are taxable in that other State.
> 2. However, subject to the provisions of paragraph 3, such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the law of that State, but the tax so charged shall not exceed:
> a. 10[%] of the gross amount of the dividends if the recipient is a company which has had exclusive ownership of at least 10[%] of the capital of the company distributing the dividends since the beginning of the last financial year of that company closed before the distribution;
> b. 15[%] of the gross amount of the dividends in all other cases.
> This paragraph shall not concern the taxation of the company in respect of the profits out of which the dividends are paid.'

11. Article 19A of the France-Belgium Tax Convention provides, in particular:

> 'Double taxation shall be avoided as follows:
> A. As regards Belgium:
> 1. Income and proceeds from investment capital which fall within the set of rules in paragraphs 2 to 4 of Article 15, which have actually been taxed at source in France and which are received by Belgian resident companies liable for corporation tax, shall, in return for payment of withholding tax at the normal rate on their amount of French tax, be exempt from corporation tax and distribution tax under the conditions laid down by Belgian domestic law.
> …'

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

12. Between 2008 and 2011 Sofina, Rebelco and Sidro received dividends as shareholders in French companies.

13. Pursuant to Article 119*bis*(2) of the CGI, read in conjunction with Article 15(2) of the France-Belgium Tax Convention, those dividends were subject to withholding tax at a rate of 15%.

14. Since the financial years for the appellants in the main proceedings between 2008 and 2011 were loss-making, they submitted claims to the French tax authority, seeking reimbursement of the withholding tax levied on dividends paid during those financial years.

15. When those claims were dismissed, the appellants in the main proceedings brought actions before the competent courts which, at first instance and on appeal, dismissed their applications for reimbursement.

16. The appellants in the main proceedings then brought an appeal on a point of law before the referring court.

17. The Conseil d'État (Council of State, France) notes, first, that the application of withholding tax so far as concerns solely the dividends paid to loss-making non-resident companies with respect to their holdings in resident companies creates for those companies a cash-flow disadvantage as compared with loss-making resident companies. The referring court seeks, however, to ascertain whether that fact constitutes in itself a difference in treatment to be classified as a restriction on the free movement of capital, which is prohibited, in principle, by Article 63 TFEU.

18. On the assumption that the national legislation at issue in the main proceedings does constitute such a restriction, the Conseil d'État (Council of State) is uncertain, secondly, whether that restriction might be justified, in the light of the objective of that legislation, that is, the effective collection of tax.

19. Thirdly, and in the alternative, if the principle of a withholding tax at issue in this case were to be accepted, the referring court seeks to ascertain, in the first place, whether the fact that the loss-making resident company which ceases trading thereby obtains a de facto exemption from the taxation of dividends which it received in the loss-making financial years is liable to have an influence on the examination of whether the national legislation at issue in the main proceedings is compatible with Articles 63 and 65 TFEU.

20. In the second place, the Conseil d'État (Council of State) states that the differences in the way the base for taxing dividends is calculated, depending on whether the recipient company is resident or non-resident, may also constitute a restriction on the free movement of capital. Where the withholding tax provided for in Article 119bis of the CGI is calculated on the gross amount of the dividends, the expenses linked to their actual receipt are deducted from the base for calculating the tax chargeable on dividends paid to a resident company.

21. In those circumstances, the Conseil d'État (Council of State) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Must Articles [63 and 65 TFEU] be interpreted as meaning that the cash-flow disadvantage resulting from the application of withholding tax to dividends paid to loss-making non-resident companies, while loss-making resident companies are not taxed on the amount of the dividends they receive until the year when, if at all, they return to profitability, constitutes in itself a difference in treatment characterising a restriction on the free movement of capital?
> 2. Must the potential restriction on the free movement of capital referred to in the preceding question, in view of the requirements resulting from Articles [63 and 65 TFEU], be regarded as being justified by the need to ensure the effective collection of tax, since non-resident companies are not subject to the supervision of the French tax authorities, or by the need to safeguard the allocation of the power to impose taxes between the Member States?
> 3. If application of the withholding tax at issue may in principle be accepted with regard to the free movement of capital:
> – Do those provisions preclude the collection of withholding tax on dividends paid by a resident company to a loss-making non-resident company of another Member State where the latter ceases to trade without returning to profitability, while a resident company placed in that situation is not in fact taxed on such dividends?
> – Must those provisions be interpreted as meaning that where taxation rules apply which treat dividends differently depending on whether they are paid to residents or non-residents, it is appropriate to compare the actual tax burden borne by each of them in respect of those dividends, so that a restriction on the free movement of capital resulting from the fact that those rules preclude for non-residents alone the deduction of expenses which are directly linked to the actual receipt of the dividends may be regarded as being justified by the difference in the rate of tax between the general tax payable in a subsequent year by residents and the withholding tax levied on dividends paid to non-residents, where that difference compensates, with regard to the amount of tax paid, for the difference in the taxable base?'

### Consideration of the questions referred

*The first and second questions, together with the first part of the third question*

22. By its first and second questions, together with the first part of its third question, which it is appropriate to examine together, the referring court is asking, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends distributed by a resident company are subject to a withholding tax when they are received by a non-resident company whereas, when such dividends are received by a resident company, under the general corporation tax rules, they are subject to taxation at the end of the financial year in which they were received only if the latter company was profit-making in that financial year, and such taxation may,

where applicable, never be levied if that company ceases trading without having become profitable after receiving those dividends.

The existence of a restriction on the free movement of capital, for the purposes of Article 63(1) TFEU

23. It is settled case-law of the Court that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (judgments of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 15; of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 44; and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 27).

24. Specifically, the less favourable treatment by a Member State of dividends paid to non-resident companies, compared to the treatment of dividends paid to resident companies, is liable to deter companies established in a Member State other than that first Member State from undertaking investments in that same first Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 28 and the case-law cited).

25. Pursuant to the national legislation at issue in the main proceedings, companies which hold shares in a company established in France are subject, so far as concerns the dividends paid to them in that capacity, to two different sets of tax rules, the application of which depends on their status as resident or non-resident on the territory of that Member State.

26. It is apparent from the order for reference that, pursuant to Article 119*bis*(2) of the CGI, dividends paid to non-resident companies by a French company are subject to a withholding tax of 25% on the gross amount thereof; that rate may, however, be reduced pursuant to a double taxation agreement, irrespective of their financial results. As stated by the referring court, the dividends received by the appellants in the main proceedings were subject to a 15% withholding tax pursuant to such an agreement, that is, the France-Belgium Tax Convention.

27. By contrast, dividends paid to a resident company are included in that company's tax base and subject to the general tax rules, that is, corporation tax at a rate of 33.33%, in accordance with Article 38 of the CGI. In the event of losses being incurred at the end of the relevant financial year, the third subparagraph of Article 209(1) of the CGI, in the version applicable at the material time, provided for a deferral of that tax to a subsequent profit-making year, with the recorded losses carried forward to the following financial year being set against the amount of the dividends received.

28. It follows that, whereas the dividends paid to a non-resident company are subject to immediate and definitive taxation, the tax imposed on dividends paid to a resident company depends on whether the latter's financial year is net loss-making or net profit-making. Thus, where losses are made, the taxation of those dividends is not only deferred to a subsequent profit-making year, thus procuring a cash-flow advantage for the resident company, but is also thereby uncertain, since that tax will not be levied if the resident company ceases trading before becoming profitable.

29. First, the exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction on the free movement of capital (see, by analogy, judgments of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 33, and of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 59).

30. Secondly, the assessment of whether there exists a potentially less favourable treatment of the dividends paid to non-resident companies must be undertaken for each tax year, taken individually (judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 41).

31. Since the dividends received by a non-resident company are taxed at the time when they are distributed, the financial year in which the distribution of those dividends occurs must be taken into account in order to compare the tax burden on such dividends and that on dividends paid to a resident company.

32. It should be noted that there is no such tax burden when the resident company is loss-making at the end of such a financial year.

33. Thirdly, such a deferral of taxation will be a definitive exemption of the dividends paid to a resident company if the latter does not become profitable before it ceases trading.

34. Accordingly, the national legislation at issue in the main proceedings is liable to procure an advantage for loss-making resident companies, since it gives rise, at the very least, to a cash-flow advantage, or even an exemption in the event of that company ceasing trading, whereas non-resident companies are subject to immediate and definitive taxation irrespective of their results.

35. The French Government states, in that connection, that the dividends paid to a non-resident company are subject, pursuant to the provisions of Article 119*bis*(2) of the CGI read in conjunction with Article 15 of the France-Belgium Tax Convention, to a tax burden of 15%, whereas dividends paid to a resident company are subject, pursuant to Article 38 of the CGI, to a tax burden of 33.33%.

36. However, it must be said in that regard that the mere fact that the dividends paid to a non-resident company are subject to a 15% withholding tax in France does not preclude the Kingdom of Belgium also taxing those dividends, on the basis of the powers of taxation conferred by Article 15(1) of the France-Belgium Tax Convention, within the limits laid down in Article 19A(1) of that convention.

37. Furthermore, the circumstance set out in paragraph 35 of the present judgment cannot, in any case, nullify the less favourable treatment of dividends paid to non-resident companies.

38. In the first place, unfavourable tax treatment that is contrary to a fundamental freedom cannot be regarded as compatible with EU law because of the potential existence of other advantages (judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C 182/06, EU:C:2007:452, paragraph 24 and the case-law cited, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C 18/15, EU:C:2016:549, paragraph 32).

39. In the second place, the less favourable tax rate relied upon by the French Government so far as concerns dividends paid to a resident company is, in any case, irrelevant since those dividends are subject to a tax exemption when the resident company ceases trading without having become profitable following the receipt of those dividends. The Court has previously held that the fact that the applicable national rules place non-residents at a disadvantage cannot be compensated for by the fact that, in other situations, that same legislation does not discriminate between non-residents and residents (judgments of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C-182/06, EU:C:2007:452, paragraph 23, and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 38).

40. Such a difference in tax treatment of dividends dependent on the place of residence of the companies receiving those dividends is liable to deter (i) non-resident companies from investing in companies established in France, and (ii) investors residing in France from purchasing holdings in non-resident companies.

41. It follows that the national legislation at issue in the main proceedings constitutes a restriction on the free movement of capital, which is, in principle, prohibited by Article 63(1) TFEU.

42. It is necessary, however, to examine whether that restriction might be justified in the light of the provisions of the FEU Treaty.

The existence of a justification for the restriction on the free movement of capital under Article 65 TFEU

43. The French Government argues that, although the national legislation at issue in the main proceedings constitutes a restriction, (i) the positions of resident and non-resident companies are objectively different, and (ii) that legislation is justified by the necessity of ensuring that tax is collected and therefore corresponds to the allocation of powers of taxation between the Member State of residence and the Member State in which the dividends are paid.

44. Under Article 65(1)(a) TFEU, 'the provisions of Article 63 [TFEU] shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

45. In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. It cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers on the basis of their place of residence or of the Member State in which they invest their capital is automatically compatible with the Treaty. The derogation provided for in Article 65(1)(a) TFEU is itself restricted by Article 65(3) TFEU, which provides that the national provisions referred to in Article 65(1) 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 63).

46. A distinction must therefore be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. It is clear from the Court's case-law that, before national tax legislation can be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 64).

– *Comparability of the situations in question*

47. It is settled case-law of the Court that as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgments of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 56, and of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 67 and the case-law cited).

48. Relying on the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), the French, Belgian, German and United Kingdom Governments contend, however, that legislation laying down solely the various arrangements for the collection of tax on the basis of the location of the registered offices of the recipient company is justified on account of a difference in the objective situation of resident and non-resident companies.

49. Thus, the application of different taxation arrangements depending on the place of residence of the recipient of the dividends is, it is argued, a reflection of the objective difference in the situations of non-resident and resident companies; the French State acts, with regard to non-resident companies, as the Member State in which the dividends are paid and not as the Member State of residence of the recipients of those dividends, a fact which restricts its collection capacity so far as concerns the latter category of companies and justifies the application of a withholding tax to the dividends paid to those companies.

50. However, that argument cannot be accepted.

51. Although the Court held, in paragraph 41 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that a difference in treatment consisting in the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable, it nevertheless made clear, in paragraphs 43 and 44 of that judgment, that the income at issue in the case which gave rise to that judgment was, in any event, subject to tax irrespective of whether it was received by a resident or non-resident taxable person.

52. As is clear from paragraph 33 of the present judgment, the national legislation at issue in the main proceedings is not limited to laying down different arrangements for the collection of tax on the basis of the place of residence of the recipient of the nationally sourced dividends, but is liable to result in a deferral of taxation of the dividends to a subsequent tax year in the event of a resident company making a loss, or even an exemption in the event of that company ceasing trading in the absence of a return to profitability (see, by analogy, judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 43).

53. Accordingly, since that legislation procures a substantial tax advantage for loss-making resident companies which is not granted to loss-making non-resident companies, it cannot be claimed that the difference in treatment in the taxation of dividends that depends on whether those dividends are received by a resident or non-resident company is restricted to the arrangements for the collection of tax.

54. It follows that that difference in treatment is not justified by an objective difference in situation.

– *Justification based on the balanced allocation of powers of taxation between the Member States*

55. The French Government argues that the withholding tax to which only those dividends received by a non-resident company are subject is the sole means by which the French State may tax that income without its tax revenue being reduced because of losses arising in another Member State.

56. In that connection, the Court has accepted that the preservation of the balanced allocation of taxation powers between Member States constitutes a legitimate objective and that, in the absence of any unifying or harmonising measures adopted by the European Union, the Member States retain the power to define, by

treaty or unilaterally, the criteria for allocating their powers of taxation (judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 35).

57. Such a justification can be accepted where, inter alia, the rules at issue are intended to prevent behaviour capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried on in its territory (judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 77).

58. In the present case, the French State has chosen to tax the dividends paid to a non-resident company by means of a withholding tax at a rate fixed in a double taxation agreement, while not taxing dividends paid to a resident company that is loss-making.

59. However, in the main proceedings, the deferral of the taxation of dividends received by a loss-making non-resident company would not mean that the French State has to waive its right to tax income generated on its territory. The dividends distributed by the resident company would, in fact, be subject to taxation once the non-resident company became profitable during a subsequent tax year, in the same way as is the case for a resident company in a similar situation.

60. Admittedly, if the non-resident company were to fail to become profitable prior to ceasing trading, this would result in an effective exemption of the income generated by the dividends and give rise to tax losses for the Member State of taxation.

61. However, it is settled case-law of the Court that a reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is, in principle, contrary to a fundamental freedom (judgment of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 83).

62. Further, where Member States make use of the freedom to tax revenue generated on their territory, they are required to respect the principle of equal treatment and the freedoms of movement guaranteed by primary EU law (see, to that effect, judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 36).

63. The French Government cannot claim that the loss of tax revenue associated with the taxation of dividends received by non-resident companies in the event of their ceasing trading is of such a nature as to justify a withholding tax on that income so far as concerns solely those companies, when the French State consents to such losses when resident companies cease trading without returning to profitability.

64. In those circumstances, the justification of the national legislation at issue in the main proceedings by the need to maintain the balanced allocation of powers of taxation between the Member States cannot be accepted.

– *Justification on the grounds of the effective collection of tax*

65. The French Government also argues that submitting dividends, paid to a non-resident company, to a withholding tax is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State in which the dividends are paid.

66. The withholding tax to which the dividends paid to non-resident companies are subject serves, it is argued, to minimise the administrative formalities associated with the obligation on those companies to submit a tax return to the French tax authority at the end of the financial year.

67. In that connection, the Court has held that the need to ensure the effective collection of tax is a legitimate objective capable of justifying a restriction on fundamental freedoms, provided, however, that that restriction is applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, judgment of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 39).

68. Furthermore, the Court has previously held that retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 39).

69. In that connection, it should be recalled that the restriction on the free movement of capital arising from the national legislation at issue in the main proceedings rests, as is clear from paragraph 34 of the present

judgment, in the fact that, unlike loss-making resident companies, non-resident companies which are also loss-making do not benefit from the deferral of taxation on the dividends which they receive.

70. Granting the benefit of that deferral to non-resident companies, while necessarily eliminating that restriction, would not undermine the achievement of the aim of the effective collection of the tax owed by those companies when they receive dividends from a resident company.

71. In the first place, the rules on the deferral of taxation in the event of losses constitute, inherently, a derogation to the principle of taxation during the tax year in which the dividends are distributed, so that those rules are not intended to apply to the majority of companies which receive dividends.

72. In the second place, it should be pointed out that it would be the duty of non-resident companies to provide the relevant evidence to allow the tax authorities of the Member State of taxation to determine that the conditions, laid down in the legislation, for benefiting from such a deferral have been met.

73. In the third place, the mutual assistance mechanisms existing between the authorities of the Member States are sufficient to enable the Member State in which the dividends are paid to check the accuracy of the evidence put forward by non-resident companies wishing to claim a deferral of taxation of dividends which they have received (see, to that effect, judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 68).

74. In that connection, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2004/106/EC of 16 November 2004 (OJ 2004 L 359, p. 30), repealed and replaced by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799 (OJ 2011 L 64, p. 1), allows a Member State to apply to the competent authorities of another Member State for all the information required to allow it to ascertain the correct amount of income tax.

75. Further, Article 4(1) of Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28), repealed and replaced by Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures (OJ 2010 L 84, p. 1), provides that 'at the request of the applicant authority, the requested authority shall provide any information which would be useful to the applicant authority in the recovery of its claim'. That directive therefore allows the Member State in which dividends are paid to obtain, from the Member State of residence, the information necessary to allow it to recover a tax liability which arose when the dividends were distributed.

76. Thus, Directive 2008/55 provides the authorities of the Member State in which dividends are paid with a framework of cooperation and assistance that allows them actually to recover a tax liability in the Member State of residence (see, to that effect, judgments of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 78, and of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraphs 70 and 71).

77. Accordingly, if the advantage associated with the deferral of taxation on dividends distributed were also granted to loss-making non-resident companies, that would have the effect of eliminating any restriction on the free movement of capital, but would not thereby impede the achievement of the aim pursued by the national legislation at issue in the main proceedings.

78. In those circumstances, justification of the national legislation at issue in the main proceedings in the effective collection of tax cannot be accepted.

79. In the light of the foregoing, the answer to the first and second questions, together with the first part of the third question, is that Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.

*The second part of the third question*

80. In the light of the answer given to the first and second questions, together with the first part of the third question, there is no need to answer the second part of the third question.

**Costs**

81.

On those grounds,

the Court (Fifth Chamber)

hereby rules:

**Articles 63 and 65 TFEU must be interpreted as precluding the legislation of a Member State, such as that at issue in the main proceedings, pursuant to which the dividends paid by a resident company are subject to a withholding tax when they are received by a non-resident company, whereas, when such dividends are received by a resident company, under the general corporation tax rules they are subject to taxation at the end of the financial year in which they were received only if the latter company was profitable in that financial year, and such taxation may, where applicable, never be levied if that company ceases trading without becoming profitable after receiving those dividends.**

# EU Court of Justice, 22 November 2018*

# Case C-625/17

# *Voralberger Landes- und Hypothekenbank AG v Finanzamt Feldkirch*

*First Chamber:* *R. Silva de Lapuerta, Vice-President, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, E. Regan and C. G. Fernlund, Judges*

*Advocate General:* *P. Mengozzi*

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1. This request for a preliminary ruling concerns the interpretation of Articles 56 and 63 TFEU.

2. The request has been made in proceedings between Vorarlberger Landes- und Hypothekenbank AG ('Hypothekenbank') and the Finanzamt Feldkirch (Feldkirch Tax Office, Austria) in respect of the latter's decisions of 20 January 2015 determining the amount of the stability charge and of the special contribution for the stability charge which Hypothekenbank is required to pay in respect of the 2014 calendar year.

**Legal context**

3. Paragraph 1 of the Stabilitätsabgabegesetz (Law on the stability charge, 'the StabAbgG'), as introduced by the Budgetbegleitgesetz 2011 (Supplementary Budget Law 2011), of 30 December 2010 (BGBl. I, 111/2010), provided:

> 'The activities of credit institutions shall be subject to a stability charge. "Credit institutions" shall, for the purposes of this Federal Law, mean those institutions which have been granted a licence under the Bankwesengesetz (Law on the banking system) (BGBl. No 532/1993) and branches of foreign credit institutions which are entitled under the Law on the banking system to supply services at a branch in Austria. ...'

4. Paragraph 2 of the StabAbgG, as in force before the entry into force of Federal Law BGBl. I, 184/2013, provided:

> '1. The basis of assessment for the stability charge shall be the average unconsolidated balance sheet total (see subparagraph (2)) of a credit institution, following deduction of the amounts referred to in subparagraph (2). For the 2011, 2012 and 2013 calendar years, the average unconsolidated balance sheet total shall be that for the financial year which ends in 2010. From the following calendar year, the average unconsolidated balance sheet total shall be that of the financial year which ends in the year prior to the calendar year for which the stability charge is due.
> …
> 6. For credit institutions within the meaning of Paragraph 1 which have their seat in another Member State … and operate through a branch in Austria, a notional balance sheet total shall be calculated for the volume of transactions to be attributed to that branch in accordance with the provisions of Paragraph 2(1) to (5) and shall form the basis of assessment.'

5. Paragraph 3 of the StabAbgG, as in force before the entry into force of Federal Law BGBl. I, 13/2014, was worded as follows:

> 'The stability charge shall, for each of the elements of the basis of assessment under Paragraph 2, be fixed at:
> 1. 0.055%, where the amount exceeds EUR 1 000 000 000, up to EUR 20 000 000 000;

* Language of the case: German.

2. 0.085%, where the amount exceeds EUR 20 000 000 000.'

6. Paragraph 3 of the StabAbgG, as amended by Federal Law BGBl. I, 13/2014, provides:

'The stability charge shall, for each of the elements of the basis of assessment under Paragraph 2, be fixed at:
1. 0.09%, where the amount exceeds EUR 1 000 000 000, up to EUR 20 000 000 000;
2. 0.11%, where the amount exceeds EUR 20 000 000 000.'

7. Under Paragraph 7a(1) of the StabAbgG, the special contribution for the stability charge is be calculated as a percentage of the amount due for the stability charge.

8. In accordance with Paragraph 7b(2) of the StabAbgG, the amount of the stability charge for 2014 is calculated according to a combined reading of the cited provisions, before and after the amendments enacted by Federal Laws BGBl. I, 184/2013 and BGBl. I, 13/2014.

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

9. Hypothekenbank is a credit institution established in Austria which supplies banking services to clients resident in that Member State and in other Member States. Hypothekenbank's balance sheet total results, for a not insignificant part, namely almost one fourth in 2014, from banking transactions entered into with the latter group of clients.

10. By decisions of 20 January 2015, the Feldkirch Tax Office fixed, pursuant to the StabAbgG, the amount to be paid by Hypothekenbank for the stability charge and the special contribution for the 2014 stability charge. The Bundesfinanzgericht (Federal Finance Court, Austria) dismissed an action brought against those decisions in a judgment of 1 April 2016.

11. In support of its appeal on a point of law before the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), Hypothekenbank claims that it has nothing to pay for the stability charge and the special contribution on the ground that those charges are contrary, first, to the rules on State aid and, second, to the freedom to provide services and free movement of capital. In particular, Hypothekenbank submits that Paragraph 2 of the StabAbgG is discriminatory in so far as it treats similar transactions differently. Whereas the banking transactions of a credit institution established in Austria with nationals of other Member States which are not entered into through an intermediary or through a branch in another Member State are taken into account for the purposes of the basis of assessment for the charges in question, the same transactions entered into through subsidiaries established in another Member State are not.

12. Hypothekenbank thus claims that a group of undertakings would be taxed more favourably than an undertaking which did not belong to a group. In the case of a group of undertakings, the criterion of non-consolidation automatically means that the balance sheet of subsidiaries established in a Member State other than Austria is automatically excluded from the basis of assessment of the charges in question. That is not the case of a single undertaking which, alone or through a branch, supplies services in Member States other than Austria, since those services would automatically be included in the balance sheet of that undertaking and in the basis of assessment of the stability charge which it must pay. That is discriminatory, as follows from the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47). Such discrimination is capable of impairing the supply of banking services in the Member States other than Austria. It could have been avoided had the consolidated balance sheet total been taken into account in calculating the basis of assessment for the stability charge and the special contribution for that charge, whilst allowing for deduction of any charges of a similar type to be paid by a subsidiary in another Member State.

13. The Verwaltungsgerichtshof (Supreme Administrative Court) considers that it is not clear that it follows from the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), on freedom of establishment, and from the judgments of 2 June 2005, *Commission* v *Italy* (C-174/04, EU:C:2005:350); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774); and of 24 May 2007, *Holböck* (C-157/05, EU:C:2007:297), on the free movement of capital, that the StabAbgG is not compatible with EU law.

14. Furthermore, as regards the enforcement of the rules on State aid, the referring court notes that it follows, inter alia, from the judgment of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 21), that those liable to pay a tax cannot rely on the argument that a fiscal measure enjoyed by other businesses constitutes State aid in order to avoid payment of that tax. It therefore takes the view that there is no need to refer any questions for a preliminary ruling in that regard.

15. In those circumstances, the Verwaltungsgerichtshof (Supreme Administrative Court) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> 'Is legislation which imposes a charge on the basis of the balance sheet total of credit institutions contrary to the freedom to provide services under Article 56 TFEU et seq. and/or to the free movement of capital and payments under Article 63 TFEU if, for the purposes of the charge, banking transactions with clients in other Member States are taken into account for a credit institution with its seat in Austria whereas the same does not apply to a credit institution with its seat in Austria which enters into such transactions as the parent company of a group of credit institutions through a credit institution belonging to the group with its seat in another Member State, the balance sheet of which must, since it belongs to a group of companies, be consolidated with that of the credit institution acting as a parent company, because the charge is levied on the basis of the unconsolidated (that is to say, not included in a group financial statement) balance sheet total?'

**Consideration of the question referred**

*Preliminary observations*

16. It is clear from the order for reference that the stability charge and the special contribution for that charge, the legality of which has been challenged in the case in the main proceedings, is levied on credit institutions established in Austria and branches of foreign credit institutions established in that Member State. The basis of assessment of those charges is determined according to the 'average unconsolidated balance sheet total' of credit institutions established in Austria and, in the case of branches of foreign undertakings, according to a notional balance sheet. The term 'unconsolidated' means that the stability charge and the special contribution for that charge are determined according to the total balance sheet of each distinct legal person and not according to the consolidated balance sheet of a group of undertakings.

17. As stated by the referring court, banking transactions are shown in the balance sheet total of credit institutions. It follows that the amount payable under the charges at issue in the main proceedings varies according to the banking transactions that credit institutions established in Austria enter into directly or in their branches. The banking transactions of subsidiaries of such Austrian institutions, established in other Member States, are not taken into account when determining the basis of assessment of those charges.

18. Furthermore, the issue in the case in the main proceedings is not whether the applicant in the main proceedings, Hypothekenbank, is able to supply services through a permanent credit institution in a Member State other than Austria or to establish itself there. As it has stated in its written observations, Hypothekenbank does not supply services to clients resident in other Member States through permanent credit institutions established in those Member States.

19. By its question, the referring court therefore asks, in essence, whether Articles 56 and 63 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, in so far as it imposes on credit institutions established in Austria, such as the credit institution at issue in the main proceedings, which do not supply services to their clients resident in other Member States through permanent credit institutions established in those Member States, a charge determined according to the 'average unconsolidated balance sheet total', which includes the banking transactions which those institutions enter into directly with nationals of other Member States, whilst excluding the same transactions entered into by subsidiaries of credit institutions established in Austria where those subsidiaries are established in other Member States.

*The applicable freedom*

20. As the question referred for a preliminary ruling concerns both Article 56 TFEU and Article 63 TFEU, it is necessary to establish, as a preliminary point, whether, and if so to what extent, national legislation such as that at issue in the main proceedings is liable to affect the exercise of the freedom to provide services and the free movement of capital (judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 32).

21. In the present case, according to the order for reference, in so far as banking services are supplied to residents of Member States other than Austria, credit institutions established in Austria are treated differently, as regards the stability charge and the special contribution for that charge, according to whether they supply such services through an intermediary or through subsidiaries established in other Member States.

22. Hypothekenbank has claimed before the Verwaltungsgerichtshof (Supreme Administrative Court) that such difference in treatment is discriminatory and capable of impairing, first, the supply of banking services in Member States other than Austria and, second, the free movement of capital.

23. In that regard, the Court has previously held that banking transactions, such as granting credit on a commercial basis, concern, in principle, both the freedom to provide services within the meaning of Article 56 TFEU et seq. and the free movement of capital within the meaning of Article 63 TFEU et seq. (judgment of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 43).

24. In addition, it should be observed that, when a national measure concerns both the freedom to provide services and the free movement of capital, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (judgment of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 39).

25. It is clear that, in the circumstances of the case in the main proceedings, the predominant consideration is freedom to provide services rather than the free movement of capital. By its line of reasoning, as summarised by the referring court, Hypothekenbank seeks to assert that taking into account, for the purposes of calculating the stability charge and the special contribution for that charge, the banking transactions that it enters into without an intermediary with clients in Member States other than Austria increases its transaction costs, thereby making its cross-border operations less attractive. Such an effect predominantly concerns the freedom to provide services, whereas its effect on the free movement of capital is merely an inevitable consequence thereof.

26. Accordingly, it is appropriate to consider the question referred not in respect of Article 63 TFEU et seq., on the free movement of capital, but in respect of Article 56 TFEU et seq., on the freedom to provide services.

*The existence of a restriction on the freedom to provide services*

27. It should be noted that, regardless of whether the stability charge and the special contribution for that charge constitute direct or indirect taxation, those taxes have not been harmonised within the European Union and therefore fall within the competence of the Member States, which, according to settled case-law, must exercise that competence consistently with EU law (judgment of 1 December 2011, *Commission* v *Hungary*, C-253/09, EU:C:2011:795, paragraph 42).

28. Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State. In accordance with the Court's case-law, Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided (judgment of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 45 and the case-law cited).

29. Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (judgment of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 46 and the case-law cited).

30. The freedom to provide services conferred by Article 56 TFEU on Member State nationals also includes 'passive' freedom to provide services, namely the freedom for recipients of services to go to another Member State in order to receive a service there, without being hindered by restrictions (judgment of 9 March 2017, *Piringer*, C-342/15, EU:C:2017:196, paragraph 35).

31. In that regard, it should be noted that the stability charge and the special contribution for that charge do not draw any distinction according to where clients come from or the place where the services are supplied. For the purposes of calculating the basis of assessment of those charges according to the average unconsolidated balance sheet total of credit institutions established in Austria, account is taken of all the banking transactions entered into by a given credit institution, without any intermediary, in Austria or in another Member State.

32. In addition, the mere fact that those charges are liable to increase banking transaction costs cannot constitute an impediment to the freedom to provide services. As has been held by the Court, measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and the provision of services within one Member State, do not fall within the scope of Article 56 TFEU (judgments of 8 September 2005, *Mobistar and Belgacom Mobile*,

C-544/03 and C-545/03, EU:C:2005:518, paragraph 31, and of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 36).

33. As to the claim that banking institutions established in Austria which enter into banking transactions in another Member State without an intermediary are being discriminated against in relation to banking institutions which offer such services by means of independent subsidiaries established in that other Member State, it should be made clear that the latter type of institution has chosen to exercise the freedom of establishment conferred on such institutions by Articles 49 and 54 TFEU, whereas the former type is established only in Austria and supplies services of a cross-border nature, which is covered by the freedom to provide services, enshrined in Article 56 TFEU.

34. In that regard, the Court has previously held that the scope of the freedom to provide services must be distinguished from the scope of the freedom of establishment. To that end, it is necessary to establish whether or not the economic operator is established in the Member State in which it offers the services in question. Where that operator is established in the Member State in which it offers the service, it falls within the scope of the principle of freedom of establishment, as defined in Article 49 TFEU. On the other hand, where the economic operator is not established in the Member State of destination, it is a cross-border service provider covered by the principle of freedom to provide services (see, to that effect, judgments of 11 December 2003, *Schnitzer*, C-215/01, EU:C:2003:662, paragraphs 28 and 29, and of 10 May 2012, *Duomo Gpa and Others*, C-357/10 to C-359/10, EU:C:2012:283, paragraph 30).

35. The concept of 'establishment' within the meaning of the FEU Treaty provisions on freedom of establishment involves the actual pursuit of an economic activity through a fixed establishment in the host Member State for an indefinite period. Consequently, it presupposes actual establishment of the company concerned in that Member State and the pursuit of genuine economic activity there (judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 54).

36. In contrast, where the provider of services moves to a Member State other than the Member State in which it is established, the provisions of the Treaty chapter on services, in particular the third paragraph of Article 57 TFEU, envisage that he is to pursue his activity there on a temporary basis (judgments of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 26, and of 11 December 2003, *Schnitzer*, C-215/01, EU:C:2003:662, paragraph 27).

37. In those circumstances, Member States are free to take account of such disparities and, therefore, for tax purposes, to treat differently the activities of persons and undertakings which fall within the freedom of establishment or the freedom to provide services respectively and imply, in general, different legal and economic effects.

38. It follows that national legislation, such as that at issue in the main proceedings, is not liable to impede the exercise of the freedom to provide services or make its exercise less attractive.

39. As regards the doubts expressed by the referring court in relation to the implications of the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), cited before the referring court by the applicant in the main proceedings, it should be noted that, in paragraphs 37 to 41 of that judgment and in paragraph 23 of the judgment of 26 April 2018, *ANGED* (C-234/16 and C-235/16, EU:C:2018:281), the Court held that a tax based on an apparently objective criterion of differentiation but that disadvantages in most cases, given its features, companies whose seat is in other Member States and that are in a comparable situation to companies whose seat is situated in the Member State where that tax is charged, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU.

40. However, it is clear from paragraphs 18 and 26 above that, in the case in the main proceedings, Hypothekenbank cannot rely on an infringement of the provisions of the FEU Treaty on freedom of establishment.

41. In addition, in proceedings under Article 267 TFEU, only the court making the reference may define the factual context in which the questions which it asks arise or, at very least, explain the factual assumptions on which the questions are based (judgment of 10 July 2018, *Jehovan todistajat*, C-25/17, EU:C:2018:551, paragraph 28).

42. Indeed, in the written observations which it provided to the Court, Hypothekenbank submits that, in practice, regional credit institutions established in Austria near to the border of that Member State supply services of a cross-border nature more often than the other regional credit institutions established in that Member State, so that the stability charge and the special contribution for that charge predominantly affect the former.

It submits that that situation constitutes discrimination similar to that at issue in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*(C-385/12, EU:C:2014:47). However, it cannot be ascertained from the few statistics provided by Hypothekenbank on the Austrian banking sector whether that claim is well founded. In any event, such facts were not made clear by the referring court.

43. Therefore, since it has not been established that the legislation at issue in the main proceedings is liable to lead to a situation similar to that at issue in the case which gave rise to the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), there is no need to consider whether, by analogy in respect of the freedom to provide services, the case-law cited in paragraph 39 above is applicable.

44. In the light of all of the foregoing considerations, the answer to the question referred is that Article 56 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, in so far as it imposes on credit institutions established in Austria, such as the credit institution at issue in the main proceedings, which do not supply services to their clients resident in other Member States through permanent credit institutions established in those Member States, a charge determined according to the 'average unconsolidated balance sheet total', which includes the banking transactions which those institutions enter into directly with nationals of other Member States, whilst excluding the same transactions entered into by subsidiaries of credit institutions established in Austria where those subsidiaries are established in other Member States.

**Costs**

45. …

On those grounds,

the Court (First Chamber)

hereby rules:

**Article 56 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, in so far as it imposes on credit institutions established in Austria, such as the credit institution at issue in the main proceedings, which do not supply services to their clients resident in other Member States through permanent credit institutions established in those Member States, a charge determined according to the 'average unconsolidated balance sheet total', which includes the banking transactions which those institutions enter into directly with nationals of other Member States, whilst excluding the same transactions entered into by subsidiaries of credit institutions established in Austria where those subsidiaries are established in other Member States.**

# EU Court of Justice, 22 November 2018*

## Case C-679/17

## *Vlaams Gewest v Johannes Huijbrechts*

*First Chamber:* *R. Silva de Lapuerta, Vice-President, acting as President of the First Chamber, J.-C. Bonichot (Rapporteur), A. Arabadjiev, C. G. Fernlund and S. Rodin, Judges*

*Advocate General:* *M. Campos Sánchez-Bordona*

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1. This reference for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2. The reference has been made in proceedings between Vlaams Gewest (Flemish Region, Belgium), represented by the Vlaamse regering (Flemish Government, Belgium) in the person of the Vlaamse Minister van Begroting, Financiën en Energie (Flemish Minister for the Budget, Finance and Energy, Belgium) and in the person of the Vlaamse Minister van Omgeving, Natuur en Landbouw (Flemish Minister for the Environment, Nature and Agriculture, Belgium), and Mr Johannes Huijbrechts concerning the exemption from inheritance tax he seeks for woodland in the Netherlands.

**Legal context**

3. Article 15 of the Vlaams wetboek der successierechten (Flemish Code of Inheritance Tax, 'the Code of Inheritance Tax') provides that inheritance tax is to be determined on the basis of the taxable value of all the deceased's property, wherever situated, after deducting the debts.

4. Article 55 *quater* of the Code of Inheritance Tax, now Article 2.7.6.0.3 of the Vlaamse Codex Fiscaliteit (Flemish Code of Taxation), provides that real property regarded as 'woodland' within the meaning of the Belgian legislation is to be exempt from inheritance tax if it the subject of a sustainable management plan in accordance with the criteria laid down by the Flemish legislation and approved by the Flemish forestry authorities.

5. Article 13 *bis* of the Bosdecreet (Decree on woodland) of 13 June 1990, in the version applicable to the facts of the main proceedings, provides:

> 'Inheritance tax which would have been due on the amount exempted under Article 2.7.6.0.3 of the Flemish Code of Taxation is deemed to be granted as a subsidy. The subsidy is deemed to be granted over 30 years at the rate of 1/30 per year, counting from the opening of the succession which is the subject of the exemption.
>
> The subsidy is deemed to be granted on the following conditions, which must be satisfied during the period of 30 years mentioned in the first paragraph:
>
> 1. the property must continue to maintain its woodland character in accordance with Article 3 of this decree;
> 2. the property must continue to satisfy the conditions laid down in the second indent of Article 2.7.6.0.3 of the Flemish Code of Taxation;
> 3. the management actually carried on must be in accordance with the approved management plan.
>
> In the event of non-compliance with those conditions, the landowner or person entitled to the usufruct of the woodland is required to repay the subsidy for the remaining part of the period for which it is deemed to be granted. …'

* Language of the case: Dutch.

6. The second paragraph of Article 41 of the Decree on woodland provides that the Flemish Government is to establish 'criteria for sustainable management of woodland' and to determine, in accordance with Article 7 of the decree, the 'woodland governed by those criteria'.

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

7. By her will of 24 May 2012 Mrs Oyen, who resided in Belgium, designated Mr Huijbrechts, resident in the Netherlands, as specific legatee of the parcel of land 'Klein Zundertse Heide' in Klein Zundert (Netherlands). That estate, of approximately 156 hectares, includes a woodland area subject to the Netherlands legislation on the protection of natural sites and to sustainable management requirements in accordance with the plan established for that purpose by the Netherlands authorities.

8. On the death of Mrs Oyen on 1 April 2013, Mr Huijbrechts accepted the legacy, and it is common ground that the succession was subject to Belgian law.

9. Mr Huijbrechts applied to the Belgian authorities for exemption from inheritance tax on the property in question under Article 55 *quater* of the Code of Inheritance Tax, which exempts from inheritance tax 'woodland' subject to a sustainable management plan approved by the Flemish forestry authorities.

10. That application was rejected on the ground that the property was situated in a Member State other than the Kingdom of Belgium.

11. Mr Huijbrechts brought an action before the Rechtbank van eerste aanleg van Antwerpen (Court of First Instance, Antwerp, Belgium) against the decision to reject his application, arguing that Article 55 *quater* of the Code of Inheritance Tax was inconsistent with the free movement of capital, in that it does not apply to sustainably managed woodland situated in the territory of a Member State other than the Kingdom of Belgium.

12. The court allowed the action, finding, first, that the estate in question had been the subject of a sustainable management plan that corresponded to that required by Belgian law for the exemption laid down in Article 55 *quater* of the Code of Inheritance Tax and, second, that Mr Huijbrechts had produced an attestation equivalent to that also required by that provision. The court considered that the different tax treatment of woodland situated in the territory of Member States other than the Kingdom of Belgium constituted a restriction of the free movement of capital, and that the restriction could not be justified, since the assistance of the Netherlands authorities could be sought for monitoring compliance with the sustainable management criteria.

13. The Belgian authorities appealed against that court's judgment to the Hof van beroep te Antwerpen (Court of Appeal, Antwerp, Belgium), which decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Does a situation in which [a person] inherits a woodland area located abroad, which is managed in a sustainable manner, and which is not exempt from inheritance tax under Article 55 *quater* of the [Code of Inheritance Tax], whereas [a person] who inherits a woodland area within the country which is managed in a sustainable manner is exempt from inheritance tax under Article 55 *quater* of the [Code of Inheritance Tax], constitute an infringement of the free movement of capital as laid down in Article 63 TFEU?
> 2. Do the interests of the Flemish woodland area within the meaning of Article 55 *quater* of the [Code of Inheritance Tax] constitute an overriding reason in the public interest which justifies rules under which the application of an exemption from inheritance tax is limited to woodland areas in Flanders which are sustainably managed?'

**Consideration of the questions referred**

14. By its questions, which should be considered together, the referring court essentially asks whether Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which grants a tax advantage for inherited woodland on condition that it is the subject of sustainable management as defined by national law, but restricts that advantage to woodland situated in the territory of that Member State.

15. Under Article 63(1) TFEU, all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited.

16. According to settled case-law, the tax treatment of successions falls within the TFEU provisions on the movement of capital, except in cases where their constituent elements are confined within a single Member

State (judgments of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 25, and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 27).

17. In the present case, the documents before the Court show that the legacy at issue in the main proceedings was bequeathed by a person resident in Belgium to a taxpayer resident in the Netherlands and relates to an estate consisting of woodland situated in Netherlands territory.

18. That situation is therefore within the scope of Article 63(1) TFEU.

19. With reference to inheritance tax, it follows from settled case-law that the fact that the grant of tax advantages is made subject to the condition that the property inherited is situated in national territory constitutes a restriction of the free movement of capital prohibited in principle by Article 63(1) TFEU (judgments of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 35, and of 18 December 2014, *Q*, C-133/13, EU:C:2014:2460, paragraph 20).

20. Moreover, it should be recalled that, under Article 65(1)(a) TFEU, 'the provisions of Article 63 shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation … with regard to the place where their capital is invested'. However, Article 65(3) TFEU provides that the national provisions referred to in Article 65(1) are not to constitute 'a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]'.

21. A distinction must therefore be drawn between unequal treatment permitted under Article 65(1)(a) TFEU and arbitrary discrimination prohibited under Article 65(3) TFEU. According to the case-law, in order for national tax legislation such as that at issue in the main proceedings which, for the purposes of calculating inheritance tax, distinguishes between assets situated in another Member State and those situated in the territory of a region of the Kingdom of Belgium to be compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the public interest (judgment of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 42) and must not go beyond what is necessary to achieve the objective pursued by the measure at issue (judgments of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 32; of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraph 41; and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 41).

22. To assess whether the different treatment concerns situations which are not objectively comparable, account must be taken of the object and content of the national provisions at issue in the main proceedings (judgment of 18 December 2014, *Q*, C-133/13, EU:C:2014:2460, paragraph 22 and the case-law cited).

23. In the present case, it follows expressly from the wording of Article 55 *quater* of the Code of Inheritance Tax, now Article 2.7.6.0.3 of the Flemish Code of Taxation, and from the order for reference that the tax exemption in that provision pursues an environmental objective, namely the sustainable management of forest and woodland in the territory of the Flemish Region of the Kingdom of Belgium.

24. In addition, according to the Belgian Government, the object of the exemption is to avoid the fragmentation of woodland that might result from sales for the purpose of paying inheritance tax.

25. Such an environmental objective consisting in the sustainable management of forest and woodland cannot, as a matter of principle, be limited solely to the territory of a region of a Member State or to the national territory of a Member State, since a woodland area may form only a single block or complex even if it extends to the territory of several Member States and, from a legal and administrative point of view, falls within their jurisdiction.

26. Effective protection and sustainable management of forest and woodland are typically a cross-border environmental issue entailing common responsibilities for the Member States (see, by analogy, judgments of 12 July 2007, *Commission* v *Austria*, C-507/04, EU:C:2007:427, paragraph 87, and of 26 January 2012, *Commission* v *Poland*, C-192/11, not published, EU:C:2012:44, paragraph 23).

27. To distinguish between adjoining parts of a single wood or forest according to whether they are located in the territory of the Flemish Region of the Kingdom of Belgium or in that of the Kingdom of the Netherlands is artificial and does not correspond to any objective difference.

28. Consequently, a taxpayer who inherits forest or woodland in the territory of a Member State bordering on the Flemish Region of the Kingdom of Belgium, which he can show to be the subject of sustainable management corresponding to requirements such as those laid down by Article 55quater of the Code of Inheritance

Tax, now Article 2.7.6.0.3 of the Flemish Code of Taxation, is, from the point of view of the tax exemption at issue in the main proceedings, in a comparable situation to a taxpayer who inherits forest or woodland which is the subject of a sustainable management plan in accordance with that provision and is situated in the territory of that region (see, by analogy, judgments of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 40, and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraphs 48 to 50).

29. It follows that the different tax treatment thus found creates a restriction of the movement of capital within the meaning of Article 63(1) TFEU.

30. Such a restriction may nonetheless be accepted if it is justified by an overriding reason in the public interest and complies with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (judgment of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 52).

31. The Belgian Government submits that the restriction of the exemption to woodland in the Flemish Region is justified by considerations of the protection of the environment, in particular the need for sustainable management of woodland and nature in the Flemish Region of the Kingdom of Belgium, where wooded areas are in great demand especially because of population density, industrialisation and the presence of good arable land.

32. It should also be recalled that protection of the environment is one of the essential objectives of the European Union (judgment of 11 December 2008, *Commission* v *Austria*, C-524/07, not published, EU:C:2008:717, paragraph 58 and the case-law cited).

33. In the present case, the grant and maintenance of the tax exemption provided for in Article 55 *quater* of the Code of Inheritance Tax, now Article 2.7.6.0.3 of the Flemish Code of Taxation, are indeed subject to compliance with environmental requirements for a period of 30 years.

34. However, in so far as enjoyment of the tax exemption is also conditional on the forest or woodland inherited being in the territory of the Flemish Region of the Kingdom of Belgium, the exemption is not an appropriate measure for attaining the objectives it pursues, since sustainable management of a wooded area situated on the adjoining territories of two Member States, such as that at issue in the main proceedings, is a cross-border environmental issue that cannot be confined to the territory of one of those Member States alone or a part of it.

35. The Belgian Government further submits that the restriction of the exemption to woodland in the Flemish Region is justified by the difficulty of ascertaining whether, in Member States other than the Kingdom of Belgium, woodland in fact complies with the requirements laid down in the national legislation for the grant and maintenance of the exemption, and by the impossibility of ensuring that actual compliance with those requirements is monitored for 30 years, as required by that legislation.

36. It is true that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction of the exercise of the freedoms of movement guaranteed by the Treaty. However, such a restriction must comply with the principle of proportionality, in that it must be appropriate for ensuring the attainment of the objective pursued and must not go beyond what is necessary for attaining it (judgment of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 52).

37. In this respect, it is settled case-law that the existence of practical difficulties in determining whether the conditions for obtaining a tax advantage are satisfied cannot justify the categorical refusal to grant them. The competent tax authorities of a Member State can request the taxpayer concerned to provide the relevant documentation to enable them to verify compliance with the requirements concerning the sustainable management of woodland in the territory of another Member State, in order to assess whether the conditions for the application of the tax exemption in question are satisfied (see inter alia, by analogy, judgments of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 48; of 25 October 2007, *Geurts and Vogten*, C-464/05, EU:C:2007:631, paragraph 28; of 17 January 2008, *Jäger*, C-256/06, EU:C:2008:20, paragraphs 54 and 55; and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraphs 53 to 55).

38. Thus national legislation such as that at issue in the main proceedings which categorically prevents the taxpayer from providing proof that inherited woodland is subject to a sustainable management plan, drawn up in accordance with the legislation of the Member State in which it is located and corresponding to identical requirements to those laid down in Article 55 quater of the Code of Inheritance Tax, cannot be justified on the

ground of the effectiveness of fiscal supervision (see, to that effect, judgments of 10 March 2005, *Laboratoires Fournier*, C-39/04, EU:C:2005:161, paragraph 25; of 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 48; and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 60).

39. As to the impossibility alleged by the Belgian Government of verifying compliance in a Member State other than the Kingdom of Belgium with such a plan for 30 years, as required by the legislation at issue in the main proceedings for woodland in the territory of the Flemish Region, it follows from the foregoing, however, that that argument cannot validly be put forward in the abstract and presumes that the tax authorities of the Member State of taxation show that it is really not possible for them to obtain, during that period, the necessary information from the competent authorities of the Member State in which the woodland is located.

40. In the event that the Member State in which the woodland is situated grants a tax advantage of the same kind as that at issue in the main proceedings, subject to equivalent conditions, in particular a management plan comparable to that laid down by the Belgian legislation, it cannot be excluded from the outset that the Member State of taxation may, in the framework of the mutual assistance established by EU law, be able to receive the information needed to verify that the conditions for granting and maintaining the tax advantage provided for in that legislation are satisfied (see inter alia, to that effect, judgment of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 68).

41. In any case, there is nothing to prevent the tax authorities concerned from refusing the exemption at issue in the main proceedings if the evidence they consider necessary for a correct determination of tax is not provided (see inter alia, to that effect, judgment of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 69 and the case-law cited).

42. As to the question raised by the Belgian Government in its written observations of whether that analysis applies also to woodland situated in the territory of a third country, it must be stated that not only is an answer to that question unnecessary for resolving the main proceedings, it is also legitimate, in any event, for a Member State to refuse to grant a tax advantage if, in particular because that non-member country is not under any international obligation to provide information, it proves impossible to obtain the necessary information from that country (judgments of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 63, and of 27 January 2009, *Persche*, C-318/07, EU:C:2009:33, paragraph 70).

43. In the light of the above, the answer to the questions referred is that Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which grants a tax advantage for inherited woodland on condition that it is the subject of sustainable management as defined by national law, but restricts that advantage to woodland situated in the territory of that Member State.

**Costs**

44. …

On those grounds,

the Court (First Chamber)

hereby rules:

**Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which grants a tax advantage for inherited woodland on condition that it is the subject of sustainable management as defined by national law, but restricts that advantage to woodland situated in the territory of that Member State.**

*In this Case, no Opinion of the Advocate General was issued.*

# EU Court of Justice, 6 December 2018*

## Case C-480/17

## *Frank Montag v Finanzamt Köln-Mitte*

*Tenth Chamber:* *F. Biltgen, President of the Eighth Chamber, acting as President of the Tenth Chamber, E. Levits (Rapporteur) and L. Bay Larsen, Judges*

*Advocate General:* *M. Campos Sánchez-Bordona*

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1. This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2. The request has been made in proceedings between Mr Frank Montag and the Finanzamt Köln-Mitte (Tax Office, Cologne Central, Germany) concerning a refusal to deduct contributions to an occupational pension scheme and to a private pension scheme, as special expenses, for the purposes of reducing tax in the framework of limited tax liability in Germany.

### Legal context

*European Union law*

3. Recital 12 of Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained (OJ 1998 L 77, p. 36), as amended by Council Directive 2006/100/EC of 20 November 2006 (OJ 2006 L 363, p. 141) ('Directive 98/5'), provides that a lawyer registered under his home-country professional title in the host Member State must remain registered with the competent authority in his home Member State if he is to retain his status of lawyer and be covered by that directive.

4. Article 3(1) and (2) of Directive 98/5 is worded as follows:

> '1. A lawyer who wishes to practise in a Member State other than that in which he obtained his professional qualification shall register with the competent authority in that State.
> 2. The competent authority in the host Member State shall register the lawyer upon presentation of a certificate attesting to his registration with the competent authority in the home Member State. It may require that, when presented by the competent authority of the home Member State, the certificate be not more than three months old. It shall inform the competent authority in the home Member State of the registration.'

*German law*

5. Paragraph 1 of the Einkommensteuergesetz (Law on income tax), as amended by the 2008 tax law, of 20 December 2007 (BGBl. 2007 I, p. 3150) ('the EStG 2008'), provides:

> '1. Natural persons whose place of residence or habitual residence is in Germany shall be subject to unlimited income tax liability. …
> …

* Language of the case: German.

3. At their request, natural persons whose place of residence or habitual residence is not in Germany shall also be treated as subject to unlimited income tax liability provided that they receive income in Germany within the meaning of Paragraph 49. This applies only if at least 90% of their income during the calendar year is subject to German income tax or if their income which is not subject to German income tax does not exceed the tax-free allowance under the first indent of the second sentence of Paragraph 32a(1);

…

4. Natural persons whose place of residence or habitual residence is not in Germany shall, subject to subparagraphs 2 and 3 and to Paragraph 1a, be subject to limited income tax liability if they receive income in Germany within the meaning of Paragraph 49.'

6. Paragraph 10 of the EStG 2008, entitled 'Special expenses', provides:

'1. Provided that they are not business or occupational expenses or are not treated as such, the following expenses shall constitute special expenses:

…

2. a. ... contributions to professional insurance funds which provide comparable benefits to statutory pension funds;

b. contributions to a self-funded personal pension …

…

3. The provident expenses referred to in the second sentence of subparagraph 1(2) shall be taken into consideration up to a ceiling of EUR 20 000 ...'

7. Paragraph 50(1) of the EStG 2008, entitled 'Special provisions on persons subject to limited tax liability', states:

'Persons subject to limited tax liability may deduct business expenses (Paragraph 4(4) to (8)) or occupational expenses (Paragraph 9) only to the extent that those expenses are economically linked to income of German origin. … Paragraphs … 10 … shall not apply. ...'

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

8. In 2008, the applicant in the main proceedings, a German national, was resident in Belgium where he worked as a lawyer in an international law firm which was registered as a limited liability partnership ('the LLP'), and held shares in that partnership for the purposes of company law.

9. As an equity partner, the applicant in the main proceedings earned income which was treated as derived from several countries following a procedure for the assessment and distribution of income, which is not at issue between the parties in the main proceedings. As part of the net world profit which was attributed to the applicant in the main proceedings from his shareholding and activities in the LLP, approximately 54% of that net world profit was received in Germany, approximately 6.3% in Belgium and the remainder in other countries. In 2008, the applicant in the main proceedings also received other income. The referring court states that the applicant in the main proceedings cannot be regarded as subject to unlimited income tax liability in Germany under Paragraph 1(3) of the EStG 2008 due, first, to the fact that less than 90% of his total income is subject to income tax in Germany and, second, the amount of his income not subject to German income tax exceeds his tax-free allowance.

10. In 2008, the applicant in the main proceedings was registered as a 'European lawyer' on List E of the *Ordre français du barreau de Bruxelles* (French-speaking Brussels Bar, Belgium) under the professional title of '*Rechtsanwalt (Cologne) établi à Bruxelles*' (Lawyer (Cologne) established in Brussels). In order to practise in that capacity, the applicant in the main proceedings was required to be registered with the Rechtsanwaltkammer Köln (Cologne Bar Association, Germany) and, as such, it was compulsory for him to be a member of the Versorgungswerk der Rechtsanwälte Nordrhein-Westfalen (The North Rhine-Westphalia Lawyers' Pension Scheme, Germany, 'the lawyers' provident institution'). In accordance with the German legislation on the statutory pension scheme, employed and self-employed members of an occupational pension scheme are exempt from the obligation otherwise applicable of membership of the German statutory pension scheme.

11. In 2008, the applicant in the main proceedings paid a contribution in the amount of EUR 16 453.32 to the lawyers' provident institution, the maximum contribution which could have been paid. Of that amount, EUR 12 656.40 formed compulsory contributions and EUR 3 796.92 additional voluntary contributions. Furthermore, the applicant in the main proceedings paid contributions into a private pension scheme in Germany in the amount of EUR 3 696.

12. The applicant in the main proceedings was subject to unlimited income tax liability in Belgium. According to information provided by the applicant, restated by the referring court, the payments made to the lawyers' provident institution in Germany did not result in a deduction of the tax paid in Belgium. However, for the purposes of determining the basis of assessment in Belgium, the mandatory payments to the Belgian statutory social security system were able to be deducted.

13. In respect of income tax for 2008, as a taxable person subject to a limited liability to tax, the applicant in the main proceedings sent the defendant in the main proceedings a tax declaration and applied for a deduction of the contributions paid to the lawyers' provident institution and into a private pension fund in Germany as withheld occupational expenses under the third sentence of Paragraph 22(1) of the EStG 2008 or, alternatively, as special expenses under Paragraph 10(1)(2) of that law.

14. In determining the income tax basis of assessment, the defendant in the main proceedings refused to deduct those contributions on the ground that they related to the category of 'special expenses', set out in Paragraph 10 of the EStG 2008. The third sentence of Paragraph 50(1) of the EStG 2008 excludes special expenses from being deducted in the case of limited tax liability. In the view of the defendant in the main proceedings, such expenses also cannot be deducted as occupational expenses under Paragraph 9 of that law or as business expenses under Paragraph 4(4) of that law.

15. Following the rejection of the complaint lodged by the applicant in the main proceedings against that refusal, he brought an action before the Finanzgericht Köln (Finance Court, Cologne, Germany). A stay in the proceedings before that Court was ordered until July 2016 on account of proceedings for a preliminary ruling before the Court of Justice in the case which gave rise to the judgment of 24 February 2015, *Grünewald* (C-559/13, EU:C:2015:109), and of proceedings brought before the Bundesverfassungsgericht (Federal Constitutional Court, Germany).

16. In essence, since the Bundesverfassungsgericht (Federal Constitutional Court) held that it was not unconstitutional for the German legislature to treat provident expenses as special expenses, the applicant in the main proceedings now seeks the deduction of his provident expenses as special expenses pursuant to Paragraph 10(1)(2) of the EStG 2008, within the limits set out in Paragraph 10(3) thereof, and for the third sentence of Paragraph 50(1) of that law, which provides for a deduction in respect of non-resident taxable persons, not to be applied as contrary to EU law.

17. The referring court notes that, although he earns most of his income in Germany, the applicant in the main proceedings earned sufficient income, in Belgium, for his personal situation to be taken into account there.

18. However, that court asks whether the provident expenses at issue in the main proceedings must be treated, under EU law, as expenses relating to the taxable person's personal and family circumstances or expenses relating to income received in Germany.

19. In those circumstances, the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Does Article 49 TFEU read in conjunction with Article 54 TFEU preclude a national rule under which compulsory contributions to an occupational pension scheme made by a non-resident taxpayer (on the basis of his membership of a bar association in the Member State, which is mandatory on professional grounds for the purposes of his activity carried on in several Member States) are not treated as deductible from income within the framework of limited tax liability, whereas in the case of resident taxpayers national law permits their deduction from income up to a specific ceiling within the framework of unlimited tax liability?
> 2. Does Article 49 TFEU read in conjunction with Article 54 TFEU preclude the national rule described in Question 1 in the case where, in addition to his compulsory contributions, the taxpayer makes additional (voluntary) contributions to the occupational pension scheme and the Member State does not treat these as deductible from income although, under national law, future pension benefits payable in that Member State may be taxable even in the framework of limited tax liability?
> 3. Does Article 49 TFEU read in conjunction with Article 54 TFEU preclude the national rule described in Question 1 in the case where the taxpayer, independently of his admission as a lawyer and his contributions to an occupational pension scheme, makes contributions to a voluntary private pension scheme and the Member State does not treat these as deductible from income although, under national law, future pension benefits payable in that Member State may be taxable even in the framework of limited tax liability?'

**Consideration of the questions referred**

20. By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of compulsory and additional contributions paid into an occupational pension scheme or the amount of contributions paid into a private pension scheme, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law.

*Existence of a restriction under Article 49 TFEU*

21. Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. The Court has consistently held that, even though, according to their wording, the FEU Treaty provisions on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, to that effect, judgments of 13 April 2000, *Baars*, C-251/98, EU:C:2000:205, paragraph 28 and the case-law cited; of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraph 42; and of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 35 and the case-law cited).

22. It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on that freedom (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 36 and the case-law cited).

23. In the present case, in accordance with the national legislation at issue in the main proceedings, contributions to providential pension schemes, treated as special expenses in that legislation, may be deducted, within a certain limit, from the total income of a resident taxable person, subject to unlimited liability to income tax. Such a deduction allows such a taxable person to reduce the amount of taxable income and is therefore a tax advantage.

24. By contrast, non-resident taxable persons who are subject to limited tax liability cannot make such a deduction in Germany and therefore cannot benefit from that tax advantage.

25. Thus, since the tax treatment of non-residents is less advantageous, it is capable of rendering the establishment of a resident taxable person in a Member State other than the Federal Republic of Germany less attractive and, accordingly, amounts to a restriction in principle, which is prohibited by the Treaty provisions on the freedom of establishment.

26. It is clear from the Court's case-law that such a restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (judgment of 17 July 2014, *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 23). It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment of 20 December 2017, *Deister Holding and Juhler Holding*, C-504/16 and C-613/16, EU:C:2017:1009, paragraph 91 and the case-law cited).

*A comparable situation*

27. It is settled case-law that, in relation to direct taxes, the situations of residents and non-residents within a State are not, as a rule, comparable, since the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he is habitually resident (see, inter alia, judgments of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 37, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 25).

28. Thus, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory, given the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (see, inter alia, judgments of 31 March 2011, *Schröder*,

C-450/09, EU:C:2011:198, paragraph 38, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 26).

29. The position is different, however, where the non-resident receives no significant income in the State of his residence and obtains the greater part of his taxable income from an activity performed in the other Member State concerned (judgment of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 27), and consequently the Member State of residence is not in a position to grant him the benefits that result from taking into account his personal and family circumstances (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 36; of 16 October 2008, *Renneberg*, C-527/06, EU:C:2008:566, paragraph 61; and of 18 June 2015, *Kieback*, C-9/14, EU:C:2015:406, paragraph 25).

30. Moreover, the Court has also held, in relation to expenses directly linked to an activity which has generated taxable income in a Member State, that residents of that State and non-residents are in a comparable situation (see, inter alia, judgments of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 40 and the case-law cited, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 29).

31. In the present case, it follows from the observations of the referring court that, although he earned most of his income in Germany, the applicant in the main proceedings has, in Belgium, earned sufficient income for his personal and family circumstances to be taken into account there.

32. Accordingly, as regards the deduction of provident expenses in Germany, in a situation such as that at issue in the main proceedings, a non-resident, such as the applicant in the main proceedings, and a resident would be in a comparable situation only if, despite its characterisation under national law as special expenses, the provident expenses could be treated as expenses directly linked to an activity which has generated taxable income in Germany, within the meaning of the case-law set out in paragraph 30 above (see, by analogy, judgment of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 31).

33. In accordance with the Court's case-law, expenses occasioned by the activity which generated taxable income are directly linked to that activity and are accordingly necessary in order to carry it out (see, to that effect, judgments of 12 June 2003, *Gerritse*, C-234/01, EU:C:2003:340, paragraphs 9 and 27; of 15 February 2007, *Centro Equestre da Lezíria Grande*, C-345/04, EU:C:2007:96, paragraph 25; and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 30).

34. It must be observed that it is ultimately for the national court, which has sole jurisdiction to determine the facts in the case before it and to interpret the national legislation, to determine whether that is the case here. However, in preliminary ruling proceedings, the Court, which is called on to provide answers of use to the national court, may provide guidance based on the documents in the file and on the written and oral observations submitted to it, in order to enable the national court to give judgment (see, inter alia, judgments of 16 May 2013, *Alakor Gabonatermelö és Forgalmazó*, C-191/12, EU:C:2013:315, paragraph 31 and the case-law cited, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 32).

35. In the present case, as regards, in the first place, the compulsory contributions paid to the lawyers' provident institution, it follows from the order for reference that it was compulsory for the applicant in the main proceedings to be a member of that institution and he was required to pay contributions due to his registration with the Cologne Bar Association.

36. As is clear from the order for reference, that registration is compulsory in order for the applicant in the main proceedings to be able to practise, under the title of *Rechtsanwalt*, both in Germany, where he earns most of his professional income and where he has a limited liability to tax on that income, and, in accordance with Article 3 of Directive 98/5, in Belgium, the Member State where he is established and is resident.

37. The Court therefore finds that the expenses relating to the compulsory contributions paid to the lawyers' provident institution were made because registration with the bar association was necessary in order to practise the activity which generated the taxable income. Those expenses must be regarded as having been generated by that activity and therefore as being necessary in order to carry it out.

38. That finding cannot be called into question by the arguments on which the defendant in the main proceedings and the German Government relied in that regard.

39. First of all, the fact, relied on both by the defendant in the main proceedings and by the German Government, according to which, in accordance with the articles of association governing the lawyers' provident institution, there is the possibility of being exonerated, under certain conditions, from compulsory membership of that institution, which the applicant in the main proceedings did not seek to do, does not call into question the existence of a direct link between the expenses and the activity which generated the income.

40. First, the fact that the applicant in the main proceedings should have undertaken certain steps in order to avoid the payment of contributions to that institution, assuming that that was possible, which the applicant in the main proceedings contested before the Court, tends rather to show that the activity of a lawyer in question in the case in the main proceedings ordinarily generates that type of expense.

41. Second, the fact that the applicant in the main proceedings may have been able to avoid such expenses cannot alter their characterisation. The existence of a direct link, within the meaning of the case-law set out in paragraph 33 above, does not mean that an expense must be unavoidable. Thus, it was held that there was a direct link in respect of costs involved in obtaining tax advice for the purpose of preparing a tax return, since the duty to file such a tax return results from the fact of receiving income in the Member State in question (judgment of 6 July 2006, *Conijn*, C-346/04, EU:C:2006:445, paragraph 22).

42. The existence of a direct link, within the meaning of the case-law set out in paragraph 33 above, results from the fact that the expense is inextricably linked to the activity which gives rise to that income (judgments of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 43, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 36). As has been stated in paragraph 37 above, the payment of the contributions to the lawyers' provident institution is necessary on account of membership of the bar association, which is itself necessary in order to carry on the activity which generated the taxable income.

43. Next, the fact on which the defendant in the main proceedings and the German Government relied that the contributions at issue in the main proceedings are alleged not to be principally concerned with practising as a lawyer in Germany, but with the acquisition of rights for the purpose of ensuring means of subsistence in old-age, which — it is argued — proves that they relate to the personal and family circumstances of the taxable person, does not change their characterisation as expenses incurred which are directly related to the income at issue in the main proceedings in so far as, objectively speaking, the expenses are necessary in order to receive that income.

44. Lastly, the facts at issue in the main proceedings differ from those at issue in the case which gave rise to the judgment of 22 June 2017, *Bechtel* (C-20/16, EU:C:2017:488), and the findings made by the Court in that judgment as regards the refusal to grant a resident taxpayer the advantages arising from his or her personal and family circumstances being taken into account in the form of deductions of additional pension and health insurance contributions, paid in the Member State of employment, cannot be applied to the issue of taking into account, in the Member State where an activity is carried out, compulsory contributions to an occupational pension scheme. In the case which gave rise to the judgment cited, the issue of whether expenses in the form of pension contributions are directly linked to the activity which generated the taxable income did not need to be examined.

45. The Court therefore finds that the compulsory contributions to the lawyers' provident institution are directly linked to the activity which generated the taxable income in Germany.

46. It should, however, be noted, in that regard, as has been stated in paragraph 36 above, that registration with the Cologne Bar Association was necessary in order for the applicant in the main proceedings to be able to practise, as a *Rechtsanwalt*, not only in Germany, but also in Belgium. Furthermore, it is stated in the order for reference that the applicant in the main proceedings also practised in other countries without specifying whether they are other Member States or whether he practised as a *Rechtsanwalt*.

47. Accordingly, the compulsory contributions to the lawyers' provident institution are also directly linked to the activity which generated the taxable income in Belgium and, potentially, in other Member States.

48. As opposed to the income of a resident taxable person, subject in Germany to unlimited liability to tax, a non-resident taxable person is subject in that Member State only to a limited tax liability for the income generated in that Member State.

49. It follows that, as regards the compulsory contributions to the lawyers' provident institution, the situation of a non-resident taxable person, such as the applicant in the main proceedings, should be regarded as comparable to that of a resident taxable person as regards the share of the contributions paid which corresponds, proportionally, to the share that the taxable income in Germany represents in the total income generated by the activity in question.

50. Accordingly, a difference between the situation of resident taxable persons and that of non-resident taxable persons cannot legitimately be relied on in the case of a restriction, such as that at issue in the main proceedings, which follows from the refusal to deduct compulsory contributions to the lawyers' provident institution, in due proportion to the share of the income taxable in Germany.

51. As regards, in the second place, the voluntary contributions to the lawyers' provident institution, it is clear from the order for reference that those expenses are based on a free decision of the applicant in the main proceedings to increase his pension entitlement to the extent of the maximal amount authorised for contributions.

52. In that regard, although the expenses also result from membership of the bar association, they do not, contrary to the compulsory contributions, necessarily result from such membership. They are not therefore necessary in order to practise as a lawyer in Germany or to receive the taxable income in Germany.

53. Accordingly, as regards the additional contributions to the lawyers' provident institution, a non-resident taxable person, such as the applicant in the main proceedings, is not in a situation comparable to that of a resident taxable person.

54. That finding cannot be called into question by the argument that pensions paid by the lawyers' provident institution will, at a future time, be taxable in Germany. Aside from the uncertainty of such future taxation, suffice it to note that the case in the main proceedings concerns the taxation of income generated in Germany by the applicant in the main proceedings practising as a lawyer and that, in order for such expenses to be deducted in the framework of that taxation, they must be directly linked to the activity which generated that income. An uncertain link with other future income is not relevant for the purposes of ascertaining whether such a direct link exists.

55. In the third place, as regards the amount paid into a private pension scheme, the Courts finds, as did the referring court, that there is no direct link between those expenses and the activity of practising as a lawyer which generated the taxable income.

56. For reasons similar to those set out in paragraph 54 above, an uncertain link with other future income is not relevant in ascertaining whether an amount paid into a private pension scheme is directly linked to the income generated in Germany by the activity of the applicant in the main proceedings.

57. The Court therefore finds that, as regards the amount paid into a private pension scheme, a non-resident taxable person, such as the applicant in the main proceedings, is not in a situation comparable to that of a resident taxable person.

58. Accordingly, a difference between the situation of resident taxable persons and that of non-resident taxable persons may legitimately be relied on in the case of a restriction, such as that at issue in the main proceedings, which follows from the refusal to deduct additional contributions to the lawyers' provident institution and the amount paid into a private pension scheme.

*Justification*

59. It should also be ascertained whether the restriction on the freedom of establishment, resulting from the refusal to deduct compulsory contributions to the lawyers' provident institution, in due proportion to the share of the income taxable in Germany, can be justified by overriding reasons of general interest.

60. In that regard, the defendant in the main proceedings claims that the refusal to deduct the contributions is justified by reasons related to the risk that the contributions would also be deducted in Member States other than the Federal Republic of Germany, which would confer on the taxable person several unjustified advantages. According to the defendant in the main proceedings, the taxable person should be required to prove that those contributions did not lead to further tax advantages in the Member State of residence of the taxable person.

61. In relying without further explanation on that risk, the defendant in the main proceedings has not enabled the Court to assess the implications of that argument when it has not been claimed that that risk could not have been avoided through the application of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129), in force at the time (see, also, judgment of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 52).

62. Having regard to all the foregoing considerations, the answer to the questions referred must be that:

– Article 49 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of compulsory contributions paid into an occupational pension scheme in due proportion to the share of the income taxable in that Member State if directly linked to the activity which generated that income, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law, and

– Article 49 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of additional contributions paid into an occupational pension scheme or the amount of contributions paid into a private pension scheme, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law.

**Costs**

63. …

On those grounds,

the Court (Tenth Chamber)

hereby rules:

**Article 49 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of compulsory contributions paid into an occupational pension scheme in due proportion to the share of the income taxable in that Member State if directly linked to the activity which generated that income, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law.**

**Article 49 TFEU must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, under which a non-resident taxable person, subject, in that Member State, to income tax in the framework of limited tax liability, cannot deduct from the income tax basis of assessment the amount of additional contributions paid into an occupational pension scheme or the amount of contributions paid into a private pension scheme, whereas a resident taxable person, subject to income tax in the framework of unlimited tax liability, can deduct such contributions from the income tax basis of assessment to the extent laid down by national law.**

*In this Case, no Opinion of the Advocate General was issued.*

# EU Court of Justice, 23 January 2019*

## Case C-272/17

## *K. M. Zyla v Staatssecretaris van Financiën*

*Tenth Chamber:* *K. Lenaerts, President of the Court, acting as President of the Tenth Chamber, F. Biltgen and E. Levits (Rapporteur), Judges*

*Advocate General:* *M. Campos Sánchez-Bordona*

*Provisional text*

**Table of contents**



1. This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2. The request has been made in the context of a dispute between Ms K.M. Zyla and the Staatssecretaris van Financiën (Secretary of State for Finance, Netherlands) concerning the pro rata calculation of the social security component of the tax credit to which she is entitled.

**Legal context**

*EU law*

3. According to Article 3(1) of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1):

> 'This Regulation shall apply to all legislation concerning the following branches of social security:
> a. sickness benefits;
> b. maternity and equivalent paternity benefits;
> c. invalidity benefits;
> d. old-age benefits;
> ...'

4. Article 4 of that regulation provides:

> 'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

5. Article 5(a) of that regulation is worded as follows:

> 'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:
> a. where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State.'

* Language of the case: Dutch.

6. Title II of Regulation No 883/2004, entitled 'Determination of the legislation applicable', includes Article 11, which provides:

> '1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.
> ...
> 3. Subject to Articles 12 to 16:
> a. a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;
> ...
> e. any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, ...'

*Netherlands law*

7. Under Article 8.1 of the Wet op de inkomstenbelasting 2001 (2001 Law on Income Tax), income tax and social security contributions are collected by the tax authorities by means of a levy referred to in that article as a combined tax. The total amount of that 'combined tax' payable by a person is calculated by adding the amount of tax on income from employment and from other sources such as residential property and savings, to the amount of social security contributions. That article provides that the rate of the 'combined tax' is the sum of the tax rate for the first band of income and the rates of the applicable contributions. The law also provides that the amount of that 'combined tax' can be reduced; the 'combined tax credit' is defined under the same article as the sum of the amount of income tax credit and the amount of social security contributions credit.

8. In accordance with Article 8.10 of the 2001 Law on Income Tax, the 'general tax credit' applies to all taxpayers. In 2013 it amounted to EUR 2 001.

9. Social security contributions are governed by the Algemene Ouderdomswet (General Law on old-age pensions), the Algemene Nabestaandenwet (General Law on survivors' pensions) and the Algemene Wet Bijzondere Ziektekosten (General Law on exceptional medical expenses). Persons insured under those three insurance schemes are Netherlands residents and non-residents who are subject to income tax by reason of employment in that Member State.

10. Article 9 of the Wet financiering sociale verzekeringen (Law on the Financing of Social Security; 'the WFSV') provides:

> 'The social security contributions payable are those due after they have been reduced by the amount of the social security component of the tax credit applicable to persons liable to pay contributions.'

11. Article 12(1)(a) to (c) of the WFSV determines how the social security component of the 'general tax credit' is applied. Article 12(3) stipulates that all persons who have paid contributions throughout the calendar year are entitled to that credit.

12. Article 2.6a of the Regeling Wet financiering sociale verzekeringen (Decree implementing the WFSV; 'the implementing decree') provides:

> 'In the case of persons who are not liable to pay social security contributions for part of the calendar year (for reasons other than death), the tax credit referred to in Article 12(1)(a), (b) and (c) of the WFSV shall be calculated pro rata, that is, in proportion to the period during which contributions were actually paid in the calendar year.'

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

13. Ms Zyla, who is of Polish nationality, worked in the Netherlands from 1 January 2013 to 21 June 2013. During that time she was insured under the Netherlands general social security system and was liable to pay the corresponding social security contributions. Ms Zyla then returned to Poland, where she took up residence but performed no paid work in 2013.

14. Ms Zyla received an income of EUR 9 401 for the work she performed in the Netherlands in 2013. A wage levy of EUR 1 399 was withheld at source from that amount. Ms Zyla was also liable in the amount of EUR 2 928 in respect of social security contributions. When her tax assessment was made for that year, as a person resident in the Netherlands she benefited, under national law, from a general tax credit on both income tax and social security contributions. An amount of EUR 1 254 in general tax credit and an amount of EUR 840

in employed person's tax credit was therefore deducted from the income tax and social security contributions due. The referring court notes that, since Ms Zyla was no longer liable to pay social security contributions from 22 June 2013, the tax authorities, in accordance with Article 2.6a of the implementing decree, reduced the contributions component of the general tax credit pro rata in line with Ms Zyla's period of compulsory contribution in 2013.

15. Ms Zyla brought an action before the rechtbank Zeeland-West-Brabant (District Court, Zeeland-West-Brabant, Netherlands) against that tax assessment, claiming that Article 2.6a of the implementing decree leads to a difference in treatment between residents and non-residents and constitutes a barrier to the free movement of workers guaranteed under Article 45 TFEU. After that action had been dismissed, Ms Zyla appealed against the judgment to the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands). The appeal court also rejected the Ms Zyla's claims on the ground that, since she had been employed in the Netherlands, within the meaning of Article 45 TFEU, for only a short period of time, she could not claim the full amount of the social security component of the general tax credit. The appeal court also noted that the national legislation which provides for this limitation on the amount of the general tax credit does not establish any difference in treatment, since the amount of the tax credit depends on whether or not a person is insured under the national social security system and the length of the contribution period.

16. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), before which Ms Zyla has brought an appeal in cassation, is uncertain whether the partial credit applied with regard to Ms Zyla complies with EU law and particularly with the case-law of the Court of Justice.

17. The referring court takes the view that Article 45 TFEU could be interpreted as not precluding the application of a credit on social security contributions in proportion to the taxpayer's period of insurance, but is nevertheless uncertain whether a worker who earned all of his annual income in a Member State in which he does not reside or no longer resides should be entitled to the full social security component of the tax credit, even though that worker was not insured under the Member State's social security system during the whole year.

18. In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> 'Must Article 45 TFEU be interpreted as precluding legislation of a Member State under which a worker who, pursuant to [Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and to members of their families moving within the Community, as amended by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),] or Regulation No 883/2004, is insured under the social security system of the Member State concerned for part of a calendar year, and who, when the contributions for that insurance are levied, is entitled to only a portion of the contributions component of the general tax credit which is determined on a time-proportionate basis in relation to the period of insurance, if that worker, for the remainder of the calendar year, was not insured under the social security system of that Member State, and was resident in another Member State for the remainder of the calendar year and earned (virtually) his entire annual income in the first-mentioned Member State?'

**Consideration of the question referred**

19. By its question, the referring court asks, in essence, whether Article 45 TFEU should be interpreted as precluding legislation of a Member State which, in order to establish the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is proportionate to the period during which the worker was insured under the social security system of that Member State, thus excluding from that annual credit the fraction proportionate to any period during which that worker was not insured under that social security system and lived in another Member State where he did not engage in any professional activity.

20. It is settled case-law that an EU citizen who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and been employed in a Member State other than that of his origin comes within the scope of Article 45 TFEU (judgment of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 18 and the case-law cited).

21. It follows that the situation of Ms Zyla, a Polish national who moved to the Netherlands to work as an employed person from 1 January 2013 to 21 June 2013, comes within the scope of Article 45 TFEU.

22. It is also clear from the Court's case-law that all of the provisions of the FEU Treaty relating to the freedom of movement of persons are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the European Union, and preclude measures which might place them at a disadvantage when they wish to pursue an economic activity in another Member State (judgment of 7 March 2018, *DW*, C-651/16, EU:C:2018:162, paragraph 21 and the case-law cited).

23. Accordingly, provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (judgments of 16 February 2006, *Rockler*, C-137/04, EU:C:2006:106, paragraph 18, and of 16 February 2006, *Öberg*, C-185/04, EU:C:2006:107, paragraph 15 and the case-law cited).

24. In that regard it must be borne in mind, as the Netherlands Government noted in its written observations, that the principle of equal treatment enshrined in Article 45 TFEU prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact lead to the same result. Unless objectively justified and proportionate to the aim pursued, a provision of national law — even if it applies regardless of nationality — must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the migrant worker at a particular disadvantage (judgment of 5 December 2013, *Zentralbetriebsrat der gemeinnützigen Salzburger Landeskliniken*, C-514/12, EU:C:2013:799, paragraphs 25 and 26).

25. In the present case, Article 2.6a of the implementing decree affects in the same way all persons not liable to pay social security contributions during part of the calendar year, without making a distinction on the basis of their nationality. As the Advocate General noted in point 47 of his Opinion, that provision does not, therefore, directly discriminate on the basis of nationality.

26. However, in order for a measure to be treated as being indirectly discriminatory, it is not necessary for it to have the effect of placing at an advantage all the nationals of the State in question or of placing at a disadvantage only nationals of other Member States to the exclusion of nationals of the State in question (see, to that effect, judgment of 18 December 2014, *Larcher*, C-523/13, EU:C:2014:2458, paragraph 32 and the case-law cited). In addition, it follows from the case-law cited in paragraphs 22 and 23 above that even non-discriminatory obstacles to the freedom of movement for workers are, in principle, prohibited by Article 45 TFEU.

27. In the present case, in order to determine whether Article 2.6a of that decree is indirectly discriminatory or an obstacle to the freedom of movement for workers, it is necessary to establish, first, whether that provision relates to tax or social security, since the applicable EU law rules differ in each case.

28. In that regard, it must be noted, as has been stated in paragraphs 7 and 14 above, that the social security component of the tax credit is set out in legislation on the establishment of income tax which combines both the system of collection of personal income tax from those liable to pay it and that of the collection of their social security contributions.

29. However, even if taxes and social security contributions are levied jointly, tax revenues benefit government resources generally, whereas the social security contributions levied provide the funds for the specific social security benefits in respect of which they are levied. The referring court explains that, in the tax credit system, the tax component of the tax credit is distinguished from the social security contributions component of the tax credit. It adds that, under Article 12(1) of the WFSV, an entitlement to the contributions component of the tax credit exists only if the person concerned is liable to pay social security contributions.

30. Consequently, the legislation at issue in the main proceedings concerns levies allocated specifically and directly to the funding of social security. That legislation therefore has a direct and sufficiently relevant link to the laws which govern the branches of social security listed in Article 3 of Regulation No 883/2004 and thus comes within the scope of that regulation (see, to that effect, judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 27 and the case-law cited). The dispute in the main proceedings thus concerns a possible restriction on the freedom of movement for workers as a result of a social security measure which forms an integral part of the national social security system.

31. In those circumstances, the principles derived from the case-law concerning the conditions governing liability for payment of tax on income from employment, in particular from the judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31) and of 16 October 2008, *Renneberg* (C-527/06, EU:C:2008:566), relied on by Ms Zyla in her observations, are not applicable in a situation such as that in the main proceedings.

32. That assessment is not called into question by the fact, noted by the referring court, that a compensation mechanism allows part of the social security contribution credit to be set off against income tax, reducing the latter where the amount of social security contributions is less than the reduction applicable to those contributions.

33. The Court has previously held that persons insured under the Netherlands social security system are entitled only in exceptional circumstances to tax credits in respect of social security, since it is only in a situation where an insured person cannot set off reductions in contributions against contributions due that that person can claim such tax credits (see, to that effect, judgment of 8 September 2005, *Blanckaert*, C-512/03, EU:C:2005:516, paragraph 47). It follows that the existence of the compensation mechanism identified in paragraph 32 above does not affect the nature of the social security credit provided for in Netherlands law, which, as the Advocate General noted in point 56 of his Opinion, is specifically intended to offset the economic effort which social security contributions represent for workers.

34. That being so, it is clear from settled case-law that, although, in principle, Member States retain the power to organise their social security schemes, they must nonetheless, when exercising that power, observe EU law and, in particular, the provisions of the FEU Treaty on the free movement of workers and the right of establishment (see, inter alia, judgment of 13 July 2016, *Pöpperl*, C-187/15, EU:C:2016:550, paragraph 22 and the case-law cited).

35. As the national legislation at issue in the main proceedings forms part of the Netherlands social security system, it is necessary to determine, second, whether, as such, it is indirectly discriminatory or an obstacle to the free movement of workers.

36. In that regard, as was explained in paragraph 30 above, Ms Zyla's situation comes within the scope of the social security coordination rules resulting from Regulation No 883/2004.

37. It must be noted in this regard that, in order to ensure the free movement of employed and self-employed persons within the European Union, while upholding the principle of equal treatment of those persons under the various measures of national legislation, Regulation No 1408/71, and then Regulation No 883/2004, have established a system of coordination concerning, inter alia, the determination of the legislation applicable to employed persons who make use, under various circumstances, of their right to freedom of movement (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 34 and the case-law cited).

38. The completeness of that system of conflict rules has the effect of divesting the legislature of each Member State of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (judgment of 26 February 2015, *de Ruyter*, C-623/13, EU:C:2015:123, paragraph 35 and the case-law cited).

39. In the case in the main proceedings, in accordance with Article 11(1) and (3)(a) of Regulation No 883/2004, Ms Zyla, while she worked as an employed person in the Netherlands, was subject to the legislation of that Member State and insured under the Netherlands social security system. Because of this insurance, Ms Zyla was able to benefit, during that period, from the social security component of the tax credit. However, as Ms Zyla ceased to be insured under the Netherlands social security system and, accordingly, was no longer liable to pay contributions after she left the Netherlands and returned to her Member State of origin, she did not, in application of Article 2.6a of the implementing decree, benefit from the whole amount of the social security component of the tax credit.

40. Therefore, it is only as regards the second part of 2013 that the legislation at issue in the main proceedings led to a difference in treatment between Ms Zyla and a person insured under the Netherlands social security system for the whole of that year. Such a person, even if, like Ms Zyla, he no longer received income during that second part of the year, was entitled to the whole tax credit relating to social security contributions, set off as a matter of priority against his social security contributions or, alternatively, against his taxes. This implies that, with equivalent income, the application in its entirety of the social security component of the tax credit to a person insured during the whole year under the Netherlands social security system leads to a social security or even tax obligation that is less than that borne by a person who ceases to be insured under that social security system during the same year.

41. However, in the light of the rule, set out in Article 11(1) of Regulation No 883/2004, that the social security legislation of a single Member State is to apply, and the rule, set out in paragraph 3(e) of that article, that a person who does not pursue an activity as an employed or self-employed person is subject only to the social

security legislation of the Member State of residence, a person in Ms Zyla's situation could no longer belong to the Netherlands social security system after ceasing to work in that Member State and ceasing to reside there.

42. It follows that, as the Advocate General correctly noted in point 63 of his Opinion, in the light of the nature of the legislation at issue, an objective difference must be found to exist between the situation of a person who, like Ms Zyla, ceased to be insured under the Netherlands social security system during the year, and a worker who remained insured under that social security system throughout the whole of that same year.

43. Furthermore, the Court has held that it falls within the internal process of a national social security system to allow entitlement to reductions in contributions only to persons liable to pay them, that is to say, persons insured under that system (judgment of 8 September 2005, *Blanckaert*, C-512/03, EU:C:2005:516, paragraph 49).

44. Moreover, as has been noted in paragraph 22 above, the provisions of the Treaty on the freedom of movement of persons are intended to facilitate the pursuit by EU citizens of occupational activities of all kinds throughout the European Union, and preclude measures that might place EU citizens at a disadvantage when they wish to pursue an activity in a Member State other than their Member State of origin. In that context, nationals of the Member States have in particular the right, which they derive directly from the FEU Treaty, to leave their Member State of origin to enter the territory of another Member State and reside there in order to pursue an activity there (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 33 and the case-law cited).

45. However, primary EU law cannot guarantee to a worker that moving to a Member State other than his Member State of origin will be neutral in terms of social security, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned in that regard (judgment of 18 July 2017, *Erzberger*, C-566/15, EU:C:2017:562, paragraph 34 and the case-law cited). EU law guarantees only that workers active in a Member State other than their Member State of origin are subject to the same conditions as workers of that other State.

46. In the light of the foregoing, Article 2.6a of the implementing decree cannot be regarded either as a provision that is indirectly discriminatory or as an obstacle to the free movement of workers, prohibited by Article 45 TFEU.

47. Lastly, contrary to the European Commission's submissions, that assessment is not called into question by the judgment of 26 January 1999, *Terhoeve* (C-18/95, EU:C:1999:22), or the judgment of 8 May 1990, *Biehl* (C-175/88, EU:C:1990:186).

48. The first of those two judgments concerned the social security contributions payable by a worker who was merely seconded from his Member State of origin and who, consequently, in application of the coordination rules provided for in Regulation No 1408/71, remained during the whole of the period at issue insured under the social security system of that Member State despite his secondment to another Member State. Such a situation is fundamentally different from a situation in which, as in the present case, a worker ceases to be insured under the social security system of a Member State after having ended his professional activity there and moved his residence to another Member State.

49. Regarding the second judgment, suffice it to note that the difference in treatment at issue in that case, unlike that at issue in the present case, was unrelated to the national social security system and, accordingly, was not covered by the system of coordination of the rules concerning social security legislation provided for by Regulation No 1408/71, replaced since then by Regulation No 883/2004.

50. In those circumstances, the answer to the question referred is that Article 45 TFEU must be interpreted as not precluding legislation of a Member State which, with a view to establishing the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is to be proportionate to the period during which that worker was insured under the social security system of that Member State, thus excluding from that annual credit a fraction proportionate to the period during which that worker was not insured under that system and lived in another Member State where he did not engage in professional activity.

**Costs**

51. …

On those grounds,

the Court (Tenth Chamber)

hereby rules:

**Article 45 TFEU must be interpreted as not precluding legislation of a Member State which, with a view to establishing the amount of social security contributions payable by a worker, provides that the social security component of the tax credit to which a worker is entitled for a calendar year is to be proportionate to the period during which that worker was insured under the social security system of that Member State, thus excluding from that annual credit a fraction proportionate to the period during which that worker was not insured under that social security system and lived in another Member State where he did not engage in professional activity.**

# EU Court of Justice, 26 February 2019*

## Joined Cases C-115/16, C-118/6, C-119/16 and C-299/16

## *N Luxembourg 1 (C-115/16), X Denmark A/S (C-118/16), C Danmark I (C-119/16), Z Denmark ApS (C-299/16) v Skatteministeriet*

*Grand Chamber:* *K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilesic, L. Bay Larsen, M. Safjan, C. G. Fernlund, C. Vajda and S. Rodin, Judges*

*Advocate General:* *J. Kokott*

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1. These requests for a preliminary ruling concern the interpretation of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49) and of Articles 49, 54 and 63 TFEU.

2. The requests have been made in proceedings brought by N Luxembourg 1, X Denmark A/S, C Danmark I and Z Denmark ApS against the Skatteministeriet (Ministry of Taxation, Denmark) relating to the obligation imposed on those companies to pay withholding tax by reason of the payment by them of interest to non-resident companies regarded by the tax authority as not being the beneficial owners of that interest and, accordingly, as incapable of being entitled to the exemption from any taxes that is provided for by Directive 2003/49.

* Language of the case: Danish.

**Legal context**

OECD Model Tax Convention

3. On 30 July 1963 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning the avoidance of double taxation and called on the governments of the member countries, when concluding or revising bilateral conventions, to conform to a 'model convention for the avoidance of double taxation with respect to taxes on income and capital' that had been drawn up by the Fiscal Committee of the OECD and was annexed to that recommendation ('the OECD Model Tax Convention'). That model tax convention is re-examined and amended regularly. It is the subject of commentaries approved by the OECD Council.

4. Paragraphs 7 to 10 of the commentary on Article 1 of the OECD Model Tax Convention as amended in 1977 ('the OECD 1977 Model Tax Convention') — a provision which states that this convention is to apply to persons who are residents of one or both of the Contracting States — draw attention to the fact that the convention could be used improperly, with the objective of tax avoidance, by means of artificial legal constructions. The text of those paragraphs of the commentary underlines the importance of the concept of 'beneficial owner' introduced, in particular, in Article 10 (taxation of dividends) and Article 11 (taxation of interest) of the model convention and the need to combat tax evasion.

5. Article 11(1) and (2) of the OECD 1977 Model Tax Convention is worded as follows:

> '1. Interest arising in a Contracting State and paid to a resident of the other Contracting State may be taxed in that other State.
> 2. However, such interest may also be taxed in the Contracting State in which it arises and according to the laws of that State, but if the recipient is the beneficial owner of the interest the tax so charged shall not exceed 10 per cent of the gross amount of the interest. The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of this limitation.'

6. When the commentaries were revised in 2003, comments were added concerning 'conduit companies', that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 8 of the commentary on Article 11, in the revised version of 2003, states, in particular, that 'the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance'. Paragraph 8.1 of the revised version of 2003 states that 'it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned' and that 'a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties'.

7. A further revised version of the commentaries in 2014 provided explanation of the concepts of 'beneficial owner' and 'conduit company'. Paragraph 10.3 of this version of the commentaries states that 'there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches'.

Directive 2003/49

8. Recitals 1 to 6 of Directive 2003/49 are worded as follows:

> '1. In a Single Market having the characteristics of a domestic market, transactions between companies of different Member States should not be subject to less favourable tax conditions than those applicable to the same transactions carried out between companies of the same Member State.
> 2. This requirement is not currently met as regards interest and royalty payments; national tax laws coupled, where applicable, with bilateral or multilateral agreements may not always ensure that double taxation is eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned.
> 3. It is necessary to ensure that interest and royalty payments are subject to tax once in a Member State.

4. The abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies.
5. The arrangements should only apply to the amount, if any, of interest or royalty payments which would have been agreed by the payer and the beneficial owner in the absence of a special relationship.
6. It is moreover necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.'

9. Article 1 of Directive 2003/49 provides:

'1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.
…
4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.
5. A permanent establishment shall be treated as the beneficial owner of interest or royalties:
…
b. if the interest or royalty payments represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) or in the case of Belgium to the "impôt des non-résidents/belasting der niet-verblijfhouders" or in the case of Spain to the "Impuesto sobre la Renta de no Residentes" or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes.
…
7. This Article shall apply only if the company which is the payer, or the company whose permanent establishment is treated as the payer, of interest or royalties is an associated company of the company which is the beneficial owner, or whose permanent establishment is treated as the beneficial owner, of that interest or those royalties.
…
11. The source State may require that fulfilment of the requirements laid down in this Article and in Article 3 be substantiated at the time of payment of the interest or royalties by an attestation. If fulfilment of the requirements laid down in this Article has not been attested at the time of payment, the Member State shall be free to require deduction of tax at source.
12. The source State may make it a condition for exemption under this Directive that it has issued a decision currently granting the exemption following an attestation certifying the fulfilment of the requirements laid down in this Article and in Article 3. A decision on exemption shall be given within three months at most after the attestation and such supporting information as the source State may reasonably ask for have been provided, and shall be valid for a period of at least one year after it has been issued.
13. For the purposes of paragraphs 11 and 12, the attestation to be given shall, in respect of each contract for the payment, be valid for at least one year but for not more than three years from the date of issue and shall contain the following information:
…
b. beneficial ownership by the receiving company in accordance with paragraph 4 or the existence of conditions in accordance with paragraph 5 where a permanent establishment is the recipient of the payment; …'

10. The term used in Article 1(1) of Directive 2003/49 is, depending on the language version, the 'beneficiary'/'recipient' (in Bulgarian (*бенефициерът*), French (*bénéficiaire*), Latvian (*beneficiārs*) and Romanian (*beneficiarul*)), the 'beneficial owner'/'actual beneficiary' (in Spanish (*beneficiario efectivo*), Czech (*skutečný vlastník*), Estonian (*tulusaaja*), English (*beneficial owner*), Italian (*beneficiario effettivo*), Lithuanian (*tikrasis savininkas*), Maltese (*sid benefiċjarju*), Portuguese (*beneficiário efectivo*) and Finnish (*tosiasiallinen edunsaaja*)), the 'owner'/'person entitled to use' (in German (*der Nutzungsberechtigte*), Danish (*retmæssige ejer*), Greek (*ο δικαιούχος*), Croat (*ovlašteni korisnik*), Hungarian (*haszonhúzó*), Polish (*właściciel*), Slovak (*vlastník požitkov*),

Slovenian (*upravičeni lastnik*) and Swedish (*den som har rätt till*)), or the 'person entitled in the end' (in Dutch (*de uiteindelijk gerechtigde*)).

11. Article 2 of Directive 2003/49 provides:

> 'For the purposes of this Directive:
> a. the term "interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; …
> …'

12. Article 3 of Directive 2003/49 provides:

> 'For the purposes of this Directive:
> a. the term "company of a Member State" means any company:
> i. taking one of the forms listed in the Annex hereto; and
> ii. which in accordance with the tax laws of a Member State is considered to be resident in that Member State and is not, within the meaning of a Double Taxation Convention on Income concluded with a third State, considered to be resident for tax purposes outside the Community; and
> iii. which is subject to one of the following taxes without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of this Directive in addition to, or in place of, those existing taxes:
> …
> – selskabsskat in Denmark,
> …
> – impôt sur le revenu des collectivités in Luxembourg,
> …
> b. a company is an "associated company" of a second company if, at least:
> i. the first company has a direct minimum holding of 25% in the capital of the second company, or
> ii. the second company has a direct minimum holding of 25% in the capital of the first company, or
> iii. a third company has a direct minimum holding of 25% both in the capital of the first company and in the capital of the second company.
> Holdings must involve only companies resident in Community territory.
> …'

13. The companies covered by Article 3(a) of Directive 2003/49, listed in the annex thereto, include 'companies under Luxembourg law known as: "société anonyme, société en commandite par actions and société à responsabilité limitée"'.

14. Article 4 of Directive 2003/49, headed 'Exclusion of payments as interest or royalties', states in paragraph 1:

> 'The source State shall not be obliged to ensure the benefits of this Directive in the following cases:
> a. payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;
> b. payments from debt-claims which carry a right to participate in the debtor's profits;
> …'

15. Article 5 of Directive 2003/49, headed 'Fraud and abuse', is worded as follows:

> '1. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.
> 2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.'

*Double taxation conventions*

16. Article 11(1) of the Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the avoidance of double taxation and the establishment of rules relating to mutual administrative assistance with respect to taxes on income and on capital, signed in Luxembourg

on 17 November 1980 ('the Luxembourg-Denmark Tax Convention'), allocates the power to tax interest between those two Member States and is worded as follows:

> 'Interest arising in a Contracting State and paid to a person resident in the other Contracting State can only be taxed in that other State, if that person is the beneficial owner of the interest.'

17. Article 11(1) of the Convention between the Nordic Countries for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed in Helsinki on 23 September 1996, in the version relevant to the main proceedings ('the Nordic Tax Convention'), has identical wording.

18. It is apparent from those conventions that the source State, that is to say, in the main proceedings, the Kingdom of Denmark, may tax interest paid to a person resident in another Member State if that person is not the beneficial owner of the interest. Neither convention, however, defines the concept of 'beneficial owner'.

*Danish law*

Taxation of interest

19. Paragraph 2(1)(d) of the selskabsskattelov (Law on corporation tax) provides:

> '… companies, associations and so forth within the meaning of Paragraph 1(1) having their seat abroad are liable for tax under this Law inasmuch as they
> …
> d. receive interest from sources in Denmark in relation to a liability which a [company registered in Denmark] or a [permanent establishment of a foreign company] has towards legal entities which are listed in Paragraph 3 B of the Law on tax control) (controlled liability). … The tax liability does not apply to interest which is not taxed or is subject to reduced taxation under Directive [2003/49] or a double taxation convention with the Faroe Islands, Greenland or the State in which the recipient company and so forth has its seat. However, that applies only if the paying company and the recipient company are associated within the meaning of that directive for a continuous period of at least one year, which must include the payment date. ...'

Withholding tax

20. If, by virtue of Paragraph 2(1)(d) of the Law on corporation tax, there is a limited tax liability in respect of interest income arising in Denmark, the Danish payer of the interest has to withhold the tax at source pursuant to Paragraph 65 D of the kildeskattelov (Law on tax at source). The interest payer is liable to the State for payment of those sums of withholding tax.

21. As is apparent, inter alia, from the order for reference in Case C-115/16, for 2006 to 2008 the rate of tax on interest received by a company resident in a Member State other than the Kingdom of Denmark was higher than the rate of tax paid by a Danish company. The Ministry of Taxation acknowledged, however, in the main action that that difference in rate infringed the provisions of the EC Treaty relating to freedom of establishment. It conceded that the amount of withholding tax owed in respect of those years should be reduced.

22. The tax withheld at source falls due when the interest is paid, whereas the chargeability of the tax payable by a Danish company on its projected income is governed by more flexible rules. Furthermore, in the event of late payment of the tax withheld at source, the rate of default interest is higher than the rate payable in the event of late payment of corporation tax by a Danish company.

23. Pursuant to Paragraph 65 C(1) of the Law on tax at source, a person paying royalties whose source is in Denmark is in principle required to withhold tax at source, whether or not the payee is resident in Denmark.

Law applicable to fraud and abuse

24. Until the adoption of Law No 540 of 29 April 2015, no general statutory rule to combat abuse existed in Denmark. However, case-law developed the 'reality' principle, under which taxation must be determined on the basis of a specific assessment of the facts. This means in particular that artificial tax arrangements may, depending on the circumstances, be set aside so that taxation takes account of reality, under the principle of substance over form.

25. It is clear from the orders for reference that, in each of the main actions, the parties are in agreement that the reality principle is not sufficient to justify setting aside the arrangements at issue in those actions.

26. As is apparent from the orders for reference, case-law has also developed the 'rightful income recipient' (*rette indkomstmodtager*) principle. This principle is based on the fundamental provisions relating to taxation of income, set out in Paragraph 4 of the statsskatteloven (Law on State tax), which have the effect that the tax authorities are not obliged to accept an artificial separation between the income-generating undertaking or activity and the allocation of the income deriving therefrom. This principle is therefore intended to determine the person who - regardless of formal appearances - is the real recipient of certain income and thus the person who is liable for tax on it.

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

27. In the four main actions, a Luxembourg company which has assumed the obligations of a Danish company (Case C-115/16) and three Danish companies (Cases C-118/16, C-119/16 and C-299/16) contest the decisions of SKAT (tax authority, Denmark) ('SKAT') that refused to grant them the exemption from corporation tax provided for by Directive 2003/49 in respect of interest paid to entities established in another Member State, on the ground that those entities were not the beneficial owners of the interest and were mere conduit companies.

28. In order to enjoy the tax advantages provided for by Directive 2003/49, the entity that receives the interest must meet the conditions that the directive lays down. However, as the Danish Government states in its observations, groups of companies not satisfying those conditions may in some cases create, between the company which pays the interest and the entity which is intended actually to have the use of it, one or more artificial companies meeting the formal conditions of the directive. The referring courts' questions concerning abuse of rights and the concept of 'beneficial owner' relate to such financial constructions.

29. The facts as set out by the referring courts and illustrated, in the orders for reference, by a number of diagrams of the structure of the company groups concerned are particularly complex and detailed. Only the matters necessary for the answers to be given to the questions referred for a preliminary ruling will be noted.

1. Case C-115/16, N Luxembourg 1

30. According to the order for reference, five private equity funds, none of which is a company resident in a Member State or in a country with which the Kingdom of Denmark has signed a double taxation convention, established in 2005 a group consisting of a number of companies with the aim of purchasing T Danmark, a large Danish service provider.

31. In its observations, the Danish Government stated that Case C-115/16 concerns the same group of companies as the group at issue in Case C-116/16, which relates to the taxation of dividends and is decided by today's judgment in *T Danmark and Y Denmark Aps* (C-116/16 and C-117/16).

32. As explained by the referring court, the private equity funds set up companies in Luxembourg, inter alia A Luxembourg Holding, and companies in Denmark, including N Danmark 1. The acquisition of T Danmark was financed, inter alia, by loans granted by the private equity funds to N Danmark 1 and by increases in that company's capital. In 2009 N Danmark 1 merged with another Danish company, which was dissolved in 2010 when a cross-border merger with C Luxembourg took place. C Luxembourg subsequently changed its name and was liquidated with transfer of the claim at issue to N Luxembourg 1, which is pursuing the main proceedings in N Danmark 1's place.

33. One of the Danish companies set up by the private equity funds, N Danmark 5, acquired T Danmark. In the spring of 2006, N Danmark 5 transferred its shares in T Danmark to C Luxembourg, which thus became the parent company of T Danmark.

34. On 27 April 2006, the debt securities relating to the loans granted by the private equity funds were transferred by those funds to A Luxembourg Holding, which itself transferred them on the same day to C Luxembourg, T Danmark's parent company.

35. From that date, C Luxembourg was indebted to A Luxembourg Holding in an amount equal to that payable by N Danmark 1 to C Luxembourg. According to the referring court, interest at a rate of 10% was payable on the debt of N Danmark 1, whereas the debts of C Luxembourg and A Luxembourg Holding were at a rate of 9.96875%. On 9 July 2008, the yield on the loans between C Luxembourg and A Luxembourg Holding increased to 10%. On the other hand, the yield on the loans between A Luxembourg Holding and the private equity funds was kept at 9.96875%.

36. In 2006, C Luxembourg bore expenses in respect of 'other external charges' of EUR 8 701, including EUR 7 810 for salaries. In addition, that company bore expenses in respect of 'other operating charges' of EUR 209 349.

37. In the same year, A Luxembourg Holding likewise bore expenses in respect of 'other external charges' of EUR 3 337, including EUR 2 996 for salaries. In addition, that company bore expenses in respect of 'other operating charges' of EUR 127 031.

38. According to the order for reference, C Luxembourg's annual accounts for 2007 and 2008 indicate that it had on average two part-time employees during those years. A Luxembourg Holding's annual accounts for the same period reveal that it had on average one part-time employee during those years.

39. Apart from the holding of stakes in N Danmark 1, C Luxembourg's activity is stated to be limited to the holding of debt issued by that company.

40. C Luxembourg and A Luxembourg Holding are both registered at the same address. That address is also used by companies that have direct links with one of the investment funds.

41. The referring court states that in 2011 SKAT issued a notice of assessment in respect of interest for the years 2006 to 2008, in an amount totalling 925 764 961 Danish krone (DKK) (roughly EUR 124 million). SKAT took the view that C Luxembourg and A Luxembourg Holding were not the beneficial owners of the interest, but operated as mere conduits, and that the interest was transferred from the Danish part of the group to the private equity funds through those two Luxembourg companies. SKAT drew the conclusion that the applicant in the main proceedings was subject to the obligation to withhold at source tax on the interest paid and recorded and that it was liable for payment of the withholding tax that had not been levied.

42. The notice of assessment was contested by the applicant in the main proceedings before the Danish courts.

43. N Luxembourg 1 contests the fact that the situation in the main proceedings represents fraud or abuse. It contends that, in any event, even where there is fraud or abuse, the benefits of Directive 2003/49 can be withdrawn, under Article 5(1) thereof, only if there is a corresponding legal basis in national law. However, there is, it submits, no such basis in Danish law.

44. Should C Luxembourg not be regarded as being the beneficial owner of the interest, the applicant in the main proceedings contends that the Danish rules concerning the withholding of tax at source and its levying, and the liability relating thereto, infringe the freedom of establishment guaranteed in EU law and, in the alternative, the free movement of capital, in particular for the following reasons: (i) tax withheld at source is paid earlier than similar corporation tax; (ii) default interest on tax withheld at source is much higher than default interest in respect of corporation tax; (iii) the debtor must withhold the tax at source; and (iv) the debtor must assume liability for the tax withheld deducted at source in accordance with the Law on tax at source.

45. In that context, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. a. Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State, is the "beneficial owner" of that interest for the purposes of the directive?
>
> b. Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?
>
> c. If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?
>
> d. If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a "beneficial owner" for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be "the beneficial owners" of the interest in question, and — if so — is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

e. Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal ("rolled up"), if the interest recipient has subsequently made an intra-group transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

f. What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

2. a. Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

b. If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

3. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

4. Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?

5. Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court of Justice is requested to take the answer to Question 6 into account in its answer to Question 7.'

2. Case C-118/16, X Denmark

46. It is apparent from the order for reference that the X Group is a worldwide group of businesses, of which the applicant in the main proceedings forms part. That group was purchased by private equity funds in 2005, the year in which the applicant in the main proceedings had been founded.

47. Those funds are direct shareholders of the group's ultimate parent, namely X SCA, SICAR, established in Luxembourg, which is operated as a *société en commandite par actions* (SCA) (limited partnership with share capital) and has the status of *société d'investissement en capital à risque* (SICAR) (risk capital investment company).

48. The Danish tax authority took the view that X SCA, SICAR was a transparent entity under Danish law, that is to say, that it was not a separate taxpayer for the purposes of Danish law.

49. According to the order for reference, the portfolio of X SCA, SICAR consisted of a 100% holding in the capital of X Sweden Holding AB established in Sweden and a loan granted to that company. Apart from that holding and loan, X SCA, SICAR did not engage in any activity.

50. The sole activity of X Sweden Holding is being the holding company of X Sweden, established in Sweden, which is the parent company of X Denmark, the applicant in the main proceedings. On 27 December 2006 X Sweden Holding took out from its own parent company, X SCA, SICAR, the loan referred to in the preceding paragraph, in the sum of EUR 498 500 000. When calculating its taxable income, X Sweden Holding deducted the interest paid to X SCA, SICAR.

51. X Sweden is 97.5% owned by X Sweden Holding and 2.5% owned by the X Group's management. During the period at issue in the main proceedings, X Sweden had the same board as X Sweden Holding and did not own shares in companies other than X Denmark.

52. The referring court states that at the beginning of 2007 X Sweden took on the activities of another company – X AB, established in Sweden – which consisted in product registration with the authorities and various administrative tasks relating to clinical trials. X Sweden then had around 10 employees and leased a part of the offices at X AB's headquarters, where the staff covered by the transfer continued to work.

53. According to the order for reference, it is apparent from the annual reports in respect of the years 2007 to 2009 that X Sweden had two income items, namely 'Interest income and similar profit items' and 'Other income'. X Sweden did not receive interest income other than interest received from X Denmark pursuant to a loan for EUR 501 million taken out, like the loan referred to in paragraph 50 above, on 27 December 2006. In 2007, 2008 and 2009, the interest constituted 98.1%, 97.8% and 98% respectively of X Sweden's overall income, other income amounting to 1.9%, 2.2% and 2%. The interest recorded in respect of the loan to X Denmark was taken into account when calculating X Sweden's taxable income for those years. In those years, X Sweden – in accordance with the specific rules applicable in Sweden in respect of adjusting earnings for tax purposes within a group, as laid down in Chapter 35 of the Law on income tax – made transfers to its parent company, X Sweden Holding, amounting to EUR 60 468 000, EUR 75 621 000 and EUR 60 353 294 respectively. That intragroup transfer gave X Sweden a right of deduction, whereas the sums transferred were taxable in the hands of X Sweden Holding.

54. X Denmark, when calculating its taxable income, deducted the interest paid to X Sweden pursuant to the EUR 501 million loan taken out with that company on 27 December 2006. As it took the view that X Sweden was the beneficial owner of the interest, it did not withhold tax at source in respect of the interest.

55. In its decision of 13 December 2010, SKAT took the view that X Sweden, X Sweden Holding and X SCA, SICAR did not have the status of beneficial owners of the interest, within the meaning of Directive 2003/49 and of the Luxembourg-Denmark Tax Convention and the Nordic Tax Convention, and that the beneficial owners of the interest were the owners of X SCA, SICAR. According to the Ministry of Taxation, X SCA, SICAR is incorporated as a form of company that is not included in the list, referred to in Article 3(a)(i) of Directive 2003/49, of companies falling within the scope of that directive, and moreover does not satisfy the condition laid down in Article 3(a)(iii) that the company must not be exempt from tax. It is exempt from tax on income in the form of interest, profits and dividends. In any event, X SCA, SICAR cannot be the beneficial owner of the interest since it is transparent under Danish law. In that context, the Ministry of Taxation took the view that X Denmark had not produced documentation showing that a majority of the investors in the private equity

funds that own X SCA, SICAR are resident for tax purposes in other countries of the European Union or in countries with which the Kingdom of Denmark has concluded a double taxation convention. SKAT accordingly considered that X Denmark should have withheld tax at source on the interest paid to X Sweden.

56. SKAT's decision of 13 December 2010 was contested by X Denmark before the Danish courts.

57. In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. a. Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?

b. Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

c. If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?

d. If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a "beneficial owner" for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be "the beneficial owners" of the interest in question, and – if so – is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

e. Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal ("rolled up"), if the interest recipient has subsequently made an intra-group transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

f. What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

2. a. Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

b. If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

3. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

4. Is it abuse etc. under Directive 2003/49 if, in the Member State where the interest payer is resident, tax deductions are allowed for interest, whilst interest in the Member State where the interest recipient is resident is not taxed?

5. a. Is a company resident in Luxembourg, established and registered under Luxembourg company law as a "société en commandite par actions" (SCA) and also classified as a "société d'investissement en capital à risqué" (SICAR) under the Luxembourg law of 15 June 2004 relating to the investment company in risk capital (SICAR), covered by Directive 2003/49?

b. If Question 5(a) is answered in the affirmative, can a Luxembourg "SCA/SICAR" then be "beneficial owner" of interest under Directive 2003/49, even though the Member State in which the interest-paying company is resident deems the company in question to be a tax-transparent entity under its domestic law?

c. If Question 1(a) is answered in the negative, so that the company receiving the interest is deemed not to be the "beneficial owner" of the interest in question: can the SCA/SICAR then, in circumstances such as those of the present case, be deemed to be the "beneficial owner" of the interest at issue herein for the purposes of the directive?

6. Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, then preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

8. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court of Justice is requested to take the answer to Question 7 into account in its answer to Question 8.'

3. Case C-119/16, C Danmark I

58. As is apparent from the order for reference, C USA, established in the United States, owns C Cayman Islands, established in the Cayman Islands, which until the end of 2004 was the owner of C Danmark II, established in Denmark, the ultimate parent company of a group of companies. At the end of 2004 the group carried out a restructuring in which two Swedish companies, C Sverige I and C Sverige II, and a Danish company, C Danmark I, were interposed between C Cayman Islands and C Danmark II. From 1 January 2005, C Danmark I became the ultimate parent company of the Danish part of the American group, whose ultimate parent company is C USA.

59. The reasons for the restructuring of the European part of the group were described by C Danmark I in a note entitled '2004 European Restructuring Process', which states in particular:

> 'During 2004, … Group reviewed its organisational structure and decided to introduce additional holding companies and leverage into its European structure. The additional holding companies permit the company to more freely access the capital within Europe and to more efficiently move capital within the … Group family of companies. Furthermore, the financial statements for the new holding companies reflect fair market valuations for the European Group which may assist the company prospectively in obtaining third party financing. Finally, and perhaps most importantly, the introduction of leverage into the structure helps minimise business risk by reducing the amount of equity at stake within business operations.

Given the favourable holding company regime currently operating in Sweden, … Group decided to establish its new European holding companies in Sweden in order to benefit from this regime.'

60. The Ministry of Taxation took the view that the interposing of two Swedish companies above the Danish part of the group had been driven by tax considerations. On 30 October 2009, SKAT adopted a decision according to which C Sverige II and C Sverige I could not be regarded as being the beneficial owners of the interest paid by C Danmark I, within the meaning of Directive 2003/49 and the Nordic Tax Convention.

61. By order of 25 May 2011, the Landskatteretten (National Tax Appeals Commission, Denmark) confirmed SKAT's decision, holding that the Swedish companies were mere conduits. That order stated inter alia as follows:

> 'Until the restructuring carried out at the end of 2004/beginning of 2005, it was the overarching company in the Danish part of the group, [C Danmark II], that was directly owned by [C Cayman Islands].
>
> With the restructuring, three newly created companies were interposed between [C Cayman Islands] and [C Danmark II], so that [C Cayman Islands] then owned a Swedish holding company, which owned another Swedish holding company, which owned [C Danmark I], which became the overarching parent company in the Danish part of the group. The group structure was achieved inter alia through a number of intragroup sales of companies involving two loans of EUR 75 million and EUR 825 million respectively between [C Cayman Islands] and [C Sverige I] and two loans of EUR 75 million and EUR 825 million respectively between [C Sverige II] and [C Danmark I].
>
> The debt instrument of EUR 75 million between [C Cayman Islands] and [C Sverige I] was concluded on terms completely identical to those stated in the debt instrument of EUR 75 million between [C Sverige II] and [C Danmark I]. The same is true of the debt instruments of EUR 825 million … Through the implemented restructuring and the resulting debt relationship reflecting transactions between parties with common interests, [C Sverige II], making use of the Swedish rules on intragroup transfers, transferred the interest income received from [C Danmark I] to [C Sverige I], whilst [C Sverige I] transferred the amounts onwards to [C Cayman Islands] as interest expenses.
>
> Since under the then-prevailing Swedish tax rules, there was no taxable net income to be taxed in Sweden, the interest payments owed by [C Danmark I] were therefore transferred in full to [C Cayman Islands] through the Swedish companies.
>
> None of the companies set up in the restructuring carried out activities other than holding-company activities and for that reason their foreseeable revenue was solely revenue inherently linked to the holding-company activity. When the debt relationships linked to the restructuring were established, it was therefore a necessary presupposition, if the debtor companies were to be able to meet their obligations relating thereto, that they received funds from other companies in the group. That had to be a precondition from the beginning.
>
> [C Sverige II] is therefore regarded as a conduit company with so few powers over the sums received that it cannot be regarded as the beneficial owner of the interest received from [C Danmark I], either under the [Nordic Tax Convention] or under Directive 2003/49. It is irrelevant in this regard that the transfers between the Swedish companies were in the form of intragroup transfers and not interest payments.'

62. The applicant in the main proceedings, C Danmark I, takes the view that C Sverige II and C Sverige I were established in Sweden in connection with the restructuring of the group in Europe, which was driven by general and commercial considerations. According to the applicant in the main proceedings, C Sverige II is the 'beneficial owner', within the meaning of Directive 2003/49, of the interest which it paid to it.

63. In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. a. Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?
>
> b. Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?
>
> c. If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003

regarding “conduit companies” (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding “contractual or legal obligations” (paragraph 10.2)?

d. If the 2003 commentaries can be incorporated into the interpretation, is it then a condition for deeming a company not to be a “beneficial owner” for the purposes of Directive 2003/49 that there actually has been a channelling of funds to those persons who are deemed by the State in which the interest payer is resident to be “the beneficial owners” of the interest in question, and – if so – is it then a further condition that the actual passing take place at a point close in time to the payment of the interest and/or take place as a payment of interest?

e. Of what significance is it in that connection if equity capital is used for the loan, if the interest in question is entered on the principal (“rolled up”), if the interest recipient has subsequently made an intra-group transfer to its parent company resident in the same State with a view to adjusting earnings for tax purposes under the prevailing rules in the State in question, if the interest in question is subsequently converted into equity in the borrowing company, if the interest recipient has had a contractual or legal obligation to pass the interest to another person, and if most of the persons deemed by the State where the person paying the interest is resident to be the “beneficial owners” of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under the Danish taxation legislation there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

f. What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a “beneficial owner” for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — “in substance” did not have the right to “use and enjoy” the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

2. a. Does a Member State’s reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

b. If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include “interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States”, then be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

3. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

4. Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an “artificial conduit company”, bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

5. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court of Justice is requested to take the answer to Question 5 into account in its answer to Question 6.'

4. Case C-299/16, Z Denmark

64. It is apparent from the order for reference that Z Denmark is a Danish industrial undertaking.

65. In August 2005, A Fund, a private equity fund, acquired roughly 66% of that company's Class A shares (representing approximately 64% of the voting rights) from their previous owners, that is to say, private equity fund B and Danish financial institution C, whilst D retained the remaining Class A shares. In addition, a number of Z Denmark's senior managers held Class B shares.

66. A Fund consists of five funds, four of which were set up in the form of limited partnerships in Jersey, that is to say, in a tax-transparent form according to Danish tax law. The final fund, A Fund (No. 5) Limited, Jersey, takes the form of a non-tax-transparent company and owns roughly 0.5% of A Fund. According to the information provided by the referring court, the investors in the first four funds are resident for tax purposes in a large number of countries, inside or outside the European Union.

67. In the context of the acquisition referred to in paragraph 65 above, on 27 September 2005 A Fund granted Z Denmark a loan in the sum of DKK 146 010 341 (roughly EUR 19.6 million). Interest at 9% per annum was payable on the loan.

68. On 28 April 2006, A Fund transferred its entire debt claim against Z Denmark for a total of DKK 146 010 341 (roughly EUR 19.6 million) to Z Luxembourg, a company set up by it in Luxembourg on the same day.

69. The transfer transaction was supplemented by the grant by A Fund to Z Luxembourg of a loan which likewise amounted to DKK 146 010 341 (roughly EUR 19.6 million). The interest payable on the loan was 9.875% and it had to be recorded in the accounts at the year end.

70. On 21 June 2006 A Fund transferred its shares in Z Denmark to Z Luxembourg.

71. According to Z Luxembourg's accounts for 2007 (the accounts for 2006 disclose comparable items), that company had no activity other than that of owning shares in Z Denmark. Those accounts also reveal that Z Luxembourg's loss of EUR 23 588 in 2006 became a profit of EUR 15 587 in 2007. It is also apparent from those accounts that the interest income in those years amounted to EUR 1 497 208 and EUR 1 192 881 respectively, while the interest expenses were EUR 1 473 675 and EUR 1 195 124 respectively. The item 'Tax on profit' showed an amount of EUR 3 733 for 2006 and nil for 2007.

72. On 1 November 2007 Z Denmark repaid the loan granted by A Fund, the accumulated interest amounting on that date to DKK 21 241 619 (roughly EUR 2.85 million). On the same day Z Luxembourg paid A Fund its debt, consisting of the capital and interest.

73. In its decision of 10 December 2010, SKAT did not accord Z Luxembourg the status of beneficial owner of the interest paid to it by Z Denmark, within the meaning of Directive 2003/49 and the Luxembourg-Denmark Tax Convention.

74. By decision of 31 January 2012, the National Tax Appeals Commission confirmed SKAT's decision. The decision contained the following passages:

'[Z Luxembourg] is not regarded here as "beneficial owner" either under the [Luxembourg-Denmark Tax Convention] or under [Directive 2003/49].

Regard must be had to the actual structure set up between the parties within the group, under which [Z Luxembourg] transfers the interest income received from [Z Denmark] to the private equity fund, from where it is transferred on to the fund's investors.

With [Z Luxembourg's] acquisition of the private equity fund's debt claim against [Z Denmark], and the company's simultaneous acquisition of the shares in [Z Denmark] through a loan from the private equity fund of almost the same amount and on almost the same terms as the debt claim against the company, [Z

Luxembourg's] tax on interest payments from the Danish company would be offset by the company's interest payments to the private equity fund, which is why there would not be taxable net income on the overall transactions falling to be taxed in the hands of the company. The Luxembourg company is therefore regarded as a conduit company without any real powers or opportunities to take decisions on disposals of the transferred amounts received.

[Z Luxembourg] is accordingly refused the benefit of the [Luxembourg-Denmark Tax Convention] and/or [Directive 2003/49] with regard to waiver of Danish tax at source.

It has been explained that the interest transferred from [Z Luxembourg] to the private equity fund, which should be regarded as transparent, was transferred onwards to the fund's investors. The question arises therefore whether tax on the interest should possibly not be levied by virtue of a double taxation convention covering the investors. In the light of the way in which the case has been presented, a decision on this issue is not warranted, for the simple reason that the lists produced do not constitute documentation sufficient to establish that double taxation occurred.'

75. That decision of the National Tax Appeals Commission was contested by Z Denmark before the Danish courts.

76. Before the referring court, Z Denmark submits, in particular, that the concept of 'beneficial owner' within the meaning of Directive 2003/49 is a concept of EU law that must be given its own interpretation and not an interpretation in the light of the OECD Model Tax Convention. In any event, it can be interpreted only in the light of the OECD 1977 Model Tax Convention and the commentaries relating thereto. A dynamic interpretation would be contrary to the principle of legal certainty. In addition, Z Denmark disputes that in this instance there has been abuse within the meaning of Directive 2003/49.

77. Finally, Z Denmark criticises the difference in treatment in this instance, contrary to Article 43 EC, in particular Z Luxembourg's inability to deduct the interest paid on a loan entered into with its shareholder in order to be able to grant the loan to Z Denmark. If Z Luxembourg had been a Danish company, it would have been able to deduct that expenditure and would not have had taxable interest income.

78. In respect of taxation at source, Z Denmark submits that there are a number of fundamental differences compared with taxation of resident companies. First, tax at source is payable earlier than corporation tax. Second, default interest payable on tax at source is much higher than in the case of corporation tax. Third, it is for the borrower to withhold tax at source. Fourth, it is also the borrower who is bound to pay the tax at source.

79. In those circumstances, the Vestre Landsret (High Court of Western Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. a. Is Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted as meaning that a company resident in a Member State that is covered by Article 3 of the directive and, in circumstances such as those of the present case, receives interest from a subsidiary in another Member State is the "beneficial owner" of that interest for the purposes of the directive?

b. Is the concept "beneficial owner" in Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, to be interpreted in accordance with the corresponding concept in Article 11 of the OECD 1977 Model Tax Convention?

c. If Question 1(b) is answered in the affirmative, should the concept then be interpreted solely in the light of the commentary on Article 11 of the [OECD] 1977 Model Tax Convention (paragraph 8), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies" (paragraph 8.1, now paragraph 10.1), and the additions made in 2014 regarding "contractual or legal obligations" (paragraph 10.2)?

d. If the 2003 commentaries can be incorporated into the interpretation, in that case of what significance is it in the assessment of whether a company can be deemed not to be a "beneficial owner" for the purposes of Directive 2003/49 if the interest in question is entered on the principal ("rolled up"), if the interest recipient has had a contractual or legal obligation to pass the interest to another person and if most of the persons to whom the interest is credited or passed on and who are deemed by the State where the person paying the interest is resident to be the "beneficial owners" of the interest are resident in other Member States or other States with which Denmark has entered into a double taxation convention, so that under domestic law there would not have been a basis for levying tax at source had those persons been lenders and thereby received the interest directly?

e. What significance does it have for the assessment of the issue whether the interest recipient must be deemed to be a "beneficial owner" for the purposes of the directive if the referring court, following an assessment of the facts of the case, concludes that the recipient — without having been contractually or legally bound to pass the interest received to another person — "in substance" did not have the right to "use and enjoy" the interest as referred to in the 2014 commentaries on the [OECD] 1977 Model Tax Convention?

2. a. Does a Member State's reliance on Article 5(1) of the directive on the application of national provisions for the prevention of fraud or abuse, or Article 5(2) of the directive, presuppose that the Member State in question has adopted a specific domestic provision implementing Article 5 of the directive, or that national law contains general provisions or principles on fraud, abuse and tax evasion that can be interpreted in accordance with Article 5?

b. If Question 2(a) is answered in the affirmative, can Paragraph 2(2)(d) of the Law on corporation tax, which provides that the limited tax liability on interest income does not include "interest which is tax-exempt … under Directive 2003/49 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States", be deemed to be a specific domestic provision as referred to in Article 5 of the directive?

3. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of interest is contingent on whether the interest recipient is deemed to be the beneficial owner of the interest, an agreement-based anti-abuse provision covered by Article 5 of the directive?

4. Is a Member State which does not wish to recognise that a company in another Member State is the beneficial owner of interest, and claims that the company in the other Member State is an "artificial conduit company", bound under Directive 2003/49 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

5. In a case where an interest payer is resident in one Member State and the interest recipient is resident in another Member State and where the interest recipient is deemed by the first Member State not to be the "beneficial owner" of the interest in question under Directive 2003/49 and is therefore deemed to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the first Member State, in the taxation of the non-resident interest recipient, does not take account of expenses in the form of interest expenses that the interest recipient has had in circumstances such as those of the present case, whilst interest expenses are generally deductible under that Member State's legislation and can therefore be deducted from taxable income by a resident interest recipient?

6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems the parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims (including, inter alia, interest income) lodged against a company resident in the same Member State?

7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 2003/49 in respect of interest received from a company resident in another Member State (subsidiary), and the latter Member State deems that parent company to have limited tax liability on that interest in that Member State, does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the person paying the interest to withhold tax at source on the interest and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the interest recipient is resident in the latter Member State?

– a parent company in the latter Member State would not have been required to make advance payments of corporation tax in the first two fiscal years, but would only have begun to pay corporation tax at a much later time than the due date for tax at source?

The Court is requested to take the answer to Question 6 into account in its answer to this question.'

### Procedure before the Court

80. On account of the connection between the four main actions, which all relate to the interpretation of Directive 2003/49 and of the fundamental freedoms enshrined in the Treaties, the cases should be joined for the purposes of the judgment.

81. By letter of 2 March 2017, the Danish Government requested, in accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that these cases be heard by the Grand Chamber of the Court. Furthermore, in the light of the similarities between these cases and Cases C-116/16 and C-117/16, which are the subject of today's judgment in *T Danmark and Y Denmark Aps* (C-116/16 and C-117/16), the Danish Government also suggested that the Court, pursuant to Article 77 of its Rules of Procedure, organise a joint hearing of all the cases. The Court granted the Danish Government's requests.

**Consideration of the questions referred**

82. The questions referred by the national courts concern three topics. The first topic relates to the concept of 'beneficial owner' within the meaning of Directive 2003/49 and to the existence of a legal basis enabling a Member State to refuse, on account of the commission of an abuse of rights, to grant the exemption from any taxes that is provided for in Article 1(1) of the directive to a company that has paid interest to an entity established in another Member State. In so far as such a legal basis exists, the second topic addressed by the questions concerns the constituent elements of any abuse of rights and the conditions for proving it. Finally, the third topic of the questions, likewise in the event that it is possible for a Member State to refuse such a company the benefits of Directive 2003/49, concerns the interpretation of the provisions of the FEU Treaty relating to freedom of establishment and the free movement of capital, in order to enable the referring courts to establish whether the Danish legislation infringes those freedoms.

*Question 1(a) to (c), Question 2(a) and (b) and Question 3 in Cases C-115/16, C-118/16, C-119/16 and C-299/16*

83. First, by Question 1(a) to (c) in Cases C-115/16, C-118/16, C-119/16 and C-299/16, the referring courts ask how the concept of 'beneficial owner of the interest', for the purposes of Article 1(1) and (4) of Directive 2003/49, is to be interpreted. Second, by Question 2(a) and (b) and Question 3 in Cases C-115/16, C-118/16, C-119/16 and C-299/16, the referring courts ask, in essence, whether the combating of fraud or abuse, as permitted by Article 5 of Directive 2003/49, requires there to be a domestic or agreement-based anti-abuse provision as referred to in Article 5(1). They ask in particular whether a domestic or agreement-based provision containing the concept of 'beneficial owner' may be regarded as constituting a legal basis enabling fraud or abuse of rights to be combated.

The concept of 'beneficial owner of the interest'

84. It should be pointed out at the outset that the concept of 'beneficial owner of the interest', which appears in Article 1(1) of Directive 2003/49, cannot refer to concepts of national law that vary in scope.

85. It has been held, in this regard, that it is apparent from recitals 2 to 4 of Directive 2003/49 that the aim of the directive is that double taxation should be eliminated with respect to interest and royalty payments between associated companies of different Member States and that such payments should be subject to tax once in a single Member State, the abolition of all taxation of those payments in the Member State where they arise being the most appropriate means of ensuring equality of tax treatment as between national and cross-border transactions (judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 24).

86. The scope of Directive 2003/49, as defined in Article 1(1) of the directive, thus concerns the exemption of interest and royalty payments in their source Member State, provided that the beneficial owner is a company established in another Member State or a permanent establishment situated in another Member State belonging to a company of a Member State (judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 25).

87. The Court has, furthermore, stated that, since Article 2(a) of Directive 2003/49 defines interest as 'income from debt-claims of every kind', only the actual beneficial owner can receive interest which constitutes income from such claims (see, to that effect, judgment of 21 July 2011, *Scheuten Solar Technology*, C-397/09, EU:C:2011:499, paragraph 27).

88. The concept of 'beneficial owner of the interest', within the meaning of Directive 2003/49, must therefore be interpreted as designating an entity which actually benefits from the interest that is paid to it. Article 1(4) of the directive confirms that reference to economic reality by stating that a company of a Member State is to be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

89. As is apparent from paragraph 10 above, whilst some language versions of Article 1(1) of Directive 2003/49, such as the Bulgarian, French, Latvian and Romanian versions, use the term 'beneficiary'/'recipient', the other versions have recourse to expressions such as 'beneficial owner'/'actual beneficiary' (the Spanish, Czech, Estonian, English, Italian, Lithuanian, Maltese, Portuguese and Finnish versions), 'owner'/'person entitled to use' (the German, Danish, Greek, Croat, Hungarian, Polish, Slovak, Slovenian and Swedish versions) or 'person entitled in the end' (the Dutch version). The use of those various expressions underscores that the term 'beneficial owner' concerns not a formally identified recipient but rather the entity which benefits economically from the interest received and accordingly has the power freely to determine the use to which it is put. In accordance with what has been recalled in paragraph 86 above, only an entity established in the European Union can be a beneficial owner of interest, capable of being entitled to the exemption provided for in Article 1(1) of Directive 2003/49.

90. Furthermore, as is apparent from the Proposal for a Council Directive on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, which was submitted on 6 March 1998 (document COM(1998) 67 final) and formed the basis for Directive 2003/49, the directive draws upon Article 11 of the OECD 1996 Model Tax Convention and pursues the same objective, namely avoiding international double taxation. The concept of 'beneficial owner', which appears in the bilateral conventions based on that model, and the successive amendments of that model and of the commentaries relating thereto are, therefore, relevant when interpreting Directive 2003/49.

91. The applicants in the main proceedings submit that, if the concept of 'beneficial owner of the interest or royalties', within the meaning of Article 1(1) of Directive 2003/49, were interpreted in the light of the OECD Model Tax Convention and of the commentaries relating thereto, that interpretation would not be acceptable as it would lack any democratic legitimacy whatsoever. That argument cannot, however, be upheld as such an interpretation, even if it draws on the OECD's documents, has its basis, as is clear from paragraphs 85 to 90 above, in the directive itself and in its legislative history reflecting the democratic process of the European Union.

92. It is clear from the development - as set out in paragraphs 4 to 6 above - of the OECD Model Tax Convention and the commentaries relating thereto that the concept of 'beneficial owner' excludes conduit companies and must be understood not in a narrow technical sense but as having a meaning that enables double taxation to be avoided and tax evasion and avoidance to be prevented.

93. The bilateral conventions, such as the Nordic Tax Convention, concluded by Member States with other Member States on the basis of the OECD Model Tax Convention also attest to that development. Those conventions, cited in paragraphs 16 to 18 above, all contain the term 'beneficial owner' as referred to in that model.

94. It should also be stated that the mere fact that the company which receives the interest in a Member State is not its 'beneficial owner' does not necessarily mean that the exemption provided for in Article 1(1) of Directive 2003/49 is not applicable. It is conceivable that such interest will be exempt on that basis in the source State when the company which receives it transfers the amount thereof to a beneficial owner who is established in the European Union and furthermore satisfies all the conditions laid down by Directive 2003/49 for entitlement to such an exemption.

The need for a specific domestic or agreement-based provision implementing Article 5 of Directive 2003/49

95. The referring courts seek to ascertain whether, in order to combat an abuse of rights in the context of applying Directive 2003/49, a Member State must have adopted a specific domestic provision transposing that directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions.

96. It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

97. That general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect, judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

98. It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.

99. That is so, for example, where the completion of customs formalities does not fall within the context of normal commercial transactions but is purely formal and is designed solely to obtain wrongfully the grant of compensatory amounts (see, to that effect, judgments of 27 October 1981, *Schumacher and Others*, 250/80, EU:C:1981:246, paragraph 16, and of 3 March 1993, *General Milk Products*, C-8/92, EU:C:1993:82, paragraph 21) or export refunds (see, to that effect, judgment of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 59).

100. Furthermore, the principle of prohibition of abuse of rights is applicable in fields as varied as the free movement of goods (judgment of 10 January 1985, *Association des Centres distributeurs Leclerc and Thouars Distribution*, 229/83, EU:C:1985:1, paragraph 27), freedom to provide services (judgment of 3 February 1993, *Veronica Omroep Organisatie*, C-148/91, EU:C:1993:45, paragraph 13), public service contracts (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 62), freedom of establishment (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24), company law (judgment of 23 March 2000, *Diamantis*, C-373/97, EU:C:2000:150, paragraph 33), social security (judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 48; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99), transport (judgment of 6 April 2006, *Agip Petroli*, C-456/04, EU:C:2006:241, paragraphs 19 to 25), social policy (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 37 to 41), restrictive measures (judgment of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 62) and value added tax (VAT) (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74).

101. As regards that last field, the Court has observed on a number of occasions that, whilst preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the principle that abusive practices are prohibited nonetheless constitutes a general principle of EU law which applies irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 30 and 31).

102. It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that principle may be relied on against a taxable person in order to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 33).

103. In the main proceedings, the rules that are claimed by SKAT to have been abused are the provisions of Directive 2003/49, which was adopted in order to foster the development of a single market having the characteristics of a domestic market and provides for an exemption, in the source Member State, of interest paid to an associated company established in another Member State. As is apparent from the proposal for a directive referred to in paragraph 90 above, certain definitions set out in Directive 2003/49 are based on the definitions in Article 11 of the OECD 1996 Model Tax Convention.

104. Whilst Article 5(1) of Directive 2003/49 provides that the directive is not to preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law, noted in paragraphs 96 to 98 above, that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 42) and could prove incompatible with the objective pursued by that directive.

105. Furthermore, whilst Article 5(2) of Directive 2003/49 provides that Member States may, in the event of evasion, avoidance or abuse, withdraw the benefits of the directive or refuse to apply it, that provision likewise cannot be interpreted as excluding the application of the principle of EU law that abusive practices are prohibited, since the application of that principle is not – as the provisions of the directive are – subject to a require-

ment of transposition (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 28 and 31).

106. As has been pointed out in paragraph 85 above, it is apparent from recitals 2 to 4 of Directive 2003/49 that the directive has the aim of eliminating double taxation of interest and royalty payments between associated companies of different Member States and between permanent establishments of such companies in order, first, to spare them burdensome administrative formalities and cash-flow problems and, second, to ensure equality of tax treatment as between national and cross-border transactions.

107. To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 2003/49 would not be consistent with such objectives and, on the contrary, would undermine economic cohesion and the effective functioning of the internal market by distorting the conditions of competition. As the Advocate General has, in essence, observed in point 63 of her Opinion in Case C-115/16, that would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue (see, to that effect, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 45, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 53).

108. Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 2003/49 has the objective of harmonisation in respect of direct taxation in order to enable economic operators to benefit from the internal market, by abolishing double taxation, and that, more specifically, recital 6 of the directive states that it is necessary not to preclude Member States from taking appropriate measures to combat fraud or abuse.

109. Whilst the pursuit by a taxpayer of the tax regime most favourable for him cannot, as such, set up a general presumption of fraud or abuse (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 50; of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 84; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 60), the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 51; of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 61; and of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 61 to 63).

110. It is apparent from these factors that it is incumbent upon the national authorities and courts to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends.

111. Thus, in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 2003/49 where they are invoked for fraudulent or abusive ends.

112. The applicants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) – which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) – in order to contend that, on account of Article 5(1) of Directive 2003/49, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

113. However, that line of argument cannot be upheld.

114. It is true that the Court noted in paragraph 42 of the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408), that the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals and therefore from being capable of being relied upon per se by the Member State as against individuals.

115. It also noted that such a finding is without prejudice to the requirement for all authorities of a Member State, in applying national law, to interpret it as far as possible in the light of the wording and purpose of directives in order to achieve the result pursued by those directives, and that those authorities are thus able to rely on a directive-compliant interpretation of national law against individuals (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 45 and the case-law cited).

116. It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraphs 46 and 47).

117. Nevertheless, even if it were to transpire, in the main proceedings, that national law does not contain rules which may be interpreted in compliance with Article 5 of Directive 2003/49, this – notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) – could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in Article 1(1) of the directive in the event of fraud or abuse of rights (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 54).

118. A refusal given to a taxpayer in such circumstances is not covered by the situation referred to in paragraph 114 above since it reflects the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 55 and 56 and the case-law cited).

119. Accordingly, since, as has been noted in paragraph 96 above, abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, in this instance Directive 2003/49, does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

120. In such circumstances, the Member States must, therefore, refuse to grant the advantage resulting from Directive 2003/49, in accordance with the general principle that abusive practices are prohibited, under which EU law cannot cover abusive practices of economic operators (see, to that effect, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99 and the case-law cited).

121. Having regard to the finding made in paragraph 111 above, there is no need to answer Question 3 asked by the referring courts, relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of Directive 2003/49.

122. In the light of all those matters, the answer to Question 1(a) to (c) and Question 2(a) and (b) in Cases C-115/16, C-118/16, C-119/16 and C-299/16 is as follows:

– Article 1(1) of Directive 2003/49, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.

– The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption of interest payments from any taxes that is provided for in Article 1(1) of Directive 2003/49, even if there are no domestic or agreement-based provisions providing for such a refusal.

*Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16, Question 4 in Cases C-115/16 and C-118/16, Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16*

123. By Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16 and Question 4 in Cases C-115/16 and C-118/16, the referring courts ask, in essence, what the constituent elements of an abuse of rights are and how those elements may be established. They are unsure in particular, in this context, whether there can be an abuse of rights where the beneficial owner of interest transferred by conduit companies is ultimately a company whose seat is in a third State with which the Member State concerned has concluded a double taxation convention. By Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16, the referring courts ask, in essence, whether a Member State which refuses to accord a company of another Member State the status of beneficial owner of the interest is required to identify the company which it regards, as the case may be, as being the beneficial owner.

The constituent elements of an abuse of rights and the relevant evidence

124. As is clear from the Court's case-law, proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraphs 52 and 53, and of 12 March 2014, *O. and B.*, C-456/12, EU:C:2014:135, paragraph 58).

125. Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage (see, to that effect, judgments of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 47 to 49; of 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33; and of 14 April 2016, *Cervati and Malvi*, C-131/14, EU:C:2016:255, paragraph 47).

126. It is not for the Court to assess the facts in the main proceedings. However, when giving preliminary rulings, the Court may, if appropriate, specify indicia in order to guide national courts in the assessment of the cases that they have to decide. In the main proceedings, whilst the presence of a number of such indications could lead to the conclusion that there is an abuse of rights, it is nevertheless for the referring courts to establish whether those indications are objective and consistent, and whether the applicants in the main proceedings have had the opportunity to adduce evidence to the contrary.

127. A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays interest and the entity which is its beneficial owner, payment of the tax on the interest is avoided.

128. Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 1(1) of Directive 2003/49 that all or almost all of the aforesaid interest is, very soon after its receipt, passed on by the company that has received it to entities which do not fulfil the conditions for the application of Directive 2003/49, either because those entities are not established in any Member State, or because they are not incorporated in one of the forms referred to in the annex to the directive, or because they are not subject to one of the taxes listed in Article 3(a)(iii) of the directive without being exempt, or because they do not have the status of associated company within the meaning of Article 3(b) of the directive.

129. The conditions for the application of Directive 2003/49 are not met by entities resident for tax purposes outside the European Union, such as the companies at issue in Cases C-119/16 and C-299/16 or the investment funds at issue in Cases C-115/16 and C-299/16. In those cases, if the interest had been paid directly by the Danish debtor undertaking to the recipient entities which, according to the Ministry of Taxation, were its beneficial owners, the Kingdom of Denmark could have levied withholding tax.

130. Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the interest paid by the debtor company must itself pass that interest on to a third company which does not fulfil the conditions for

the application of Directive 2003/49, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

131. The fact that a company acts as a conduit company may be established where its sole activity is the receipt of interest and its transmission to the beneficial owner or to other conduit companies. The absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has.

132. Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds which, as is mentioned in Article 4 of Directive 2003/49, may have the aim of transferring profits from a profit-making commercial company to shareholding entities in order to avoid the tax burden or reduce it as much as possible. The way in which the transactions are financed, the valuation of the intermediary companies' equity and the conduit companies' inability to have economic use of the interest received may also be used as indications of such an arrangement. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the company receiving interest to pass it on to a third party but also by the fact that, 'in substance', as the referring court states in Cases C-115/16, C-118/16 and C-119/16, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those sums.

133. Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main proceedings, which some of the groups of companies strive to circumvent and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.

134. The referring courts are also unsure, in essence, whether there can be an abuse of rights where the beneficial owner of interest transferred by conduit companies is ultimately a company whose seat is in a third State with which the source Member State has concluded a tax convention under which no tax would have been withheld on the interest if the interest had been paid directly to the company having its seat in that third State.

135. In that regard, when examining the structure of the group it is immaterial that some of the beneficial owners of the interest paid by the conduit company are resident for tax purposes in a third State which has concluded a double taxation convention with the source Member State. The existence of such a convention cannot in itself rule out an abuse of rights. Thus, a convention of that kind cannot call into question that there is an abuse of rights where its existence is duly established on the basis of a set of facts showing that economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting improperly from the exemption from any taxes that is provided for in Article 1(1) of Directive 2003/49.

136. It should be added that, whilst taxation must correspond to economic reality, the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded. If the company owing the interest wishes to benefit from the advantages of such a convention, it is open to it to pay the interest directly to the entities that are resident for tax purposes in a State which has concluded a double taxation convention with the source State.

137. That said, it remains possible, in a situation where the interest would have been exempt had it been paid directly to the company having its seat in a third State, that the aim of the group's structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the interest to that company.

138. Furthermore, where the beneficial owner of interest paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 1(1) of Directive 2003/49 is not in any way subject to fraud or an abuse of rights being found. As has been stated, in essence, in paragraph 86 above, that provision is designed to exempt interest payments in the source Member State only where the beneficial owner of the interest is a company established in another Member State or a permanent establishment situated in another Member State belonging to a company of a Member State.

139. In the light of all those matters, the answer to Question 1(d) to (f) in Cases C-115/16, C-118/16 and C-119/16, Question 1(d) and (e) in Case C-299/16 and Question 4 in Cases C-115/16 and C-118/16 is that proof of an

abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.

The burden of proving the abuse of rights

140. As is apparent from Article 1(11) and (12) and Article 1(13)(b) of Directive 2003/49, the source Member State may require the company which has received interest to establish that it is its beneficial owner, within the meaning specified for that concept in the first indent of paragraph 122 above.

141. The Court has moreover held, more generally, that there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see, to that effect, judgment of 28 February 2013, *Petersen and Petersen*, C-544/11, EU:C:2013:124, paragraph 51 and the case-law cited).

142. On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 1(1) of Directive 2003/49 to a company that has paid interest to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the interest has been paid is not its beneficial owner.

143. Such an authority has the task not of identifying the beneficial owners of that interest but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide.

144. Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, where a company receiving interest has a parent company, which itself has a parent company, the tax authorities and courts of the source Member State are, in all probability, unable to determine which of those two parent companies is or will be the beneficial owner of the interest. Moreover, the allocation of that interest may have been decided upon after the tax authority's findings relating to the conduit company.

145. Consequently, the answer to Question 5 in Case C-115/16, Question 6 in Case C-118/16 and Question 4 in Cases C-119/16 and C-299/16 is that, in order to refuse to accord a company the status of beneficial owner of interest, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of that interest.

*Question 5(a) to (c) in Case C-118/16*

146. By Question 5(a) to (c) in Case C-118/16, the referring court asks, in essence, whether an SCA authorised as a SICAR governed by Luxembourg law may benefit from the provisions of Directive 2003/49. It must be stated that this question is of interest only if X SCA, SICAR should be regarded as being the beneficial owner of the interest paid to it by X Denmark, a matter which is for the referring court alone to determine.

147. That having been explained, it should be noted, as the Commission and several of the governments that submitted observations have done, that under Article 3(a) of Directive 2003/49 three conditions must be met in order for a company to have the status of a 'company of a Member State' capable of benefiting from advantages provided for pursuant to the directive. First, that company must have one of the forms listed in the annex to the directive. Second, it must, in accordance with the tax laws of a Member State, be considered to be resi-

dent in that Member State and not be considered, within the meaning of a double taxation convention, to be resident for tax purposes outside the European Union. Third, it must be subject to one of the taxes listed in Article 3(a)(iii) of Directive 2003/49 without being exempt, or to a tax which is identical or substantially similar and which is imposed after the date of entry into force of the directive in addition to, or in place of, those existing taxes.

148. The first condition must, subject to verification by the referring court, be considered fulfilled in the case of X SCA, SICAR, since, as the Luxembourg Government stated at the hearing, an SCA authorised as a SICAR is a company taking one of the forms listed in the annex to Directive 2003/49.

149. The second condition also appears, subject to the same reservation, to be fulfilled as X SCA, SICAR is resident for tax purposes in Luxembourg.

150. As regards the third condition, it is not disputed that X SCA, SICAR is subject to *impôt sur les revenus des collectivités* (corporate income tax) in Luxembourg, which is one of the taxes listed in Article 3(a)(iii) of Directive 2003/49.

151. However, should it have to be found that, as SKAT contends in the main proceedings in Case C-118/16, the interest received by X SCA, SICAR is in fact exempt in that respect from corporate income tax in Luxembourg, it would then have to be stated that that company does not satisfy the third condition referred to in paragraph 147 above and that it cannot therefore be regarded as being a 'company of a Member State' within the meaning of Directive 2003/49. It is, however, for the referring court alone to make, if appropriate, the necessary checks in that regard.

152. That interpretation of the scope of the third condition referred to in paragraph 147 above is supported, first, by Article 1(5)(b) of Directive 2003/49, from which it is apparent that a permanent establishment can be regarded as being the beneficial owner of interest, within the meaning of the directive, only 'if the interest … payments [which it receives] represent income in respect of which that permanent establishment is subject in the Member State in which it is situated to one of the taxes mentioned in Article 3(a)(iii) …', and second, by the objective of Directive 2003/49, which, as has been recalled, in essence, in paragraph 85 above, is to ensure that such interest payments are subject to tax once in a single Member State.

153. Therefore, the answer to Question 5(a) to (c) in Case C-118/16 is that Article 3(a) of Directive 2003/49 must be interpreted as meaning that an SCA authorised as a SICAR governed by Luxembourg law cannot be classified as a company of a Member State, within the meaning of that directive, capable of being entitled to the exemption provided for in Article 1(1) of the directive if, a matter which is for the referring court to ascertain, the interest received by that SICAR, in a situation such as that at issue in the main proceedings, is exempt from corporate income tax in Luxembourg.

*Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16*

154. By Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16, the referring courts seek to ascertain, should the system, laid down in Article 1 of Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation of the first Member State, such as that at issue in the main proceedings, relating to the taxation of that interest.

155. In that regard, two situations must be distinguished at the outset. The first situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax arises from a finding that there is fraud or abuse, within the meaning of Article 5 of the directive. In such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 96 above, claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of interest paid to a company resident in another Member State.

156. The second situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax arises from the fact that the conditions for the application of that system of exemption are not fulfilled, but without a finding having been made that there is fraud or abuse, within the meaning of Article 5 of the directive. In such a situation, it should be determined whether the articles of the FEU Treaty referred to in paragraph 154 above must be interpreted as precluding national legislation, such as that at issue in the main proceedings, relating to the taxation of the aforesaid interest.

157. In this regard, in the first place, by Question 7 in Case C-115/16, Question 8 in Case C-118/16, Question 6 in Case C-119/16 and Question 7 in Case C-299/16, the referring courts ask, in essence, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company. They ask, in addition, whether those articles must be interpreted as precluding national legislation under which a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company.

158. First of all, as the Commission has stated, the payment of interest connected with a loan concerning two companies resident in different Member States falls within the provisions relating to the free movement of capital, as referred to in Article 63 TFEU (see, to that effect, judgments of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraphs 41 and 42, and of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 14). These questions must therefore be examined in the light of that article.

159. In that regard, and irrespective of the effects that the withholding of tax at source may have on the tax situation of the company that receives the interest, the obligation on the company paying the interest to withhold tax at source when that payment is made to a non-resident company may, inasmuch as it results in an additional administrative burden and risks concerning liability which would not exist if the loan had been taken out with a resident company, render cross-border loans less attractive than domestic loans (see, to that effect, judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraphs 28 and 32). Such an obligation therefore constitutes a restriction on the free movement of capital, within the meaning of Article 63 TFEU.

160. However, the need to ensure the effective collection of tax constitutes an overriding reason in the public interest capable of justifying such a restriction. The procedure for withholding tax at source and the liability rules supporting it constitute a legitimate and appropriate means of ensuring tax treatment of the income of a company resident outside the State of taxation. Nor does such a measure go beyond what is necessary for the purpose of attaining that objective (see, to that effect, judgments of 18 October 2012, *X,* C-498/10, EU:C:2012:635, paragraphs 39 and 43 to 52, and of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraphs 21 and 22).

161. As to the fact that the national legislation at issue in the main proceedings provides that a resident company which receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company, it follows therefrom that, whilst interest paid by a resident company to a non-resident company is subject to immediate and definitive taxation, interest paid by a resident company to another resident company is not subject to the making of any advance payment during the first two tax years, thereby procuring a cash-flow advantage for the latter company (see, to that effect, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 28).

162. The exclusion of a cash-flow advantage in a cross-border situation when it is granted in an equivalent situation on national territory constitutes a restriction on the free movement of capital (judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 29 and the case-law cited).

163. The Danish Government nevertheless asserts, referring to the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that national legislation which provides solely for arrangements for the levying of tax that differ depending on where the company receiving the interest has its seat concerns situations which are not objectively comparable.

164. However, whilst it is admittedly apparent from paragraphs 41 and 46 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that a difference in treatment consisting in the application of methods or arrangements for the levying of tax that differ depending on the place of residence of the company receiving the income at issue relates to situations which are not objectively comparable, the Court nevertheless made clear, in paragraphs 43 and 44 of that judgment, that the income at issue in the case which gave rise to the judgment was, in any event, subject to tax, irrespective of whether it was received by a resident company or by a non-resident company (see, to that effect, judgment of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 51). The Court pointed out in particular, in paragraph 49 of the judgment

of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that resident companies were obliged to make advance payments of corporation tax in connection with interest received from another resident company.

165. In the present instance, the national legislation at issue in the main proceedings does not merely lay down arrangements for the levying of tax that differ depending on the place of residence of the company which receives interest paid by a resident company, but exempts a resident company which receives interest from another resident company from the obligation to make an advance payment relating to that interest during the first two tax years, so that that first company is not required to pay tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source where interest is paid by a resident company to a non-resident company. The assessment of whether there is any disadvantageous treatment of interest paid to non-resident companies must be undertaken for each tax year, taken individually (see, to that effect, judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 41, and of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraphs 30 and 52).

166. Therefore, and as the Danish Government has not set out any overriding reason in the public interest capable of justifying the restriction on the free movement of capital established in paragraph 162 above, that restriction must be considered to be contrary to Article 63 TFEU.

167. In the light of the considerations set out in paragraphs 158 to 166 above, Article 63 TFEU must be interpreted as not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company. That article precludes, however, national legislation which prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source.

168. In the second place, by Question 6 in Case C-115/16, Question 7 in Case C-118/16, Question 5 in Case C-119/16 and Question 6 in Case C-299/16, the referring courts ask, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation under which the resident company that owes an obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company.

169. As has been explained in paragraph 158 above, these questions should be answered in the light of Article 63 TFEU.

170. National legislation such as that referred to in paragraph 168 above establishes a difference in treatment as regards rates of default interest, according to whether the late payment of the tax due on the interest paid by a resident company relates to a loan granted by a non-resident company or by another resident company. The application of a higher rate of default interest in the event of late payment of the withholding tax that is due on interest paid by a resident company to a non-resident company than in the event of late payment of the corporation tax due on interest received by a resident company from another resident company thus results in cross-border loans being less attractive than domestic loans. This constitutes a restriction on the free movement of capital.

171. As the Commission has observed, such a restriction cannot be justified by the fact, put forward by the Danish Government, that the taxation of interest relating to a loan obtained from a resident company and that of interest relating to a loan obtained from a non-resident company is a matter of different methods and arrangements for levying tax. That being so, and as the Danish Government has not set out any overriding reason in the public interest capable of justifying that restriction, it must be considered to be contrary to Article 63 TFEU.

172. In the light of the considerations set out in paragraphs 169 to 171 above, Article 63 TFEU must be interpreted as precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company.

173. In the third place, by Question 5 in Case C-299/16, the referring court asks, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation providing that, where a resi-

dent company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest which the latter has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

174. As has been explained in paragraph 158 above, this question should also be answered in the light of Article 63 TFEU.

175. As the Commission has observed, and as, according to the information provided by the Danish Government, the Ministry of Taxation acknowledged after Case C-299/16 was brought before the Court, it follows from the judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraphs 23 to 55), that national legislation under which a non-resident company is taxed, by means of tax withheld at source by a resident company, on the interest which it is paid by the latter without it being possible to deduct business expenses, such as interest expenditure, that are directly related to the lending at issue, whereas such a possibility of deduction is accorded to resident companies receiving interest from another resident company, constitutes a restriction on the free movement of capital that is prohibited, in principle, by the FEU Treaty.

176. The Danish Government nevertheless maintains that such a restriction is justified for the purpose of combating the abuses resulting from the fact that, whilst the non-resident company receiving the interest is admittedly subject to tax thereon in its Member State of residence, it will, however, ultimately never be taxed because that interest will be cancelled out by corresponding interest expenditure or by deductible intragroup transfers.

177. In that regard, it should be pointed out that, as is clear from paragraph 155 above, any finding that there is an abusive or fraudulent arrangement, justifying the inapplicability of Directive 2003/49, would also result in the fundamental freedoms guaranteed by the FEU Treaty being inapplicable.

178. On the other hand, in the absence of such a finding, the restriction referred to in paragraph 175 above cannot be justified by the considerations put forward by the Danish Government, so that it must be considered to be contrary to Article 63 TFEU. Interest expenditure or intragroup transfers are also liable to result in the reduction or even cancelling out of the tax payable when a resident company receives interest from another resident company.

179. It follows that Article 63 TFEU must be interpreted as precluding, except where fraud or abuse is found, national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

180. In the light of all the foregoing considerations, the answer to Questions 6 and 7 in Case C-115/16, Questions 7 and 8 in Case C-118/16, Questions 5 and 6 in Case C-119/16 and Questions 5 to 7 in Case C-299/16 is as follows:

– In a situation where the system, laid down by Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 5 of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of that interest.

– Outside such a situation, Article 63 TFEU must be interpreted as:

– not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;

– precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company;

– precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.

**Costs**

181. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. Cases C-115/16, C-118/16, C-119/16 and C-299/16 are joined for the purposes of the judgment.**

**2. Article 1(1) of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, read in conjunction with Article 1(4) thereof, must be interpreted as meaning that the exemption of interest payments from any taxes that is provided for by it is restricted solely to the beneficial owners of such interest, that is to say, the entities which actually benefit from that interest economically and accordingly have the power freely to determine the use to which it is put.**

**The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption of interest payments from any taxes that is provided for in Article 1(1) of Directive 2003/49, even if there are no domestic or agreement-based provisions providing for such a refusal.**

**3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans. The fact that the Member State where the interest arises has concluded a convention with the third State in which the company that is the beneficial owner of the interest is resident has no bearing on any finding of an abuse of rights.**

**4. In order to refuse to accord a company the status of beneficial owner of interest, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of that interest.**

**5. Article 3(a) of Directive 2003/49 must be interpreted as meaning that a *société en commandite par actions* (SCA) (limited partnership with share capital) authorised as a *société d'investissement en capital à risque* (SICAR) (risk capital investment company) governed by Luxembourg law cannot be classified as a company of a Member State, within the meaning of that directive, capable of being entitled to the exemption provided for in Article 1(1) of the directive if, a matter which is for the referring court to ascertain, the interest received by that SICAR, in a situation such as that at issue in the main proceedings, is exempt from *impôt sur les revenus des collectivités* (corporate income tax) in Luxembourg.**

**6. In a situation where the system, laid down by Directive 2003/49, of exemption from withholding tax on interest paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 5 of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of that interest.**

**Outside such a situation, Article 63 TFEU must be interpreted as:**

**– not precluding, in principle, national legislation under which a resident company which pays interest to a non-resident company is required to withhold tax on that interest at source whilst such an obligation is not owed by that resident company when the company which receives the interest is also a resident company, but as precluding national legislation that prescribes such withholding of tax at source if interest is paid by a resident company to a non-resident company whilst a resident company that receives interest**

**from another resident company is not subject to the obligation to make an advance payment of corporation tax during the first two tax years and is therefore not required to pay corporation tax relating to that interest until a date appreciably later than the date for payment of the tax withheld at source;**

**– precluding national legislation under which the resident company that owes the obligation to withhold tax at source on interest paid by it to a non-resident company is obliged, if the tax withheld is paid late, to pay default interest at a higher rate than the rate which is applicable in the event of late payment of corporation tax that is charged, inter alia, on interest received by a resident company from another resident company;**

**– precluding national legislation providing that, where a resident company is subject to an obligation to withhold tax at source on the interest which it pays to a non-resident company, account is not taken of the expenditure in the form of interest, directly related to the lending at issue, which the latter company has incurred whereas, under that national legislation, such expenditure may be deducted by a resident company which receives interest from another resident company for the purpose of establishing its taxable income.**

# EU Court of Justice, 26 February 2019*

# Joined Cases C-116/16 and C-117/16

## *Skatteministeriet v T Danmark (C-116/16), Y Denmark Aps (C-117/16)*

*Grand Chamber:* *K. Lenaerts, President, J.-C. Bonichot, A. Arabadjiev, T. von Danwitz, C. Toader and F. Biltgen, Presidents of Chambers, A. Rosas (Rapporteur), M. Ilesic, L. Bay Larsen, M. Safjan, C. G. Fernlund C. Vajda and S. Rodin, Judges*

*Advocate General:* *J. Kokott*

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1. These requests for a preliminary ruling concern the interpretation of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) ('Directive 90/435'), and of Articles 49, 54 and 63 TFEU.

2. The requests have been made in proceedings brought by the Skatteministeriet (Ministry of Taxation, Denmark) against T Danmark and Y Denmark Aps relating to the obligation imposed on those companies to pay withholding tax by reason of the payment by them of dividends to non-resident companies regarded by the tax authority as not being the beneficial owners of those dividends and, accordingly, as incapable of being entitled to the exemption from withholding tax provided for by Directive 90/435.

### Legal context

#### *OECD Model Tax Convention*

3. On 30 July 1963 the Council of the Organisation for Economic Cooperation and Development (OECD) adopted a recommendation concerning the avoidance of double taxation and called on the governments of the member countries, when concluding or revising bilateral conventions, to conform to a 'model convention for the avoidance of double taxation with respect to taxes on income and capital' that had been drawn up by the Fiscal Committee of the OECD and was annexed to that recommendation ('the OECD Model Tax Convention'). That model tax convention is re-examined and amended regularly. It is the subject of commentaries approved by the OECD Council.

4. Paragraphs 7 to 10 of the commentary on Article 1 of the OECD Model Tax Convention as amended in 1977 ('the OECD 1977 Model Tax Convention') — a provision which states that this convention is to apply to persons who are residents of one or both of the Contracting States — draw attention to the fact that the convention

* Language of the case: Danish.

could be used improperly, with the objective of tax avoidance, by means of artificial legal constructions. The text of those paragraphs of the commentary underlines the importance of the concept of 'beneficial owner' introduced, in particular, in Article 10 (taxation of dividends) and Article 11 (taxation of interest) of the model convention and the need to combat tax evasion.

5. Article 10(1) and (2) of the OECD 1977 Model Tax Convention is worded as follows:

> '1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.
> 2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:
> a. 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
> b. 15 per cent of the gross amount of the dividends in all other cases.'

6. When the commentaries were revised in 2003, comments were added concerning 'conduit companies', that is so say, companies which, though the formal owners of the income, have, in practice, only very narrow powers, rendering them mere fiduciaries or administrators acting on account of the interested parties, so that they are not to be regarded as the beneficial owners of that income. Paragraph 12 of the commentary on Article 10, in the revised version of 2003, states, in particular, that 'the term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance'. Paragraph 12.1 of the revised version of 2003 states that 'it would be … inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned' and that 'a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties'.

7. A further revised version of the commentaries in 2014 provided explanation of the concepts of 'beneficial owner' and 'conduit company'. Paragraph 10.3 of this version of the commentaries states that 'there are many ways of addressing conduit company and, more generally, treaty shopping situations. These include specific anti-abuse provisions in treaties, general anti-abuse rules and substance-over-form or economic substance approaches'.

*Directive 90/435*

8. The first and third recitals of Directive 90/435 are worded as follows:

> '… the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; … such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; … it is therefore necessary to introduce with respect to such grouping together of companies of different Member States, tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;
> …
> … the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; … cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; … it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies.'

9. Article 1 of Directive 90/435 provides:

> '1. Each Member State shall apply this Directive:
> …

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,

– …

2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.'

10. Article 2 of Directive 90/435 sets out the conditions relating to a company's form, to residence for tax purposes and to liability to tax that must be met in order to benefit from the directive.

11. Article 3 of Directive 90/435 states:

'1. For the purposes of applying this Directive:

a. the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20% in the capital of a company of another Member State fulfilling the same conditions;

such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20% in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State;

from 1 January 2007 the minimum holding percentage shall be 15%;

from 1 January 2009 the minimum holding percentage shall be 10%;

b. "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).

2. By way of derogation from paragraph 1, Member States shall have the option of:

– replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,

– not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.'

12. Article 4(1) of Directive 90/435 allows the Member States to choose between two systems, namely a system of exemption or one of imputation.

13. Article 5 of Directive 90/435 is worded as follows:

'Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.'

*Double taxation conventions*

14. Article 10(1) and (2) of the Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the avoidance of double taxation and the establishment of rules relating to mutual administrative assistance with respect to taxes on income and on capital, signed in Luxembourg on 17 November 1980 ('the Luxembourg-Denmark Tax Convention'), allocates the power to tax dividends between those two Member States and is worded as follows:

'1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

a. 5 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;

b. 15 per cent of the gross amount of the dividends in all other cases.'

15. Article 10(1) and (2) of the Convention between the Government of the Kingdom of Denmark and the Government of the Republic of Cyprus for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital, signed on 26 May 1981, allocated the power of taxation in respect of dividends and provided as follows:

'1. Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, and according to the laws of that State, but if the recipient is the beneficial owner of the dividends the tax so charged shall not exceed:

a. 10 per cent of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25 per cent of the capital of the company paying the dividends;
b. 15 per cent of the gross amount of the dividends in all other cases.'

16. Under Article 10(2) of the Convention between the Government of the United States of America and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, signed in Washington on 19 August 1999, the Contracting State of which the company paying the dividends is a resident may tax dividends distributed to a company which is resident in the other State and is their 'beneficial owner' at the rate of 5% of their gross amount.

17. There is no tax convention between the Kingdom of Denmark and Bermuda.

18. It is apparent from those bilateral conventions that the source State, that is to say, in the main actions, the Kingdom of Denmark, may tax dividends paid to a company established in another Member State, if that company is not the beneficial owner of the dividends, at a rate higher than that prescribed by those conventions. None of the conventions, however, defines the concept of 'beneficial owner'.

*Danish law*

Taxation of dividends

19. Paragraph 2(1)(c) of the selskabsskattelov (Law on corporation tax) provides:

'… companies, associations and so forth within the meaning of Paragraph 1(1) having their seat abroad are liable for tax under this Law inasmuch as they
…
c. receive dividends falling within Paragraph 16 A(1) and (2) of the Law on the assessment of State income tax … The tax liability shall not extend to dividends on shares of subsidiaries (see Paragraph 4 A of the Law on the taxation of capital gains) where taxation of the dividends paid by the subsidiary is waived or reduced under the provisions of Directive [90/435] or a tax convention concluded with the Faroe Islands, Greenland or the State where that parent company is resident. The tax liability shall also not extend to dividends on shares of affiliated companies (see Paragraph 4 B of the Law on the taxation of capital gains) which are not shares of subsidiaries when the recipient company which is the member of a group is resident in a Member State of the [European Union/European Economic Area (EEA)] and taxation of the dividends would have been waived or reduced pursuant to the provisions of Directive [90/435] or the tax convention concluded with the State in question if shares of subsidiaries had been involved. The tax liability shall also not extend to dividends received by owners of holdings in parent companies which are included in the list of companies referred to in Article 2(1)(a) of Directive [90/435] but which are regarded, for the purpose of their taxation in Denmark, as transparent entities. This provision is subject to the condition that the owner of a holding in the company is not resident in Denmark.'

Withholding tax

20. If, pursuant to Paragraph 2(1)(c) of the Law on corporation tax, limited tax liability arises on account of dividends from Denmark, Paragraph 65 of the kildeskattelov (Law on tax at source) obliges the Danish company distributing the dividends to withhold tax at source at the rate of 28%.

21. Paragraph 65(1) and (5) of the Law on tax at source, in the version at the material time, stated:

'1. For any adoption of, or decision to distribute or credit, dividends on shares in companies, associations and so forth referred to in Paragraph 1(1), points 1, 2, 2e and 4 of the Law on corporation tax, those companies, associations and so forth must withhold 28% of the total distributed, save where otherwise provided in subparagraph 4 or pursuant to subparagraphs 5 to 8. … The sum thus withheld shall be called "tax on dividends".
…
5. No tax shall be withheld on dividends received by a company resident abroad from a company resident in Denmark where those dividends do not give rise to tax liability (see Paragraph 2(1)(c) of the Law on corporation tax).'

22. It is clear from Paragraph 2(2), point 2, of the Law on corporation tax that the tax liability resulting from Paragraph 2(1)(c) of that law is definitively met when the tax withheld at source, prescribed in Paragraph 65 of the Law on tax at source, is levied. In addition, the rate of tax on profits was 28% during the period at issue in the main proceedings.

23. Danish parent companies are entitled to an exemption from tax on dividends received from Danish subsidiaries, under Paragraph 13(1), point 2, of the Law on corporation tax. Furthermore, it is clear from Paragraph 31(1), point 2, of the kildeskattebekendtgørelsen (Order on tax at source) that, when such dividends are distributed, the distributing Danish company does not have to withhold tax at source.

24. On the other hand, in so far as a Danish company is liable to tax on dividends distributed by another Danish company, the latter has to withhold tax at source pursuant to Paragraph 65(1) of the Law on tax at source.

25. The Ministry of Taxation acknowledged before the national court, in particular in the main action in Case C-116/16, that the Kingdom of Denmark infringed the FEU Treaty in levying, in 2011, on dividends received by a company of another Member State tax at a higher rate than the rate of corporation tax applicable at that time. Consequently, the Ministry of Taxation reduced the amount claimed to 25%, that is to say, a rate equal to the rate of corporation tax applicable at the time.

26. The date on which tax withheld at source is chargeable is specified in the second sentence of Paragraph 66(1) of the Law on tax at source, which is worded as follows:

> 'Tax withheld at source is chargeable from adoption of a dividend, or from a decision to distribute or credit a dividend, and must be paid no later than the following month, on the due date for payment by the company of the taxes collectable at source [known as "A-skat"] and the special workers' contribution that have been withheld.'

27. The payer of dividends is liable to the State for payment of the sums withheld.

28. In the event of late payment of the tax withheld at source, the rate of default interest is higher than the rate laid down in the event of late payment of corporation tax payable by a Danish company. However, the national court states that, under a legislative amendment that took effect on 1 August 2013, default interest is set at the same rate for both tax withheld at source and corporation tax.

29. The obligation to pay default interest is owed by the person required to withhold tax at source. For a company subject to unlimited tax liability in Denmark, taxable dividends form part of taxable income. It is the company distributing the dividends that must withhold tax at source and pay the tax withheld to the Treasury as well as default interest in the event of late payment.

30. Pursuant to Paragraph 65 C(1) of the Law on tax at source, a person paying royalties whose source is in Denmark is in principle required to withhold tax at source, whether or not the payee is resident in Denmark.

*Law applicable to fraud and abuse*

31. Until the adoption of Law No 540 of 29 April 2015, no general statutory rule to combat abuse existed in Denmark. However, case-law developed the 'reality' principle, under which taxation must be determined on the basis of a specific assessment of the facts. This means in particular that artificial tax arrangements may, depending on the circumstances, be set aside so that taxation takes account of reality, under the principle of substance over form.

32. It is clear from the orders for reference that, in both of the main actions, the parties are in agreement that the reality principle is not sufficient to justify setting aside the arrangements at issue in those actions.

33. As is apparent from the orders for reference, case-law has also developed the 'rightful income recipient' (*rette indkomstmodtager*) principle. This principle is based on the fundamental provisions relating to taxation of income, set out in Paragraph 4 of the statsskatteloven (Law on State tax), which have the effect that the tax authorities are not obliged to accept an artificial separation between the income-generating undertaking or activity and the allocation of the income deriving therefrom. This principle is therefore intended to determine the person who - regardless of formal appearances - is the real recipient of certain income and thus the person who is liable for tax on it.

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

34. In both main actions, the Ministry of Taxation contests the decisions by which the Landsskatteret (National Tax Appeals Commission, Denmark) found that T Danmark (Case C-116/16) and Y Denmark (Case C-117/16) had to be entitled to the exemption from withholding tax, provided for by Directive 90/435, on dividends paid to entities established in another Member State.

35. In order to enjoy the tax advantages provided for by Directive 90/435, the entity that receives the dividends must meet the conditions that the directive lays down. However, as the Danish Government states in its

observations, groups of companies not satisfying those conditions may in some cases create, between the company which distributes the dividends and the entity which is intended actually to have the use of them, one or more artificial companies meeting the formal conditions of the directive. The referring court's questions concerning abuse of rights and the concept of 'beneficial owner' relate to such financial constructions.

36. The facts as set out by the referring court and illustrated, in the orders for reference, by a number of diagrams of the structure of the company groups concerned are particularly complex and detailed. Only the matters necessary for the answers to be given to the questions referred for a preliminary ruling will be noted.

1. Case C-116/16, T Danmark

37. It is apparent from the order for reference that five private equity funds, none of which is a company resident in a Member State or in a country with which the Kingdom of Denmark has signed a double taxation convention, established in 2005 a group consisting of a number of companies with the aim of purchasing T Danmark, a large Danish service provider.

38. In its observations, the Danish Government stated that Case C-116/16 concerns the same group of companies as the group at issue in Case C-115/16, which relates to the taxation of interest and is decided by today's judgment in *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16).

39. As explained by the referring court, the private equity funds set up companies in Luxembourg. In 2010 one of them, N Luxembourg 2, acquired a large holding in the capital of T Danmark, and it thus held more than 50% of T Danmark's shares during the period at issue in the main proceedings. T Danmark's remaining shares were held by thousands of shareholders.

40. At the request of the Danish authorities, the Luxembourg tax authorities drew up in the spring of 2011 a 'residence certificate' certifying in particular that N Luxembourg 2 was subject to corporate income tax and was the beneficial owner of all the dividends paid on the shares that it owned in T Danmark and of any other income derived from them. The Danish Government notes in its observations that that certificate does not specify the factual information on the basis of which it was drawn up.

41. In accordance with its dividend policy, T Danmark paid its shareholders in the summer of 2011 dividends totalling roughly 1.8 billion Danish krone (DKK) (roughly EUR 241.4 million). Dividends were also paid in the spring of 2012.

42. In 2011 T Danmark submitted an application to SKAT (tax authority, Denmark) for a binding answer in order to ascertain whether the dividends that it was distributing to N Luxembourg 2 were exempt under the third sentence of Paragraph 2(1)(c) of the Law on corporation tax and, accordingly, whether they escaped withholding tax.

43. It was indicated in the request for a binding answer that in the third quarter of 2011 it was proposed to distribute dividends to N Luxembourg 2 amounting to roughly DKK 6 billion (roughly EUR 805 million). It was also stated that N Luxembourg 2 was an independent entity with its own management and own decision-making powers, so that it clearly was not possible to ascertain in advance and with certainty whether and in what way the management of N Luxembourg 2 would in fact decide to use those dividends. Finally, it was explained that a significant proportion of the ultimate investors were resident in the United States.

44. The Ministry of Taxation replied that an answer could not be given to the request if it was not known how N Luxembourg 2 would use the dividends paid by T Danmark.

45. T Danmark replied that it could be taken as established, for the purpose of the binding answer, that the dividends would be paid by T Danmark to N Luxembourg 2, which would itself distribute dividends to its own parent company. According to these details, it could be assumed that the latter would distribute part of those sums (as dividends and/or interest and/or debt repayment) to companies controlled by the various private equity funds or by its creditors. T Danmark also assumed that the sums paid by the parent company of N Luxembourg 2 to companies controlled by the various private equity funds would be transferred to the ultimate investors in the private equity funds, but T Danmark stated that it did not know how those transfers would be made or be treated for tax purposes.

46. The Skatterådet (Tax Commission, Denmark) answered the request for a binding answer in the negative.

47. The National Tax Appeals Commission, before which T Danmark lodged an appeal against that decision, took the view, on the other hand, that the dividends distributed by T Danmark to N Luxembourg 2 were exempt from tax. It held that limited tax liability was precluded pursuant to Directive 90/435, as the Kingdom

of Denmark had not adopted legislative provisions to prevent fraud or abuse, as provided for by Article 1(2) of that directive, and consequently could not tax the dividends under Paragraph 2(1)(c) of the Law on corporation tax. The Ministry of Taxation brought legal proceedings against that decision of the National Tax Appeals Commission.

48. In that context, the Østre Landsret (High Court of Eastern Denmark, Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. a. Does a Member State's reliance on Article 1(2) of [Directive 90/435] on the application of domestic provisions required for the prevention of fraud or abuse presuppose that the Member State in question has adopted a specific domestic provision implementing Article 1(2) of the directive, or that national law contains general provisions or principles on fraud and abuse that can be interpreted in accordance with Article 1(2)?
>
> b. If Question 1(a) is answered in the affirmative, can Paragraph 2(1)(c) of the Law on corporation tax, which provides that "it is a precondition that taxation of the dividends be waived … under the provisions of [Directive 90/435]", then be deemed to be a specific domestic provision as referred to in Article 1(2) of the directive?
>
> 2. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of distributed dividends is contingent on whether the dividends recipient is deemed to be the beneficial owner of the dividends, an agreement-based anti-abuse provision covered by Article 1(2) of [Directive 90/435]?
>
> 3. If Question 2 is answered in the affirmative, is it then for the national courts to define what is included in the concept "beneficial owner", or should the concept, in the application of Directive 90/435, be interpreted as meaning that a specifically EU law significance should be attached to the concept which is subject to review by the Court of Justice?
>
> 4. a. If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept of "beneficial owner", is the concept then to be interpreted as meaning that a company resident in a Member State which, in circumstances such as those of the present case, receives dividends from a subsidiary in another Member State, is the "beneficial owner" of those dividends as that concept is to be interpreted under EU law?
>
> b. Is the concept "beneficial owner" to be interpreted in accordance with the corresponding concept in Article 1(1) of [Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49)], read in conjunction with Article 1(4) thereof?
>
> c. Should the concept be interpreted solely in the light of the commentary on Article 10 of the OECD 1977 Model Tax Convention (paragraph 12), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies", and the additions made in 2014 regarding "contractual or legal obligations"?
>
> d. What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" if the dividends recipient has had a contractual or legal obligation to pass the dividends to another person?
>
> e. What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" that the referring court, following an assessment of the facts of the case, concludes that the recipient - without having been contractually or legally bound to pass the dividends received to another person - "in substance" did not have the right to "use and enjoy" the dividends as referred to in the 2014 Commentaries on the [OECD] 1977 Model Tax Convention?
>
> 5. If it is assumed in the case:
>
> – that there are "domestic or agreement-based provisions required for the prevention of fraud or abuse" (see Article 1(2) of Directive 90/435),
>
> – that dividends have been distributed from a company (A) resident in a Member State to a parent company (B) in another Member State and from there passed to that company's parent company (C), resident outside the EU/EEA, which in turn has distributed the funds to its parent company (D), also resident outside the EU/EEA,
>
> – that no double taxation convention has been entered into between the first-mentioned State and the State where C is resident,
>
> – that a double taxation convention has been entered into between the first-mentioned State and the State where D is resident, and
>
> – that the first-mentioned State, under its legislation, would therefore not have had a claim to tax at source on dividends distributed from A to D, had D been the direct owner of A,

is there abuse under the directive so that B is not protected thereunder?
6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member State taxes the parent company resident in the other Member State on the dividends, when the Member State in question deems resident parent companies in otherwise similar circumstances to be exempt from tax on such dividends?
7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), and the parent company is deemed by the latter Member State to have limited tax liability in that Member State on the dividends in question, does Article 49 TFEU, read in conjunction with Article 54 TFEU, preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims lodged against a company resident in the same Member State?
8. If Question 2 is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept "beneficial owner", and if a company (parent company) resident in a Member State cannot, on that basis, be deemed exempt from tax at source pursuant to Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), is the latter Member State then bound pursuant to Directive 90/435 or Article 4(3) TEU to state whom the Member State in that case deems to be the beneficial owner?
9. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 49 TFEU, read in conjunction with Article 54 TFEU (in the alternative Article 63 TFEU), viewed separately or as a whole, preclude legislation under which:
– the latter Member State requires the subsidiary to withhold tax at source on the dividends and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the parent company is resident in the Member State?
– the latter Member State calculates default interest on the tax at source owing?
The Court of Justice is requested to take the answer to Questions 6 and 7 into account in its answer to Question 9.
10. In circumstances where:
– a company (parent company) resident in a Member State fulfils the requirement in Directive 90/435 of owning (in 2011) at least 10% of the share capital of a company (subsidiary) resident in another Member State,
– the parent company is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends distributed by the subsidiary,
– the parent company's (direct or indirect) shareholder(s), resident in a non-EU/EEA country, are deemed to be the beneficial owner(s) of the dividends in question,
– the aforementioned (direct or indirect) shareholder(s) also fulfil the aforementioned capital requirement,
does Article 63 TFEU then preclude legislation under which the Member State where the subsidiary is situated taxes the dividends in question when the Member State in question deems resident companies fulfilling the capital requirement in Directive 90/435, that is to say, in fiscal year 2011 they own at least 10% of the share capital in the dividend-distributing company, to be exempt from tax on such dividends?'

2. Case C-117/16, Y Denmark

49. As is apparent from the order for reference, Y Inc., established in the United States ('Y USA'), which is the ultimate parent company of the Y Group, is listed on the stock exchange. Its subsidiaries established abroad are held through Y Global Ltd, established in Bermuda ('Y Bermuda'), whose sole activity, apart from the holding of shares in its subsidiaries, is the holding of intellectual property rights over the group's products. Its administrative operations are conducted by an independent management company.

50. Y Denmark, which was incorporated in 2000 by Y USA in Denmark and has always had around 20 employees, has sales and support services as its object and reports to Y BV, a company established in the Netherlands ('Y Holland'), which has operational responsibility for the group's sales outside the United States, Canada and Mexico. Y Denmark is also the parent company for the European part of the Y Group.

51. Following the enactment in the United States of the American Jobs Creation Act of 2004, companies established in the United States had the temporary ability to repatriate dividends of foreign subsidiaries on particularly favourable tax terms in return for an undertaking to use the resulting income for specific purposes in the United States, inter alia research and development. It was in those circumstances that Y USA decided to repatriate as large a dividend as possible from Y Bermuda in the financial year from 1 May 2005 to 30 April 2006. The total contribution, which was to come inter alia from dividends paid by Y Bermuda's subsidiaries, was set at 550 million United States dollars (USD) (roughly EUR 450.82 million).

52. Before those distributions were made, the European part of the Y Group was restructured. In this context, on 9 May 2005 Y Bermuda incorporated in Cyprus the company Y Cyprus with an initial share capital of USD 20 000 (roughly EUR 16 400), of which USD 2 000 (roughly EUR 1 640) was paid in. By agreement of 16 September 2005, Y Bermuda sold the holding in Y Denmark to Y Cyprus for EUR 90 million. The price was paid by means of a debt instrument.

53. As is apparent from the order for reference, Y Cyprus is a holding company which also carries out certain treasury management activities, such as the grant of loans to subsidiaries. It is clear from the management reports in its annual accounts for the financial years 2005-2006 and 2006-2007 that its main activity was the management of holdings. Furthermore, the company paid directors' fees of USD 571 (roughly EUR 468) and USD 915 (roughly EUR 750) respectively. According to the annual accounts, the company was not taxed as it did not make a taxable profit.

54. The referring court explains that on 26 September 2005 Y Holland decided to distribute a dividend of EUR 76 million to Y Denmark in respect of the 2004-2005 financial year. That dividend was paid to Y Denmark on 25 October 2005. On 28 September 2005 the general meeting of the members of Y Denmark approved, in respect of the same financial year, the payment of a dividend to Y Cyprus, also of EUR 76 million. That sum was paid to Y Cyprus on 27 October 2005. On 28 October 2005 Y Cyprus transferred the same sum to Y Bermuda in partial repayment of the loan granted when Y Denmark was acquired.

55. On 21 October 2005, Y Cyprus incorporated a company in the Netherlands named Y Holding BV. By agreement of 25 October 2005, Y Denmark sold its holding in Y Holland to Y Holding for EUR 14 million.

56. On 3 April 2006 Y Bermuda distributed a dividend of USD 550 million (roughly EUR 450.82 million) to Y USA. Payment of that dividend was financed from its own funds and by a bank loan.

57. On 13 October 2006 the general meeting of the members of Y Denmark approved the payment to Y Cyprus of a dividend in the sum of DKK 92 012 000 (roughly EUR 12.3 million) in respect of the 2005-2006 financial year. Y Denmark stated that that sum formed part (as a dividend to be received) of the total dividend of USD 550 million (roughly EUR 450.82 million) that Y Bermuda had distributed to Y USA on 3 April 2006, a fact which the Ministry of Taxation contested in the absence of supporting documents. Y Denmark transferred DKK 92 012 000 (roughly EUR 12.3 million) to Y Cyprus in 2010.

58. According to the referring court, the main question that arises in the case in point is whether Y Cyprus has limited tax liability in Denmark in respect of the dividends in question. Under national law, a foreign parent company does not, in principle, have limited tax liability in Denmark on account of dividends. The exemption of the dividends or their reduced taxation is, however, contingent on either Directive 90/435 or a double taxation convention applying. Most of the tax conventions concluded by the Kingdom of Denmark lay down as a condition for exemption from tax or its reduction that the entity which has received the dividends is their 'beneficial owner' (*retmæssig ejer*). Directive 90/435 does not lay down an equivalent condition.

59. SKAT takes the view that Y Cyprus has limited tax liability in Denmark in respect of the dividends in question, because it cannot be regarded as the beneficial owner of those dividends, within the meaning of the tax convention between the Kingdom of Denmark and the Republic of Cyprus. Nor is it covered by the provisions of Directive 90/435 that relate to exemption from withholding tax.

60. By decision of 17 September 2010, SKAT found that Y Denmark should have withheld tax at source on two dividend payments made in 2005 and 2006 to its parent company, Y Cyprus, and that Y Denmark had to be regarded as being liable for payment of that withholding tax.

61. An appeal was lodged against that decision before the National Tax Appeals Commission. On 16 December 2011 it found, like SKAT, that Y Cyprus was not the beneficial owner of the dividends within the meaning of the tax convention between the Kingdom of Denmark and the Republic of Cyprus, but it upheld the plea put forward by Y Denmark that tax should not be withheld at source on the ground that Y Cyprus had to benefit from the rules on exemption provided for by Directive 90/435.

62. The Ministry of Taxation brought an action before the referring court challenging the decision of the National Tax Appeals Commission.

63. In the order for reference, the referring court observes that the parties to the dispute are in agreement that the 'reality' principle does not enable the arrangements implemented to be set aside and that the company which has received the dividends, in this instance Y Cyprus, is the rightful income recipient within the meaning of Danish law.

64. In that context, the Østre Landsret (High Court of Eastern Denmark) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. a. Does a Member State's reliance on Article 1(2) of [Directive 90/435] on the application of domestic provisions required for the prevention of fraud or abuse presuppose that the Member State in question has adopted a specific domestic provision implementing Article 1(2) of the directive, or that national law contains general provisions or principles on fraud and abuse that can be interpreted in accordance with Article 1(2)?
>
> b. If Question 1(a) is answered in the affirmative, can Paragraph 2(1)(c) of the Law on corporation tax, which provides that "it is a precondition that taxation of the dividends be waived … under the provisions of [Directive 90/435]", then be deemed to be a specific domestic provision as referred to in Article 1(2) of the directive?
>
> 2. a. Is a provision in a double taxation convention entered into between two Member States and drafted in accordance with [the OECD] Model Tax Convention, under which taxation of distributed dividends is contingent on whether the dividends recipient is deemed to be the beneficial owner of the dividends, an agreement-based anti-abuse provision covered by Article 1(2) of [Directive 90/435]?
>
> b. If so, is the term "agreement" in Article 1(2) of the directive then to be construed as presupposing that the Member State may, under its domestic law, rely on the double taxation convention, to the detriment of the taxpayer?
>
> 3. If Question 2(a) is answered in the affirmative, is it then for the national courts to define what is included in the concept "beneficial owner", or should the concept, in the application of Directive 90/435, be interpreted as meaning that a specifically EU law significance should be attached to the concept which is subject to review by the Court of Justice?
>
> 4. a. If Question 2(a) is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept of "beneficial owner", is the concept then to be interpreted as meaning that a company resident in a Member State which, in circumstances such as those of the present case, receives dividends from a subsidiary in another Member State, is the "beneficial owner" of those dividends as that concept is to be interpreted under EU law?
>
> b. Is the concept "beneficial owner" to be interpreted in accordance with the corresponding concept in Article 1(1) of [Directive 2003/49], read in conjunction with Article 1(4) thereof?
>
> c. Should the concept be interpreted solely in the light of the commentary on Article 10 of the OECD 1977 Model Tax Convention (paragraph 12), or can subsequent commentaries be incorporated into the interpretation, including the additions made in 2003 regarding "conduit companies", and the additions made in 2014 regarding "contractual or legal obligations"?
>
> d. What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" if the dividends recipient has had a contractual or legal obligation to pass the dividends to another person?
>
> e. What significance does it have for the assessment of the issue whether the dividends recipient must be deemed to be a "beneficial owner" that the referring court, following an assessment of the facts of the case, concludes that the recipient – without having been contractually or legally bound to pass the dividends received to another person – "in substance" did not have the right to "use and enjoy" the dividends as referred to in the 2014 Commentaries on the [OECD] 1977 Model Tax Convention?
>
> 5. If it is assumed in the case:
>
> – that there are "domestic or agreement-based provisions required for the prevention of fraud or abuse" (see Article 1(2) of Directive 90/435),
>
> – that dividends have been distributed from a company (A) resident in a Member State to a parent company (B) in another Member State and from there passed to that company's parent company (C), resident outside the EU/EEA, which in turn has distributed the funds to its parent company (D), also resident outside the EU/EEA,
>
> – that no double taxation convention has been entered into between the first-mentioned State and the State where C is resident,

– that a double taxation convention has been entered into between the first-mentioned State and the State where D is resident, and

– that the first-mentioned State, under its legislation, would therefore not have had a claim to tax at source on dividends distributed from A to D, had D been the direct owner of A,

is there abuse under the directive so that B is not protected thereunder?

6. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 43 EC, read in conjunction with Article 48 EC (and/or Article 56 EC), preclude legislation under which the latter Member State taxes the parent company resident in the other Member State on the dividends, when the Member State in question deems resident parent companies in otherwise similar circumstances to be exempt from tax on such dividends?

7. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), and the parent company is deemed by the latter Member State to have limited tax liability in that Member State on the dividends in question, does Article 43 EC, read in conjunction with Article 48 EC (and/or Article 56 EC), preclude legislation under which the latter Member State requires the company liable for withholding the tax at source (subsidiary) to pay default interest in the event of late payment of the tax at source at a higher rate of interest than the default interest rate that the Member State charges on corporation tax claims lodged against a company resident in the same Member State?

8. If Question 2(a) is answered in the affirmative and the answer to Question 3 is that it is not for the national courts to define what is included in the concept "beneficial owner", and if a company (parent company) resident in a Member State cannot, on that basis, be deemed exempt from tax at source pursuant to Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), is the latter Member State then bound pursuant to Directive 90/435 or Article 10 EC to state whom the Member State in that case deems to be the beneficial owner?

9. If a company resident in a Member State (parent company) is in fact deemed not to be exempt from tax at source under Directive 90/435 in respect of dividends received from a company resident in another Member State (subsidiary), does Article 43 EC, read in conjunction with Article 48 EC (in the alternative Article 56 EC), viewed separately or as a whole, preclude legislation under which:

– the latter Member State requires the subsidiary to withhold tax at source on the dividends and makes that person liable to the authorities for the non-withheld tax at source, where there is no such duty to withhold tax at source when the parent company is resident in the Member State?

– the latter Member State calculates default interest on the tax at source owing?

The Court of Justice is requested to take the answer to Questions 6 and 7 into account in its answer to Question 9.

10. In circumstances where:

– a company (parent company) resident in a Member State fulfils the requirement in Directive 90/435 of owning (in 2005 and 2006) at least 20% of the share capital of a company (subsidiary) resident in another Member State,

– the parent company is in fact deemed not to be exempt from tax at source pursuant to Article 1(2) of Directive 90/435 in respect of dividends distributed by the subsidiary,

– the parent company's (direct or indirect) shareholder(s), resident in a non-EU/EEA country, are deemed to be the beneficial owner(s) of the dividends in question,

– the aforementioned (direct or indirect) shareholder(s) also fulfil the aforementioned capital requirement,

does Article 56 EC then preclude legislation under which the Member State where the subsidiary is situated taxes the dividends in question when the Member State in question deems resident companies fulfilling the capital requirement in Directive 90/435, that is to say, in fiscal years 2005 and 2006 they own at least 20% of the share capital in the dividend-distributing company (15% in 2007 and 2008 and 10% thereafter), to be exempt from tax on such dividends?'

**Procedure before the Court**

65. On account of the connection between the two main actions, which both relate to the interpretation of Directive 90/435 and of the fundamental freedoms enshrined in the Treaties, the cases should be joined for the purposes of the judgment.

66. By letter of 2 March 2017, the Danish Government requested, in accordance with the third paragraph of Article 16 of the Statute of the Court of Justice of the European Union, that these cases be heard by the Grand Chamber of the Court. Furthermore, in the light of the similarities between these cases and Cases C-115/16, C-118/16, C-119/16 and C-299/16, which are the subject of today's judgment in *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16), the Danish Government also suggested that the Court decide, pursuant to Article 77 of its Rules of Procedure, to organise a joint hearing of all the cases. The Court granted the Danish Government's requests.

**Consideration of the questions referred**

67. The questions referred by the national court concern three topics. The first topic relates to the existence of a legal basis enabling a Member State to refuse, on account of the commission of an abuse of rights, to grant the exemption provided for in Article 5 of Directive 90/435 to a company that has distributed profits to a company of another Member State, of which it is the subsidiary. In so far as such a legal basis exists, the second topic addressed by the questions concerns the constituent elements of any abuse of rights and the conditions for proving it. Finally, the third topic of the questions, likewise in the event that it is possible for a Member State to refuse such a company the benefits of Directive 90/435, concerns the interpretation of the provisions of the FEU Treaty relating to freedom of establishment and the free movement of capital, in order to enable the referring court to establish whether the Danish legislation infringes those freedoms.

*Questions 1 to 3 and 4(a) to (c) in the main actions*

68. By Questions 1 to 3 and 4(a) to (c) in the main actions, the referring court asks, in essence, first, whether the combating of fraud or abuse, as permitted by Article 1(2) of Directive 90/435, requires there to be a domestic or agreement-based anti-abuse provision as referred to in that article. Second, it asks whether a convention drafted in accordance with the OECD Model Tax Convention and containing the concept of 'beneficial owner' may constitute an agreement-based anti-abuse provision as referred to in Article 1(2) of Directive 90/435. Third, it seeks to ascertain whether that concept of 'beneficial owner' is a concept of EU law and must be understood in the same sense as the concept of 'beneficial owner' in Article 1(1) of Directive 2003/49 and whether it is possible, when interpreting that provision, to take account of Article 10 of the OECD 1977 Model Tax Convention. It asks in particular whether a provision containing the concept of 'beneficial owner' may be regarded as constituting a legal basis enabling abuse of rights to be combated.

69. It is appropriate to begin by examining Question 1 in the main actions, by which the referring court asks whether, in order to combat an abuse of rights in the context of applying Directive 90/435, a Member State must have adopted a specific domestic provision transposing that directive or whether it may refer to domestic or agreement-based anti-abuse principles or provisions.

70. It is settled case-law that there is, in EU law, a general legal principle that EU law cannot be relied on for abusive or fraudulent ends (judgments of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24 and the case-law cited; of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 68; of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 35; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

71. That general principle of law must be complied with by individuals. Indeed, the application of EU legislation cannot be extended to cover transactions carried out for the purpose of fraudulently or wrongfully obtaining advantages provided for by EU law (see, to that effect, judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38; of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 27; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99).

72. It thus follows from that principle that a Member State must refuse to grant the benefit of the provisions of EU law where they are relied upon not with a view to achieving the objectives of those provisions but with the aim of benefiting from an advantage in EU law although the conditions for benefiting from that advantage are fulfilled only formally.

73. That is so, for example, where the completion of customs formalities does not fall within the context of normal commercial transactions but is purely formal and is designed solely to obtain wrongfully the grant of compensatory amounts (see, to that effect, judgments of 27 October 1981, *Schumacher and Others*, 250/80, EU:C:1981:246, paragraph 16, and of 3 March 1993, *General Milk Products*, C-8/92, EU:C:1993:82, paragraph 21) or export refunds (see, to that effect, judgment of 14 December 2000, *Emsland-Stärke*, C-110/99, EU:C:2000:695, paragraph 59).

74. Furthermore, the principle of prohibition of abuse of rights is applicable in fields as varied as the free movement of goods (judgment of 10 January 1985, *Association des Centres distributeurs Leclerc and Thouars Distribution*, 229/83, EU:C:1985:1, paragraph 27), freedom to provide services (judgment of 3 February 1993, *Veronica Omroep Organisatie*, C-148/91, EU:C:1993:45, paragraph 13), public service contracts (judgment of 11 December 2014, *Azienda sanitaria locale n. 5 'Spezzino' and Others*, C-113/13, EU:C:2014:2440, paragraph 62), freedom of establishment (judgment of 9 March 1999, *Centros*, C-212/97, EU:C:1999:126, paragraph 24), company law (judgment of 23 March 2000, *Diamantis*, C-373/97, EU:C:2000:150, paragraph 33), social security (judgments of 2 May 1996, *Paletta*, C-206/94, EU:C:1996:182, paragraph 24; of 6 February 2018, *Altun and Others*, C-359/16, EU:C:2018:63, paragraph 48; and of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99), transport (judgment of 6 April 2006, *Agip Petroli*, C-456/04, EU:C:2006:241, paragraphs 19 to 25), social policy (judgment of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraphs 37 to 41), restrictive measures (judgment of 21 December 2011, *Afrasiabi and Others*, C-72/11, EU:C:2011:874, paragraph 62) and value added tax (VAT) (judgment of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 74).

75. As regards that last field, the Court has observed on a number of occasions that, whilst preventing possible tax evasion, avoidance and abuse is an objective recognised and encouraged by Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the principle that abusive practices are prohibited nonetheless constitutes a general principle of EU law which applies irrespective of whether the rights and advantages that are abused have their basis in the Treaties, in a regulation or in a directive (see, to that effect, judgment of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraphs 30 and 31).

76. It follows that the general principle that abusive practices are prohibited must be relied on against a person where that person invokes certain rules of EU law providing for an advantage in a manner which is not consistent with the objectives of those rules. The Court has thus held that that principle may be relied on against a taxable person in order to refuse him, inter alia, the right to exemption from VAT, even in the absence of provisions of national law providing for such refusal (see, to that effect, judgments of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 62, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 33).

77. Whilst Article 1(2) of Directive 90/435 provides that the directive is not to preclude application of the domestic or agreement-based provisions required for the prevention of fraud or abuse, that provision cannot be interpreted as excluding the application of the general principle of EU law, noted in paragraphs 70 to 72 above, that abusive practices are prohibited. The transactions alleged by SKAT to constitute an abuse of rights fall within the scope of EU law (see, to that effect, judgment of 22 December 2010, *Weald Leasing*, C-103/09, EU:C:2010:804, paragraph 42) and could prove incompatible with the objective pursued by that directive.

78. As is clear from its first and third recitals, Directive 90/435 has the aim of facilitating the grouping together of companies at EU level by introducing tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.

79. To permit the setting up of financial arrangements whose sole aim is to benefit from the tax advantages resulting from the application of Directive 90/435 would not be consistent with such objectives and, on the contrary, would undermine the effective functioning of the internal market by distorting the conditions of competition. As the Advocate General has, in essence, observed in point 51 of her Opinion in Case C-116/16, that would also be the case even if the transactions at issue do not exclusively pursue such an aim, as the Court has held that the principle that abusive practices are prohibited applies, in tax matters, where the accrual of a tax advantage constitutes the essential aim of the transactions at issue (see, to that effect, judgments of 21 February 2008, *Part Service*, C-425/06, EU:C:2008:108, paragraph 45, and of 22 November 2017, *Cussens and Others*, C-251/16, EU:C:2017:881, paragraph 53).

80. Furthermore, the right of taxpayers to take advantage of competition engaged in by the Member States on account of the lack of harmonisation of taxation of income cannot be raised against the application of the general principle that abusive practices are prohibited. In that regard, it should be noted that Directive 90/435 had the objective of harmonisation in respect of direct taxation by the introduction of tax rules which were neutral from the point of view of competition and that it did not seek to preclude Member States from taking the necessary measures to combat fraud or abuse.

81. Whilst the pursuit by a taxpayer of the tax regime most favourable for him cannot, as such, set up a general presumption of fraud or abuse (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 50; of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 84; and of 24 November 2016, SECIL, C-464/14, EU:C:2016:896, paragraph 60), the fact remains that such a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 51; of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 61; and of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraphs 61 to 63).

82. It is apparent from these factors that it is incumbent upon the national authorities and courts to refuse to grant entitlement to the rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

83. Thus, in the light of the general principle of EU law that abusive practices are prohibited and of the need to ensure observance of that principle when EU law is implemented, the absence of domestic or agreement-based anti-abuse provisions does not affect the national authorities' obligation to refuse to grant entitlement to rights provided for by Directive 90/435 where they are invoked for fraudulent or abusive ends.

84. The defendants in the main proceedings rely on the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) – which concerned entitlement to an exemption provided for by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) – in order to contend that, on account of Article 1(2) of Directive 90/435, entitlement to the advantages provided for by that directive can be refused by the Member State concerned only where the national legislation contains a distinct and specific legal basis in that regard.

85. However, that line of argument cannot be upheld.

86. It is true that the Court noted in paragraph 42 of the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408), that the principle of legal certainty precludes directives from being able by themselves to create obligations for individuals and therefore from being capable of being relied upon per se by the Member State as against individuals.

87. It also noted that such a finding is without prejudice to the requirement for all authorities of a Member State, in applying national law, to interpret it as far as possible in the light of the wording and purpose of directives in order to achieve the result pursued by those directives, and that those authorities are thus able to rely on a directive-compliant interpretation of national law against individuals (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 45 and the case-law cited).

88. It was on the basis of those considerations that the Court invited the referring court to ascertain whether there was, in Danish law, a provision or general principle prohibiting abuse of rights or other provisions on tax evasion or tax avoidance which might be interpreted in accordance with the provision of Directive 90/434 under which, in essence, a Member State may refuse the right of deduction provided for by that directive where a transaction is essentially directed at such evasion or avoidance, and, if so, then to determine whether the conditions for the application of those national provisions were satisfied in the main proceedings (see, to that effect, judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraphs 46 and 47).

89. Nevertheless, even if it were to transpire, in the main actions, that national law does not contain rules which may be interpreted in compliance with Article 1(2) of Directive 90/435, this – notwithstanding what the Court held in the judgment of 5 July 2007, *Kofoed* (C-321/05, EU:C:2007:408) – could not be taken to mean that the national authorities and courts would be prevented from refusing to grant the advantage derived from the right of exemption provided for in Article 5 of the directive in the event of fraud or abuse of rights (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 54).

90. A refusal given to a taxpayer in such circumstances is not covered by the situation referred to in paragraph 86 above since it reflects the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraphs 55 and 56 and the case-law cited).

91. Accordingly, since, as has been noted in paragraph 70 above, abusive or fraudulent acts cannot found a right provided for by EU law, the refusal of an advantage under a directive, such as Directive 90/435, does not amount to imposing an obligation on the individual concerned under that directive, but is merely the consequence of the finding that the objective conditions required for obtaining the advantage sought, prescribed by the directive as regards that right, are met only formally (see, by analogy, judgment of 18 December 2014, *Schoenimport 'Italmoda' Mariano Previti and Others*, C-131/13, C-163/13 and C-164/13, EU:C:2014:2455, paragraph 57 and the case-law cited).

92. In such circumstances, the Member States must, therefore, refuse to grant the advantage resulting from Directive 90/435, in accordance with the general principle that abusive practices are prohibited, under which EU law cannot cover abusive practices of economic operators (see, to that effect, judgment of 11 July 2018, *Commission* v *Belgium*, C-356/15, EU:C:2018:555, paragraph 99 and the case-law cited).

93. Having regard to the finding made in paragraph 72 above, there is no need to answer Question 2 asked by the referring court in the main actions, relating in essence to whether a provision of a bilateral double taxation convention that refers to the concept of 'beneficial owner' can constitute a legal basis for combating fraudulent and abusive practices in the context of Directive 90/435.

94. Accordingly, there is also no need to answer Questions 3 and 4(a) to (c), relating to the interpretation of that concept of 'beneficial owner', as they have been asked only if Question 2 is answered in the affirmative.

95. In the light of all those matters, the answer to Question 1 is that the general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Directive 90/435, even if there are no domestic or agreement-based provisions providing for such a refusal.

*Questions 4(d) and (e), 5 and 8 in the main actions*

96. By Questions 4(d) and (e) and 5 in the main actions, the referring court asks, in essence, what the constituent elements of an abuse of rights are and how those elements may be established. In that regard, it is unsure in particular whether a company may be regarded as having really received dividends from its subsidiary when it is bound by a contractual or legal obligation to pass those dividends on to a third party or when it is apparent from the factual circumstances that, 'in substance', that company, without being bound by such an obligation, does not have the right to 'use and enjoy the dividend' within the meaning of the commentaries on the OECD 1977 Model Tax Convention that were adopted in 2014. It is also unsure whether there can be an abuse of rights where the beneficial owner of the dividends, transferred by conduit companies, is ultimately a company whose seat is in a third State with which the Member State concerned has concluded a tax convention. By Question 8, the referring court further asks, in essence, whether a Member State which refuses to accord a company of another Member State the status of beneficial owner of the dividends is required to identify the company which it regards, as the case may be, as being the beneficial owner.

The constituent elements of an abuse of rights and the relevant evidence

97. As is clear from the Court's case-law, proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it (judgments of 14 December 2000, *Emsland-Stärke,* C-110/99, EU:C:2000:695, paragraphs 52 and 53, and of 12 March 2014, *O. and B*., C-456/12, EU:C:2014:135, paragraph 58).

98. Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting from an improper advantage (see, to that effect, judgments of 20 June 2013, *Newey*, C-653/11, EU:C:2013:409, paragraphs 47 to 49; of 13 March 2014, *SICES and Others*, C-155/13, EU:C:2014:145, paragraph 33; and of 14 April 2016, *Cervati and Malvi*, C-131/14, EU:C:2016:255, paragraph 47).

99. It is not for the Court to assess the facts in the main proceedings. However, when giving a preliminary ruling, the Court may, if appropriate, specify indicia in order to guide the national court in the assessment of the cases that it has to decide. In the main proceedings, whilst the presence of a number of such indications could lead to the conclusion that there is an abuse of rights, it is nevertheless for the referring court to establish

whether those indications are objective and consistent, and whether the defendants in the main proceedings have had the opportunity to adduce evidence to the contrary.

100. A group of companies may be regarded as being an artificial arrangement where it is not set up for reasons that reflect economic reality, its structure is purely one of form and its principal objective or one of its principal objectives is to obtain a tax advantage running counter to the aim or purpose of the applicable tax law. That is so inter alia where, on account of a conduit entity interposed in the structure of the group between the company that pays dividends and the company in the group which is their beneficial owner, payment of tax on the dividends is avoided.

101. Thus, it is an indication of the existence of an arrangement intended to obtain improper entitlement to the exemption provided for in Article 5 of Directive 90/435 that all or almost all of the aforesaid dividends are, very soon after their receipt, passed on by the company that has received them to entities which do not fulfil the conditions for the application of Directive 90/435, either because they are not established in any Member State, or because they are not incorporated in one of the forms covered by the directive, or because they are not subject to one of the taxes listed in Article 2(c) of the directive, or because they do not have the status of 'parent company' and do not meet the conditions laid down in Article 3 of the directive.

102. The conditions for the application of Directive 90/435 are not met by entities resident for tax purposes outside the European Union, such as, it seems, the companies at issue in Case C-117/16 or the investment funds at issue in Case C-116/16. In those cases, if the dividends had been paid directly by the Danish debtor company to the entities which, according to the Ministry of Taxation, were their beneficial owners, the Kingdom of Denmark could have levied withholding tax.

103. Likewise, the artificiality of an arrangement is capable of being borne out by the fact that the relevant group of companies is structured in such a way that the company which receives the dividends paid by the debtor company must itself pass those dividends on to a third company which does not fulfil the conditions for the application of Directive 90/435, with the consequence that it makes only an insignificant taxable profit when it acts as a conduit company in order to enable the flow of funds from the debtor company to the entity which is the beneficial owner of the sums paid.

104. The fact that a company acts as a conduit company may be established where its sole activity is the receipt of dividends and their transmission to the beneficial owner or to other conduit companies. The absence of actual economic activity must, in the light of the specific features of the economic activity in question, be inferred from an analysis of all the relevant factors relating, in particular, to the management of the company, to its balance sheet, to the structure of its costs and to expenditure actually incurred, to the staff that it employs and to the premises and equipment that it has.

105. Indications of an artificial arrangement may also be constituted by the various contracts existing between the companies involved in the financial transactions at issue, giving rise to intragroup flows of funds, by the way in which the transactions are financed, by the valuation of the intermediary companies' equity and by the conduit companies' inability to have economic use of the dividends received. In this connection, such indications are capable of being constituted not only by a contractual or legal obligation of the parent company receiving the dividends to pass them on to a third party but also by the fact that, 'in substance', as the referring court states, that company, without being bound by such a contractual or legal obligation, does not have the right to use and enjoy those dividends.

106. Moreover, such indications may be reinforced by the simultaneity or closeness in time of, on the one hand, the entry into force of major new tax legislation, such as the Danish legislation at issue in the main actions or the United States legislation referred to in paragraph 51 above, and, on the other hand, the setting up of complex financial transactions and the grant of intragroup loans.

107. The referring court is also unsure, in essence, whether there can be an abuse of rights where the beneficial owner of dividends transferred by conduit companies is ultimately a company whose seat is in a third State with which the source Member State has concluded a tax convention under which no tax would have been withheld on the dividends if they had been paid directly to the company having its seat in that third State.

108. In that regard, when examining the structure of the group it is immaterial that some of the beneficial owners of the dividends paid by the conduit company are resident for tax purposes in a third State which has concluded a double taxation convention with the source Member State. The existence of such a convention cannot in itself rule out an abuse of rights. Thus, a convention of that kind cannot call into question that there is an abuse of rights where its existence is duly established on the basis of a set of facts showing that economic

operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim of benefiting improperly from the exemption from withholding tax, provided for in Article 5 of Directive 90/435.

109. It should be added that, whilst taxation must correspond to economic reality, the existence of a double taxation convention is not, as such, capable of establishing that a payment was really made to recipients resident in the third State with which that convention has been concluded. If the company owing the dividends wishes to benefit from the advantages of such a convention, it is open to it to pay the dividends directly to the entities that are resident for tax purposes in a State which has concluded a double taxation convention with the source State.

110. That said, it remains possible, in a situation where the dividends would have been exempt had they been paid directly to the company having its seat in a third State, that the aim of the group's structure is unconnected with any abuse of rights. In such a case, the group cannot be reproached for having chosen such a structure rather than direct payment of the dividends to that company.

111. Furthermore, where the beneficial owner of dividends paid is resident for tax purposes in a third State, refusal of the exemption provided for in Article 5 of Directive 90/435 is not in any way subject to fraud or an abuse of rights being found.

112. Indeed, Directive 90/435, as is apparent in particular from its third recital, seeks to eliminate, by the introduction of a common tax system, any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 25 and the case-law cited). As has been stated in paragraph 78 above, the directive is thus designed to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State since it is clear from Article 1 that the directive applies only to distributions received by companies of one Member State from their subsidiaries with a seat in other Member States (see, to that effect, order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C-439/07 and C-499/07, EU:C:2009:339, paragraph 62 and the case-law cited).

113. The mechanisms of Directive 90/435, in particular Article 5, are therefore intended for situations in which, if they were not applied, the exercise by the Member States of their powers of taxation might lead to the profits distributed by the subsidiary to its parent company being subject to double taxation (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 39). Such mechanisms are not, on the other hand, intended to apply when the beneficial owner of the dividends is a company resident for tax purposes outside the European Union since, in such a case, exemption of those dividends from withholding tax in the Member State from which they are paid could well result in them not actually being taxed in the European Union.

114. In the light of all those matters, the answer to Question 4(d) and (e) in the main actions is that proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.

The burden of proving the abuse of rights

115. Directive 90/435 does not contain provisions relating to the burden of proving that there is an abuse of rights.

116. However, as the Danish and German Governments contend, it is in principle for the companies which seek entitlement to the exemption from withholding tax on dividends that is provided for in Article 5 of Directive 90/435 to establish that they fulfil the objective conditions imposed by the directive. Indeed, there is no reason why the tax authorities concerned should not request from the taxpayer the evidence that they consider they need for a concrete assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (judgment of 28 February 2013, *Petersen and Petersen*, C-544/11, EU:C:2013:124, paragraph 51 and the case-law cited).

117. On the other hand, where a tax authority of the source Member State seeks, on a ground relating to the existence of an abusive practice, to refuse to grant the exemption provided for in Article 5 of Directive 90/435 to a company that has paid dividends to a company established in another Member State, it has the task of establishing the existence of elements constituting such an abusive practice while taking account of all the relevant factors, in particular the fact that the company to which the dividends have been paid is not their beneficial owner.

118. Such an authority has the task not of identifying the beneficial owners of those dividends but of establishing that the supposed beneficial owner is merely a conduit company through which an abuse of rights has been committed. Indeed, identification of that kind may prove impossible, in particular because the potential beneficial owners are unknown. Given the complexity of certain financial arrangements and the possibility that the intermediary companies involved in the arrangements are established outside the European Union, the national tax authority does not necessarily have information enabling it to identify those owners. That authority cannot be required to furnish evidence that would be impossible for it to provide.

119. Furthermore, even if the potential beneficial owners are known, it is not necessarily established which of them are or will be the actual beneficial owners. Thus, in this instance, in Case C-117/16 the referring court states that, while the parent company of Y Cyprus is Y Bermuda, whose seat is in Bermuda, the parent company of Y Bermuda is Y USA, established in the United States. If the referring court were to hold that Y Cyprus is not the beneficial owner of the dividends, the tax authorities and courts of the dividends' source Member State would, in all probability, be unable to determine which of those two parent companies is or will be the beneficial owner of those dividends. In particular, the allocation of those dividends may have been decided upon after the tax authority's findings relating to the conduit company.

120. Consequently, the answer to Question 8 in the main actions is that, in order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends.

*Questions 6, 7, 9 and 10 in the main actions*

121. By Questions 6, 7, 9 and 10 in the main actions, the referring court seeks, in essence, to ascertain, should the system, laid down in Article 5(1) of Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State not be applicable, whether Articles 49 and 54 TFEU or Article 63 TFEU must be interpreted as precluding various aspects of the legislation of the first Member State, such as that at issue in the main proceedings, relating to the taxation of those dividends.

122. It must be stated at the outset that these questions are based on the premiss that the inapplicability of that system of exemption arises from the finding that there is fraud or abuse, within the meaning of Article 1(2) of Directive 90/435. However, in such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 70 above, claim the benefit of the freedoms enshrined in the FEU Treaty in order to call into question the national legislation governing the taxation of dividends paid to a company resident in another Member State.

123. Consequently, the answer to Questions 6, 7, 9 and 10 in the main actions is that, in a situation where the system, laid down by Directive 90/435, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.

**Costs**

124. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. Cases C-116/16 and C-117/16 are joined for the purposes of the judgment.**

**2. The general principle of EU law that EU law cannot be relied on for abusive or fraudulent ends must be interpreted as meaning that, where there is a fraudulent or abusive practice, the national authorities and courts are to refuse a taxpayer the exemption from withholding tax on profits distributed by a subsidiary to its parent company, provided for in Article 5 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2003/123/EC of 22 December 2003, even if there are no domestic or agreement-based provisions providing for such a refusal.**

**3. Proof of an abusive practice requires, first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, second, a subjective element consisting in the intention to obtain an advantage from the EU rules by artificially creating the conditions laid down for obtaining it. The presence of a certain number of indications may demonstrate that there is an abuse of rights, in so far as those indications are objective and consistent. Such indications can include, in particular, the existence of conduit companies which are without economic justification and the purely formal nature of the structure of the group of companies, the financial arrangements and the loans.**

**4. In order to refuse to accord a company the status of beneficial owner of dividends, or to establish the existence of an abuse of rights, a national authority is not required to identify the entity or entities which it regards as being the beneficial owner(s) of those dividends.**

**5. In a situation where the system, laid down by Directive 90/435, as amended by Directive 2003/123, of exemption from withholding tax on dividends paid by a company resident in a Member State to a company resident in another Member State is not applicable because there is found to be fraud or abuse, within the meaning of Article 1(2) of that directive, application of the freedoms enshrined in the FEU Treaty cannot be relied on in order to call into question the legislation of the first Member State governing the taxation of those dividends.**

# EU Court of Justice, 26 February 2019*

# Case C-135/17

# *X GmbH v Finanzamt Stuttgart - Körperschaften*

*Grand Chamber:* *K. Lenaerts, President, J.-C. Bonichot, M. Vilaras, E. Regan, F. Biltgen, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas (Rapporteur), E. Juhász, M. Ilesic, J. Malenovský, E. Levits and L. Bay Larsen, Judges*

*Advocate General:* *P. Mengozzi*

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1. This request for a preliminary ruling concerns the interpretation of Articles 63 and 64 TFEU.

2. The request has been made in proceedings between X GmbH, a company incorporated under German law, and the Finanzamt Stuttgart – Körperschaften (Stuttgart Tax Office – Legal Persons Department, Germany) regarding the incorporation of the income obtained by Y, a company incorporated under Swiss law which is 30% owned by X, into the latter's tax base.

**Legal context**

3. The fourth part of the Gesetz über die Besteuerung bei Auslandsbeziehungen (Law on taxation of foreign transactions) of 8 September 1972 (BGBl. 1972 I, p. 1713), in the version applicable to the facts in the main proceedings ('the AStG 2006'), entitled 'Shareholding in foreign controlled companies', includes Paragraphs 7 to 14 of that law.

4. Paragraph 7(1) of the AStG 2006 defines a 'foreign company' as 'a legal person, a group of legal persons or a fund within the meaning of the Körperschaftsteuergesetz [(Law on Corporation Tax)], of which neither the management nor the head office are in Germany and which is not exempt from corporation tax pursuant to Paragraph 3(1) [of the latter law]'. According again to that Paragraph 7(1), when taxable persons with unlimited tax liability hold a shareholding amounting to more than half of the capital of such a company, the income with respect to which that company is a controlled company [Zwischengesellschaft], within the meaning of Paragraph 8 of the AStG 2006, is chargeable to tax as the income of each of those persons in the proportion corresponding to the shareholding attributable to each person in the share capital of that company.

5. Paragraph 7(6) of the AStG 2006 provides that:

> 'If a foreign company is a controlled company with respect to controlled-company income from invested capital [Zwischeneinkünfte mit Kapitalanlagecharakter] within the meaning of subparagraph 6a, and if a taxable person with unlimited tax liability holds at least 1% of the shares in that company, that controlled-company income shall be taxed as the income of that person to the extent defined in subparagraph 1, even where the remaining conditions laid down in that subparagraph are not satisfied. ...'

6. Paragraph 7(6a) of the AStG 2006 provides:

> 'Controlled-company income from invested capital is income of a foreign controlled company … which is derived from the holding, administering or maintenance or increasing the value of means of payment,

* Language of the case: German.

debts, securities, shares (with the exception of the types of income referred to in Points 8 and 9 of Paragraph 8(1)) and similar assets, unless the taxable person proves that that income is derived from an activity that contributes to one of the foreign company's activities pursued on its own account covered under Points 1 to 6 of Paragraph 8(1) ...'

7. Under Paragraph 8(1) of the AStG 2006, a company established in a third country is to be regarded as a 'controlled company' with respect to income that is liable to low taxation and does not arise from the economic activities listed in Points 1 to 10 of that subparagraph. In accordance with those points, the concept of a 'controlled company' does not include companies that receive income from – subject to several exceptions and details – agriculture and forestry, the manufacture, treatment, processing or assembly of objects, energy production activities and the search for or extraction of natural resources, the operation of credit institutions or insurance companies, trade, the provision of services, leasing and rental, raising or making available through a loan capital which the taxable person can show has been raised on foreign capital markets exclusively and not through a person related to the taxable person or foreign company, the distribution of profits of companies, the sale of shares held in another company, its dissolution or reduction of its capital, and company conversions.

8. For the purposes of the definition of a controlled company established in a third country, Paragraph 8(3) of the AStG 2006 defines a tax on profits as 'low' when it is less than 25%.

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

9. It is apparent from the order for reference that X, a limited liability company incorporated under German law, held, during the period which is the subject of the main proceedings, 30% of the shares in Y, a company with its head office and management in Switzerland. In June 2005 Y concluded a 'debt assignment contract' with Z GmbH, a sports rights management company established in Germany.

10. The debts thus assigned to Y were owed under contracts pursuant to which Z granted non-repayable subsidies to sports clubs, thereby making liquid assets available to those clubs, and received 'profit participation rights' in return, the minimum amount of which corresponded to the amount paid in subsidies by Z, although that amount could be larger depending, inter alia, on the sports performance of the club concerned and its income from, inter alia, broadcasting rights.

11. Y paid EUR 11 940 461, funded entirely from third parties, to Z as the purchase price for the assignment of the debts in question. In November 2005 X granted to Y a loan of EUR 2.8 million.

12. By decision of 1 January 2007, the Stuttgart Tax Office — Legal Persons Department determined that X had received income from the passive activity of a company established in a third country. As that office regarded Y as a controlled company with respect to 'controlled-company income from invested capital' within the meaning of Paragraph 7(6) and (6a) of the AStG 2006, part of the income obtained by Y derived from the debts purchased from Z was incorporated into the tax base of X, whose profits were calculated for the year 2006 at EUR 546 651, from which the amount of EUR 95 223 in losses for the previous year was deductible.

13. X brought an action against that decision before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany), which, however, dismissed the action.

14. Further to that dismissal, X brought proceedings before the Bundesfinanzhof (Federal Finance Court, Germany). According to that court, it is not disputed that Y was with respect to X a 'controlled company' and that the income obtained by Y further to the debt assignment contract was 'controlled-company income from invested capital' within the meaning of Paragraphs 7(6) and 8(1) of the AStG 2006. As X held more than 1% of the shares in that company established in a third country, the income obtained by Y was correctly incorporated into X's tax base pursuant to those provisions, pro rata to the amount of its shareholding in that company. Accordingly, under German law, X's appeal against the decision of 1 January 2007 is, according to the referring court, unfounded.

15. The referring court states, however, that those provisions apply only to shares held by German taxable persons in companies established in third countries. In those circumstances, that court is uncertain whether the provisions in question could infringe Article 63(1) TFEU, which provides, inter alia, that all restrictions on the movement of capital between Member States and third countries are prohibited.

16. Before addressing the question of whether the national legislation is compatible with Article 63 TFEU, the referring court recalls, however, that under the so-called 'standstill clause' in Article 64(1) TFEU, the prohibition in Article 63 TFEU is 'without prejudice to the application to third countries of any restrictions which exist

on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries' when such movement involves, inter alia, direct investment. On the assumption that the situation in the main proceedings involves direct investment in a third country, in this case Switzerland, the referring court considers it necessary to determine at the outset whether national rules on controlled companies established in third countries, applicable during the tax year at issue, must be regarded as constituting a restriction 'which [existed] on 31 December 1993', given that those rules underwent certain amendments after that date.

17. In that regard, the Bundesfinanzhof (Federal Finance Court) explains that those rules, as they stood on 31 December 1993, were amended by, inter alia, the Gesetz zur Senkung der Steuersätze und zur Reform der Unternehmensbesteuerung (Law on reduction of tax rates and on reform of taxation of undertakings) of 23 October 2000 (BGBl. 2000 I, p. 1433; 'the StSenkG 2000'), which entered into force on 1 January 2001. That court indicates that the StSenkG 2000 'substantially reconfigured' the rules which existed on 31 December 1993, but explains that the amendments made by way of that law were, however, repealed shortly after by the Gesetz zur Fortentwicklung des Unternehmenssteuerrechts (Law on the further development of tax law in relation to undertakings) of 20 December 2001 (BGBl. 2001 I, p. 3858; 'the UntStFG 2001'), which entered into force on this subject on 25 December 2001 and which, as regards the tax regime in relation to controlled companies established in a third country, includes a restriction on the movement of capital relating to direct investment identical in essence to the restriction arising from the rules which existed on 31 December 1993. To the extent that the amendments introduced by the StSenkG 2000 were capable of resulting in 'controlled-company income from invested capital' being incorporated into the tax base of a resident taxpayer, pursuant to the relevant provisions of that legislation, only as from 2002, those provisions were repealed before those amendments would have enabled the tax authorities to carry out that incorporation.

18. In those circumstances, the Bundesfinanzhof (Federal Finance Court) requests the Court to interpret two aspects of the standstill clause in Article 64(1) TFEU.

19. In the first place, the Bundesfinanzhof (Federal Finance Court) seeks, in essence, to ascertain whether the derogation in Article 64(1) TFEU allows a restriction to be applied on movements of capital between a Member State and a third country relating to direct investment, even though the substantive scope of the legislation at issue was extended after 31 December 1993 to also cover other types of investments, including 'portfolio' investments. In that regard, the referring court observes that Paragraph 7(6) of the AStG 2006, in the wording following the UntStFG 2001, reduced, inter alia, the amount of shares held in the controlled company established in a third country required for such incorporation from 10% to 1% of the capital of that company. However, given that that amendment does not concern, in principle, direct investment, such as that at issue in the main proceedings, the standstill clause might still apply to the situation in the main proceedings.

20. The referring court's second concern relating to Article 64(1) TFEU relates to the temporal scope of the substantial amendments made by way of the StSenkG 2000 to the rules on 'controlled-company income from invested capital'. According to the referring court, those amendments came into force, but would have been capable of resulting in controlled-company income being incorporated into the tax base of a resident taxpayer only from a date that was subsequent to the date on which those amendments were repealed by the UntStFG 2001. Nevertheless, the amendment of the legal situation which existed on 31 December 1993 became, albeit temporarily, an integral part of the national legal framework and could therefore have interrupted the validity of the restrictions which existed on that date. In that regard, the referring court is uncertain whether the protected maintenance of a national restriction on the free movement of capital which existed on 31 December 1993 can lapse exclusively as a result of the formal legislative effect of an amending piece of legislation, or whether that legislation must also have been actually implemented in practice.

21. In the event that the national legislation at issue is not covered by the standstill clause in Article 64(1) TFEU on account of one of those two aspects and should therefore be assessed in the light of EU law on the free movement of capital, the referring court is uncertain whether such legislation constitutes a restriction which is prohibited under Article 63(1) TFEU and, if so, whether such a restriction can be justified by overriding reasons in the public interest. It recalls, in that regard, that the Court has analysed the question of the taxation of controlled-company income in the case that resulted in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), but that the context of that case was the freedom of establishment applicable in relationships between Member States and not the context of the free movement of capital, which is also applicable in relationships between Member States and third countries.

22. The referring court considers that, if the principles identified in that judgment concerning freedom of establishment were to be applied without any qualification to the movement of capital between Member States and third countries, the German legislation at issue would infringe Article 63(1) TFEU. According to that legislation, the incorporation of 'controlled-company income from invested capital' into the tax base of a shareholder residing in Germany would not occur solely in the case of wholly artificial arrangements aimed at circumventing the application of national tax provisions within the meaning of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544). On the contrary, the national legislation at issue would apply irrespective of the economic function of the controlled company and the shareholder concerned would not be afforded the opportunity to establish and demonstrate to the tax authorities that his investment in a third country has an economic basis.

23. The referring court is therefore uncertain whether the grounds capable of justifying a restriction on freedom of establishment set out in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), apply in relationships with third countries and, if so, what qualitative and quantitative requirements must the shareholding in a company established in a third country satisfy in order for it not to be regarded as 'wholly artificial'.

24. In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Is Article 57(1) EC (now Article 64(1) TFEU) to be interpreted as meaning that a restriction in a Member State which existed on 31 December 1993 in respect of the movement of capital to and from third countries involving direct investments is not affected by Article 56 EC (now Article 63 TFEU) if the national law in force at the relevant date restricting the movement of capital to and from third countries essentially applied only to direct investments, but was extended after that date to cover also portfolio holdings in foreign companies below the threshold of 10%?
> 2. If the first question is to be answered in the affirmative: Is Article 57(1) EC to be interpreted as meaning that a provision of national law restricting the movement of capital to or from third countries involving direct investments, existing on the relevant date of 31 December 1993, is to be regarded as applicable by reason of the fact that a later provision of national law that is essentially identical to the restriction in force at the relevant date is applicable, but where the restriction existing at the relevant date was substantially amended after that date and for a short period by legislation which formally entered into force but was in practice never applied due to the fact that it was replaced, before it could be applied to a specific case for the first time, by the provision that is now applicable?
> 3. If either of the first two questions is to be answered in the negative: Does Article 56 EC preclude legislation of a Member State under which the basis of assessment to tax of a taxable person resident in that Member State, which holds at least 1% of the shares in a company established in another State (in the present case, Switzerland), includes, pro rata to the percentage of the shareholding, positive income obtained by that company from invested capital, where such income is taxed at a lower rate than in the Member State?'

## Consideration of the questions referred

*The first question*

25. By its first question, the referring court seeks, in essence, to ascertain whether the standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in essence, on 31 December 1993 in the legislation of a Member State, although the scope of the restriction was extended, after that date, to include shareholdings which do not involve direct investment.

26. Article 63(1) TFEU lays down a general prohibition on restrictions on the movement of capital between Member States and third countries. Movements of capital covered by that provision include, in particular, direct investments in the form of participation in an undertaking through the holding of shares which confers the possibility of effectively participating in its management and control ('direct' investments) and the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing the management and control of the undertaking ('portfolio' investments) (see, to that effect, judgment of 28 September 2006, *Commission* v *Netherlands*, C-282/04 and C-283/04, EU:C:2006:608, paragraphs 18 and 19, and Opinion 2/15 (*EU-Singapore Free Trade Agreement*) of 16 May 2017, EU:C:2017:376, paragraphs 80 and 227).

27. However, under Article 64(1) TFEU, a Member State, in its relations with third countries, may apply restrictions on movements of capital which come within the substantive scope of that provision, even though they contravene the principle of the free movement of capital laid down under Article 63(1) TFEU, provided that those restrictions already existed on 31 December 1993 (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 187; of 24 May 2007, *Holböck*, C-157/05, EU:C:2007:297, paragraph 39; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 86).

28. In so far as the standstill clause in Article 64(1) TFEU provides that 'Article 63 TFEU [is] to be without prejudice to the application to third countries of any restrictions which exist on 31 December 1993 under national or Union law adopted in respect of the movement of capital to or from third countries involving direct investment …', it is apparent from the very wording of that provision that the restrictions on movements of capital to or from third countries involving direct investments fall within the substantive scope of that clause. By contrast, portfolio investments are not included in the movements of capital that are the subject of that clause.

29. In that regard, it is apparent from the order for reference that (i) during the tax year in question in the main proceedings, X held 30% of Y's share capital, a participation which the referring court classifies as a direct investment, and (ii) the scope of the national legislation at issue in the main proceedings was extended after 31 December 1993, so that the legislation covers not only shareholdings of more than 10% in the capital of a company established in a third country, but also shareholdings of less than 10% in the capital of such companies, participations which the referring court classifies as portfolio investments.

30. However, in order for the standstill clause in Article 64(1) TFEU to apply, it is not necessary for the national legislation restricting movements of capital to or from third countries to concern exclusively the movements of capital that are the subject of that provision.

31. In that regard, the Court has previously held that the fact that national legislation may apply not only to movements of capital covered by Article 64(1) TFEU but also to other situations is not such as to preclude the standstill clause from being applicable in the circumstances which it covers. The substantive scope of that clause does not depend on the specific purpose of a national restriction, but on the effect of that restriction on the movements of capital that are the subject of Article 64(1) TFEU (see, to that effect, judgment of 15 February 2017, *X*, C-317/15, EU:C:2017:119, paragraphs 21 and 22).

32. Accordingly, Article 63(1) TFEU does not prejudice the application of a restriction which existed on 31 December 1993 under national law concerning the movements of capital that are the subject of Article 64(1) TFEU such as, inter alia, direct investment to or from third countries, notwithstanding any extensions after that date of the scope of the legislation laying down such a restriction to other types of movement of capital, such as portfolio investments.

33. In those circumstances, as observed by the Advocate General in points 58 and 59 of his Opinion, the amendment introduced by the UntStFG 2001 which lowered the shareholding threshold from 10% to 1% in the capital of the companies concerned, even though it may have resulted in the inclusion of investments other than direct investments within the scope of the national legislation at issue in the main proceedings, cannot affect the fact that the Member State concerned has the option of continuing to apply, to third countries, restrictions which existed under national law on 31 December 1993, on condition that those restrictions concern movements of capital that are the subject of Article 64(1) TFEU.

34. Having regard to the foregoing considerations, the answer to the first question is that the standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in its essence, on 31 December 1993 under the legislation of a Member State, although the scope of that restriction was extended, after that date, to include shareholdings which do not involve direct investment.

*The second question*

35. By its second question, asked in the event that the answer to the first question is in the affirmative, the referring court seeks, in essence, to ascertain whether the standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU applies to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended after 31 December 1993, on account of the adoption of a law which

entered into force but was replaced, before ever being applied in practice, by legislation that is essentially identical to that applicable on 31 December 1993.

36. As is apparent, in essence, from paragraph 27 of the present judgment, the standstill clause in Article 64(1) TFEU allows, by derogation from the principle of the free movement of capital enshrined in the FEU Treaty, restrictions to be applied on certain types of movements of capital, provided, however, that those restrictions are 'restrictions which exist on 31 December 1993'.

37. As regards the notion of 'restrictions which exist on 31 December 1993' in Article 64(1) TFEU, it should be borne in mind that any national provision adopted after that date is not, by that fact alone, automatically excluded from the derogation provided for in that provision. The Court has accepted that restrictions laid down in provisions adopted after that date which, in essence, are identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of rights and freedoms of movement in that legislation can be treated as equivalent to such restrictions 'which exist' (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraphs 189 and 192; of 24 May 2007, *Holböck*, C-157/05, EU:C:2007:297, paragraph 41; and of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 49).

38. Although the standstill clause in Article 64(1) TFEU thus permits the Member States to continue to apply restrictions falling within the substantive scope of that clause without any limitation in time, providing that those restrictions remain essentially unchanged, it should be noted that, according to the Court's settled case-law, the words 'restrictions which exist on 31 December 1993' presuppose nonetheless that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date (judgments of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 48; of 5 May 2011, *Prunus and Polonium*, C-384/09, EU:C:2011:276, paragraph 34; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 81).

39. The Court has thus held that the derogation established by the standstill clause in Article 64(1) TFEU cannot apply to provisions adopted by a Member State which, although essentially identical to legislation which existed on 31 December 1993, have reintroduced an obstacle to the free movement of capital which, following the repeal of the earlier legislation or the adoption of amending provisions which are based on a logic different from that of that legislation, no longer existed (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 192; of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 49; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraphs 87 and 88).

40. It must be held that when the Member State concerned repeals or amends legislation in such a manner, it waives the option available to it under Article 64(1) TFEU to continue to apply certain restrictions to movements of capital which existed on 31 December 1993 in its relations with third countries (see, to that effect, judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraphs 86 to 88).

41. Accordingly, the application of Article 64(1) TFEU presupposes, not only that the essential substantive content of the restriction at issue has been maintained, but that that restriction has also existed continuously. If there were no requirement that the restrictions permitted under the standstill clause in that article should form part of the legal order of the Member State concerned continuously since 31 December 1993, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained (see, to that effect, judgment of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 48; of 5 May 2011, *Prunus and Polonium*, C-384/09, EU:C:2011:276, paragraph 34; and of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraph 81).

42. Moreover, in so far as it is a derogation from the fundamental principle of the free movement of capital, the standstill clause in Article 64(1) TFEU must be interpreted strictly. Similarly, the conditions that national legislation must fulfil in order to be regarded as 'existing' on 31 December 1993, notwithstanding an amendment to national law after that date, must also be interpreted strictly (see, to that effect, judgment of 20 September 2018, *EV*, C-685/16, EU:C:2018:743, paragraphs 80 and 81).

43. In the present case, it is not disputed that the legislation at issue in the main proceedings, which existed on 31 December 1993, was amended after that date. However, as stated, inter alia, in paragraphs 17 and 20 of the present judgment, the referring court observes that the amendments made to the existing legal framework on that date by the StSenkG 2000 were repealed some time after they were adopted pursuant to the subsequent entry into force of the UntStFG 2001.

44. It is clear that, even though it is not apparent from the order for reference that the StSenkG 2000 repealed the provisions laying down the restriction which existed on 31 December 1993, mentioned by the referring court, that court appears nonetheless to consider that the amendments made to the earlier legislation by way of that law at the very least were based on a logic which differed from that of that legislation. The referring court submits, in that regard, that, by adopting the StSenkG 2000, the German legislature substantially reformed the system of taxation of companies and their shareholders, including the legislation concerning controlled companies established in third countries, that legislation being aligned with that general system, which was, according to the referring court, 'substantially reconfigured'.

45. Assuming, subject to verification by the referring court, that the changes thus made to the national legislation by the StSenkG 2000 were indeed based on a logic different from that of the earlier legislation, or even repealed that legislation, it is appropriate to examine the effect on the applicability of the standstill clause of the fact, highlighted by the referring court, that those changes, although they entered into force on 1 January 2001, could result in 'controlled-company income from invested capital' being incorporated into a taxable person's tax base only from 2002 onwards, that is, after those changes were repealed when the UntStFG 2001 subsequently came into force on 25 December 2001.

46. As is apparent from the Court's case-law recalled in paragraphs 39 and 40 of the present judgment, a restriction on movements of capital which has existed under national law since 31 December 1993 cannot be regarded as having formed part of the legal order of the Member State concerned continuously since that date when, for example, the legislation laying down that restriction is repealed or amended in such a way that the logic on which that legislation is based is different. Such repeal or amendment takes place, in principle, on the entry into force, pursuant to the national constitutional procedures laid down for that purpose, of the provisions which repeal or amend the existing legislation.

47. However, notwithstanding the formal entry into force of the provisions repealing or amending the legislation laying down a restriction which existed on 31 December 1993, that restriction must be regarded as having been maintained continuously where the applicability of the repealing or modifying provisions is deferred under national law and those provisions are themselves repealed before they ever become applicable. In such a scenario, it must be held that such a restriction has remained part of the legal order of the Member State concerned, and has done so continuously.

48. In those circumstances, if, which it is for the referring court to ascertain, the StSenkG 2000 was adopted together with provisions deferring the applicability of that law, so that the amendments made by that law to the tax regime of controlled companies established in a third country were not applicable to the cross-border movements of capital referred to in Article 64(1) TFEU during the period between 1 January and 25 December 2001, when the UntStFG 2001 entered into force, it would be appropriate to consider that the restriction mentioned by that court has been maintained since 31 December 1993 continuously, for the purpose of the standstill clause in that article.

49. By contrast, if the referring court were to find that the StSenkG 2000 became applicable as soon as it entered into force, it would be appropriate to consider that the adoption of that law interrupted the continuous existence of the restriction at issue in the main proceedings – an interruption which should result in the inapplicability of Article 64(1) TFEU.

50. This would be the case if the tax rules deriving from the StSenkG 2000, which entered into force on 1 January 2001, meant that controlled-company income arising in 2001 was bound to be incorporated into the tax base of the resident taxpayer concerned, notwithstanding the fact that, on account of the repeal of that law on 25 December 2001, the tax authorities ultimately did not apply those rules in order to collect, in 2002, the tax on that income.

51. Having regard to the foregoing considerations, the answer to the second question is that the standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU is applicable to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended, after 31 December 1993, by means of the adoption of a law which entered into force, but which was replaced, before ever being applied in practice, by legislation essentially identical to that applicable on 31 December 1993, unless the applicability of that law was deferred in accordance with national law, so that, despite its entry into force, it was not applicable to cross-border movements of capital that are covered by Article 64(1) TFEU, which it is for the referring court to determine.

*The third question*

52. In the event that the referring court should find, in the light of the answer to the second question, that the national legislation at issue in the main proceedings does not fall within the scope of the standstill clause in Article 64(1) TFEU, it is appropriate to examine, in accordance with the referring court's request, that court's third question.

53. By that question, the referring court asks, in essence, whether Article 63(1) TFEU must be interpreted as precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled-company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, in the tax base of a taxable person residing in that Member State, where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned.

54. In order to answer that question, it is appropriate to analyse, in the first place, whether there is a restriction on the free movement of capital within the meaning of Article 63 TFEU and, if so, in the second place, whether such a restriction is permissible.

Whether there is a restriction on the free movement of capital

55. It follows from the Court's settled case-law that the measures prohibited as restrictions on the movement of capital include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see, inter alia, judgments of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 40; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 50; and of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraph 28).

56. Pursuant to the legislation at issue in the main proceedings, a taxable person who is resident for tax purposes in Germany and holds at least 1% of the shares in a company established in a third country with a 'low' tax rate, is to be allocated, pro rata to the amount of the shareholding, the so-called 'passive' income, that is, 'controlled-company income from invested capital' within the meaning of that legislation, obtained by that company, irrespective of any distribution of the profits. By contrast, a taxable person holding an equivalent shareholding in a company established in Germany is not subject to that legislation, since it applies, by definition, only to cross-border situations.

57. Such a difference in tax treatment can have detrimental consequences for a resident taxpayer who holds shares in a company established in a third country earning such 'passive' income, as that company's profits are incorporated into the taxable person's tax base, pro rata to the amount of the shareholding in that company. Compared with a taxable person holding a comparable shareholding in a company established in the Member State where he resides, in the present case Germany, that difference in treatment creates a tax disadvantage for the taxable person investing capital in a third country, in so far as the legislation at issue in the main proceedings attributes the profits of a separate legal person to that taxable person and subjects the latter person to tax on them (see, by analogy, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 45).

58. In those circumstances, the Court must hold that the legislation at issue in the main proceedings is such as to discourage investors with unlimited tax liability in Germany from investing in companies established in certain third countries and therefore constitutes a restriction on the free movement of capital, which is prohibited, in principle, by Article 63(1) TFEU.

Whether the restriction is permissible

59. Given the restrictive nature of the legislation at issue in the main proceedings, it is appropriate to examine, as stated by the German Government, whether the restriction on the free movement of capital created by that legislation can be justified in the light of Article 65(1)(a) TFEU, which provides that 'the provisions of Article 63 TFEU shall be without prejudice to the rights of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested'.

60. It is apparent from settled case-law that Article 65(1)(a) TFEU, in so far as it is a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly. That provision cannot therefore be interpreted as meaning that all tax legislation which draws a distinction between taxpayers based on

their place of residence or the State in which they invest their capital is automatically compatible with the Treaty (judgments of 11 September 2008, *Eckelkamp and Others*, C-11/07, EU:C:2008:489, paragraph 57; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 56; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 55).

61. The differences in treatment permitted by Article 65(1)(a) TFEU must not constitute, according to Article 65(3), a means of arbitrary discrimination or a disguised restriction. The Court has held, consequently, that such differences in treatment are permitted only when they concern situations which are not objectively comparable or, otherwise, when they are justified by an overriding reason in the public interest (see, to that effect, judgments of 6 June 2000, *Verkooijen*, C-35/98, EU:C:2000:294, paragraph 43; of 7 September 2004, *Manninen*, C-319/02, EU:C:2004:484, paragraph 29; and of 17 September 2009, *Glaxo Wellcome*, C-182/08, EU:C:2009:559, paragraph 68).

62. It is therefore necessary to verify, in the first place, whether the difference in treatment at issue concerns situations which are objectively comparable and, if need be, to examine, in the second place, whether the restriction on the free movement of capital at issue can be justified by an overriding reason in the public interest.

– The comparability of the situations

63. The German Government disputes the existence of a restriction on the free movement of capital, submitting that the situation of taxable persons holding shares in a company established in a third country which has a low tax rate, caught by the legislation at issue in the main proceedings, is not comparable to that of taxable persons holding shares in a company resident in Germany. According to that government, those situations are not comparable, inter alia, on the ground that that legislation concerns shareholdings in companies which do not come within the scope of German powers of taxation and are subject, in a third country, to only a low tax rate.

64. It is settled case-law that the comparability of a cross-border situation with an internal situation within a Member State must be examined having regard to the aim pursued by the national provisions at issue (see, to that effect, judgments of 18 July 2007, *Oy AA*, C-231/05, EU:C:2007:439, paragraph 38; of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 25; and of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 32).

65. In that regard, according to the referring court's explanations, the objective of the legislation at issue in the main proceedings is 'to prevent or offset the transfer of (passive) income of persons with unlimited tax liability to States with a low tax rate'. According to the German Government, that legislation is also designed to prevent tax avoidance by the artificial transfer of income to third countries which have a low tax rate.

66. Admittedly, an objective of combating the transfer of income to third countries with a low tax rate is not likely to be pursued by a Member State as regards investments made within that State.

67. However, as observed by the Advocate General in point 71 of his Opinion, the purpose of the legislation at issue in the main proceedings is, so far as possible, to treat the situation of resident companies which have invested capital in a company established in a third country with a 'low' tax rate in the same way as that of resident companies which have invested their capital in another company resident in Germany, with a view, inter alia, to offsetting any tax advantages which the former might obtain from investing their capital in a third country. As soon as a Member State unilaterally taxes a resident company on the income obtained by a company established in a third country, in which that resident company holds shares, the situation of that resident company becomes comparable to that of a resident company which holds shares in another resident company (see, by analogy, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraph 45, and of 14 December 2006, *Denkavit Internationaal and Denkavit France*, C-170/05, EU:C:2006:783, paragraphs 35 and 36).

68. In those circumstances, and without prejudice to the assessment of whether the legislation at issue in the main proceedings might be justified by an overriding reason in the public interest, it would deprive Article 63(1) TFEU of all meaning if it were accepted that situations are not comparable solely because the investor in question holds shares in a company established in a third country, when that provision specifically prohibits restrictions on cross-border movements of capital (see, by analogy, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 35).

69. Having regard to the foregoing considerations, the difference in treatment at issue in the main proceedings concerns situations that are objectively comparable.

– Whether there is an overriding reason in the public interest

70. According to the Court's settled case-law, a restriction on the free movement of capital is permissible only if it is justified by overriding reasons in the public interest and, if that is the case, only if it is suitable for securing the attainment of the objective in question and does not go beyond what is necessary in order to attain it (see, to that effect, judgments of 11 October 2007, *ELISA*, C-451/05, EU:C:2007:594, paragraphs 79 and 82; of 23 January 2014, *DMC*, C-164/12, EU:C:2014:20, point 44; and of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraph 64).

71. In their written observations, the German, French and Swedish Governments submit that legislation such as that at issue in the main proceedings is capable of being justified by overriding reasons in the public interest, namely safeguarding the balanced allocation between Member States and third countries of the power to impose taxes, preventing tax evasion and avoidance and ensuring the effectiveness of fiscal supervision.

72. In that regard, it must be recalled at the outset that the need to safeguard the balanced allocation between the Member States of the power to impose taxes is a ground capable of justifying a restriction on the free movement of capital, in particular, where the national measures in question are designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory (see, to that effect, judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 121; of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 47; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 98).

73. In the same vein, the Court has held that a national measure restricting the free movement of capital may be justified by the need to prevent tax evasion and avoidance where it specifically targets wholly artificial arrangements which do not reflect economic reality and the purpose of which is to avoid the tax normally payable on the profits generated by activities carried out in the territory of the Member State concerned (see, to that effect, judgments of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 51 and 55; of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraphs 72 and 74; and of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 34).

74. Moreover, the Court has consistently held that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding reason in the public interest capable of justifying a restriction on the free movement of capital (see, to that effect, judgments of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 46, and of 22 November 2018, *Huijbrechts*, C-679/17, EU:C:2018:940, paragraph 36). In that regard, it should be borne in mind that fiscal supervision is designed, according to the Court's case-law, to combat tax evasion and avoidance (see, to that effect, judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 44).

75. In those circumstances, the overriding reasons in the public interest put forward by the interested parties are, in a situation such as that in the main proceedings, closely linked (see, by analogy, judgments of 13 December 2005, *Marks & Spencer*, C-446/03, EU:C:2005:763, paragraph 51; of 21 January 2010, *SGI*, C-311/08, EU:C:2010:26, paragraph 69; and of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 48). As the objective of the national legislation at issue in the main proceedings, as recalled in paragraph 65 of the present judgment, corresponds, in essence, to those overriding reasons in the public interest and, in particular, to the prevention of tax evasion and avoidance, it is therefore necessary to examine whether that legislation is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.

76. Regarding whether that legislation is suitable for attaining the objective which it pursues, it must be noted that it provides, in particular in Paragraphs 7(6) and 8(3) of the AStG 2006, that the profits of a company established in a third country, receiving 'controlled-company income from invested capital', which is not taxable in Germany and is taxed at a 'low' rate, within the meaning of that legislation, in the third country concerned, are, irrespective of any distribution of those profits, incorporated into the tax base of a person with unlimited tax liability in Germany pro rata to the amount of the shareholding in that company, and tax charged thereon as a distributed dividend.

77. In that regard, it cannot be ruled out, as observed in essence by the Advocate General in point 94 of his Opinion, that, in circumstances such as those in the main proceedings, the assignment of debts by Z, a company established in Germany, to Y, a company not subject to German powers of taxation, could result in the revenue generated by the activities of sports clubs carried out in Germany, to which those debts relate, being, at least in part, excluded from German powers of taxation, although the question of the substantive tax law applicable is a matter for the referring court to determine. Moreover, although the Court does not have enough factual information before it to make a finding that, in the present case, the transactions at issue in the main proceedings are artificial, nor can it be ruled out that, to the extent that Y's sole activity consists of holding debts purchased from a company established in Germany using funding provided by third parties, including a loan granted by X, the shares held by the latter in Y have no valid commercial justification, but rather X's primary objective or one of its primary objectives is to avoid the tax normally due on the profits generated by activities carried out in Germany by using Y as a controlled company for that purpose.

78. When legislation, such as that at issue in the main proceedings, by providing that the income of a company established in a third country with a 'low' tax rate is to be incorporated into the tax base of a company with unlimited tax liability in Germany, is such as to offset, in a situation such as that in the main proceedings, the effects of any artificial transfer of income to such a third country, such legislation is, in principle, suitable for ensuring the attainment of the objective which it pursues.

79. It must further be determined whether that legislation goes beyond what is necessary in order to attain its objective.

80. According to the Court's settled case-law, the mere fact that a resident company holds shares in another company established in a third country cannot, as such, give rise to a general presumption of tax evasion and avoidance and, on that basis, justify a measure which compromises the free movement of capital (see, to that effect, judgments of 16 July 1998, *ICI*, C-264/96, EU:C:1998:370, paragraph 26; of 21 November 2002, *X and Y*, C-436/00, EU:C:2002:704, paragraph 62; and of 11 October 2007, *ELISA*, C-451/05, EU:C:2007:594, paragraph 91). By contrast, as is apparent from the case-law recalled in paragraph 73 above, a national measure restricting the free movement of capital may be justified when it is designed specifically to prevent conduct that consists of creating wholly artificial arrangements.

81. In that regard, the referring court seeks to ascertain whether the interpretation of the concept of 'wholly artificial arrangement' adopted by the Court in the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), can be applied to the situation in the main proceedings. It notes, moreover, that the case that gave rise to that judgment related to freedom of establishment, provided for in Article 49 TFEU in particular, in that the case concerned national legislation of a Member State covering the taxation, imposed on a taxable person established in that State, of the income of a company established in another Member State, in particular when the resident taxpayer held more than 50% of the capital of that company.

82. It should be noted that the Court held, in paragraphs 67 and 68 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544), that the establishment of a company in a Member State is a 'wholly artificial arrangement' when it is demonstrated, based on objective factors which are ascertainable by third parties, that that company is a fictitious establishment in so far as it does not carry out any genuine economic activity in the territory of the host Member State, account being taken, in particular, of the extent to which that company physically exists in terms of premises, staff and equipment. The Court inferred that such fictitious establishments, in particular those that have the characteristics of a 'letterbox' or 'front' subsidiary, can be subject to a specific tax regime for the purpose of preventing tax evasion and avoidance, and that the Treaty provisions on that freedom do not preclude such a regime.

83. That said, with respect to the question, expressly raised by the referring court, of what qualitative and quantitative requirements the shareholding held by a resident taxpayer in a company established in a third country must satisfy in order for it not to be regarded as 'wholly artificial', it should be borne in mind that the free movement of capital between Member States and third countries is intended not to frame the conditions under which companies can establish themselves within the internal market (see, to that effect, judgment of 13 November 2012, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 100), but to liberalise cross-border movements of capital (see, to that effect, judgments of 14 December 1995, *Sanz de Lera and Others*, C-163/94, C-165/94 and C-250/94, EU:C:1995:451, paragraph 19, and of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 46).

84. Therefore, in the context of the free movement of capital, the concept of 'wholly artificial arrangement' cannot necessarily be limited to merely the indications, referred to in paragraphs 67 and 68 of the judgment of

12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*(C-196/04, EU:C:2006:544), that the establishment of a company does not reflect economic reality, since the artificial creation of the conditions required in order to escape taxation in a Member State improperly or enjoy a tax advantage in that Member State improperly can take several forms as regards cross-border movements of capital. Indeed, those indications may also amount to evidence of the existence of a wholly artificial arrangement for the purpose of applying the rules on the free movement of capital, in particular when it proves necessary to assess the commercial justification of acquiring shares in a company that does not pursue any economic activities of its own. However, that concept is also capable of covering, in the context of the free movement of capital, any scheme which has as its primary objective or one of its primary objectives the artificial transfer of the profits made by way of activities carried out in the territory of a Member State to third countries with a low tax rate.

85. Nonetheless, in the present case, it is apparent that the legislation at issue in the main proceedings is not designed solely to prevent conduct consisting of creating such artificial schemes. Indeed, it is apparent from the order for reference that, under Paragraphs 7(6) and 8(3) of the AStG 2006, when a resident taxpayer has been found to hold at least 1% of the shares in a company, established in a third country with a 'low' tax rate, which receives 'controlled-company income from invested capital' within the meaning of that legislation, that income is automatically incorporated into the tax base of that taxable person, without the latter being afforded the opportunity to provide evidence to show that his shareholding is not the result of an artificial scheme, such as, inter alia, the commercial reasons for his shareholding in that company or the genuine nature of the company's economic activities.

86. The automatic nature of the legislation at issue in the main proceedings, comparable, in essence, to an irrebuttable presumption of tax evasion or avoidance, cannot be justified solely on the basis of the criteria established by that legislation. Although a low tax rate applicable to the income of a company established in a third country or the 'passive' nature of the activities which generated that income, as defined by that legislation, can constitute indications of conduct that might amount to tax evasion or avoidance, they are not, as such, sufficient grounds to find that the acquisition of shares in that company by a taxable person residing in a Member State necessarily constitutes an artificial scheme in all cases.

87. It is settled case-law that, as regards relationships between Member States, national legislation, in order for it to be proportionate to the aim of preventing tax evasion or avoidance, must, on each occasion on which the existence of artificial transactions cannot be ruled out, give the taxable person an opportunity, without subjecting him to undue administrative constraints, to provide evidence of any commercial justification that there may have been for the transaction at issue (see, to that effect, judgments of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 82; of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 50; and of 3 October 2013, *Itelcar*, C-282/12, EU:C:2013:629, paragraph 37).

88. Having regard to the case-law recalled in the previous paragraph, the legislation at issue in the main proceedings, in that it presumes that conduct is artificial on the sole ground that the conditions laid down by that legislation are met, while affording the taxable person concerned no opportunity whatsoever to rebut that presumption, goes, in principle, beyond what is necessary in order to attain its objective.

89. That said, the legislation at issue in the main proceedings does not concern Member States, but third countries.

90. It that regard, it must be recalled that the case-law concerning restrictions on the exercise of the freedoms of movement within the European Union cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context (see, inter alia, judgment of 28 October 2010, *Établissements Rimbaud*, C-72/09, EU:C:2010:645, paragraph 40 and the case-law cited).

91. Regarding, in particular, a Member State's obligation to give a taxable person the opportunity to produce evidence demonstrating any commercial justification for its shareholding in a company established in a third country, it is apparent from the Court's case-law that the existence of such an obligation must be assessed according to the availability of administrative and legislative measures permitting, if necessary, the accuracy of such evidence to be verified (see, to that effect, judgments of 11 October 2007, *ELISA*, C-451/05, EU:C:2007:594, paragraph 98; of 28 October 2010, *Établissements Rimbaud*, C-72/09, EU:C:2010:645, paragraphs 45 and 46; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 85).

92. It is also apparent from the Court's settled case-law that, where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions, compliance with which can be

verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, for example, because that third country has no treaty obligation to provide information, it proves impossible to obtain that information from that third country (see, to that effect, judgments of 18 December 2007, *A*, C-101/05, EU:C:2007:804, paragraph 63; of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 67; and of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 84).

93. In the present case, the finding that the shareholding of the company established in Germany, at issue in the main proceedings, in a company established in a third country is not, even if the conditions laid down in Paragraphs 7(6) and 8(3) of the AStG 2006 are met, the result of an artificial scheme requires the German tax authorities to analyse information relating, in particular, to the nature of the activities of that company that is established in a third country.

94. Since a Member State is not required to accept the information relating to the activities of a company established a third country in which a taxable person of that Member State holds shares, when it is not able to verify, if necessary, the accuracy of that information (see, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 85), it is for the referring court to examine, in the present case, whether there are, in particular, treaty obligations between the Federal Republic of Germany and the Swiss Confederation, establishing a legal framework of cooperation and procedures for the exchange of information between the national authorities concerned, which are genuinely such as to empower the German tax authorities to verify, if necessary, the accuracy of the information provided on the company established in Switzerland in order to demonstrate that that taxable person's shareholding in that company is not the result of an artificial scheme.

95. To the extent that such a legal framework, governed, inter alia, by treaties, does not exist between the Member State and the third country concerned, it must be held that Article 63(1) TFEU does not preclude the Member State concerned from applying legislation, such as that at issue in the main proceedings, which provides for the incorporation of the income of a company established in a third country into the tax base of a resident taxpayer, without the latter being afforded the opportunity to demonstrate any commercial justification for its shareholding in that company. By contrast, if such a legal framework were found to exist, the taxable person concerned should be given the opportunity to demonstrate, without being subject to undue administrative constraints, any commercial justification that there may have been for its investment in the third country concerned.

96. Having regard to the foregoing considerations, the answer to the third question is that Article 63(1) TFEU must be interpreted as not precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled-company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than that prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person's shareholding in that company is not the result of an artificial scheme.

**Costs**

97. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. The standstill clause in Article 64(1) TFEU must be interpreted as meaning that Article 63(1) TFEU does not prejudice the application of a restriction on movements of capital to or from third countries involving direct investment which existed, in its essence, on 31 December 1993 in the legislation of a Member State, although the scope of the restriction was extended, after that date, to include shareholdings which do not involve direct investment.**

**2. The standstill clause in Article 64(1) TFEU must be interpreted as meaning that the prohibition in Article 63(1) TFEU is applicable to a restriction on movements of capital to or from third countries involving direct investment where the national tax legislation laying down that restriction was substantially amended, after 31 December 1993, by means of the adoption of a law which entered into force, but which was replaced, before ever being applied in practice, by legislation essentially identical to that applicable on 31 December 1993, unless the applicability of that law was deferred in accordance with national law, so that, despite its entry into force, it was not applicable to cross-border movements of capital that are covered by Article 64(1) TFEU, which it is for the referring court to determine.**

**3. Article 63(1) TFEU must be interpreted as not precluding legislation of a Member State under which income obtained by a company established in a third country that does not come from an activity of that company pursued on its own account, such as income classified as 'controlled-company income from invested capital' within the meaning of that legislation, is incorporated, pro rata to the amount of the shareholding, into the tax base of a taxable person residing in that Member State where that taxable person holds at least 1% of the shares in that company and that income is taxed, in that third country, at a lower rate than the rate prevailing in the Member State concerned, unless there is a legal framework providing, in particular, treaty obligations that empower the national tax authorities of that Member State to verify, if necessary, the accuracy of information provided in respect of that company with a view to demonstrating that that taxable person's shareholding in that company is not the result of an artificial scheme.**

# EU Court of Justice, 26 February 2019*

## Case C-581/17

## *Martin Wächtler v Finanzamt Konstanz*

*Grand Chamber:* *K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Prechal, M. Vilaras, K. Jürimäe and C. Lycourgos, Presidents of Chambers, A. Rosas, M. Ilesic, J. Malenovský, M. Safjan and C. G. Fernlund (Rapporteur), Judges*

*Advocate General:* *M. Wathelet*

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1. This request for a preliminary ruling concerns the interpretation of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6; 'the AFMP').

2. The request has been made in proceedings between Mr Martin Wächtler and the Finanzamt Konstanz (the tax authority of Konstanz, Germany) concerning the decision of that authority to tax, on his transferring his domicile from Germany to Switzerland, the unrealised capital gains with respect to shares held by him in a company established in Switzerland of which he is also the managing director.

### Legal context

*The AFMP*

3. The European Community and its Member States, of the one part, and the Swiss Confederation, of the other part, signed, on 21 June 1999, seven agreements, one of which was the AFMP. By Decision 2002/309/EC, Euratom, of the Council and of the Commission as regards the Agreement on Scientific and Technological Cooperation of 4 April 2002 on the conclusion of seven Agreements with the Swiss Confederation (OJ 2002 L 114, p. 1, and corrigendum OJ 2015 L 210, p. 38), those seven agreements were approved on behalf of the European Community and entered into force on 1 June 2002.

4. According to the preamble of the AFMP, the Contracting Parties are '[r]esolved to bring about the free movement of persons between them on the basis of the rules applying in the European Community'.

5. Article 1 of that agreement states:

> 'The objective of this Agreement, for the benefit of nationals of the Member States of the European Community and Switzerland, is:
> a. to accord a right of entry, residence, access to work as employed persons, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties;
> …
> c. to accord a right of entry into, and residence in, the territory of the Contracting Parties to persons without an economic activity in the host country;
> d. to accord the same living, employment and working conditions as those accorded to nationals.'

6. Article 2 of that agreement, headed 'Non-discrimination', provides:

> 'Nationals of one Contracting Party who are lawfully resident in the territory of another Contracting Party shall not, in application of and in accordance with the provisions of Annexes I, II and III to this Agreement, be the subject of any discrimination on grounds of nationality.'

* Language of the case: German.

7. Article 4 of the AFMP, headed 'Right of residence and access to an economic activity', is worded as follows:

   'The right of residence and access to an economic activity shall be guaranteed … in accordance with the provisions of Annex I.'

8. Article 6 of the AFMP states:

   'The right of residence in the territory of a Contracting Party shall be guaranteed to persons not pursuing an economic activity in accordance with the provisions of Annex I relating to non-active people.'

9. Article 7 of that agreement, headed 'Other rights', provides:

   'The Contracting Parties shall make provision, in accordance with Annex I, for the following rights in relation to the free movement of persons:
   a. the right to equal treatment with nationals in respect of access to, and the pursuit of, an economic activity, and living, employment and working conditions;
   b. the right to occupational and geographical mobility which enables nationals of the Contracting Parties to move freely within the territory of the host state and to pursue the occupation of their choice;
   c. the right to stay in the territory of a Contracting Party after the end of an economic activity;
   …'

10. In accordance with Article 15 of the AFMP, the annexes and protocols to the Agreement are to form an integral part of it.

11. Article 16 of the AFMP, headed 'Reference to Community law', states:

   '1. In order to attain the objectives pursued by this Agreement, the Contracting Parties shall take all measures necessary to ensure that rights and obligations equivalent to those contained in the legal acts of the European Community to which reference is made are applied in relations between them.
   2. Insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law.'

12. Article 21 of the AFMP, headed 'Relationship to bilateral agreements on double taxation', states:

   '1. The provisions of bilateral agreements between Switzerland and the Member States of the European Community on double taxation shall be unaffected by the provisions of this Agreement. In particular, the provisions of this Agreement shall not affect the double taxation agreements' definition of "frontier workers".
   2. No provision of this Agreement may be interpreted in such a way as to prevent the Contracting Parties from distinguishing, when applying the relevant provisions of their fiscal legislation, between taxpayers whose situations are not comparable, especially as regards their place of residence.
   3. No provision of this Agreement shall prevent the Contracting Parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under their national tax legislation or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States of the European Community, of the other part, or any other tax arrangements.'

13. Annex I to the AFMP concerns the free movement of persons. Article 6(1) of that annex provides:

   'An employed person who is a national of a Contracting Party (hereinafter referred to as "employed person") and is employed for a period of one year or more by an employer in the host state shall receive a residence permit which is valid for at least five years from its date of issue. …'

14. Article 7(1) of that annex states:

   'An employed frontier worker is a national of a Contracting Party who has his residence in the territory of a Contracting Party and who pursues an activity as an employed person in the territory of the other Contracting Party, returning to his place of residence as a rule every day, or at least once a week.'

15. Article 9(1) and (2) of Annex I, that article being headed 'Equal treatment', provide:

   '1. An employed person who is a national of a Contracting Party may not, by reason of his nationality, be treated differently in the territory of the other Contracting Party from national employed persons as

regards conditions of employment and working conditions, especially as regards pay, dismissal, or reinstatement or re-employment if he becomes unemployed.
2. An employed person and the members of his family … shall enjoy the same tax concessions and welfare benefits as national employed persons and members of their family.'

16. Chapter III of Annex I to the AFMP, which concerns self-employed persons, contains Articles 12 to 16 of that annex. Article 12(1), that article being headed 'Rules regarding residence', provides:

> 'A national of a Contracting Party wishing to become established in the territory of another Contracting Party in order to pursue a self-employed activity (hereinafter referred to as a "self-employed person") shall receive a residence permit valid for a period of at least five years from its date of issue, provided that he produces evidence to the competent national authorities that he is established or wishes to become so.'

17. Article 13(1) of that annex, that article being headed 'Self-employed frontier workers', provides:

> 'A self-employed frontier worker is a national of a Contracting Party who is resident in the territory of a Contracting Party and who pursues a self-employed activity in the territory of the other Contracting Party, returning to his place of residence as a rule every day or at least once a week.'

18. Article 15 of that annex, headed 'Equal treatment', provides:

> '1. As regards access to a self-employed activity and the pursuit thereof, a self-employed worker shall be afforded no less favourable treatment in the host country than that accorded to its own nationals.
> 2. The provisions of Article 9 of this Annex shall apply *mutatis mutandis* to the self-employed persons referred to in this Chapter.'

*The Agreement between the Swiss Confederation and the Federal Republic of Germany*

19. Article 1 of the Agreement between the Swiss Confederation and the Federal Republic of Germany to avoid double taxation with respect to income tax and capital taxes, of 11 August 1971 (BGBl. 1972 II, p. 1022), as amended by the Protocol of 27 October 2010 (BGBl. 2011 I, p. 1092) ('the Agreement between the Swiss Confederation and the Federal Republic of Germany'), provides:

> 'This Agreement applies to persons who are residents of one Contracting State or of both Contracting States.'

20, Article 4(1) of the Agreement between the Swiss Confederation and the Federal Republic of Germany provides:

> 'For the purposes of this Agreement, the expression "person who is a resident of a Contracting State" means any person who, under the law of that State, is subject to unlimited tax liability in that State.'

21. Article 13 of that Agreement provides:

> '1. Gains accruing from the disposal of immovable property, as defined in Article 6(2), are taxable in the Contracting State where that property is situated.
> 2. Gains accruing from the disposal of movable property that forms part of the assets of a permanent establishment that an undertaking of a Contracting State has in the other Contracting State, or movable property that is part of fixed facilities available to a person who is a resident of a Contracting State in the other Contracting State for the pursuit of a profession, including such gains as accrue from the complete disposal of the permanent establishment (alone or together with the whole undertaking) or of those fixed facilities, shall be taxable in that other State. …
> 3. Gains accruing from the disposal of any property other than that referred to in paragraphs 1 and 2 shall be taxable only in the Contracting State in which the transferor is resident.
> …
> 5. If a Contracting State, on the departure of a natural person who is a resident of that State, taxes the capital gains accruing from a substantial shareholding in a company which is resident in that State, the other Contracting State, when it taxes the gain accruing from a subsequent disposal of the shareholding in accordance with the provisions of paragraph 3, shall, in order to calculate the amount of the gain on disposal, deem the cost of acquisition to be the amount which the first State accepted as the disposal proceeds at the time of departure.'

22. Article 27(1) of that Agreement states:

> 'The competent authorities of the Contracting States shall exchange any information that may be reasonably required to apply the provisions of this Agreement or for the administration or application of domestic legislation relating to taxes of any kind or description that are levied on behalf of the Contracting States or their "Länder", cantons, districts, municipalities or groups of municipalities, in so far as the taxation imposed is not contrary to the Agreement. The exchange of information is not restricted by Articles 1 and 2.'

*German law*

23. Paragraph 1(1) of the Einkommensteuergesetz (Law on Income tax), in the version applicable to the main proceedings (BGBl. 2009 I, p. 3366: 'the EStG'), provides:

> 'Natural persons who are domiciled or habitually resident in the national territory shall have an unlimited liability to income tax. …'

24. Paragraph 17(1) and (2) of the EStG state:

> '1. A gain from a disposal of shares in a company also constitutes income from a professional activity where the transferor has held, either directly or indirectly, at least a 1% share of the company's capital within the preceding five years …
> 2. The difference, after deduction of the sale costs, between the sale price and the cost of acquisition is considered to be a capital gain within the meaning of subparagraph 1. ...'

25. Paragraph 6 of the Gesetz über die Besteuerung bei Auslandsbeziehungen (Law on foreign transaction tax), of 8 September 1972 (BGBl. 1972 I, p. 1713), in the version applicable to the main proceedings ('the AStG'), provides:

> '1. In the case of a natural person who has been subject to unlimited tax liability for at least ten years in total under Paragraph 1(1) of the [EStG] and where that person's unlimited liability ends with the transfer of his domicile or habitual residence, Paragraph 17 of the [EStG] shall be applicable to the shares referred to in the first sentence of Paragraph 17(1) of the [EStG] when the unlimited liability comes to an end, including in the absence of disposal, if the requirements of that provision concerning those shares are also met at that time.
> …
> 4. Subject to [Paragraph 6](5), the income tax due under [Paragraph 6](1) must, upon request, be deferred and paid in instalments at regular intervals over a maximum period of five years from the due date of first payment, subject to the provision of a bank guarantee, in so far as immediate recovery would have consequences which would be difficult for the taxpayer to bear. The deferral shall end if, during the deferral period, the shares are sold or covertly transferred to a company, as provided for in Paragraph 17(1) of the [EStG], or if one of the situations referred to in Paragraph 17(4) of the [EStG] arises …
> 5. If the taxpayer in the situation referred to in the first sentence of [Paragraph 6](1) is a national of a Member State … or of another State to which the Agreement on the European Economic Area [of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement')] applies, and, after the end of the unlimited tax liability, he is subject to tax in one of those States (host State) comparable to German income tax liability, the tax payable under [Paragraph 6](1) shall be deferred without interest and without the provision of a bank guarantee. This measure is subject to the condition that administrative support and mutual assistance in the recovery of tax between the Federal Republic of Germany and that State are guaranteed. …
> The deferral shall end in the following cases:
> 1. if the taxpayer or his legal successor within the meaning of the third sentence of subparagraph 1, sells the shares or covertly transfers them to a company, in accordance with the first sentence of Article 17(1) of the [EStG], or if one of the situations referred to in Paragraph 17(4) of the [EStG] arises;
> 2. if the shares are transferred to a person not subject to unlimited tax liability, who is not subject to tax comparable to unlimited German income tax liability in a Member State … or in a State which is party to the EEA agreement;
> 3. if the shares are subject to a levy or another transaction which, under national law, means that the going-concern value or market value are taken into account;
> 4. if the taxpayer or his legal successor within the meaning of the third sentence of subparagraph 1, is no longer subject to tax liability within the meaning of the first sentence because he has transferred his domicile or habitual residence.'

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

26. Mr Wächtler, a German national, has since 1 February 2008 been the managing director of a company incorporated under Swiss law, the nature of his business being in the field of IT consultancy, and he owns 50% of the company's share capital.

27. On 1 March 2011 Mr Wächtler transferred his domicile from Germany to Switzerland. Following that transfer, the Finanzamt Konstanz, pursuant to Paragraph 6 of the AStG and Paragraph 17 of the EStG, levied income tax on the unrealised capital gain with respect to his shareholding in that company.

28. Since Mr Wächtler considered that that taxation, liability for which arises solely because he has transferred his domicile to Switzerland, is contrary to the AFMP, and more specifically to the right of establishment provided for by the AFMP, he brought an action before the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg, Germany).

29. That court has doubts as to the compatibility of the tax regime at issue with the preamble of the AFMP, with Articles 1, 2, 4, 6, 7, 16 and 21 thereof, and with Article 9 of Annex I thereto, in that it prescribes the taxation of unrealised capital gains with respect to company shares while permitting no deferral of payment of the tax payable in the event of a transfer, by a national of the Member State concerned, of his domicile to Switzerland, whereas, in the event of a transfer, by such a national, of his domicile to a Member State other than the Federal Republic of Germany or to a third State that is a party to the EEA Agreement, that tax regime does permit deferral, without interest and without provision of any guarantee, of payment of such a tax until the actual disposal of the shareholdings concerned, provided that, first, the host State gives to the Federal Republic of Germany assistance and support in tax recovery and, second, the tax payer is subject in that host State to taxation comparable to the German income tax liability.

30. That court states that that deferral, with respect to the second scenario involving transfer of domicile, was introduced in Paragraph 6(5) of the AStG by the national legislature because, if there were no possibility of deferring payment of the tax at issue, the tax regime concerned would be in breach of the freedom of establishment guaranteed by EU law, since a German national who maintains his domicile in the national territory is taxed only at the time when the capital gains with respect to the shares concerned are realised. The compatibility with EU law of the amendment made to that provision in relation to the deferral of recovery was, it is added, confirmed by the judgment of 11 March 2004, de Lasteyrie du Saillant (C-9/02, EU:C:2004:138).

31. If the tax regime at issue were to constitute a restriction on the right of establishment within the meaning of the AFMP, the referring court is uncertain whether that restriction can be justified by overriding reasons in the general interest, linked to the preservation of the allocation of powers of taxation between the contracting parties concerned, the effectiveness of fiscal supervision and the need to ensure the effective collection of the tax in order to prevent loss of tax revenue and, if that is the case, whether that restriction is appropriate for attaining the objective pursued and does not go beyond what is necessary in order to attain it.

32. In those circumstances, the Finanzgericht Baden-Württemberg (Finance Court, Baden-Württemberg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

> 'Must the provisions of the [AFMP], in particular the preamble and Articles 1, 2, 4, 6, 7, 16 and 21 thereof and Article 9 of Annex I thereto, be interpreted as precluding the legislation of a Member State which, in order to prevent any loss of the tax base, prescribes the taxation (without deferral) of latent, unrealised capital gains with respect to company shares, where a national of that Member State, initially subject to unlimited tax liability in that Member State, transfers his domicile from that Member State to Switzerland, and not to a Member State … or to a State to which the EEA Agreement is applicable?'

**Consideration of the question referred**

33. As stated in paragraph 30 of the present judgment, the possibility of deferring the payment of tax relating to unrealised capital gains with respect to company shares, in the event that a German national transfers his domicile to a Member State other than the Federal Republic of Germany or to a third State that is party to the EEA Agreement, was introduced by the national legislature in order to bring the German tax regime into compliance with EU law on the free movement of persons, since a German national who maintains his domicile in the national territory is taxed on the capital gains with respect to company shares only at the time when those gains are realised.

34. Consequently, the question of the referring court has to be understood as seeking, in essence, to ascertain whether the provisions of the AFMP must be interpreted as precluding a Member State's tax regime which, in a situation where a natural person, who is a national of that Member State and who pursues an economic activity in the territory of the Swiss Confederation, transfers his domicile from the Member State whose tax regime is at issue to Switzerland, prescribes the collection, at the time of that transfer, of the tax payable on the unrealised capital gains with respect to company shares owned by that person, whereas, in the event that domicile is maintained in that Member State, the collection of the tax takes place only at the time when the capital gains are realised, that is when there is a disposal of the company shares concerned.

35. As a preliminary point, since the AFMP is an international treaty, it must be interpreted, in accordance with Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 (United Nations Treaty Series, vol. 1155, p. 331), in good faith, in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (judgments of 2 March 1999, *Eddline El-Yassini*, C-416/96, EU:C:1999:107, paragraph 47, and of 24 November 2016, SECIL, C-464/14, EU:C:2016:896, paragraph 94 and the case-law cited). Further, it follows from that provision that a term will be understood to have a special meaning if it is shown that that was the intention of the parties (see, to that effect, judgment of 27 February 2018, *Western Sahara Campaign UK*, C-266/16, EU:C:2018:118, paragraph 70).

36. In that context, it is important to note, first, that the AFMP falls within the more general framework of relations between the European Union and the Swiss Confederation. Although the Swiss Confederation does not participate in the European Economic Area and in the European Union's internal market, it is nevertheless linked to the European Union by numerous agreements covering vast fields and prescribing specific rights and obligations, analogous, in some respects, to those laid down by the Treaty. The general objective of those agreements, including the AFMP, is to strengthen the economic ties between the European Union and the Swiss Confederation (judgment of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 33).

37. However, as the Swiss Confederation has not joined the internal market of the European Union, the interpretation given to the provisions of EU law concerning that market cannot automatically be applied to the interpretation of the AFMP, unless there are express provisions to that effect laid down by that agreement itself (judgment of 15 March 2018, *Picart*, C-355/16, EU:C:2018:184, paragraph 29).

38. As regards, second, the objective of the AFMP and the interpretation of its terms, it is clear from the preamble, Article 1 and Article 16(2) of the AFMP that the aim of that agreement is to secure, for natural persons who are EU nationals or nationals of the Swiss Confederation, the free movement of persons in the territory of those parties based on the rules applying within the European Union, the terms of which must be interpreted in accordance with the relevant case-law of the Court prior to the date of signature of that agreement.

39. As regards case-law after that date, it must be noted that Article 16(2) of the AFMP provides, first, that that case-law must be brought to the attention of the Swiss Confederation and, second, that, in order to ensure that the AFMP works properly, at the request of a Contracting Party, the Joint Committee provided for in Article 14 of the AFMP is to determine the implications of such case-law. That said, even where no determination is made by that committee, as stated by the Advocate General in points 71 and 72 of his Opinion, that case-law should also be taken into account in so far as it does no more than clarify or confirm the principles established in the case-law in existence on the date of signature of the AFMP in relation to concepts of EU law which inform that agreement.

40. Those considerations must guide the Court in examining the scope of the AFMP and its provisions.

41. According to the preamble and Article 1(a) and (c) of the AFMP, the scope of that agreement extends both to natural persons who pursue an economic activity and those who do not do so.

42. It is apparent from the documents before the Court that Mr Wächtler pursues an economic activity, in this instance that of an IT consultant by means of a company established in Switzerland of which he is the managing director.

43. As regards, more particularly, such a person, it is stated in the wording of Article 1(a) of the AFMP that the objective of that agreement is to accord a right of entry, residence, access to work as an employed person, establishment on a self-employed basis and the right to stay in the territory of the Contracting Parties. To that end, Article 4 of the AFMP provides that the right of residence and access to an economic activity is to be guaranteed in accordance with the provisions of Annex I to that agreement.

44. As regards the capacity in which the economic activity concerned is pursued, it is clear from a comparison of Articles 6 and 7 of Annex I to the AFMP with Articles 12 and 13 of that annex that the distinction made

between employed persons and self-employed persons is linked to the question of whether the economic activity in question is to be regarded as 'activity as an employed person' or as 'self-employed activity'.

45. In that context, it must be recalled that the concept of an 'employed person' is a concept of EU law (judgment of 19 March 1964, *Unger*, 75/63, EU:C:1964:19, p. 363) which already existed at the date of signature of the AFMP. The essential feature of an employment relationship is that, for a certain period of time, a person performs services for and under the direction of another person in return for which remuneration is received. Conversely, an activity pursued without any relationship of subordination has to be classified as 'self-employed activity' (see, by analogy, judgments of 27 June 1996, *Asscher*, C-107/94, EU:C:1996:251, paragraphs 25 and 26, and of 20 November 2001, *Jany and Others*, C-268/99, EU:C:2001:616, paragraph 34).

46. Since Mr Wächtler pursues his activities as an IT Consultant by means of a company of which he is the managing director and of which he owns 50% of the shares, the relationship of subordination which characterises activity as an employed person is, in this case, absent, as the Advocate General stated in points 38 and 39 of his Opinion. It follows that the economic activity pursued by Mr Wächtler is that of a self-employed person, within the meaning of the AFMP.

47. As regards the scope *ratione personae* of the concept of 'self-employed person', within the meaning of the AFMP, the Court has already stated that that scope is defined in Articles 12 and 13 of Annex I to that agreement (judgment of 15 March 2018, *Picart*, C-355/16, EU:C:2018:184, paragraph 18).

48. It follows from Article 12(1) of that annex that that provision is applicable to a natural person who is a national of a contracting party and who has become established in the territory of another contracting party and pursues a self-employed activity in the territory of that other party (see, to that effect, judgment of 15 March 2018, Picart, C-355/16, EU:C:2018:184, paragraphs 22 and 23).

49. Mr Wächtler's situation is that of a national of a contracting party of the AFMP, namely the Federal Republic of Germany, who has become established in the territory of another contracting party, namely the Swiss Confederation, in order there to pursue, by means of a company, his self-employed activity. That situation falls, therefore, within the scope of Article 12 of Annex I to the AFMP.

50. The fact that Mr Wächtler owns 50% of the shares in the company by means of which he pursues the self-employed activity in question cannot call that finding into question. As the Advocate General stated, in essence, in points 43 to 56 of his Opinion, the right of establishment as a self-employed person, within the meaning of the AFMP, extends, with the exception of the provision of services, to any economic or gainful activity of a natural person that can be classified as a 'self-employed' activity. Moreover, the actual exercise of that right presupposes the possibility of choosing the legal form that is appropriate to doing so.

51. As regards whether it is open to a national of a contracting party to assert the rights conferred by the AFMP against his or her State of origin, it must be observed that, in accordance with case-law of the Court which existed prior to the date of signature of that agreement, the right of establishment, within the meaning of EU law, has the aim not only of ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, but also of preventing restrictions on that right issuing from the Member State of origin of the national concerned (see, to that effect, judgment of 27 September 1988, *Daily Mail and General Trust*, 81/87, EU:C:1988:456, paragraph 16).

52. Accordingly, in certain circumstances and in the light of the applicable provisions, nationals of a Contracting Party of the AFMP may claim rights under that agreement not only against the State to which they exercise freedom of movement but also against their State of origin (judgment of 15 March 2018, *Picart*, C-355/16, EU:C:2018:184, paragraph 16 and the case-law cited).

53. The free movement of persons guaranteed by the AFMP would be impeded if a national of a Contracting Party were to be placed at a disadvantage in his State of origin solely for having exercised his right of free movement (judgment of 15 December 2011, *Bergström*, C-257/10, EU:C:2011:839, paragraph 28).

54. It follows that the principle of equal treatment, laid down in Article 15(2) of Annex I to the AFMP, read together with Article 9 of that annex, can also be relied on against his State of origin by a self-employed person who falls within the scope of that agreement.

55. Since the principle of equal treatment is a concept of EU law (see, to that effect, judgments of 19 October 1977, *Ruckdeschel and Others*, 117/76 and 16/77, EU:C:1977:160, paragraph 7, and of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 26 and the case-law cited) which existed at the date of signature of the AFMP, it is necessary, as follows from paragraphs 38 and 39 of the present judgment, to take into account the principles established by the Court's case-law in relation to equal treatment in order to determine

whether there is any discrimination that is prohibited by the AFMP (see, to that effect, judgments of 6 October 2011, *Graf and Engel*, C-506/10, EU:C:2011:643, paragraph 26, and of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 47).

56. In this case, it is clear that a German national who, like Mr Wächtler, has exercised his right of establishment as a self-employed person under the AFMP suffers a fiscal disadvantage as compared with other German nationals who, like him, pursue a self-employed activity by means of a company in which they own shares, but who, unlike him, maintain their domicile in Germany. That is because the latter have to pay the tax on the capital gains with respect to the shares concerned only when those capital gains are realised, that is when there is a disposal of those shares, whereas a national such as Mr Wächtler is obliged to pay the tax at issue, at the time when he transfers his domicile to Switzerland, on the unrealised capital gains with respect to such shares, and has no right to a deferral of payment until the disposal of those shares.

57. That difference in treatment, which constitutes a tax-flow disadvantage for a German national such as Mr Wächtler, is capable of deterring him from making actual use of the right of establishment he derives from the AFMP. It follows that the tax regime at issue in the main proceedings may impede the right of establishment as a self-employed person guaranteed by that agreement.

58. It must, however, be noted that the effect of Article 21(2) of the AFMP is that taxpayers whose situations are not comparable, especially as regards their place of residence, may be treated differently for tax purposes (judgment of 21 September 2016, *Radgen*, C-478/15, EU:C:2016:705, paragraph 45).

59. In that regard, it must be stated that, under Paragraph 6 of the AStG, the Federal Republic of Germany decided to exercise its powers to tax capital gains, with respect to shares owned by a German national, which have accrued during the period when that national, being domiciled in Germany, is subject to an unlimited liability to the German tax, irrespective of the territory where those capital gains accrued.

60. Having regard to the objective of that legislation, which is to tax the capital gains on shares which have accrued within the scope of the tax powers of the Federal Republic of Germany, the situation of a national of a Member State who transfers his domicile from Germany to Switzerland is comparable to that of a national of a Member State who maintains his or her domicile in Germany. In both cases, the power to tax those capital gains falls to the Federal Republic of Germany, that power being linked, pursuant to its national legislation, to the domicile of the national concerned in its territory during the period when those capital gains accrued, irrespective of the place where they arose.

61. The question then arises whether the difference in treatment referred to in paragraphs 56 and 57 of the present judgment can be justified by the overriding reasons in the general interest described by the referring court and set out in paragraph 31 of the present judgment, namely the preservation of the allocation of powers of taxation between the parties to the AFMP concerned, the effectiveness of fiscal supervision and the need to guarantee the effective collection of the tax in order to prevent the loss of tax revenue.

62. In that regard, Article 21(3) of the AFMP provides that no provision of that agreement is to prevent the contracting parties from adopting or applying measures to ensure the imposition, payment and effective recovery of taxes or to forestall tax evasion under the national tax legislation of a contracting party or agreements aimed at preventing double taxation between Switzerland, of the one part, and one or more Member States, of the other part, or any other tax arrangements.

63. However, such measures, which correspond, according to the Court's case-law in the context of free movement of persons within the European Union, to overriding reasons in the general interest (see, inter alia, judgments of 15 May 1997, *Futura Participations and Singer*, C-250/95, EU:C:1997:239, paragraph 31 and the case-law cited; of 3 October 2006, *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 36, and of 11 December 2014, *Commission* v *Spain*, C-678/11, EU:C:2014:2434, paragraphs 45 and 46), must, in any event, have due regard for the principle of proportionality, that is, they must be appropriate for attaining those objectives and must not go beyond what is necessary in order to attain them.

64. In this case, it must be stated that, while the determination of the amount of tax at issue at the time of the transfer of domicile to Switzerland is a measure that is appropriate for attaining the objective relating to the preservation of the allocation of powers of taxation between that State and the Federal Republic of Germany, that objective cannot, however, justify it being impossible to defer payment of that tax. Such a deferral does not mean that the Federal Republic of Germany is surrendering, to the Swiss Confederation, its powers to tax the capital gains that have accrued during the period when the owner of the shares concerned had an unlimited liability to pay the German tax.

65. As regards the objective relating to the effectiveness of fiscal supervision, the Agreement between the Swiss Confederation and the Federal Republic of Germany makes provision for the possibility of an exchange of information on tax matters between the contracting parties, so that the Federal Republic of Germany could obtain from the competent Swiss authorities the information needed in relation to a disposal, by the national concerned who has earlier transferred his or her domicile to Switzerland, of the shares in which the unrealised capital gains at issue have arisen. Consequently, a denial of the possibility of deferring payment of the tax at issue in the main proceedings is a measure which, in any event, goes beyond what is necessary in order to achieve that objective.

66. As regards the objective relating to the need to guarantee the effective collection of the tax in order to prevent the loss of tax revenue, it is clear that the immediate collection of the tax at issue at the time when the taxpayer's domicile is transferred may, as a general rule, be justified by the need to ensure the effective collection of tax liabilities. However, as the Advocate General stated in points 103 to 105 of his Opinion, that measure goes beyond what is necessary in order to achieve that objective and must therefore be considered to be disproportionate. In a situation where there is a risk of non-recovery of the tax payable, particularly where there is no mutual assistance mechanism for the recovery of tax debts, deferral of collection of that tax may be subject to an obligation to provide a guarantee (see, by analogy, judgments of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 73 and 74, and of 23 January 2014, *DMC*, C-164/12, EU:C:2014:20, paragraphs 65 to 67).

67. In those circumstances, it must be concluded that the tax regime at issue in the main proceedings constitutes an unjustified restriction on the right of establishment provided for by the AFMP.

68. That conclusion is not called into question by the fact that, in a situation where the immediate collection of the tax payable would have consequences that would be difficult for the taxpayer to bear, that tax regime provides for the possibility of payment of that tax in instalments. Leaving aside the fact that the instalment-payment measure is possible only in that specific situation, it is incapable of eliminating, in such a situation, the cash-flow disadvantage inherent in the obligation on the taxpayer to pay, at the time of the transfer of his domicile to Switzerland, a proportion of the tax payable on the unrealised capital gains with respect to the shares concerned. Moreover, that measure remains more onerous, for the taxpayer, than a measure that permits the deferral, until the disposal of those shares, of payment of the tax payable.

69. In the light of all the foregoing, the answer to the question referred is that the provisions of the AFMP must be interpreted as precluding a tax regime of a Member State which, in a situation where a natural person who is a national of a Member State and who pursues an economic activity in the territory of the Swiss Confederation transfers his domicile from the Member State whose tax regime is at issue to Switzerland, provides for the collection, at the time of that transfer, of the tax payable on unrealised capital gains with respect to shares owned by that national, whereas, if domicile is retained in that Member State, the collection of the tax takes place only at the time when the capital gains are realised, that is on a disposal of the shares concerned.

**Costs**

70. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**The provisions of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999, must be interpreted as precluding a tax regime of a Member State which, in a situation where a natural person who is a national of a Member State and who pursues an economic activity in the territory of the Swiss Confederation transfers his domicile from the Member State whose tax regime is at issue to Switzerland, provides for the collection, at the time of that transfer, of the tax payable on unrealised capital gains with respect to shares owned by that national, whereas, if domicile is retained in that Member State, the collection of the tax takes place only at the time when the capital gains are realised, that is on a disposal of the shares concerned.**

# EU Court of Justice, 14 March 2019*

# Case C-174/18

# *Jean Jacob, Dominique Lennertz v État belge*

*Ninth Chamber:* *K. Jürimäe, President of the Chamber, E. Juhász and C. Vajda (Rapporteur), Judges*

*Advocate General:* *M. Campos Sánchez-Bordona*

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1. This request for a preliminary ruling concerns the interpretation of Article 45 TFEU.

2. The request has been made in proceedings between, on the one hand, Mr Jean Jacob and Ms Dominique Lennertz, a couple residing in Belgium, and, on the other hand, État belge (the Belgian State) regarding the taking into account, in the calculation of the couple's joint tax liability in Belgium, of the pension received by Mr Jacob in another Member State, which is exempt from tax in Belgium but included in the basis of assessment for the granting of certain tax advantages, with the result that Mr Jacob and Ms Lennertz are deprived of part of the advantages to which they would have been entitled were that income not taken into account.

## Legal context

### *The 1970 Convention*

3. Paragraph 3 of Article 18 (headed 'Pensions') of the Convention between the Kingdom of Belgium and the Grand Duchy of Luxembourg for the avoidance of double taxation and for the settling of certain other questions with respect to taxes on income and wealth, signed on 17 September 1970, in the version applicable to the facts in the main proceedings ('the 1970 Convention'), provides as follows:

> '... pensions and other similar income paid in Luxembourg to a Belgian resident shall not be taxable in Belgium if those payments relate to contributions, allowances or insurance premiums paid into a supplementary pension scheme by the beneficiary or on his behalf, or contributions by his employer to an internal scheme, and if those contributions, allowances, insurance premiums or employer's contributions have actually been taxed in Luxembourg.'

4. Article 23(2)(1) of the 1970 Convention provides:

> 'So far as concerns Belgian residents, double taxation shall be avoided in the following manner:
> 1. Income earned in Luxembourg – with the exception of the income referred to in subparagraphs 2 and 3 – and capital situated in Luxembourg, which are taxable in that State under the preceding articles, shall be exempt from tax in Belgium. That exemption shall not limit Belgium's right to take the income and capital thus exempted into account when determining its tax rate.'

### *Belgian law*

5. Article 131 of the code des impôts sur le revenu de 1992 (Income Tax Code 1992), in the version applicable to the facts in the main proceedings ('the CIR 1992'), governs tax-free allowances.

6. Tax reductions granted in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations are governed, respectively, by Articles 145/1, 145/21, 145/24, 145/31 and 145/33 of the CIR 1992.

* Language of the case: French.

7. Article 155 of that code provides:

> 'Income exempted under international conventions for the avoidance of double taxation shall be taken into account for the purposes of calculating tax, but the tax shall be reduced according to the proportion of the overall income represented by the exempted income.
>
> The same procedure shall apply for:
>
> – income exempt under other international treaties or agreements, in so far as they provide for a "subject to progressivity" clause;
>
> …
>
> Where joint taxation is determined, the reduction shall be calculated by reference to the total net income of each taxpayer.'

8. Following the judgment of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), the Kingdom of Belgium adopted Circular No CI.RH.331/575.420 of 12 March 2008, providing for a reduction in tax for income which is exempted under an international convention, in addition to the reduction provided for in Article 155 of the CIR 1992 ('the 2008 Circular').

9. The 2008 Circular states in its introduction:

> '1. In the Belgian tax system, tax advantages linked to the personal and family circumstances of the taxpayer … are applied both to Belgian income and to foreign income. If the personal and family circumstances in question have not been taken into account abroad, a part of those advantages is lost.
>
> The Netherlands applied a system of exemption subject to progressivity similar to that practised in Belgium. In its judgment [of 12 December 2002, *de Groot* (C-385/00, EU:C:2002:750), the Court] held, however, that that practice was contrary to the legislation on the freedom of movement for persons in the [European Union].
>
> Belgium was requested by the European Commission to bring the Belgian tax provisions relating to the application of the system of exemption subject to progressivity … into conformity with the obligations under Articles 18, 39, 43 and 56 EC …
>
> The following approach has been adopted: in cases where the personal and family circumstances of the taxpayer have not been taken into account abroad, a reduction in tax for income earned abroad will be granted in addition to the reduction provided for under [Article 155 of the CIR 1992].
>
> That additional reduction will only be granted, however, if the total of the tax calculated using the method of exemption subject to progressivity provided for in [Article 155 of the CIR 1992], together with tax due abroad on the exempt income, exceeds the tax which would have been payable if that income had been entirely earned in Belgium and the related taxes had been payable in Belgium.
>
> That reduction is to correspond to the difference between, on the one hand, Belgian income tax (calculated using the method of exemption subject to progressivity, as provided for in [Article 155 of the CIR 1992]), together with tax of the same nature payable on income earned abroad, and, on the other hand, the tax which would have been payable if that income had been earned entirely in Belgium and the related taxes had been payable in Belgium.
>
> In order to calculate the amount of the additional reduction, it is therefore necessary to calculate the tax which would have been payable if the income had been earned entirely in Belgium and the related taxes had been payable in Belgium.
>
> 2. Pending an amendment of the Belgian legislation in the manner described above, that reduction will have to be applied under the conditions and within the limits laid down in this circular.
>
> …'

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

10. In the joint tax declaration made by the applicants in the main proceedings in respect of the 2013 tax year, Mr Jacob mentioned that he receives two pensions, namely one from Belgium in the amount of EUR 15 699.57 and one from Luxembourg in the amount of EUR 14 330.75. Those two pensions were supplemented by Mr Jacob's declared income from immovable property in the amount of EUR 1 181.60, thus making his total income EUR 31 211.92.

11. With regard to Mr Jacob, the Belgian tax authorities calculated, on the basis of his total income, including the pension from Luxembourg which is exempt from taxation in Belgium under the 1970 Convention, a basic tax of EUR 11 448.36 corresponding to a tax rate of close to 36.68%. Tax reductions were applied to this amount, first, in the amount of EUR 3 032.46 in respect of tax-free allowances, long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home

against theft or fire as well as charitable donations, and, second, in the amount of EUR 1 349.45 in connection with replacement income, pension income and early retirement income. The resulting reduced basic tax, namely EUR 7 066.45 was, subsequently, reduced in connection with exempt income earned abroad by the amount of EUR 3 220.14, in proportion to the share of the Luxembourg pension in the total income, which resulted in principal tax in the amount of EUR 3 846.31.

12. The applicants in the main proceedings challenged that calculation, noting that the reduction of EUR 3 220.14 granted in connection with exempt income earned abroad does not correspond to 36.68% but to 22.47% of the pension received from Luxembourg, with the result that the latter was subject, ultimately, to a net tax rate of 14.21% instead of being exempt from tax in Belgium in accordance with the 1970 Convention. According to Mr Jacob, in order to respect the exemption of his Luxembourg pension, it would have been necessary to apply to it, directly after the calculation of the basic tax, a reduction rate of 36.68%, which would have reduced the basic tax, before the application of the tax reductions, by EUR 5 256.44, which would have led, ultimately, to a principal amount of tax of EUR 1 810.01 instead of EUR 3 846.31.

13. In rejecting that claim by decision of 25 September 2014, the Belgian tax authorities noted that, in accordance with Article 155 of the CIR 1992, income exempted under international conventions for the prevention of double taxation is to be taken into account for the purposes of calculating tax, it being understood that the tax is to be reduced in proportion to the overall income represented by the exempted income, after application of the tax reductions. Those authorities also maintained that the applicants in the main proceedings did not satisfy the conditions set out in the 2008 Circular in order to qualify for tax relief in connection with foreign income, granted in addition to the reduction provided for by Article 155.

14. The tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), before which an action was brought against the decision of the Belgian tax authorities, made a request for a preliminary ruling to the Court. The Court, by order of 29 November 2016, *Jacob and Lennertz* (C-345/16, not published, EU:C:2016:911), rejected that request on the basis of Article 53(2) of its Rules of Procedure as being manifestly inadmissible, as that request did not meet the requirements laid down in Article 94 of those rules by reason of shortcomings with regard to the factual and legal context of the case.

15. The referring court then submitted a second request for a preliminary ruling to the Court to address those shortcomings, invoking, inter alia, the judgment of 12 December 2013, *Imfeld and Garcet* (C-303/12, EU:C:2013:822).

16. In the light of that judgment, the referring court takes the view that it is required to guarantee the actual benefit of the tax advantage to which the taxpayer is entitled owing to his personal and family circumstances, regardless of the manner in which the Member States have shared between them the obligation to ensure that those tax advantages are taken into account in their entirety. The referring court states that the exemption method provided for in the 1970 Convention requires the Member State of residence to exempt fully from tax pensions which, in accordance with that convention, may be taxed only in the Member State of its source, the 'subject to progressivity' clause in that convention meaning that exempt foreign income may be taken into account only for the purpose of determining the rate of tax applicable to other income that is taxable in Belgium. However, because of the method of calculating the taxes of the applicants in the main proceedings, those applicants lose part of the benefit of the tax advantages to which they are entitled and the foreign income of Mr Jacob, which is in principle exempt, is affected fiscally.

17. In those circumstances, the tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> 'Is it contrary to Article 39 [TEU] for the Belgian tax system, in Article 155 of the [CIR 1992] and regardless of whether or not [the 2008 Circular] is applied, to have the effect that the Luxembourg pensions of the applicant Mr Jacob, which are exempt from tax pursuant to Article 18 of the [1970 Convention], are taken into account for the purpose of calculating the tax payable in Belgium and used as the basis of assessment for the granting of tax advantages provided for under the [CIR 1992], even though they should not form part of that basis by reason of their total exemption as provided for in [that convention], and that those advantages, such as the tax-free allowance and tax reductions in respect of long-term savings, costs paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire, and charitable donations made by the applicant Mr Jacob, are partly lost, reduced or granted to a lesser extent than if both applicants had income earned in Belgium, which, for its part, is taxable in Belgium and is not exempt and may thus absorb the tax advantages in their entirety?'

## Consideration of the question referred

*The freedom applicable to the situation of the applicants in the main proceedings*

18. The referring court refers, in its question, to Article 39 TEU, while mentioning in the grounds of its order for reference both the freedom of establishment and the freedom of movement for workers.

19. However, as the Court has held, it is not thereby precluded from providing the national court with all those elements for the interpretation of EU law which may be of assistance in adjudicating on the case pending before it, whether or not that national court has specifically referred to them in its question (see, to that effect, inter alia, judgments of 21 February 2006, *Ritter-Coulais*, C-152/03, EU:C:2006:123, paragraph 29, and of 23 April 2009, *Rüffler*, C-544/07, EU:C:2009:258, paragraph 57).

20. The referring court does not state, however, whether Mr Jacob receives his Luxembourg pension in respect of salaried or non-salaried occupational activities carried out in Luxembourg.

21. According to settled case-law, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons (see, inter alia, judgments of 28 January 1986, *Commission* v *France*, 270/83, EU:C:1986:37, paragraph 13; of 29 April 1999, *Royal Bank of Scotland*, C-311/97, EU:C:1999:216, paragraph 22; and of 1 October 2009, *Gaz de France – Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 54). By contrast, any national of the European Union who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his residence comes within the scope of Article 45 TFEU (see, inter alia, judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 76, and of 28 February 2013, *Petersen*, C-544/11, EU:C:2013:124, paragraph 34).

22. In that regard, if the Luxembourg pension received by Mr Jacob results from a salaried activity, it is, indeed, Article 45 TFEU concerning the freedom of movement for workers which is relevant. If, on the other hand, Mr Jacob carried out non-salaried activity in Luxembourg, it would be the freedom of establishment provided for in Article 49 TFEU which would apply. It is for the referring court to confirm which provision of the FEU Treaty is applicable.

23. Even if the Court examines the question referred by reference to the freedom of movement for workers, it should be noted that the application of the freedom of establishment to the case in the main proceedings would not in any way affect the substance of the Court's reply, which would be transposable *mutatis mutandis*.

*The question referred*

24. By its question the referring court asks, in essence, whether Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State – one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation – of part of the benefit of the tax advantages granted by the Member State of residence.

25. It must be recalled from the outset that, in accordance with settled case-law, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the Treaty. As far as concerns the exercise of the power of taxation thus allocated by bilateral conventions to prevent double taxation, the Member States must comply with EU rules (see, inter alia, judgments of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraphs 93 and 94; of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraphs 41 and 42; and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 66) and, more particularly, observe the principle of equal treatment (see, to that effect, judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 94).

26. It should also be recalled that, according to the Court's case-law, it is, in principle, a matter for the Member State of residence to grant the taxpayer all the tax advantages relating to his personal and family circumstances, because that State is, as a rule, best placed to assess the taxpayer's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, since that is where his personal and financial interests are centred (see, inter alia, judgments of 14 February 1995, *Schumacker*, C-279/93, EU:C:1995:31, paragraph 32; of 18 July 2007, *Lakebrink and Peters-Lakebrink*, C-182/06,

EU:C:2007:452, paragraph 34; of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 43; and of 22 June 2017, *Bechtel*, C-20/16, EU:C:2017:488, paragraph 55).

27. The Court has also ruled that the Member State of residence cannot cause a taxpayer to forfeit part of his tax-free allowance and his personal tax advantages because, during the year in question, he also received income in another Member State which was taxed in that State without his personal and family circumstances being taken into account (judgment of 12 December 2002, *de Groot*, C-385/00, EU:C:2002:750, paragraph 110).

28. It is in the light of these principles that it is necessary to examine whether the loss in part of the benefit of tax advantages such as those at issue in the main proceedings, as a result of the application of national legislation, is contrary to Article 45 TFEU.

29. The Belgian tax legislation at issue in the main proceedings provides that exempted income earned abroad is first of all included in the tax base which is used to determine the tax rate applicable to Belgian income that is not exempt, the base tax being calculated on the basis of that tax base. Tax reductions in connection with the tax-free allowance, long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire and charitable donations are then applied to the base tax. It is only once those reductions have been applied that the base tax is reduced in proportion to the share of the total income that the exempted foreign income represents, in accordance with Article 155 of the CIR 1992.

30. It should be noted that the inclusion of exempt foreign income in the calculation of the Belgian tax rate, in the calculation of Belgian tax and in the tax base for the granting of tax advantages comes within the Kingdom of Belgium's freedom to choose how to organise its tax system on the basis of the principle of fiscal autonomy and cannot be considered to be contrary to the free movement of workers provided that the effects of such inclusion does not amount to discriminatory treatment contrary to EU law (see, to that effect, judgment of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraph 53). Such an inclusion does not, of itself, prevent ensuring the effective exemption of that income in accordance with EU law, where relevant by means of subsequent compensation.

31. However, by applying tax reductions on a base that includes both non-exempt income from Belgium and exempt foreign income, and by deducting from the tax the share representing the latter in the total amount of income forming the taxable base only subsequently, Belgian tax legislation is liable, as the Belgian Government itself acknowledged in its written observations, to make taxpayers, such as the applicants in the main proceedings, lose part of the tax advantages that would have been granted to them in full had all of their income come from Belgium and if the tax reductions had thus been applied only to that income, or had the 2008 Circular applied to the tax advantages at issue.

32. It is clear from the case-law cited in paragraph 26 above that it is indeed for the Kingdom of Belgium, as the Member State in which the applicants in the main proceedings are resident, to grant the latter all the tax advantages connected with their personal and family circumstances. The Belgian Government maintains in this regard that, with the exception of the tax reductions in respect of the tax-free allowance, the other tax reductions at issue are not linked to the notion of 'personal and family circumstances' of the applicants in the main proceedings and must therefore not be considered, following the example of the Belgian authorities' interpretation of that notion in the 2008 Circular, to be personal tax advantages the unrelieved loss of which, as a result of the exemption of the foreign income and the inapplicability of the 2008 Circular, would be prohibited by Article 45 TFEU.

33. In the first place, it must be noted that the tax reductions in respect of the tax-free allowance are, as the Belgian Government acknowledged in its written observations, recognised by the Court's case-law as advantages linked to the taxpayer's personal and family circumstances, as is clear from paragraph 27 above.

34. It follows that, in that connection, the Belgian tax legislation does not comply with that case-law.

35. In the second place, as regards the question of whether the other tax reductions at issue in the main proceedings, namely the tax reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire and charitable donations, may be regarded as linked to the personal and family circumstances of the applicants in the main proceedings, it is important, as a preliminary matter, to set out the context in which that concept arises.

36. In that regard, it follows from the case-law cited in paragraph 26 above, and in particular from the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452), that the Member State of res-

idence must assess, for the purpose of granting potential tax advantages, the taxpayer's personal ability to pay tax as a whole.

37. The interpretation proposed by the Belgian Government, namely that the tax advantages linked to personal and family circumstances should be understood restrictively as advantages which pursue a social objective by guaranteeing the taxpayer a minimum subsistence income that is not subject to tax and which thus meet a social need, cannot be upheld.

38. In particular, contrary to the arguments put forward by the Belgian Government in its written observations, such an interpretation cannot be inferred from the judgment of 18 July 2007, *Lakebrink and Peters-Lakebrink* (C-182/06, EU:C:2007:452). In that judgment, the Court ruled that the refusal by the Member State in which the taxpayer carries out a salaried activity to take into account, for the purpose of establishing the tax rate applicable to the income of that taxpayer resident in another Member State, negative rental income relating to property not personally occupied by that taxpayer and located in that other Member State was contrary to the free movement of workers referred to in Article 39 EC, when the Member State of residence is unable to grant the taxpayer advantages resulting from the taking into account of his personal and family situation. By taking into account such negative rental income the Court opted for a broad meaning of the notion of 'personal and family situation' without reference to any social purpose.

39. In those circumstances, in order to determine whether the applicants in the main proceedings were unduly deprived of the full benefit of tax reductions linked to their personal and family situation, other than the reduction in respect of the tax-free allowance, it is necessary to ascertain whether those advantages are linked to their personal ability to pay tax.

40. In that regard, it must be considered that tax reductions such as those at issue in the main proceedings, namely reductions in respect of long-term savings, services paid with service vouchers, costs incurred in saving energy in the home, costs incurred in protecting the home against theft or fire as well as charitable donations, are designed, principally, to encourage taxpayers to spend and make investments which necessarily have an impact on their ability to pay taxes.

41. As a result, such tax reductions may be considered to be linked to the personal and family situation of the applicants in the main proceedings, in the same way as the tax reductions in respect of the tax-free allowance.

42. It follows that the applicants in the main proceedings have, as a couple, suffered a disadvantage in so far as they have not benefited in full from the tax advantages to which they would have been entitled if they had both received all of their income in Belgium.

43. The legislation at issue in the main proceedings thus establishes a difference in tax treatment between EU-citizen couples residing in the Kingdom of Belgium according to the source of their incomes – a difference which is liable to discourage those citizens from exercising the freedoms guaranteed by the Treaty, and, in particular, the free movement of workers guaranteed by Article 45 TFEU (see, to that effect, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 51).

44. It is settled case-law that a measure which is liable to hinder the free movement of workers enshrined in Article 45 TFEU can be permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate for ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain that objective (see, by analogy, judgment of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraph 64 and the case-law cited).

45. In the present case, however, no justification has been put forward by the Belgian Government nor contemplated by the referring court.

46. In the light of the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State, one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation, of part of the benefit of the tax advantages granted by the Member State of residence.

**Costs**

47. …

On those grounds,

the Court (Ninth Chamber)

hereby rules:

**Article 45 TFEU must be interpreted as precluding the application of tax legislation of a Member State, such as that at issue in the main proceedings, which has the effect of depriving a couple resident in that State, one of whom receives a pension in another Member State which is exempt from taxation in the first Member State pursuant to a bilateral convention for the avoidance of double taxation, of part of the benefit of the tax advantages granted by the Member State of residence.**

# EU Court of Justice, 2 May 2019*

## Case C-598/17

## *A-Fonds v Inspecteur van de Belastingdienst*

*First Chamber:* *J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges*

*Advocate General:* *H. Saugmandsgaard Øe*

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1. This request for a preliminary ruling concerns the interpretation of Articles 107 and 108 TFEU.

2. The request has been made in proceedings between A-Fonds and the Inspecteur van de Belastingdienst (Inspector of the Netherlands tax administration) ('the tax administration') concerning the refund of dividend tax withheld by the Netherlands tax administration.

### Legal context

*European Union law*

3. Article 1(c) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of EC Treaty (OJ 1999 L 83, p. 1) defines 'new aid' as 'all aid, that is to say, aid schemes and individual aid, which is not existing aid, including alterations to existing aid'.

4. Article 1(c) of Council Regulation (EU) 2015/1589 of 13 July 2015, laying down detailed rules for the application of Article 108 of the [TFEU] (OJ 2015 L 248, p. 9), lays down provisions identical to those referred to in the preceding paragraph.

5. Article 4(1) of Commission Regulation (EC) No 794/2004 of 21 April 2004 implementing Council Regulation No 659/1999 (OJ 2004 L 140, p. 1), provides:

> 'For the purposes of Article 1(c) of Regulation No 659/1999, an alteration to existing aid shall mean any change, other than modifications of a purely formal or administrative nature which cannot affect the evaluation of the compatibility of the aid measure with the common market. However an increase in the original budget of an existing aid scheme by up to 20% shall not be considered an alteration to existing aid.'

*Netherlands law*

The Wet Vpb 1969

6. Article 2(1)(f) and (g) of the Wet op de vennootschapsbelasting (Law on Corporation Tax), of 8 October 1969, in the version applicable to the case in the main proceedings ('the Wet Vpb 1969'), provide:

> 'The following entities established in the Netherlands are subject to tax as domestic taxable persons:
> …
> f. special investment funds;
> g. the businesses, referred to in paragraph 3, of legal persons governed by public law.'

7. Article 2(3) of the Wet Vpb 1969 sets out a list of companies operating in certain economic sectors.

* Language of the case: Latvian.

8. Article 2(7) of the Wet Vpb 1969 provides that bodies of which only legal persons governed by Netherlands public law are directly or indirectly shareholders, associates or members, and bodies whose directors are exclusively appointed and removed directly or indirectly by legal persons governed by Netherlands public law and whose assets revert exclusively to legal persons governed by Netherlands public law in the event of liquidation 'are subject to tax only to the extent that they carry on a business within the meaning of paragraph 3'.

The Wet DB 1965

9. The Wet op de dividendbelasting (Law on the Taxation of Dividends) ('the Wet DB 1965') has been amended a number of times in the period during which the facts of the main proceedings took place.

10. In the version in force with effect from 11 July 2008, recalled by the referring court, Article 1(1) of the Wet DB 1965 provides:

> 'Under the name "dividend tax" a direct tax shall be levied on persons who, directly or by means of certificates, are entitled to income from shares … '

11. In the same version, Article 10 of the Wet DB 1965 sets out the rules on the refund of that tax as follows:

> '1. By a decision of the inspector, which may be challenged by means of a complaint, a legal person established in the Netherlands and not subject to corporation tax shall, upon request by that person, be granted a refund of dividend tax withheld in respect of that person in the course of a calendar year, where that tax amounts to more than EUR 23.
> …
> 3. Paragraph 1 shall apply by analogy in relation to a body established in another Member State of the European Union which is not subject, in that State, to a tax on profits and which, if it had been established in the Netherlands, would also not have been subject to a tax levy on those companies. The first sentence shall not apply as regards bodies that carry out a function comparable with that of investment undertakings covered by Article 6a or Article 28 of the [Wet Vpb 1969].'

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

12. A-Fonds is a *Spezial-Sondervermögen* (special collective investment fund), with no legal personality, established in Germany.

13. Such funds are exempt from corporation and business tax. Investors participating in those funds are deemed to receive dividends pro rata to their shares therein. Those dividends are subject to tax, on the investors, in accordance with their personal tax status under German tax law.

14. Since A-Fonds was constituted, all of its shares have been held by BBB.

15. BBB is a body governed by German public law (*Anstalt des öffentlichen Rechts*), has a legal personality and is made up of a group German municipalities, which are legal persons governed by public law. It conducts banking business, but its aim is not solely to make profits. It also has a public role. Thus, BBB devotes part of its revenue to supporting social, cultural, sporting, scientific and educational activities in the Land where it operates.

16. BBB is subject, in Germany, to corporation tax and professional tax. It is also clear from the order for reference that the dividends it receives are exempt up to a value of 95% of the German tax on profits, and that it cannot be charged tax on dividends received in the Netherlands on the ground that its share in A-Fonds is part of its fixed assets (*Anlagebuch*).

17. At the time of the facts in the main proceedings, BBB held, through A-Fonds, shares in Netherlands companies subject to the Wet DB 1965. The Netherlands dividend tax was withheld on the dividends that those shares generated for it in respect of the financial years 2002/2003 to 2007/2008.

18. By several requests, BBB sought the refund of that tax from the Netherlands tax administration, pursuant to Article 10(1) of the Wet DB 1965. That administration rejected those requests.

19. It is clear from the order for reference that, at least for the financial years between 1 November 2002 and 31 October 2008, the tax administration considered that BBB was not entitled to claim that refund on that ground it was not established in the Netherlands.

20. A-Fonds made applications to the rechtbank Zeeland-West-Brabant te Breda (District Court of Zeeland-West-Brabant te Breda, Netherlands) for the annulment of the decisions refusing a refund, which were

rejected as unfounded by a judgment of 6 May 2014. That court considered, inter alia, that A-Fonds' situation was not comparable with that of a body covered by Article 10(1) of the Wet DB 1965.

21. A-Fonds brought an appeal against that judgment before the Gerechtshof 's-Hertogenbosch (Court of Appeal, 's-Hertogenbosch, Netherlands).

22. That court considers that both the requests for a refund sent by A-Fonds to the tax administration and the legal claims must be regarded as having been made in the name of BBB.

23. It considers that the tax administration's decisions refusing the refund of the tax on dividends, claimed by BBB, on the ground that it is established in a Member State other than the Kingdom of the Netherlands, infringes the free movement of capital.

24. It states that the dividends generated by investments made by legal persons governed by public law who are established in the Netherlands and who, under the Wet Vpb 1969, are not subject to corporation tax on the ground that they engage in activities other than those listed in Article 2(3) of the Wet Vpb 1969, are in principle subject, in the Netherlands, to dividend tax. However, that tax is later refunded to them pursuant to Article 10(1) of the Wet DB 1965.

25. It concluded that the fact that BBB could not claim the refund of the dividend tax under that same provision, even though it conducted activities comparable to those of Netherlands legal persons governed by public law and not subject to corporation tax in the Netherlands, constituted a restriction on the free movement of capital.

26. It considers that it is necessary, therefore, to grant BBB a refund of the amount equal to that which a legal person governed by public law established in the Netherlands and not subject to corporation tax in that Member State would receive pursuant to Article 10(1) of the Wet DB 1965.

27. However, that court wonders whether the grant of such a refund complies with EU law on State aid.

28. Taking the view that the refund of dividend tax laid down in Article 10(1) of the Wet DB 1965 is, in the case in the main proceedings, inextricably linked to the exemption from corporation tax for public undertakings under Article 2(3) of the Wet Vpb 1969, which the European Commission, in its decision (C(2013) 2372 final) of 2 May 2013, found to be an existing aid that was incompatible with the internal market, the referring court concludes that the refund therefore also constitutes an existing aid scheme.

29. In that context, it wonders whether a decision to grant the request by the applicant in the main proceedings for a refund on the basis of Article 56(1) EC, now Article 63(1) TFEU, constitutes the alteration of an existing aid, which constitutes a new aid, within the meaning of Article 1(c) of Regulation No 659/1999.

30. If that is the case, it wonders whether it is possible to adopt a decision upholding such a request and whether it is necessary, in particular, to notify that decision to the Commission in accordance with Article 108(3) TFEU.

31. It states that this is a 'test case' and that the tax administration has already received almost 1 000 similar requests for a refund.

32. In those circumstances, the Gerechtshof 's-Hertogenbosch (Regional Court of Appeal, 's-Hertogenbosch) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Is the extension of the scope of an existing system of aid as a result of a taxable person successfully invoking the right to the free movement of capital as laid down in Article 56 of the EC Treaty (now Article 63 TFEU) to be regarded as a new system of aid resulting from an alteration to existing aid?
> 2. If so, does the task to be performed by the national court under Article 108(3) TFEU preclude the taxable person from being granted a tax advantage which that taxable person claims under Article 56 of the EC Treaty (now Article 63 TFEU), or should a proposed judicial decision to grant that advantage be notified to the Commission, or should the national court take any other action or implement any other measure, in view of the supervisory task assigned to it under Article 108(3) TFEU?'

**Admissibility of the request for a preliminary ruling**

33. The Commission submits that the request for a preliminary ruling is inadmissible on the ground that it does not contain the elements of fact and law necessary to enable the Court to give a useful answer to the questions submitted to it.

34. In that regard, it should be observed that the two questions submitted by the referring court are based on the premiss that the scheme for the refund of dividend tax at issue in the main proceedings is an existing State aid.

35. In particular, the referring court bases its analysis on the fact that, in the case in the main proceedings, the refund, provided for in Article 10(1) of the Wet DB 1965, is inextricably linked to the exemption from corporation tax provided for in Article 2 of the Wet Vpb 1969 for legal persons governed by public law, which the Commission, in its decision C(2013) 2372 final, had considered to be an aid scheme that was incompatible with the internal market.

36. However, and as the Commission itself states in its written observations, it must be observed that that decision concerns solely the scheme for the exemption from corporation tax of persons governed by public law, provided for by Wet Vpb 1969, and not the scheme for the refund of dividend tax laid down in Article 10(1) of the Wet DB 1965.

37. Furthermore, the scope of application of those two schemes is not the same, since the second is wider and covers all Netherlands companies exempt from corporation tax.

38. Thus, the Commission's finding that the scheme exempting Netherlands public undertakings from corporation tax, laid down in Article 2 of the Wet Vpb 1969, is an existing aid scheme incompatible with the internal market cannot validly be regarded as applicable, *mutatis mutandis*, to the scheme for the refund of dividend tax provided for in Article 10(1) of the Wet DB 1965.

39. Nevertheless, it cannot be denied, as the referring court moreover indicates, that, in this specific case where the refund of dividend tax is granted to a public undertaking on the ground that it is exempt from corporation tax pursuant to Article 2 of the Wet Vpb 1969, the refund is the direct and inseparable consequence of the grant of a State aid and that it could, therefore, also be regarded as constituting a State aid.

40. Thus, since it is not inconceivable that the law at issue is to be classified as State aid and it is for the national court to determine that issue in order to ensure compliance with Article 108(3) TFEU, the answers to the questions referred must be regarded as useful to the referring court for the purpose of resolving the dispute in the main proceedings and must, therefore, be regarded as resting on the premiss that the scheme for the refund of dividend tax at issue in the main proceedings constitutes an aid scheme.

**Consideration of the questions referred**

41. At the outset, it should be noted that the referring court does not ask the Court to provide an interpretation of Article 56(1) EC, now Article 63(1) TFEU, which prohibits all restrictions on the movement of capital between Member States and between Member States and third countries, the infringement of which appears to it to be established. It is clear from the order for reference that that infringement follows from the fact that the Netherlands legislation which provides for the refund of dividend tax subject to a condition of residence on national territory.

42. It is also necessary to observe that the relevant provisions of Regulation No 659/1999, to which the referring court refers, are laid down in identical terms by Regulation 2015/1589 which replaced it, such that it is not necessary to determine the application *ratione temporis* of those two regulations to the facts of the case in the main proceedings.

43. Having regard to the foregoing considerations, by its two questions, which it is appropriate to examine together, the referring court must be regarded as asking, in essence, whether EU law precludes a court of a Member State from granting, in order to ensure compliance with Article 56(1) EC, now Article 63(1) TFEU, the benefit of a State aid scheme, such as that which may be created by the scheme for the refund of dividend tax at issue in the main proceedings, to an undertaking established in another Member State. The referring court asks in particular whether, where such an aid scheme is regarded as existing, the decision to grant the benefit of that scheme constitutes a new aid, within the meaning of Article 1(c) of Regulation No 659/1999, which that court would have to notify to the Commission in accordance with the last sentence of Article 108(3) TFEU.

44. It must be observed that the questions submitted by the referring court require, as it observes itself, the prior determination as to whether EU law precludes it from retaining its competence to examine whether the residence condition at issue in the main proceedings complies with the free movement of capital, or whether that review falls within the sole competence of the Commission to assess the compatibility of an aid scheme with the internal market.

45. As follows from the settled case-law of the Court, within the system established by the Treaty for supervision of State aid, the national courts and the Commission fulfil complementary but separate roles (see, to that effect, the judgments of 11 July 1996, *SFEI and Others*, C-39/94, EU:C:1996:285, paragraph 41, and of 15 September 2016, *PGE*, C-574/14, EU:C:2016:686, paragraph 30 and the case-law cited).

46. Whilst the assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the European Union Courts, it is for the national courts to ensure that the rights of individuals are safeguarded where the obligation to give prior notification of State aid to the Commission pursuant to Article 108(3) EC has been infringed (see, to that effect, the judgment of 8 December 2011, *Residex Capital IV*, C-275/10, EU:C:2011:814, paragraph 27). Such disregard, if relied on by individuals and confirmed by the national courts, must lead those courts to draw from it all the consequences in accordance with their national law, without their decisions, however, implying an assessment of the compatibility of the aid with the internal market, which is a matter within the exclusive competence of the Commission, subject to review by the Court (see, to that effect, the judgment of 23 April 2002, *Nygård*, C-234/99, EU:C:2002:244, paragraph 59 and the case-law cited).

47. It is also clear from the case-law of the Court that a national court has competence to assess whether the arrangements of an aid scheme comply with Treaty provisions which have direct effect, other than those relating to State aid, only if those arrangements can be evaluated separately and thus, although forming part of the aid scheme in question, are not necessary for the attainment of its objective or for its functioning (see, to that effect, the judgments of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14, and of 23 April 2002, *Nygård*, C-234/99, EU:C:2002:244, paragraph 57).

48. By contrast, the arrangements of an aid may be so indissolubly linked to the object of the aid that it is impossible to evaluate them separately so that their effect on the compatibility or incompatibility of the aid viewed as a whole must therefore of necessity be determined in the light of the procedure prescribed in Article 108 TFEU (see, to that effect, the judgment of 22 March 1977, *Iannelli & Volpi*, 74/76, EU:C:1977:51, paragraph 14).

49. In the present case, that is the case for a residence condition such as that laid down in the scheme for the refund of dividend tax at issue in the main proceedings, if the scheme is however regarded as constituting State aid, since that condition appears to be indissolubly linked to the very object of the exemption measures at issue, which is to the advantage of national undertakings only.

50. Furthermore, it should be observed that, in the case in the main proceedings, such a review would necessarily call into question, even if only indirectly, the residence condition laid down by Article 2 of the Wet Vpb 1969 for the exemption from corporation tax for public undertakings, which is a necessary condition for the achievement of the objective and functioning of that aid scheme.

51. It does not therefore appear to be possible to separate such a condition, which is necessary for the attainment of the objective and functioning of that aid scheme, without adversely affecting the division of competences between the Commission and the national courts in the matter of State aid.

52. Consequently, it must be held that EU law precludes a national court from assessing whether a residence condition, such as that at issue in the main proceedings, complies with the free movement of capital, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.

53. It follows that such a court cannot, a fortiori, draw the consequences of a possible infringement by that residence condition of the free movement of capital in granting the refund of that tax. It is not, therefore, necessary to provide an answer to the question referred to in paragraph 43 of this judgment.

54. Having regard to all the foregoing, the answer to the questions referred is that Articles 107 and 108 TFEU must be interpreted as meaning that a national court cannot assess whether a residence condition, such as that at issue in the main proceedings, complies with Article 56(1) EC, now Article 63(1) TFEU, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.

**Costs**

55. …

On those grounds,

the Court (First Chamber)

hereby rules:

**Articles 107 and 108 TFEU must be interpreted as meaning that a national court cannot assess whether a residence condition, such as that at issue in the main proceedings, complies with Article 56(1) EC, now Article 63(1) TFEU, where the scheme for the refund of dividend tax concerned constitutes an aid scheme.**

# EU Court of Justice, 16 May 2019*

# Joined Cases T-836/16 and T-624/17

# *Republic of Poland v European Commission*

*General Court (Ninth Chamber, Extended Composition): S. Gervasoni, President, L. Madise (Rapporteur), R. da Silva Passos, K. Kowalik-Banczyk and C. Mac Eochaidh, Judges*

*Registrar:* *F. Oller, Administrator*

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**Background to the dispute**

1. In early 2016, the Polish Government planned to introduce a new tax on the retail goods sector. Although various consultations had to be held on certain aspects of its implementation, the principle was of a tax whose basis of assessment would be turnover and which would be progressive in nature.

2. When the European Commission learned of that plan, it sent requests for information to the Polish authorities and, referring to the position it had taken in July 2015 on an amendment to the food chain inspection fee in Hungary, which was also based on the principle of progressive taxation of turnover, it stated:

> 'The rates of progressive turnover taxes paid by undertakings are in fact linked to the size of the undertaking and not to its profitability or solvency. They cause discrimination between undertakings and may seriously disrupt the market. In so far as they introduce a difference in treatment between undertakings, they have been found to be selective. Since all the conditions set out in Article 107(1) TFEU are met, [they give rise to State aid under that article].'

3. On 6 July 2016, the Sejm Rzeczypospolitej Polskiej (lower chamber of the Parliament of the Republic of Poland) adopted the Law on the tax on the retail sector, whose essential characteristics were ultimately as follows. The industry concerned is that of the retail sale of goods to consumers who are natural persons. All retailers, regardless of their legal status, must pay the tax. The basis of assessment is monthly turnover above 17 million Polish zlotys (PLN), approximately EUR 4 million. The tax rates are 0.8% for the portion of monthly turnover between PLN 17 million and PLN 170 million and 1.4% for the portion of monthly turnover above that. The law in question entered into force on 1 September 2016.

4. After some discussion between the Polish authorities and the Commission, the latter initiated the procedure laid down in Article 108(2) TFEU in respect of the measure at issue by Decision of 19 September 2016 on the State aid SA.44351 (2016/C) (ex 2016/NN) ('the decision to initiate the procedure, the first contested decision'). In that decision, the Commission not only requested the interested parties to submit their observations, but also ordered the Polish authorities, pursuant to Article 13(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 [TFEU] (OJ 2015 L 248, p. 9), to suspend immediately 'the application of progressive rates to its tax, until the Commission has taken a decision on the compatibility of [the Law on the tax on the retail sector] with the internal market'.

5. Throughout the procedure, the Polish authorities – which suspended the application of the measure at issue – challenged its classification as State aid within the meaning of Article 107(1) TFEU.

6. At the same time as continuing discussions with the Commission, the Polish Government applied to the General Court to have the decision to initiate the procedure, the first contested decision, annulled (Case T-836/16).

7. The Commission closed the procedure by adopting Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector (OJ 2018 L 29,

* Language of the case: Polish.

p. 38) ('the final decision, the second contested decision'). The Commission stated in that decision that the measure at issue constituted State aid which was incompatible with the internal market and that it had been unlawfully put into effect. The Polish authorities had to cancel permanently all payments suspended pursuant to the decision to initiate the procedure, the first contested decision. Since the measure at issue had not in actual fact been implemented, the Commission considered that there was no need to recover aid from beneficiaries.

8. The Polish Government also requested the General Court to annul the final decision, the second contested decision (Case T-624/17).

9. In essence, in the decision to initiate the procedure, the first contested decision, and in the final decision, the second contested decision, (collectively, 'the contested decisions') – but with its line of argument being augmented in certain regards in the final decision – the second contested decision, the Commission essentially justified the classification of the measure at issue as State aid as follows, in the light of the definition contained in Article 107(1) TFEU.

10. First, as regards the imputability of the measure at issue to the State and its financing from State resources, the Commission took the view that some of the undertakings concerned, namely those with a low turnover, were granted favourable tax treatment by the Law on the tax on the retail sector in comparison with other undertakings required to pay that tax, and that the waiver by the State of the financial resources which it would have collected if all undertakings were subject to the same average effective tax rate entailed a transfer of resources from the State to the favoured undertakings.

11. As regards the existence of an advantage, the Commission noted that, just like positive benefits, measures which mitigated the charges normally borne by the undertakings provided an advantage. In the present case, average tax rates at zero or at a lower level for undertakings with a low turnover in comparison with higher average tax rates for undertakings with a higher turnover gave the former an advantage. In the final decision, the second contested decision, the Commission added that retail structures based on the franchise principle were advantaged in comparison with integrated retail structures, since turnover was divided into a number of parts corresponding to the number of franchisees for the former but was determined on the basis of the entire undertaking's monthly turnover for the latter.

12. As to whether the advantage identified favoured certain undertakings (selectivity criterion), the Commission stated that in respect of a tax advantage, the assessment had to be carried out in several stages. First of all, the reference tax system had to be identified, then it had to be determined whether the measure at issue constituted a derogation from that system in the sense that it differentiated between undertakings which, in light of the intrinsic objectives of the system, were in a comparable factual and legal situation, and lastly, if the answer was in the affirmative, it had to be established whether that derogation was justified by the nature or general scheme of the reference tax system. A negative answer at the second stage or, as the case may be, a positive answer at the third ruled out a selective advantage in favour of certain undertakings, whereas a positive answer at the second stage and a negative answer at the third stage, on the other hand, led to the conclusion that there was a selective advantage.

13. In the present case, the Commission first of all considered that the reference system was the turnover tax on the retail sector, including in respect of undertakings with a turnover of less than PLN 17 million, but that the progressive structure of the tax did not form part of that reference system (rates of 0% for the band of turnover that was not taxable and of 0.8% and 1.4% for the associated bands of turnover).

14. To that extent, the Commission considered, next, that the progressive structure of the tax, in so far as it entailed not only marginal tax rates but also average tax rates which differed between undertakings, constituted a derogation from the reference system which was considered to be applied with a single tax rate. In the final decision, the second contested decision, the Commission provided a specific example of the taxation of three retail undertakings, the first with a monthly turnover of PLN 10 million, the second of PLN 100 million and the third of PLN 750 million. The average tax rate for the first was calculated to be zero, that of the second 0.664% and that of the third 1.246%.

15. The Commission considered, lastly, that the derogation from the reference system entailed by the progressive structure of the tax was not justified by the nature or general scheme of the system. In the decision to initiate the procedure, the first contested decision, the Commission stated that sectoral policy objectives, such as regional policy, environmental or industrial policy, could not be taken into account in that respect. As the Polish authorities had emphasised the redistributive purpose of the progressive tax structure, justified by the fact that undertakings with higher turnovers enjoy economies of scale, better conditions of supply and tax

strategies that are not available to smaller undertakings, the Commission stated that such a redistributive purpose was not consistent with a turnover tax which was only levied on undertakings relative to their volume of activity and not relative to their charges, profitability, ability to pay or facilities which, according to the Polish authorities, only large undertakings can use. For the Commission, a progressive tax levied on turnover could be justified in order to offset or deter the occurrence of certain negative effects likely to be generated by the activity concerned (negative externalities), which were more significant the larger the turnover, but such a situation had in no way been established in the present case.

16. Furthermore, the Commission stated that the measure at issue distorted or threatened to distort competition and affected trade between Member States. In that regard, it found, in particular, that the Polish retail market was open to competition, that the undertakings from other Member States participated in that market and that undertakings benefiting from the lowest tax rates therefore received operating aid. The Commission viewed the assertion by the Polish authorities that the progressive structure of the tax allowed small-scale retailers to be preserved against large format retail as evidence that those authorities were seeking to influence the structure of competition in the market.

**Procedure and forms of order sought**

17. The Republic of Poland submitted the application for annulment of the decision to initiate the procedure, the first contested decision, on 30 November 2016 (Case T-836/16).

18. The Commission lodged its defence on 21 February 2017.

19. On 17 March 2017, Hungary sought leave to intervene in support of the Republic of Poland. That request was approved by decision of the President of the Ninth Chamber of the Court of 27 April 2017.

20. The Republic of Poland, Hungary and the Commission lodged a reply, a statement in intervention and a rejoinder on 11 May, 19 June and 2 August 2017 respectively.

21. The Republic of Poland submitted the application for annulment of the final decision, the second contested decision, on 13 September 2017 (Case T-624/17).

22. The Republic of Poland and the Commission each submitted observations on the statement in intervention of Hungary in Case T-836/16 on 20 October 2017.

23. By letter of 21 November 2017, the Republic of Poland submitted a reasoned request for a hearing to be held in Case T-836/16.

24. The Commission lodged its defence in Case T-624/17 on 29 November 2017.

25. On 30 November 2017, the Commission requested the joinder of Cases T-836/16 and T-624/17 for the oral part of the procedure.

26. On 15 December 2017, Hungary sought leave to intervene in support of the Republic of Poland in Case T-624/17. That request was approved by decision of the President of the Ninth Chamber of the Court of 12 January 2018.

27. On 20 February 2018, Hungary submitted its statement in intervention in Case T-624/17. The Republic of Poland and the Commission submitted their observations thereon on 9 and 19 April 2018 respectively.

28. By letter of 15 May 2018, the Republic of Poland submitted a reasoned request for a hearing to be held in Case T-624/17.

29. On hearing the report of the Judge-Rapporteur, the Court decided to open the oral procedure in Cases T-836/16 and T-624/17. The Court also decided to put a question to the parties to be answered during this phase.

30. Acting upon a proposal of the Ninth Chamber, the Court decided, pursuant to Article 28 of the Rules of Procedure of the General Court, to refer the cases to a Chamber sitting in extended composition.

31. By decision of the Court of 4 July 2018, Cases T-836/16 and T-624/17 were joined for the purposes of the oral part of the procedure pursuant to Article 68(2) of the Rules of Procedure.

32. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 26 September 2018. On that occasion, after hearing the parties, the President of the Ninth Chamber, Extended Composition, of the General Court decided that Cases T-836/16 and T-624/17 would likewise be joined for the purposes of the decision closing the proceedings.

33. In Case T-836/16, the Republic of Poland claims that the Court should:
  – annul the decision to initiate the procedure, the first contested decision;
  – order the Commission to pay the costs.

34. In Case T-624/17, the Republic of Poland claims that the Court should:
  – annul the final decision, the second contested decision;
  – order the Commission to pay the costs.

35. In Cases T-836/16 and T-624/17, the Commission contends that the Court should:
  – dismiss the actions;
  – order the Republic of Poland to pay the costs.

36. In Cases T-836/16 and T-624/17, Hungary contends that the applications should be granted.

37. In Case T-836/16, Hungary contends that the Commission should be ordered to bear the costs incurred by the Hungarian Government.

**Law**

38. In Case T-836/16, the Polish Government raises four pleas in law against the decision to initiate the procedure, the first contested decision: first of all, alleging an error in the legal characterisation of the measure at issue as State aid within the meaning of Article 107(1) TFEU; next, alleging an infringement of Article 13(1) of Regulation No 2015/1589 and of the principle of proportionality because of the injunction to suspend immediately 'the application of progressive rates to its tax, until the Commission has taken a decision on the compatibility of [the Law on the tax on the retail sector] with the internal market'; and lastly, alleging an erroneous and inadequate statement of reasons.

39. In Case T-624/17, the Polish Government raises two pleas in law against the final decision, the second contested decision: first, alleging an error in the legal characterisation of the measure at issue as State aid within the meaning of Article 107(1) TFEU and, secondly, alleging an erroneous and inadequate statement of reasons.

40. In the present case, the Court considers it appropriate to examine, first, the pleas in law alleging that the contested decisions erred in the legal characterisation of the measure at issue as State aid within the meaning of Article 107(1) TFEU.

41. The Polish Government submits that the Commission erred in finding that the tax on the retail sector constituted a selective measure favouring certain undertakings owing to the progressive rates applied to the basis of assessment, turnover. The Polish Government asserts that, on the contrary, it is a general, non-selective measure, or a measure which might possibly be regarded *prima facie* as selective, but is ultimately not selective since it is justified by the nature and general scheme of the tax system in question.

42. According to the Polish Government's submissions in a first set of arguments, the tax on the retail sector cannot be considered inherently selective in nature as its structure, which causes it to be selective in the Commission's view, does not derogate from the reference system of which that tax is a part, since selectivity is a component of that system. More specifically, the Polish Government argues as follows.

43. The progressive nature of the rates of the tax on the retail sector, which the Commission considers as the sign of a selective advantage favouring certain undertakings, is instead an integral part of the reference system, which is constituted by the aforementioned tax with its characteristics in respect of its tax base, the taxable persons, the taxable event and the structure of tax rates. The progressive nature of the rates cannot, therefore, be regarded as causing a derogation from the reference system. The Commission wrongly limited the reference system to the tax in question without its rate structure, leading to the odd situation where the tax reference system that it identified did not include a 'normal' tax rate in comparison with which it could be ascertained whether there was a selective advantage, as is apparent from recitals 26 and 51 of the decision to initiate the procedure, the first contested decision, and from recitals 47 and 49 of the final decision, the second contested decision. The Commission simply took the view that there should be only one tax rate, which could be set by the Polish authorities at the maximum marginal rate of 1.4% or at the highest average effective tax rate to which the taxable persons were subject, as the case might be.

44. However, the rates of taxation, including where there is a progressive scale, necessarily form part of any tax, as was, moreover, stated by the Commission in paragraph 134 of its Notice on the notion of State aid as referred to in Article 107(1) [TFEU] (OJ 2016 C 262, p. 1, 'the Notice on the notion of State aid'). In its desire to impose a single taxation rate for a tax, the Commission is, moreover, encroaching on the Member States' fiscal powers.

45. The Polish Government states that in this case the progressive scale is comprehensible and clear, and that tax rates are set at relatively low levels and in a linear manner, the top rate of 1.4% being only 1.75 times greater than the first rate of 0.8%. There is no threshold effect since, irrespective of the turnover of the undertakings concerned, all are given a tax exemption on monthly turnover of up to PLN 17 million, a rate of 0.8% being applied for the portion of monthly turnover between PLN 17 million and PLN 170 million and a rate of 1.4% applied for the portion of monthly turnover above PLN 170 million. The system is neither discriminatory nor discretionary; there is no aspect that constitutes a derogation. The Polish Government also submits that the structure of the tax on the retail sector cannot be equated with the full exemption enjoyed by offshore companies in Gibraltar, examined in the judgment of 15 November 2011, Commission and Spain v Government of Gibraltar and United Kingdom (C-106/09 P and C-107/09 P, EU:C:2011:732), which was contrary to the objective of the taxes concerned, which was to introduce a general taxation system for all companies; the structure in the present case is, however, similar to the capping mechanisms on those taxes at 15% of profit for all companies, which were considered in the same judgment as not entailing a selective advantage.

46. The Polish Government adds that the tax on the retail sector as it was designed meets the dual objective of raising tax revenue for the State while splitting the tax burden fairly between taxpayers according to their ability to pay, this having a redistributive aim, an aspect which itself aims to ensure receipt of tax revenue. Contrary to the Commission's contention in recital 29 of the decision to initiate the procedure, the first contested decision, and recital 49 of the final decision, the second contested decision, the purpose of that tax is not confined to raising tax revenue or even to 'taxing the turnover of all undertakings in the retail sector'. This confirms that the associated tax rates and tax thresholds form part of the reference system. In addition, while the way in which retail chains chose to be organised could indeed affect the level of the tax that they would have had to pay, each was free to adopt the most favourable organisational structure in that regard, including through franchising. In particular, the Carrefour Group, like other large, foreign-owned retailers, makes extensive use of franchising, while some large taxpayers with integrated structures are Polish companies.

47. The Commission begins its response to those submissions by making some preliminary comments. It notes that it considered that all retail undertakings were in a comparable factual and legal situation in the light of the objective of the tax in question and that the progressive structure of its rates led to discrimination between those undertakings according to their size, which was not justified by the purpose or nature of the tax, since undertakings with a low turnover were subject to an average effective rate of zero or a lower average effective rate than undertakings with a higher turnover. Thus, almost all small and medium-sized independent retailers were in practice exempted or taxed at an average effective rate of less than 0.8% on their total turnover, while large format retailers, such as integrated chains of hypermarkets, were subject to an average effective rate closer to the maximum rate of 1.4%, which would significantly reduce their profits. Polish-owned retail undertakings generally benefit from the system while foreign-owned undertakings are taxed at a higher average rate. The Commission notes in this respect that according to various publicly available reports, out of nearly 200 000 shops or retail undertakings, only about one hundred would have been liable to the tax in September 2016, the proceeds of which would have been PLN 114 million, of which approximately PLN 80 million would have been owed by the 10 largest undertakings. Only 12 undertakings would have reached the 1.4% tax band. According to the Commission, various political declarations in Poland also clearly stated that the tax aimed to re-balance the terms on which small undertakings and international retail chains compete. Moreover, a retail chain that is organised on a franchise model pays little or no tax, while an integrated distribution chain generating the same turnover pays far more. The Commission provides the example of the Carrefour Group, which is partly organised on an integrated model and would be taxed for that part at an average rate of 1.2%, while the Polish retail chain Lewiatan, which operates on a franchise model and is itself divided into 16 companies, with a higher total turnover than Carrefour, would be taxed at an average rate of almost zero. In that regard, although foreign-owned chains, such as the Carrefour Group, also use franchising, the franchisees are precisely the local Polish undertakings who are advantaged by the tax measure in question. However, at the hearing, in respect of establishing the selectivity of the advantages generated by the progressive structure of the rates of the tax on the retail sector, the Commission emphasised that the contested decisions were not adopted on the basis that discrimination according to the national origin of the taxpayers had been identified.

48. The Commission adds, referring to the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), that it is not sufficient, when determining whether a tax measure is selective to the advantage of some undertakings, to examine whether there is a derogation from the reference system's rules as defined by the Member State concerned itself, but that it must also be ascertained whether the limits or structure of that reference system were defined consistently or, on the contrary, in a clearly arbitrary or biased manner so as to favour those undertak-

ings, as is the case here, in the Commission's view. The Commission states that, in that judgment, the Court held that the selective advantage enjoyed by certain companies resulted from the very design of the tax concerned. The judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981), confirms that approach.

49. In so far as the Polish Government justifies the tax measure in question by the need to take into account the ability to pay of undertakings, the Commission also contends that a tax base corresponding to turnover is irrelevant in that regard, since high turnover may be associated with loss making, and vice versa. The fact that an undertaking is large does not mean that it is capable of paying a sizeable amount in tax. The desire to combat tax optimisation and avoidance, which the Polish Government also mentions, is also misplaced, since the risk of reduction of the tax base arises only for profit taxes.

50. The Commission explains that its analysis does not undermine the fiscal autonomy of Member States. The Republic of Poland will remain sovereign, subject to compliance with the rules of the FEU Treaty relating to State aid.

51. More specifically in relation to the discussion on determining the reference system, the Commission states that, in order to establish the selectivity of an advantageous tax measure, it is necessary to identify that system, composed of a consistent set of rules that generally apply on the basis of criteria applicable to all undertakings falling within its scope as defined by its objective, and then to show that the measure at issue derogates from that system in so far as it distinguishes between undertakings that are in a comparable factual and legal situation in the light of that objective. In the present case, since the subject of the tax in question is retail turnover and the taxable persons are retailers, in the light of the objective of that tax, all retailers, irrespective of their size, are in a comparable legal and factual situation. The reference system is hence the taxation of turnover generated by retail sales.

52. However, as in the case leading to the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), the reference system as presented by the Polish Government is deliberately designed to be selective, which cannot be justified by the objective of the tax, which is to raise revenue for the State. The Commission did not overlook the fact that the same rates and the same bands apply to all retail undertakings, but, despite that, local retailers will benefit from an average effective rate of zero or much lower than that paid by retailers with a high turnover. In that respect, the Commission advances the figures included in the final decision, the second contested decision, to which reference is made in paragraph 14 above. In the absence of valid justification by the Polish authorities, the reason for setting the tax bands can only be to favour small retailers and to make the largest undertakings in the sector pay.

53. The Polish Government's argument that the progressive nature of the tax on the retail sector is justified by the dual objective of raising tax revenue for the State while sharing the tax burden fairly among taxpayers according to their ability to pay is not, in the Commission's view, relevant to the stage of identifying the reference tax system, but is a justification to be provided, where appropriate, after a derogation from that system is identified. In any event, the intrinsic objective of the tax to be taken into account is not to generate tax revenue, which is the objective of any tax, but to tax retail turnover, in the same way as the objective of a profit tax is to tax profits. As was stated in paragraph 49 above, nor can the objective be to take into account the ability to pay of undertakings involved in retail.

54. The reference system was hence correctly determined in the contested decisions as the taxation of turnover generated from retail sales without a progressive scale, but without a specific single rate having been set, contrary to what the Hungarian Government claims.

55. The arguments summarised above must be examined.

56. Article 107(1) TFEU provides that, save as otherwise provided for in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with the internal market.

57. It is apparent from settled case-law that the aid referred to in Article 107(1) TFEU is not limited to subsidies, given that it includes not only positive benefits, such as subsidies themselves, but also State measures which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which thus, without being subsidies in the strict sense of the word, are similar in character and have the same effects (see, to that effect, judgments of 23 February 1961, *De Gezamenlijke Steenkolenmijnen in Limburg* v *High Authority*, 30/59, EU:C:1961:2, p. 39; of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph

33; of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 13; and of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 71).

58. Consequently, in tax matters, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgments of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 72; and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 56).

59. In order to demonstrate the existence of favourable tax treatment reserved for certain undertakings, or in other words characterising the measure at issue as selective, requires assessment of whether, under a particular legal regime, that measure is such as to favour certain undertakings in comparison with others which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation (see, to that effect and by analogy, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 33; see also judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 75 and the case-law cited).

60. More specifically, according to the method of analysis upheld in the case-law, for a tax measure to be classified as 'selective', it is necessary to begin by identifying and examining the common or 'normal' tax system (see, to that effect, judgments of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57, and of 28 June 2018, *Andres (faillite Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 88 and the case-law cited).

61. It is in relation to that tax system that it must, secondly, be assessed and, where appropriate, determined whether any advantage granted by the tax measure at issue may be selective by showing that the measure derogates from that 'normal' system in that it differentiates between economic operators who, in light of the objective assigned to the common or 'normal' tax system applicable, are in a comparable factual and legal situation (see, to that effect, judgments of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49, and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57). On the other hand, if it is apparent that the tax advantage (in other words, the differentiation) is justified by the nature or general structure of the system of which it forms part, it cannot constitute a selective advantage (see, to that effect, judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke*, C-143/99, EU:C:2001:598, paragraph 42; of 15 December 2005, *Unicredito Italiano*, C-148/04, EU:C:2005:774, paragraphs 51 and 52; of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 52; of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 83; and of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 58 and 60).

62. It is apparent from the case-law that when reference is made to the nature of the 'normal' system, it is the objective attributed to that system which is being referred to, whereas when the general structure of the 'normal' system is mentioned, reference is being made to its rules of taxation (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 81, and of 7 March 2012, *British Aggregates* v *Commission*, T-210/02 RENV, EU:T:2012:110, paragraph 84). It must be noted that the concept of objective or nature of the 'normal' tax system mentioned above refers to the basic or guiding principles of that tax system and refers neither to the policies which may, as the case may be, be financed by resources which it provides (like family policy measures in the present case), nor to the aims which might be sought by establishing derogations from that tax system.

63. In the present case, the Court must consider, first, the issue of the determination of the 'normal' tax system against which the existence of a selective advantage must as a rule be examined.

64. The Court points out, in so far as the Commission refers in particular in the contested decisions to the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), that the three taxes the subject of the cases giving rise to that judgment constituted together the general taxation scheme for all companies established in Gibraltar, whereas, in the present case, the measure described by the Commission as State aid is part of the framework of a specific sectoral tax concerning the retail sale of goods to individuals. The 'normal' tax system cannot, therefore, in any event, exceed that sector (see, to that effect and by analogy, judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraphs 54 to 63).

65. The Polish Government correctly maintains that rates of taxation cannot be excluded from the content of a tax system, as the Commission did (see recitals 22 and 29 of the decision to initiate the procedure, the first contested decision, and recitals 46 and 49 of the final decision, the second contested decision). Whether tax is levied at a single rate or at a progressive rate, the tax rate forms part of the fundamental characteristics of a tax levy's legal regime, just as the basis of assessment, the taxable event and the group of taxable persons do. As the Polish Government argues, the Commission itself states, in point 134 of the Notice on the notion of State aid that, 'in the case of taxes, the reference system is based on such elements as the tax base, the taxable persons, the taxable event and the tax rates'. In the absence of the tax rate enabling the structure of the 'normal' system to be determined, it is indeed impossible to examine whether there is a favourable derogation to the advantage of certain undertakings (see, to that effect, judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56, and of 7 March 2012, *British Aggregates* v *Commission*, T-210/02 RENV, EU:T:2012:110, paragraph 52). That is why if, in the context of the same tax, certain undertakings are subject to different tax rates, including different exemptions, from other undertakings, it is necessary to determine the 'normal' situation relevant, which forms part of the 'normal' system, without whose identification the method referred to in paragraphs 60 and 61 above cannot be applied.

66. It is clear moreover from the contested decisions and the Commission's arguments in defence that the latter sought to identify a 'normal' system involving a tax structure, which it could refer to. It is apparent, in particular, from recitals 26 and 32 of the decision to initiate the procedure, the first contested decision, and from recitals 47, 49 and 54 of the final decision, the second contested decision, that, for the Commission, that system has to be one in which retailers' turnover is taxed at a single rate from the first PLN (linear). The Commission shows moreover that it regretted that the Polish authorities failed to indicate a value for that single rate to it (recital 26 of the decision to initiate the procedure, the first contested decision, and recital 47 of the final decision, the second contested decision) and it even suggested adopting the maximum rate of 1.4% or the highest average effective tax rate observed among undertakings subject to the tax (recital 51 of the decision to initiate the procedure, the first contested decision). It must, however, be stated that the 'normal' single-rate system referred to by the Commission in some passages of the contested decisions is a hypothetical system which could not be sustained. The analysis of whether a tax advantage is selective, which occurs at the second stage of the method referred to in paragraphs 60 and 61 above, must be carried out in the light of the actual features of the 'normal' tax system of which it forms part, identified during the first stage of that method, not in the light of assumptions not accepted by the competent authority.

67. Consequently, the Commission identified, in the contested decisions, a 'normal' system which was either incomplete, without any tax rate, or hypothetical, with a single tax rate, which constitutes an error of law.

68. Having regard to the sectoral nature of the tax at issue and the absence of differentiated scales of rates for certain undertakings, the only 'normal' system which could be chosen in the present case was, as the Polish Government maintains, the tax on the retail sector itself, with its structure including its scale of progressive rates and its bands, including, however, contrary to that government's submissions, the reduction of the tax base specified for the band of turnover from PLN 0 to 17 million P; this is because that reduction de facto forms part of the structure of taxation and, although it is exempt from the tax, the corresponding activity falls within its sectoral scope of application.

69. However, even though the Commission erred in the identification of the relevant 'normal' tax system, it must be ascertained whether the conclusion it reached is justified by other grounds in the contested decisions which would enable the existence of a selective advantage in favour of certain undertakings to be identified.

70. The Commission did not simply consider that the progressive structure of the tax at issue derogated from a 'normal' system, in this case identified incompletely or hypothetically, but it also, in essence, based the existence of a selective advantage in favour of undertakings with a low level of turnover on the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732), which concerned a tax system in itself discriminatory in the light of the objective it was supposed to pursue, that is to say in the light of its nature. In the present case, the Commission considered that the structure of the tax on the retail sector, with its progressive rates and successive bands, was contrary to the objective pursued by that tax and produced in that regard discriminatory effects between undertakings in that sector. The Court must, therefore, examine whether that assessment is well founded.

71. Thus, in recital 23 of the decision to initiate the procedure, the first contested decision, and in recital 46 of the final decision, the second contested decision, the Commission stated that, 'it [was] also necessary to evaluate whether the boundaries of that system have been designed by the Member State in a consistent manner or, conversely, in a clearly arbitrary or biased way, so as to favour certain undertakings over others'. Recital 47 of

the final decision, the second contested decision, states that '[the progressive rate structure subjects] undertakings with lower turnover to a lower average effective tax rate than undertakings with a higher turnover … although both types of undertaking are engaged in the same activity'. In recitals 28 and 29 of the decision to initiate the procedure, the first contested decision, the Commission observed that 'the stated objective of the tax [wa]s to collect revenue for the general budget', that 'in light of that objective, the Commission consider[ed] all retail operators to be in a comparable legal and factual situation, regardless of … their level of turnover', that 'it appear[ed] that Poland ha[d] deliberately designed the tax in such a manner so as to arbitrarily favour certain undertakings' and that 'the reference system [wa]s therefore selective by design in a way that is not justified in light of the objective of the tax'. Recital 49 of the final decision, the second contested decision, includes similar assessments, which are, however, accompanied by, as in recital 44 of the same decision, the assertion that the objective of the tax is 'to tax the turnover of all retail operators'.

72. However, in the first place, the objective identified in recitals 28 and 29 of the decision to initiate the procedure, the first contested decision, namely to raise revenue for the general budget, is, as the Commission itself says in its defences, common to all unallocated taxes, which account for the bulk of the taxation systems, and is insufficient, in itself, to determine the nature of the various taxes, for example according to the type of taxable person concerned, whether the taxes are general or sectoral, or according to a specific objective they may pursue, for example as regards taxes seeking to reduce certain damage to the environment (ecotaxes). Moreover, the progressive structure of a tax rate cannot as such be contrary to the objective of collecting budgetary revenue.

73. In the second place, the objective identified in recitals 44 and 49 of the final decision, the second contested decision, namely to tax the turnover of all undertakings in the relevant sector, could not be sustained either. There is nothing in the file to indicate that the Polish legislature had that intention. On the contrary, both the explanatory memorandum of the Law on the tax on the retail sector (see, in that regard, the section entitled 'Tax liability and rates') and the observations of the Polish authorities during the administrative procedure leading to the final decision, the second contested decision (see, in that regard, recital 27 of that decision), show that the objective was to put in place a sectoral tax adhering to a principle of fiscal redistribution.

74. More specifically, it is apparent from the evidence in the file that the Law on the tax on the retail sector introduced a tax on retailers' turnover, irrespective of their legal status, in respect of their sales of goods to individuals, coupled with a redistributive purpose. Although the tax in question was presented as allowing family policy measures to be financed, it had to raise revenue for the general budget. No other specific aim, for example seeking to offset or deter the occurrence of negative effects likely to be caused by the activity at issue, was put forward.

75. Furthermore, contrary to the Commission's submissions, the scheme of the tax on the retail sector, characterised by a progressive tax structure, was *a priori* consistent with that objective, even though the tax at issue was a turnover tax. It may reasonably be presumed that an undertaking which achieves a high turnover may, because of various economies of scale, have proportionately lower costs than an undertaking with a smaller turnover – because fixed unit costs (buildings, property taxes, plant, staff costs for example) and variable unit costs (raw material supplies for example) decrease with levels of activity – and that it may, therefore, have proportionately greater disposable revenue which makes it capable of paying proportionately more in terms of turnover tax.

76. What the Polish Government submits, in essence, must therefore be confirmed: namely, that the objective of that tax was to introduce a sectoral tax with a redistributive purpose on retailers' turnover.

77. In the present case, the Commission therefore made a further error in selecting an objective of the tax on retail trade that was different to the one put forward by the Polish authorities.

78. That second error is indeed linked to the first that the Commission made, since the objective of taxing the turnover of 'all undertakings' in the sector concerned that it selected in fact evidenced, in its view, the lack of a reduction in the tax base and the existence of a uniform rate of taxation, which corresponds to the hypothetical tax system which the Commission sought to identify, as shown by the identical final sentences of recital 32 of the decision to initiate the procedure, the first contested decision, and of recital 54 of the final decision, the second contested decision, reproduced below:

> 'The reference system [consists in] the imposition of a single (flat) rate tax on … all undertakings involved in the retail trade in Poland.'

79. At the present stage of the analysis, the issue is whether the Commission was still able, notwithstanding the two errors identified above as regards the definition of the reference system and its objective, to discern

correctly elements showing the existence of selective advantages in the tax on the retail sector taking into account the reference system and that tax's objective mentioned in paragraphs 68 and 76 above, as resulting from the Polish legislation. More specifically, the issue is whether the Commission has shown that the tax structure chosen by the Polish authorities was contrary to that system's objective.

80. It must be borne in mind that the EU Courts have on numerous occasions ruled on whether there are selective advantages within tax systems, or more generally compulsory contribution systems, which were characterised by rules varying those contributions according to the situation of the person liable. In that regard, the fact that a tax is characterised by a progressive tax structure, deductions, ceilings or by other variation mechanisms, and that different effective levels of taxation result therefrom depending on the size of the taxpayer's taxable amount or the parameters of the variation mechanisms invoked, does not necessarily imply the existence of a selective advantage in favour of certain undertakings, as is apparent from the case-law referred to in paragraphs 58 to 62 above.

81. That statement may be illustrated in particular by various specific examples related to the question formulated in paragraph 79 above, which show the circumstances in which the existence of a derogation from the application of the 'normal' system may be identified because a measure varying the tax at issue fails to have regard to the nature of that system, that is to say its objective.

82. Consequently, such a derogation was identified in the judgments of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 49 to 55); of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757, paragraphs 86 and 87); of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280); of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 85 to 108); and of 21 December 2016, *Commission* v *World Duty Free Group and Others* (C-20/15 P and C-21/15 P, EU:C:2016:981, paragraphs 58 to 94, read in conjunction with paragraph 123 thereof), with the first judgment concerning a limitation, the following three judgments exemptions and the last of the judgments reductions in the taxable amount. The Court has thereby held, in the light of the objectives of the taxes concerned – which sought (i) to combat negative externalities, in particular environmental ones, as regards the first three judgments, (ii) the establishment of a general taxation system for all undertakings as regards the following judgment, and (iii) the amortisation, with regard to corporation tax, of the goodwill resulting from the acquisition of company assets in certain circumstances as regards the last of the judgments – that the advantages which were reserved to some of the undertakings, but not others, in a similar situation in relation to those objectives, were, therefore, selective.

83. It is apparent from those judgments that, regardless of whether the objective of the tax includes a purpose linked to the impact of the activity of the undertakings liable to tax, or the advantage concerns a specific economic sector in relation to the other undertakings subject to tax or a specific form of operating companies, or even whether the advantage is potentially open to any undertaking subject to tax, if that advantage leads to differences in treatment which are contrary to the objective of the tax, it is selective. However, the objective of a tax may itself include a variation seeking to apportion the tax effort or limit its impact. Specific situations which distinguish certain taxable persons from others may also be taken into account without the tax's objective being disregarded.

84. In that respect, in the judgment of 8 November 2001, *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* (C-143/99, EU:C:2001:598, paragraphs 33 to 36), referred to in paragraph 82 above, the Court stated that the partial rebate of taxes on the energy consumed by undertakings, applicable when those taxes exceeded a certain threshold of the net value of what those enterprises produced, did not constitute State aid if it benefited all undertakings subject to those taxes regardless of their activity, while it could lead to different levels of taxation between undertakings consuming the same amount of energy.

85. Similarly, in the judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom* (C-106/09 P and C-107/09 P, EU:C:2011:732, paragraphs 77 to 83), referred to in paragraph 82 above, the Court held that the advantages which could arise from a generalised capping of two taxes on undertakings, not based on profit, to 15% of profit, leading to undertakings with the same tax base potentially paying different tax, were established on the basis of objective criteria irrespective of the choices of the undertakings concerned and were not, therefore, selective.

86. In the judgment of 8 September 2011, *Paint Graphos and Others* (C-78/08 to C-80/08, EU:C:2011:550, paragraphs 48 to 62), the Court ruled that, in the context of the tax on company profits, which constituted the 'normal' system in that case, the total exemption enjoyed by cooperative societies did not constitute a selective advantage because they were not in a comparable factual and legal situation to that of commercial companies,

provided that it was verified that they did indeed act under the conditions inherent to being a cooperative, implying, in particular, a profit margin considerably lower than that of capital companies.

87. In the judgment of 29 March 2012, *3M Italia* (C-417/10, EU:C:2012:184, paragraphs 37 to 44), the Court held, taking into account also the specific situation of certain undertakings, that a mechanism for concluding at a standard rate old tax proceedings, available to undertakings meeting objective criteria not placing them in a factual and legal situation comparable to that of other undertakings, did not entail a selective advantage, even if it could lead to the beneficiaries of that mechanism paying less tax, all other things being equal elsewhere, than other undertakings.

88. Similarly, in the judgment of 26 April 2018, *ANGED* (C-233/16, EU:C:2018:280), referred to in paragraph 82 above, the Court stated that, in the context of a tax on retail establishments, whose basis of assessment was essentially constituted by the sales area and which sought to offset negative externalities for the environment and town and country planning, the 60% reduction or total exemption enjoyed by establishments carrying on certain activities and those whose sales area was below a given threshold did not constitute State aid if it was verified that those various establishments were indeed in a different situation from those of the other establishments subject to tax, having regard to the impacts which the tax at issue sought to correct and offset, that is to say in the light of the objectives of that tax.

89. Those examples confirm that there are taxes whose nature does not preclude them from being accompanied by variation mechanisms, which may extend as far as exemptions, without those mechanisms leading, however, to selective advantages being granted. In short, there is no selectivity if those differences in taxation and the advantages which may flow therefrom, even if justified only by the purpose governing the apportionment of tax between taxpayers, stem from the straightforward application, without derogation, of the 'normal' system, if comparable situations are treated comparably and if those variation mechanisms do not misconstrue the objective of the tax concerned. Similarly, special provisions laid down for certain undertakings by reason of situations specific to them, causing them to benefit from a variation in, or even an exemption from, tax, must not be analysed as constituting a selective advantage if those provisions do not contravene the objective of the tax in question. In that regard, the fact that only taxpayers meeting the conditions for the application of a measure can benefit from the measure cannot, in itself, make it into a selective measure (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 59 and the case-law cited). Such mechanisms fulfil the condition of complying with the nature and general structure of the system of which they form part, referred to in paragraph 61 above.

90. On the other hand, if undertakings in a comparable situation in the light of the objective of the tax or the purpose justifying a variation thereof are not treated equally in that regard, that discrimination gives rise to a selective advantage which may constitute State aid if the other conditions laid down in Article 107(1) TFEU are met.

91. Accordingly, in particular, progressive tax structures, including significant reductions to the basis of assessment, which are not exceptional in the Member States' tax systems, do not in themselves imply the existence of State aid. In its Notice on the notion of State aid, the Commission states in that regard, in point 139, that the progressive nature of income tax may be justified by its redistributive purpose. However, there is no basis for limiting that type of assessment, as the Commission did in recitals 58 and 59 of the final decision, the second contested decision, to taxes on income and to exclude that assessment for taxes applying to the undertakings' activity, not their net revenue or profit. It is not apparent from the case-law referred to in paragraphs 58 to 62 above that, in order for a measure varying a tax not to be characterised as a selective advantage, a Member State could have recourse only to variation criteria limited to certain aims, such as the redistribution of wealth or the offsetting or deterrence of negative externalities that may be caused by the activity concerned. What is necessary to that end is that the intended variation must not be arbitrary, contrary to what occurred in the case giving rise to the judgment of 22 December 2008, *British Aggregates* v *Commission* (C-487/06 P, EU:C:2008:757), mentioned in paragraph 82 above, that it must be applied in a non-discriminatory manner and must remain consistent with the objective of the tax concerned. For example, the variation mechanisms referred to in paragraphs 84, 85 and 87 above, which were not held to be selective by the Court, did not reflect a taxation purpose proportional to negative externalities, nor indeed a redistributive purpose, but other aims. In addition, as pointed out in paragraph 75 above, it cannot be excluded that a redistributive purpose may also justify the progressivity of a turnover tax, as the Polish Government rightly maintains in the present case. A redistributive purpose may indeed even justify a total exemption for some undertakings as shown by the case mentioned in paragraph 86 above.

92. Consequently, as regards a turnover tax, a variation criterion taking the form of progressive taxation above a certain threshold – even if that threshold is a high one – which may reflect the wish to tax an undertaking's activity only when that activity reaches a certain level, does not in itself imply the existence of a selective advantage.

93. It follows, therefore, from paragraphs 79 to 92 above that the Commission was not entitled to infer the existence of selective advantages accompanying the tax on the retail sector solely from the progressive structure of that new tax.

94. However, if it were proven by the Commission in the contested decisions that the progressive taxation structure actually chosen was adopted in a manner which largely deprives the objective of the tax in question of its substance, it could be considered that the advantage which may be derived by undertakings benefiting from zero or low taxation compared with other undertakings is selective.

95. It must, therefore, be further ascertained whether the Commission provided such proof in the contested decisions.

96. However, it must be concluded that, in the contested decisions, the Commission merely considered that it was the principle of progressive taxation itself which gave rise to a selective advantage (recitals 32 and 37 of the decision to initiate the procedure, the first contested decision, recitals 47, 49 and 54 of the final decision, the second contested decision), which, in the light of what is stated in paragraph 92 above, constitutes an error of law.

97. It is only in recital 51 of the final decision, the second contested decision, that the Commission advanced evidence that might be capable of supporting the proposition that the progressive structure chosen in this case for the tax on the retail sector was incompatible with its objective as stated in paragraph 76 above. In that recital, the Commission stated that it had essentially inferred from various publicly available reports that in September 2016, only 109 out of 200 000 undertakings operating in the retail sector would have passed the threshold of monthly turnover of PLN 17 million, which is around EUR 4 million, above which turnover was taxed.

98. However, that fact alone, which, as the main parties confirmed at the hearing, was not discussed with the Polish authorities during the administrative procedure, was not combined with reasoning other than that directed at the very principle of progressive taxation and is therefore in any event insufficient to constitute reasoning capable of establishing that the progressive structure chosen in the present case for the tax on the retail sector was incompatible with its objective.

99. In addition, the Commission did indeed state in the contested decisions that the progressive taxation structure of the tax on the retail sector led to undertakings in a comparable factual and legal situation being treated differently, in other words that it led to discriminatory treatment. However, despite giving specific examples, it relied principally in that regard only on the fact that the undertakings' average effective rate and the marginal rate of tax had to vary according to their turnover (recitals 24, 25, 27, 28, 32 and 37 of the decision to initiate the procedure, the first contested decision, and recitals 47, 49, 53 and 54 of the final decision, the second contested decision). That variation in the average effective rate and marginal rate according to the size of the taxable amount is an integral part of any taxation system with a progressive structure and such a system is not, as set out in paragraph 92 above, as such and by virtue of that fact alone, such as to give rise to selective advantages. Moreover, when a tax's progressive taxation structure reflects the objective pursued by that tax, it cannot be considered that two undertakings with a different taxable amount are in a comparable factual situation in the light of that objective.

100. In the contested decisions, the Commission also referred to the circumstances that, de facto, the tax on the retail sector would place a greater burden on foreign-owned undertakings than Polish-owned undertakings and would place a greater burden on retail networks organised according to an integrated model than retail networks which make extensive use of franchising.

101. In respect of the first of those circumstances, disputed by the Polish Government, it suffices to note, as indicated in paragraph 47 above, that the Commission itself noted at the hearing with regard to proving the selective nature of the advantages entailed by the rate structure of that tax, that the contested decisions had not been taken on the basis that discrimination on the ground of the national origin of the taxable persons had been identified. Furthermore, it must be pointed out that, even if they are proven, the circumstances described in paragraph 100 above are merely the corollary of the application of a progressive tax structure corresponding to the objective and general scheme of the tax in question, and if the various undertakings liable to fall under the scope of the tax are free to choose how they are organised, those circumstances cannot also lead to

the conclusion that comparable factual and legal situations are treated differently, or the reverse. Furthermore, as argued by the Polish Government in its applications without being challenged by the Commission, franchising is practised in Poland by both foreign-owned retail chains and Polish retail chains. Moreover, the situation of a franchised shop is different from that of an integrated shop. The first is, as a rule, legally and financially independent from its franchiser, which is not the case for an integrated shop in respect of the undertaking which controls it, whether it is a subsidiary or a branch of a retail network.

102. Consequently, the Commission failed to establish in the contested decisions the existence of a selective advantage which differentiated between economic operators who, in light of the objective attributed by the Polish legislature to the tax on the retail sector, were in a comparable factual and legal situation. The errors the Commission made with regard to defining the 'normal' tax system, with regard to its objective and with regard to the inherent existence, in its view, of selective advantages in a structure of progressive taxation on turnover, did not allow it to ascertain whether the progressive structure actually selected led, in the light of the objective of the tax in question, to different treatment of undertakings in a comparable factual and legal situation, for instance to ascertain properly whether or not the sectoral tax in question did in fact affect a greatly inadequate share of the activity that it was supposed to apprehend, thus entailing a selective advantage for the undertakings which were not involved in that share but were still active to a significant extent in that area.

103. The final decision, the second contested decision, must therefore be annulled on the basis of the plea in law concerning the existence of an error in the legal characterisation of the measure at issue as State aid within the meaning of Article 107(1) TFEU, and there is no need to examine the Polish Government's other pleas and submissions.

104. With regard to the same plea in law, in respect of the decision to initiate the procedure, the first contested decision, it must be pointed out that the Court has consistently held that when the Commission examines aid measures under Article 107 TFEU in order to determine whether they are compatible with the internal market, it is required to initiate the procedure under Article 108(2) TFEU where, after the preliminary examination, it has been unable to overcome all the difficulties involved in determining whether those measures are compatible with the internal market. The same principles apply where the Commission also entertains doubts as to the actual classification as aid, within the meaning of Article 107(1) TFEU, of the measure examined. The Commission cannot, therefore, in principle be criticised for having initiated that procedure on the basis of, in particular, doubts as to whether the measures which are the subject of that procedure can be qualified as aid in the sense referred to above (see, to that effect, judgment of 10 May 2005, Italy v Commission, C-400/99, EU:C:2005:275, paragraph 47).

105. However, in view of the consequences of initiating the procedure provided for in Article 108(2) TFEU with regard to measures treated as new aid subject to the Commission's preliminary authorisation pursuant to Article 108(3) TFEU ('new aid'), where the Member State concerned contends during the preliminary examination that those measures do not constitute aid within the meaning of Article 107(1) TFEU, the Commission must, before initiating that procedure, undertake a sufficient examination of the question on the basis of the information notified to it at that stage, even if the outcome of that examination is not definitive (see, to that effect, judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 48). That initiation of the procedure usually entails, notably, the suspension of the measures examined, particularly when, as in this case, the Commission orders the Member State to suspend those measures on the basis of Article 13(1) of Regulation 2015/1589.

106. In that regard, if the provisional classification by the Commission as new aid results from factual or economic uncertainties as to the nature, the content or the effects of the measure at issue or its context, and even if it is ultimately apparent that that classification was erroneous in the light of new evidence which was subsequently produced, the decision to initiate the procedure is still justified having regard to the legitimate doubts entertained by the Commission when that decision was adopted (see, to that effect, judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraphs 48 and 49). In that regard, it has been held that review by the General Court of a decision to initiate the formal investigation procedure had necessarily to be limited, and that when the applicants challenged the Commission's assessment of whether a contested measure constitutes State aid, review by the EU judicature was confined to ascertaining whether the Commission did not commit a manifest error of assessment in considering that it could not overcome all the difficulties on that point during its initial examination of the measure concerned (judgments of 21 July 2011, *Alcoa Trasformazioni* v *Commission*, C-194/09 P, EU:C:2011:497, paragraph 61, and of 9 September 2014, *Hansestadt Lübeck* v *Commission*, T-461/12, EU:T:2014:758, paragraph 42).

107. Thus, if, in view of the evidence that was already available to the Commission at the time when the procedure was initiated, it appeared that the classification of the measure at issue as new aid clearly had to be dismissed at that stage, the decision to initiate the procedure in respect of that measure must be annulled (see, to that effect, judgment of 10 May 2005, *Italy* v *Commission*, C-400/99, EU:C:2005:275, paragraph 48).

108. The same applies in the present situation, where the Commission essentially based its provisional classification as new aid on an analysis of information in its possession which appears manifestly incorrect. The decision to initiate the procedure, the first contested decision, was not justified, in respect of the issue of whether new aid existed, by legitimate doubts in the light of the evidence in the file, but by a view supported by legal reasoning which did not allow that decision to be legally justified, as is apparent from paragraphs 63 to 102 above. That the Commission held its view as a matter of principle, according to which view, in particular, progressive taxation applied to a turnover tax inherently gives rise to selective advantages is, indeed, confirmed by the fact that its reasoning appears not to differ substantially between that decision and the final decision, the second contested decision.

109. The decision to initiate the procedure, the first contested decision, must therefore also be annulled, including the suspension injunction concerning the 'application of the progressive rate for the tax' contained therein, because such an injunction assumes that the State measure that it targets was correctly classified as unlawful new aid in a provisional analysis conducted under the conditions set out in paragraphs 104 to 108 above, as is apparent from Article 13(1) of Regulation No 2015/1589, which provides that 'the Commission may, after giving the Member State concerned the opportunity to submit its comments, adopt a decision requiring the Member State to suspend any unlawful aid until the Commission has taken a decision on the compatibility of the aid with the internal market '. That provision covers only unlawful new aid, as referred to in Article 1(f) of the same regulation, that is to say measures which must, in particular, be capable of corresponding, according to the provisional analysis mentioned above, to the definition of State aid provided for in Article 107(1) TFEU (see, to that effect, judgment of 25 April 2018, *Hungary* v *Commission*, T-554/15 and T-555/15, under appeal, EU:T:2018:220, paragraphs 30, 153 and 154). Thus, in the present case, the fate of the suspension injunction is not severable from the fate of the decision to initiate the procedure and must be annulled, without it being necessary to examine whether, considered in isolation, the plea put forward by the Polish Government alleging infringement of Article 13(1) of Regulation No 2015/1589 is or is not well-founded in view of the submissions supporting it.

110. In the light of the foregoing, there is likewise no need to examine the other pleas and submissions advanced by the Polish Government against the decision to initiate the procedure, the first contested decision.

111. It follows from all the considerations set out above that the two actions for annulment brought by the Republic of Poland must be upheld.

**Costs**

112. …

113. …

On those grounds,

THE GENERAL COURT (Ninth Chamber, Extended Composition)

hereby:

**1. Annuls Commission Decision C(2016) 5596 final of 19 September 2016 on the State Aid SA.44351 (2016/C) (ex 2016/NN) – Poland – Polish tax on the retail sector;**

**2. Annuls Commission Decision (EU) 2018/160 of 30 June 2017 on the State aid SA.44351 (2016/C) (ex 2016/NN) implemented by Poland for the tax on the retail sector;**

**3. Orders the European Commission to bear its own costs and to pay those incurred by the Republic of Poland in Cases T-836/16 and T-624/17;**

**4. Orders Hungary to bear its own costs in Cases T-836/16 and T-624/17.**

# EU Court of Justice, 19 June 2019*

## Case C-607/17

## *Skatteverket v Memira Holding AB*

*First Chamber:* *J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges*
*Advocate General:* *J. Kokott*

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1. This request for a preliminary ruling concerns the interpretation of Article 49 TFEU, read in conjunction with Article 54 TFEU.

2. This request has been made in proceedings between the Skatteverket (Swedish Tax Board) and Memira Holding AB ('Memira') concerning the possibility for Memira of deducting from its corporation tax the losses of a subsidiary established in another Member State where that subsidiary has been absorbed by merger.

### Legal context

*Swedish law*

3. The tax scheme applicable to mergers of companies is regulated by Chapter 37 of the inkomstskattelag (1999:1229) (Law (1999:1229) on income tax, the 'Law on income tax').

4. Paragraphs 16 to 29 of this chapter lay down special tax rules applicable to mergers known as 'qualifying' mergers.

5. In order for a merger to be a qualifying merger, under Paragraphs 11 and 12 of that chapter it is necessary, on the one hand, for the transferring company to be liable, immediately before the merger, to pay tax in Sweden on revenue from at least part of its economic activity and, on the other hand, for the receiving company, immediately after the merger, to pay tax in Sweden on revenue from the economic activity in respect of which the transferring company was taxed. Moreover, the revenue in question may not be exempt from taxation in Sweden under a double taxation agreement.

6. The result of a qualifying merger is, under Paragraphs 17 and 18 of Chapter 37 of the Law on income tax, that the transferring company is not to enter any revenue or deduct any expenditure, by reason of the merger, in respect of the economic activity referred to in Paragraph 11 of that chapter and that the receiving company is to adopt the transferring company's tax situation for the tax treatment of that activity. That means, inter alia, that the receiving company may deduct losses in the transferring company from earlier tax years, within certain limits set out in Paragraphs 21 to 26 of that chapter.

7. Chapter 35a of the Law on income tax provides for cross-border group relief allowing a final loss sustained by a wholly-owned foreign subsidiary in a country belonging to the European Economic Area (EEA) to be transferred, provided, inter alia, that the subsidiary is directly owned, that it has been liquidated and that the parent company does not carry out, via an associated company, an activity in the subsidiary's State after liquidation. Those provisions do not apply to mergers, however, according to the referring court.

* Language of the case: Swedish.

*German law*

8. It follows from the findings of the referring court, which have not been contested by the German Government, that, under German law, it is not possible to transfer losses between companies liable for tax in Germany in the event of a merger.

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

9. Memira is a Swedish company exercising, via its subsidiaries, activities in the sector of ophthalmic surgery. In Germany, it has only one subsidiary, which owns and operates clinics. The activity in the subsidiary led to losses and Memira provided a loan to the subsidiary to finance its operations, without success. The subsidiary has therefore ceased activity and only debts and certain liquid assets remain on its balance sheet.

10. Memira is considering absorbing its German subsidiary in a cross-border merger which would lead to that subsidiary being dissolved without liquidation and Memira subsequently no longer exercising any activity, either directly or indirectly, in Germany.

11. Of the losses sustained by Memira's German subsidiary, it was not possible to set off an amount of EUR 7.6 million against earlier profits. They will be eligible for deduction from German corporation tax in relation to that subsidiary either by deducting them from current profits or from earlier profits without limit of time. However, they will not be eligible for deduction in the situation envisaged by Memira and mentioned in the previous paragraph since, under German law, it is not possible to transfer losses to another company which is liable for tax in Germany in the event of a merger.

12. In that context, Memira applied for a preliminary decision by the Skatterättsnämnden (Revenue Law Commission, Sweden) in order to determine, if it implements its planned merger, whether it could rely on the freedom of establishment to deduct the losses of its German subsidiary from its Swedish corporation tax; the Revenue Law Commission gave a negative answer.

13. In that regard, the preliminary decision was that the losses of Memira's German subsidiary cannot be taken over by the parent company on the basis of the provisions of Swedish law on taxation on qualifying mergers, since the condition that the subsidiary be liable for tax in Sweden is not satisfied. Nor can deduction be allowed under the rules on group relief, since these rules do not cover a situation such as that envisaged by Memira.

14. The Revenue Law Commission accepted that such a situation would restrict the freedom of establishment but noted that, according to the reasoning of the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, 'the judgment in *Marks & Spencer*', EU:C:2005:763), that restriction may be justified provided that the principle of proportionality has been respected and, therefore, that the losses at issue do not fall within one of the situations covered by paragraph 55 of that judgment, in which the losses are regarded as 'final'.

15. Relying on the case-law of the Court of Justice, the Revenue Law Commission noted that, when assessing whether the losses in question are final, it is necessary to take into account how those losses are treated under the legislation of the State where the subsidiary is established. In that regard, it stated that since, under German law, there is no possibility of using those losses in the event of a merger with another undertaking which is liable for tax in Germany, the losses may not be regarded as final.

16. Three members of the Revenue Law Commission, by a dissenting opinion, on the contrary claimed that the losses of Memira's German subsidiary should be regarded as final to the extent that there is no German undertaking or any undertaking with a permanent establishment in Germany in Memira with which the subsidiary could be merged. Accordingly, the fact that, under German law, it is not possible to transfer losses in the event of a merger with another undertaking liable for tax in Germany is irrelevant to the assessment of whether the subsidiary's losses are final.

17. Both the Tax Board and Memira challenged the preliminary decision of the Revenue Law Commission before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden).

18. The Högsta förvaltningsdomstolen (Supreme Administrative Court) holds that the case-law of the Court of Justice, in particular the judgment of 21 February 2013, *A* (C-123/11, EU:C:2013:84), does not specify whether, in order to assess the finality of a subsidiary's losses, account should be taken of the possibilities afforded by the legislation of the subsidiary's State of establishment to other legal entities of taking into account these losses and, if so, how that legislation should be taken into account.

19. In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Must account be taken, in the assessment of whether a loss in a subsidiary in another Member State is definitive within the meaning given in, inter alia, the [judgment of 21 February 2013, *A* (C-123/11, EU:C:2013:84),] and the parent company may thus deduct the loss on the basis of Article 49 TFEU, of the fact that, under the rules of the subsidiary's State, there are restrictions on the possibility for parties other than the party itself which made the loss to deduct the loss?
> 2. If a restriction such as that referred to in Question 1 must be taken into consideration, must account then be taken of whether, in the case in question, there actually is another party in the subsidiary's State which could have deducted the losses if that were permitted there?'

**Consideration of the questions referred**

20. It must, as preliminary point, be recalled that, in paragraphs 43 to 51 of the judgment in *Marks & Spencer*, the Court has held that a restriction of the freedom of establishment which limits the right of a company to deduct the losses of a foreign subsidiary, whereas the losses of a resident subsidiary may be deducted, is justified by the need to preserve the balanced allocation of the power to impose taxes between the Member States and to prevent the risk of losses being used twice and of tax avoidance.

21. In paragraph 55 of that judgment, the Court nonetheless held that, even though that restriction is justified in principle, it is disproportionate for parent company's State of establishment to preclude the possibility for the parent company to take into account at its level for tax purposes the losses of a non-resident subsidiary that are classified as final in a situation in which:

– the non-resident subsidiary has exhausted the possibilities available in its State of establishment of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting these losses against the profits made by the subsidiary in previous periods, and

– there is no possibility for the foreign subsidiary's losses to be taken into account in its State of establishment for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

*The first question*

22. By its first question the referring court seeks, in essence, to establish the significance which should be accorded, in the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, to the fact that the subsidiary's Member State of establishment does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, but the parent company's Member State nevertheless authorises such a transfer via a merger between resident companies.

23. The Court is therefore called upon to clarify whether a situation such as that envisaged by Memira is included in those referred to by the Court in the second indent of paragraph 55 of the judgment in *Marks & Spencer*, in which there is no possibility for the losses of the foreign subsidiary to be taken into account in its State of establishment for future periods.

24. It should be recalled in that regard that the grounds relied on by the Court in the second indent of paragraph 55 of the judgment in *Marks & Spencer* expressly envisaged that the impossibility that requires the losses to be final may be applied to the situation in which they are taken into account by a third party for future periods, in particular where the subsidiary has been sold to that third party.

25. In a situation such as that envisaged by Memira, and even if all the other impossibilities referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party.

26. In fact, as the Advocate General stated in points 65 to 70 of her Opinion, it cannot be excluded from the outset that a third party may take into account for tax purposes the losses of the subsidiary in that subsidiary's State of establishment, for example following a sale of that subsidiary for a price including the tax advantage represented by the deductibility of losses for the future (see, to that effect, judgment of 21 February 2013, *A*, C-123/11, EU:C:2013:84, paragraph 52 et seq., and judgment delivered today, *Holmen*, C-608/17, paragraph 38).

27. Consequently, in a situation such as that envisaged by Memira, it is for Memira to demonstrate that the possibility referred to in the previous paragraph is precluded, with the mere fact that the subsidiary's State of

establishment does not allow the transfer of losses in the event of a merger cannot, in itself, be sufficient to regard the losses of the subsidiary as being final.

28. Consequently, the answer to the first question is that, for the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, the fact that the subsidiary's Member State of establishment does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the Member State in which the parent company is established in the event of a merger between resident companies, is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.

*The second question*

29. By its second question, the referring court asks, in essence, whether, if the fact mentioned in the first question becomes relevant, account must be taken of the fact that there is, in the State of establishment of the subsidiary, no other entity which could have deducted the losses in the context of a merger if a deduction had been authorised in that country.

30. In that regard and as stated in the answer to the first question, the restrictions on the transfer of losses by merger stemming from the legislation of the subsidiary's State of establishment are not decisive so long as the parent company has not adduced evidence that it is impossible for those losses to be used by a third party, in particular after a sale for a price including the tax value of the losses.

31. If such evidence is adduced and the other conditions referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met, the fiscal authorities are required to find that the losses of a non-resident subsidiary are final and that it is therefore disproportionate to not allow the parent company to take them into account at its level for tax purposes.

32. From that perspective, in the assessment of the finality of the losses, whether or not there were other entities in the State of establishment of the loss-making subsidiary which could have had the losses of that subsidiary transferred to them via a merger if such a possibility had been afforded is irrelevant.

33. Consequently, the answer to the second question should be that, if the fact referred to in the first question becomes relevant, the fact that there is, in the State of establishment of the subsidiary, no other entity which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.

**Costs**

34. …

On those grounds,

the Court (First Chamber)

hereby rules:

**1. For the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), the fact that the subsidiary's Member State of establishment does not does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the Member State in which the parent company is established in the event of a merger between resident companies, is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.**

**2. If the fact referred to in the first question becomes relevant, the fact that there is, in the State of establishment of the subsidiary, no other entity which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.**

# EU Court of Justice, 19 June 2019*

## Case C-608/17

## *Skatteverket v Holmen AB*

*First Chamber:* *J.-C. Bonichot (Rapporteur), President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan, Judges*
*Advocate General:* *J. Kokott*

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1. This request for a preliminary ruling concerns the interpretation of Article 49 TFEU, read in conjunction with Article 54 TFEU.

2. The request has been made in proceedings between the Skatteverket (Swedish Tax Board) and Holmen AB concerning the possibility of the latter deducting from its corporation tax the losses of a sub-subsidiary established in another Member State.

### Legal context

*Swedish law*

3. Intragroup financial transfers are regulated by Chapters 35 and 35a of the inkomstskattelag (1999:1229) (Law (1999:1229) on income tax, the 'Law on income tax').

4. Under Chapter 35, losses sustained by a subsidiary are able to be transferred directly or indirectly to its parent company for tax purposes.

5. Pursuant to Chapter 35a, that advantage can be conferred if the loss is final, as described in paragraph 55 of the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, 'the judgment in *Marks & Spencer*', EU:C:2005:763), concerning a wholly-owned subsidiary in a country belonging to the European Economic Area (EEA), provided, inter alia, that the subsidiary is directly owned, that it has been liquidated and that the parent company does not carry out, via an associated company, an activity in the subsidiary's State after liquidation.

*Spanish law*

6. It is apparent from the order for reference that the Spanish tax consolidation system allows profits to be compensated without restriction by the losses of entities belonging to the same group. Unused losses may be carried forward and set off against any future profits without limit of time.

7. However, since 2011, only part of the profits made in an accounting period may be set off against previous years' losses. Losses which may not be deducted as a result of that limitation are carried forward, in the same way as other unused losses, to subsequent periods.

8. Moreover, if a tax grouping is dissolved because one or more of the entities in the grouping are liquidated, any outstanding losses in the grouping are allocated to the companies in which they arose.

* Language of the case: Swedish.

9. Finally, in the year of liquidation, those losses may be used solely by the company in which the losses arose.

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

10. Holmen is the parent company in a group established in Sweden. In Spain, it holds, via a subsidiary, several sub-subsidiaries active in the fields of paper and printing with these entities together forming a tax-integrated group. Due to the fact that one of its sub-subsidiaries has accumulated losses of EUR 140 million since 2003, Holmen intends to liquidate its Spanish activity.

11. In that context, Holmen applied for a preliminary decision by the Skatterättsnämnden (Revenue Law Commission, Sweden) in order to determine, when the liquidation is complete, whether it would be entitled based on the reasoning of the judgment in *Marks & Spencer* to apply group relief in Sweden to its losses that would otherwise not be deductible in Spain, because of the impossibility in law to transfer the losses of a liquidated company in the year of liquidation, or in Sweden, because of the requirement that the subsidiary sustaining final losses be directly owned.

12. Holmen specifically applied for the decision of the Revenue Law Commission based on two alternatives: under the first alternative, its Spanish subsidiary and its two Spanish sub-subsidiaries are liquidated and, under the second alternative, its subsidiary is absorbed by its loss-making Spanish sub-subsidiary in a reverse merger, after which the new grouping is liquidated. In both alternatives Holmen would not carry out any operations in Spain during the liquidations and would not carry out any activities in Spain after the liquidations.

13. The decision handed down by the Revenue Law Commission contains a negative response for the first alternative and a favourable response for the second alternative.

14. The Revenue Law Commission accepted that its negative response for the first alternative would restrict the freedom of establishment but noted that, according to the reasoning in the judgment in *Marks & Spencer*, that restriction may be justified provided that the principle of proportionality has been respected and, therefore, that the losses at issue do not fall within one of the situations covered by paragraph 55 of that judgment, in which the losses are regarded as 'final'.

15. Both the Swedish Tax Board and Holmen challenged the preliminary decision of the Revenue Law Commission before the Högsta förvaltningsdomstolen (Supreme Administrative Court, Sweden).

16. The Högsta förvaltningsdomstolen (Supreme Administrative Court) holds that the case-law of the Court of Justice does not specify, on the one hand, whether the right to deduct final losses requires the subsidiary to be directly owned by the parent company and, on the other hand, whether, in order to assess the finality of a subsidiary's losses, account should be taken of the possibilities afforded by the legislation of the subsidiary's State of establishment to other legal entities of taking into account these losses and, if so, how that legislation should be taken into account.

17. In those circumstances, the Högsta förvaltningsdomstolen (Supreme Administrative Court), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. In order for a parent company in one Member State to have the right – which follows from the (judgment in *Marks & Spencer*), – on the basis of Article 49 TFEU to deduct final losses in a subsidiary in another Member State, is it necessary that the subsidiary be directly owned by the parent company?
> 2. Is that part of a loss which, as a result of the rules in the subsidiary's State, it has not been possible to set off against profits which were made there in a particular year, but instead could be carried over so that they could potentially be deducted in a future year, also to be regarded as final?
> 3. In the assessment of whether a loss is final, must account be taken of the fact that, under the rules in the subsidiary's State, the possibility for parties other than the party making the loss itself to deduct the loss is restricted?
> 4. If account is to be taken of a restriction such as that referred to in question 3, must regard be had to the extent to which the restriction has in fact led to it not being possible to set off any part of the losses against profits made by another party?'

**Consideration of the questions referred**

18. It must, as preliminary point, be recalled that, in paragraphs 43 to 51 of the judgment in *Marks & Spencer*, the Court has held that a restriction of the freedom of establishment which limits the right of a company to deduct the losses of a foreign subsidiary, whereas the losses of a resident subsidiary may be deducted, is justi-

fied by the need to preserve the balanced allocation of the power to impose taxes between the Member States and to prevent the risk of losses being used twice and of tax avoidance.

19. In paragraph 55 of that judgment, the Court nonetheless held that, even though that restriction is justified in principle, it is disproportionate for the parent company's State of establishment to preclude the possibility for the parent company to take into account at its level for tax purposes the losses of a non-resident subsidiary that are classified as final in a situation in which:

– the non-resident subsidiary has exhausted the possibilities available in its State of establishment of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting those losses against the profits made by the subsidiary in previous periods, and

– there is no possibility for the foreign subsidiary's losses to be taken into account in its State of establishment for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.

*The first question*

20. By its first question, the referring court asks, in essence, whether the concept of final losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, may be applied to a sub-subsidiary.

21. That question arises in the context of the Swedish legislation at issue in the main proceedings, which makes the application of group relief in the event of losses of a non-resident subsidiary conditional on a direct link between the parent company making the application and the non-resident subsidiary sustaining the losses.

22. It should be noted that such a condition, which leads to the exclusion of cross-border group relief in certain circumstances, may be justified by overriding reasons of the public interest referred to in paragraph 18 of the present judgment.

23. As the Court has held in paragraphs 45 to 52 of the judgment in *Marks & Spencer*, the preservation of the allocation of the power to impose taxes between Member States might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses. From that perspective, to give companies the option to have their losses taken into account in the Member State in which they are established or in another Member State would significantly jeopardise a balanced allocation of the power to impose taxes between Member States, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred. Moreover, in excluding cross-border relief the Member States must be able to prevent both the risk of double use of losses and the risk that within a group of companies losses will be transferred in an organised manner to companies established in the Member States which apply higher rates of taxation and in which the tax value of the losses is therefore the highest.

24. It is further necessary that a condition for the application of group relief, such as that at issue in the main proceedings, be apt to ensure the attainment of the objectives pursued and not go beyond what is necessary to attain them.

25. In that regard, there are two alternatives.

26. Under the first alternative, the intermediate subsidiary or intermediate subsidiaries between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are not established in the same Member State.

27. In that case, it cannot be excluded that a group may choose in which Member State the final losses are used, opting either for the Member State of the ultimate parent company or for the Member State of any potential intermediate subsidiary.

28. Such an option would permit the adoption of strategies for the optimisation of the group tax rate, which would jeopardise both the preservation of the balanced allocation of the power to impose taxes between the Member States and give rise to a risk that the losses could be used multiple times.

29. It is not therefore disproportionate for a Member State to make cross-border tax relief conditional on a direct link, even if the other impossibilities referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met, and all the less so since the exception provided for in that paragraph applies, in any event, to

the Member State of the subsidiary directly owning the sub-subsidiary which would be the subject of a claim for cross-border relief for the losses of that sub-subsidiary.

30. Under the second alternative, the intermediate subsidiary or intermediate subsidiaries between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State. That appears to be the situation in the case in the main proceedings since both Holmen's intermediate subsidiary and its sub-subsidiary sustaining the losses are established in Spain.

31. In those circumstances, the risks of optimisation of the group tax rate by choosing in which Member State the losses are set off and of the use of losses multiple times correspond to those noted by the Court in paragraphs 45 to 52 of the judgment in *Marks & Spencer.*

32. It would therefore be disproportionate for a Member State to impose a requirement of direct ownership such as that at issue in the case in the main proceedings where the conditions in paragraph 55 of the judgment in *Marks & Spencer* have been met.

33. Consequently, the answer to the first question is that the concept of final losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, does not apply to a sub-subsidiary unless all the intermediate companies between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State.

*The third question*

34. By its third question the referring court seeks, in essence, to establish the significance which should be accorded, in the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, to the fact that the subsidiary's State of establishment does not permit the losses of one company to be transferred to another company liable for corporation tax in the year of liquidation, but nevertheless authorises those losses to be carried forward to other accounting periods of that same company.

35. The Court is therefore called upon to clarify whether a situation such as that envisaged by Holmen in which, in the year of liquidation, the Member State of the non-resident company permits solely the use for tax purposes of losses by the company that sustained those losses, is included in those referred to by the Court in the second indent of paragraph 55 of the judgment in *Marks & Spencer*, in which there is no possibility for the losses of the foreign subsidiary to be taken into account in its State of establishment for future periods.

36. It should be recalled in that regard that the grounds relied on by the Court in the second indent of paragraph 55 of the judgment in *Marks & Spencer* expressly envisaged that the impossibility that requires the losses to be final may be applied to the situation in which they are taken into account by a third party for future periods, in particular where the subsidiary has been sold to that third party.

37. It follows that, in a situation such as those envisaged by Holmen, and even if all the other impossibilities mentioned in paragraph 55 of the judgment in *Marks & Spencer* have been met where applicable, the losses would not be characterised as final if there is a possibility of deducting those losses economically by transferring them to a third party before the completion of the liquidation.

38. In fact, as the Advocate General stated in points 57 to 63 of her Opinion, it cannot be excluded from the outset that a third party may take into account for tax purposes the losses of the subsidiary in that subsidiary's State of establishment, for example following a sale of that subsidiary for a price including the tax advantage represented by the deductibility of losses for the future (see, to that effect, judgment of 21 February 2013, *A*, C-123/11, EU:C:2013:84, paragraph 52 et seq., and judgment delivered today, *Memira Holding*, C-607/17, paragraph 26).

39. Consequently, in a situation such as those envisaged by Holmen, unless Holmen can demonstrate that the possibility referred to in the previous paragraph is precluded, the mere fact that the subsidiary's State of establishment does not allow the transfer of losses in the year of liquidation cannot, in itself, be sufficient for the losses of the subsidiary or of the sub-subsidiary to be regarded as being final.

40. Consequently, the answer to the third question is that, for the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment in *Marks & Spencer*, the fact that the subsidiary's Member State of establishment does not allow the losses of one company to be transferred to another company in the year of liquidation is not decisive, unless the parent company

demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are taken into account by a third party for future periods.

*The second and fourth questions*

41. By its second and fourth questions, which should be examined together and lastly, the referring court asks, in essence, whether, if the fact referred to in the third question becomes relevant, account must be taken of the fact that the legislation of the State of establishment of the subsidiary sustaining the losses that could be regarded as final results in part of the losses having to be carried forward because of a restriction on the setting-off of losses on the same entity, or being impossible to set off against the profits made by another company of the same group.

42. In that regard and as stated in the answer to the third question, the restrictions on the transfer of losses stemming from the legislation of the subsidiary's State of establishment are not decisive so long as the parent company has not adduced evidence that it is impossible for those losses to be used by a third party, in particular after a sale for a price including the tax value of the losses.

43. If such evidence is adduced and the other conditions referred to in paragraph 55 of the judgment in *Marks & Spencer* have been met, the fiscal authorities are required to find that the losses of a non-resident subsidiary are final and that it is therefore disproportionate to not allow the parent company to take them into account at its level for tax purposes.

44. In that perspective, the extent to which the loss-making company was limited in its possibilities of carrying forward its losses or the extent to which other entities of the same group also located in the State of establishment of the loss-making subsidiary may have been limited in their possibility of having the subsidiary's losses transferred to them is irrelevant for the purposes of assessing the finality of the losses.

45. Consequently, the answers to the second and fourth questions should be that, if the fact referred to in the third question becomes relevant, the extent to which the legislation of the State of establishment of the subsidiary sustaining the losses that could be regarded as final results in it not being possible to set off part of them against the current profits of the loss-making subsidiary or against those profits of another company in the same group is irrelevant.

**Costs**

46. …

On those grounds,

the Court (First Chamber)

hereby rules:

**1. The concept of final losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), does not apply to a sub-subsidiary unless all the intermediate companies between the parent company applying for group relief and the sub-subsidiary sustaining losses that could be regarded as final are established in the same Member State.**

**2. For the purposes of the assessment of the finality of a non-resident subsidiary's losses, within the meaning of paragraph 55 of the judgment of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), the fact that the subsidiary's Member State of establishment does not allow the losses of one company to be transferred to another company in the year of liquidation is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are taken into account by a third party for future periods.**

**3. If the fact referred to in paragraph 2 of the operative part of the present judgment becomes relevant, the extent to which the legislation of the State of establishment of the subsidiary sustaining the losses that could be regarded as final results in it not being possible to set off part of them against the current profits of the loss-making subsidiary or against those profits of another company in the same group is irrelevant.**

# EU Court of Justice, 24 September 2019*

## Cases T-755/15 and T-759/15

## *Grand Duchy of Luxembourg (T-755/15) AND Fiat Chrystler Finance Europe (T-759/15) v European Commission*

*The General Court (Seventh Chamber, Extended Composition: M. van der Woude, President, V. Tomljenovic (Rapporteur), E. Bieliunas, A. Marcoulli and A. Kornezov, Judges*

*Registrar: S. Spyropoulos, Administrator*

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* Languages of the case: French and English.

## I – Background to the dispute

*A – The tax ruling issued to FFT by the Luxembourg tax authorities*

1. On 14 March 2012, the tax adviser of Fiat Chrysler Finance Europe, formerly Fiat Finance and Trade Ltd ('FFT'), sent a letter to the Luxembourg tax authorities requesting a tax ruling. [*confidential*][**]

2. On 3 September 2012, the Luxembourg tax authorities issued a tax ruling in favour of FFT ('the tax ruling at issue'). The ruling was contained in a letter which stated that, 'with respect to [the] letter dated [14 March 2012] regarding the intra-group financing activity of [FFT], [it is] hereby [confirmed] that the transfer pricing analysis hereafter has been realised in accordance with the Circular 164/2 of the 28 January 2011 and respects the arm's length principle'.

3. The letter of 3 September 2012 also made clear that the decision contained therein was to be binding on the tax authorities for a period of five years (that is from tax year 2012 to tax year 2016).

*B – The administrative procedure before the Commission*

4. On 19 June 2013, the European Commission sent the Grand Duchy of Luxembourg an initial request for detailed information on its national practice regarding tax rulings. That initial request for information was followed by a lengthy exchange of correspondence between the Grand Duchy of Luxembourg and the Commission until, on 24 March 2014, the Commission adopted a decision requiring information to be provided to it by the Grand Duchy of Luxembourg.

5. On 11 June 2014, the Commission decided to initiate the formal investigation procedure under Article 108(2) TFEU ('the opening decision') in respect of the tax ruling at issue. Between the date of the opening decision and 15 July 2015, there was a further lengthy exchange of correspondence between the Commission and the Grand Duchy of Luxembourg, as well as FFT, with particular regard to the tax ruling at issue.

*C – The contested decision*

6. On 21 October 2015, the Commission adopted Decision (EU) 2016/2326 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat (OJ 2016 L 351, p. 1, 'the contested decision').

1. Description of the contested measure

7. In Section 2 of the contested decision, entitled 'Description of the aid measure', the Commission first described FFT, the beneficiary of the tax ruling at issue, which was part of the Fiat/Chrysler automobile group ('Fiat/Chrysler group'). It stated that FFT provided treasury services and financing to the Fiat/Chrysler group companies established in Europe, excluding those established in Italy, and that it operated from Luxembourg, where its head office was located. The Commission stated that FFT was involved, in particular, in market funding and liquidity investments, relations with financial market actors, financial coordination and consultancy services to the group companies, cash management services to the group companies, short-term or medium-term inter-company funding, and coordination with the other treasury companies (recitals 34 to 51 of the contested decision).

8. The Commission then described the tax ruling at issue, stating that it had been issued by the Luxembourg tax administration on 3 September 2012. It indicated that that ruling followed (i) the letter of 14 March 2012 from FFT's tax adviser to the Luxembourg tax administration, containing a request for approval of an advance transfer pricing arrangement, and (ii) a transfer pricing report containing a transfer pricing analysis, prepared

** Confidential information omitted.

by the tax adviser in support of FFT's request for a tax ruling ('the transfer pricing report') (recitals 9, 53 and 54 of the contested decision).

9. The Commission described the tax ruling at issue as endorsing a method for arriving at a profit allocation to FFT within the Fiat/Chrysler group, which enabled FFT to determine its corporate income tax liability to the Grand Duchy of Luxembourg on a yearly basis. It pointed out that the tax ruling at issue had been binding for a period of five years, from the 2012 tax year until the 2016 tax year (recitals 52 and 54 of the contested decision).

10. The Commission noted that, according to the transfer pricing report, the most appropriate method for determining the taxable profit of FFT was the transactional net margin method ('the TNMM'). This method entails, according to the Commission, taking into consideration the net margins earned in comparable transactions by independent enterprises. This choice was justified, according to that report, by the fact that FFT was providing financial services only to Fiat/Chrysler group companies. The Commission added that, according to the transfer pricing report, the remuneration due to FFT, which constituted the taxable profit, had to be determined by reference to the capital needed by FFT to perform its functions and to bear its risks, in relation to the assets in use (recitals 55 and 56 of the contested decision).

11. Specifically, the Commission found that the transfer pricing report, as endorsed by the tax ruling at issue, proposed calculating the overall remuneration due to FFT for its financing and treasury activities and the risks that it bore, such remuneration consisting of the following two components (recital 70 of the contested decision):

– a 'risk remuneration', calculated by multiplying FFT's hypothetical regulatory capital of EUR 28 500 000, estimated by applying the Basel II framework by analogy, by the pre-tax expected return of 6.05%, estimated using the Capital Asset Pricing Model ('CAPM');

– a 'functions remuneration', calculated by multiplying what is designated as FFT's capital used to perform the functions, estimated as EUR 93 710 000, by the market interest rate applied to short-term deposits, estimated to be 0.87%.

12. In addition, the Commission noted that the tax ruling at issue had endorsed the proposal in the transfer pricing report not to remunerate the portion of FFT's equity designated as supporting FFT's financial investments in Fiat Finance North America Inc. ('FFNA') and Fiat Finance Canada Ltd ('FFC') (recital 69 of the contested decision).

2. Description of the Luxembourg rules on transfer pricing

13. The Commission indicated that the tax ruling at issue had been issued on the basis of Article 164(3) of the Luxembourg Income Tax Code (loi du 4 décembre 1967 concernant l'impôt sur le revenu (Law of 4 December 1967 on income tax), as amended, 'the Tax Code') and Circular L.I.R. No 164/2 of 28 January 2011, issued by the director of Luxembourg taxes ('the Circular'). In that regard, first, the Commission noted that that article established the arm's length principle under Luxembourg tax law, according to which transactions between intragroup companies ('integrated companies') were to be remunerated as if they had been agreed to by independent companies negotiating under comparable circumstances at arm's length ('stand-alone companies'). Second, it added that the Circular explained in particular how to determine an arm's length remuneration specifically in the case of intra-group financing companies (recitals 74 to 83 of the contested decision).

3. Description of the OECD Guidelines

14. The Commission outlined the transfer pricing guidelines of the Organisation for Economic Cooperation and Development (OECD) and indicated that transfer prices referred to prices charged for commercial transactions between various entities belonging to the same corporate group. It stated that, in order to avoid a situation where multinational companies had a financial incentive to allocate as little profit as possible to jurisdictions where their profits were subject to higher taxation, tax administrations should only accept transfer prices between integrated companies when, in accordance with the arm's length principle, transactions are remunerated as if they were agreed to by stand-alone companies negotiating under comparable circumstances at arm's length. The Commission pointed out that that principle was to be found in Article 9 of the OECD Model Tax Convention on Income and on Capital ('the OECD Model Tax Convention') (recitals 84 to 87 of the contested decision).

15. The Commission recalled that the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the OECD's Committee on Fiscal Affairs on 27 June 1995 and updated on 22 July 2010 ('the OECD Guidelines'), set out five methods for approximating an arm's length pricing of transactions

and profit allocation between integrated companies. Only two of those methods were relevant for the contested decision (recitals 88 and 89 of the contested decision).

16. The first of these is the comparable uncontrolled price ('CUP') method, which is a traditional transaction method. The Commission noted that the CUP method compares the price charged for the transfer of property or services in a transaction between two associated enterprises to the price charged for the transfer of property or services in a comparable transaction between independent enterprises conducted under comparable circumstances (recital 90 of the contested decision).

17. The second method is the TNMM, which is an indirect method used to approximate an arm's length pricing of transactions and profit allocation between companies of the same group. The Commission described that method as one that involves estimating what would be an arm's length profit for an entire activity, rather than for specific transactions. It explained that, in that context, a profit level indicator would be selected, such as costs, turnover or fixed investment, to which would be applied a profit ratio reflecting that observed in comparable uncontrolled transactions (recital 91 of the contested decision).

4. Assessment of the contested measure

18. In Section 7 of the contested decision, entitled 'Assessment of the contested measure', the Commission concluded that State aid had been granted.

19. After recalling the conditions for a finding of State aid, according to which, in order for a measure to be categorised as State aid within the meaning of Article 107(1) TFEU, first, there must be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and, fourth, it must distort or threaten to distort competition, the Commission found that the first condition had been fulfilled in this case. In that regard, it stated that the tax ruling at issue was imputable to the Grand Duchy of Luxembourg. Moreover, the Commission found that that ruling had given rise to a loss of State resources, since any reduction of FFT's tax liability had resulted in a loss of tax revenue that would otherwise have been available to the Grand Duchy of Luxembourg (recitals 185 to 188 of the contested decision).

20. As regards the second and fourth conditions, the Commission found that since FFT was part of a group operating in all Member States, any aid in its favour was liable to affect intra-Union trade. Moreover, it found that, in so far as the tax ruling at issue relieved FFT of a tax liability, that ruling improved its financial position and, as a result, distorted or threatened to distort competition (recital 189 of the contested decision).

21. As regards the third condition for a finding of State aid, the Commission considered that the tax ruling at issue conferred a selective advantage on FFT, in so far as it had resulted in a lowering of FFT's tax liability in Luxembourg by deviating from the tax which FFT would have been liable to pay under the ordinary corporate income tax system (recital 190 of the contested decision).

22. As a preliminary point, the Commission observed that the case-law had established a three-step analysis to be used in determining whether a tax measure is selective. The first step is to identify the common or normal regime applicable in the Member State ('the reference system'). In the second step, it is necessary to determine whether the tax measure in question constitutes a derogation from that system, in so far as it differentiates between economic operators who, in the light of the objectives intrinsic to the system, are in a comparable factual and legal situation. The Commission then recalled that, in the third step, if the measure constitutes a derogation from the reference system, the State must establish whether that measure is justified by the nature or the general scheme of the reference system (recital 192 of the contested decision).

23. As regards the first step, identification of the reference system, the Commission considered that, in the present case, this was the general Luxembourg corporate income tax system, the objective of which was to tax the profits of all companies subject to tax in Luxembourg. It stated in that regard that the general Luxembourg corporate income tax system applied to domestic companies and foreign companies resident in Luxembourg, including Luxembourg branches of foreign companies. The Commission considered that the fact that there was a difference in determining the taxable profits of stand-alone companies and integrated companies had no bearing on the objective of the general Luxembourg corporate income tax system, which aimed to tax the profits of all companies resident in Luxembourg, whether or not integrated, and that both types of company are in a similar factual and legal situation in the light of the intrinsic objective of that system. The Commission rejected all the arguments put forward by the Grand Duchy of Luxembourg and by FFT to the effect that Article 164 of the Tax Code or the Circular constituted the relevant reference system, and also their argument

that the reference system for determining whether the tax ruling at issue was selective had to be limited to undertakings subject to transfer pricing rules (recitals 193 to 215 of the contested decision).

24. As regards the second step, the Commission stated that whether a tax measure constituted a derogation from the reference system would generally coincide with identification of the advantage granted to the beneficiary under that measure. In its view, where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference system. The Commission also noted that, according to the case-law, in the case of an individual measure, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective (recitals 216 to 218 of the contested decision).

25. The Commission went on to state that a tax measure which results in a group company charging transfer prices that do not resemble prices which would be charged between independent undertakings under the arm's length principle confers an advantage on that company, in so far as it results in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system, which, according to the Commission, the Court of Justice had accepted. Therefore, the Commission explained that it was required to verify whether the methodology accepted by the Luxembourg tax administration by way of the tax ruling at issue for the determination of FFT's taxable profits in Luxembourg departed from a methodology that led to a reliable approximation of a market-based outcome, and thus from the arm's length principle. In that case the tax ruling at issue would be deemed to confer a selective advantage on FFT for the purposes of Article 107(1) TFEU (recitals 222 to 227 of the contested decision).

26. Consequently, the Commission found that the arm's length principle necessarily formed part of its assessment, under Article 107(1) TFEU, of tax measures granted to integrated companies, irrespective of whether a Member State had incorporated that principle into its national legal system. The Commission then explained, in response to the arguments raised by the Grand Duchy of Luxembourg during the administrative procedure, that it had not examined whether the tax ruling at issue complied with the arm's length principle, as laid down in Article 164(3) of the Tax Code or in the Circular, but that it had sought to determine whether the Luxembourg tax administration had conferred a selective advantage on FFT for the purposes of Article 107(1) TFEU (recitals 228 to 231 of the contested decision).

27. In the first place, the Commission considered that several of the methodological choices approved by the Grand Duchy of Luxembourg and underlying the transfer pricing analysis in the tax ruling at issue resulted in a reduction of the corporate income tax that stand-alone companies would have been obliged to pay (recitals 234 to 240 of the contested decision).

28. First, in relation to the capital to be remunerated, the Commission did not consider the tax adviser's chosen profit level indicator, namely FFT's hypothetical regulatory capital, to be appropriate in the application of the TNMM for estimating an arm's length remuneration for the functions performed by FFT. The Commission went on to find that, by taking into account the hypothetical regulatory capital of EUR 28.5 million, instead of the accounting equity, which was EUR 287.5 million in 2011, on the basis of which the CAPM was applied, the tax adviser had divided FFT's taxable remuneration by 10. The Commission made clear that it had rejected all the arguments of the Grand Duchy of Luxembourg and FFT in that respect (recitals 248 to 266 of the contested decision).

29. Second, as regards the application of the Basel II framework in order to determine the hypothetical regulatory capital, the Commission considered that the Grand Duchy of Luxembourg had made errors that led to FFT's hypothetical regulatory capital being underestimated and resulted in a lowering of FFT's tax liability (recitals 267 to 276 of the contested decision).

30. Third, the Commission found that the tax adviser had made several deductions from FFT's remaining capital that departed from a market-based outcome. First of all, it observed that if the hypothetical regulatory capital had been correctly estimated, it was likely that no capital in excess of regulatory capital would have been found. Next, the Commission took the view that the tax adviser's decision to isolate the equity component designated as 'equity supporting the financial investments in FFNA and FFC' and to accord it a zero remuneration for the purpose of estimating FFT's tax base was inappropriate. The Commission indicated that it did not regard the Grand Duchy of Luxembourg's arguments on this point as convincing (recitals 277 to 291 of the contested decision).

31. Fourth, the Commission considered that the tax adviser's choice of a beta of 0.29 when using the CAPM to determine the return on capital to be applied to FFT's hypothetical regulatory capital resulted in a profit allo-

cation to FFT that was not in line with the arm's length principle (recitals 292 to 301 of the contested decision).

32. Among the conclusions reached by the Commission in the light of those findings are: (i) the appropriate level of remuneration for the financing and treasury functions of FFT should be established on the basis of FFT's accounting equity; (ii) 2012 was an appropriate reference year for assessing FFT's tax base in Luxembourg; (iii) the pre-tax return on equity of 6.05% (and the post-tax return of 4.3%) accepted by the tax ruling at issue and calculated using the CAPM was well below the required returns on capital in the financial sector, which had remained consistently at or above 10%; and (iv) the required post-tax return on equity was 10%, applied to the full amount of the accounting equity (recitals 302 to 311 of the contested decision).

33. In the second place, the Commission rejected FFT's argument that there was no advantage for the Fiat/Chrysler group because any increase in the tax base in Luxembourg would have been offset in full by an increased tax deduction in other Member States (recitals 312 to 314 of the contested decision).

34. In the third place, as a subsidiary point, the Commission found that, in any event, the tax ruling at issue also granted a selective advantage under the more limited reference system, invoked by the Grand Duchy of Luxembourg and by FFT, consisting of Article 164(3) of the Tax Code and the Circular, which laid down the arm's length principle in Luxembourg tax law (recitals 315 to 317 of the contested decision).

35. In the fourth place, the Commission rejected FFT's argument that, in order to prove selective treatment benefiting FFT as a result of the tax ruling at issue, the Commission should have compared that ruling to the practice of the Luxembourg tax administration under the Circular and, in particular, to the tax rulings granted to other financing and treasury companies that the Grand Duchy of Luxembourg had submitted to the Commission as part of a representative sample of its tax ruling practice (recitals 318 to 336 of the contested decision).

36. In the fifth place, neither the Grand Duchy of Luxembourg nor FFT had, according to the Commission, advanced any possible justification for the selective treatment of FFT as a result of the tax ruling at issue. Nor had the Commission identified any ground justifying the preferential treatment from which FFT had benefited (recitals 337 and 338 of the contested decision).

37. The Commission thus concluded, in the light of the foregoing considerations, that the tax ruling at issue had conferred a selective advantage on FFT in that it had resulted in a lowering of FFT's tax liability, principally, under the general Luxembourg corporate income tax system as compared to stand-alone companies and, as a subsidiary point, under the tax regime applicable to integrated companies (recitals 339 and 340 of the contested decision).

38. Finally, the Commission considered that the beneficiary of the advantage at issue was the Fiat/Chrysler group as a whole, in so far as FFT formed an economic unit with the other entities within the group, and that those entities had benefited from the tax reduction granted to FFT, given that that tax reduction necessarily had the effect of reducing the pricing conditions of its intra-group loans (recitals 341 to 345 of the contested decision).

39. In the light of all of the foregoing considerations, the Commission concluded that the tax ruling at issue constituted State aid and that the aid in question was operating aid (recitals 346 and 347 of the contested decision).

40. In Section 8 of the contested decision, entitled 'Compatibility of the aid', the Commission concluded that the aid granted to FFT was incompatible with the internal market. In this respect, it noted that the Grand Duchy of Luxembourg had not invoked any of the derogations provided for in Article 107(2) and (3) TFEU and, moreover, that the aid in question, which had to be considered to be operating aid, could not normally be considered compatible with the internal market (recitals 348 to 351 of the contested decision).

41. In Section 9 of the contested decision, entitled 'Unlawfulness of the aid', the Commission observed that the Grand Duchy of Luxembourg had not notified it, in accordance with Article 108(3) TFEU, of any plan to grant the tax ruling at issue, nor had it complied with the standstill obligation laid down in that provision. Consequently, the tax ruling at issue constituted unlawful State aid, put into effect in contravention of that provision (recitals 352 and 353 of the contested decision).

42. In Section 10 of the contested decision, entitled 'Recovery', the Commission stated, first, that the arguments advanced by the Grand Duchy of Luxembourg as to observance of the principles of protection of legitimate expectations and legal certainty were without merit (recitals 354 to 364 of the contested decision).

43. Second, the Commission pointed out that it was not required to state the exact amount of the aid to be recovered, and that it was sufficient for the contested decision to include information enabling the addressee to work out the amount itself without overmuch difficulty. In the present case, the Commission proposed one possible methodology in the contested decision for eliminating the selective advantage granted to FFT by the tax ruling at issue, and made clear that it would also be prepared to accept another method of calculation should the Grand Duchy of Luxembourg propose one before the deadline for implementation of the contested decision, provided that that method resulted in a reliable approximation of a market-based outcome (recitals 365 to 369 of the contested decision).

44. Third, the Commission found that, in the first instance, the Grand Duchy of Luxembourg was required to recover from FFT the unlawful and incompatible aid granted by means of the tax ruling at issue. Should FFT not have been in a position to repay the aid in full, the Grand Duchy of Luxembourg was to recover the balance from Fiat Chrysler Automobiles NV, the successor of Fiat SpA, since it was that entity which controlled the group to which FFT belonged (recital 370 of the contested decision).

45. In conclusion, the Commission found that the Grand Duchy of Luxembourg had, by way of the tax ruling at issue, unlawfully granted State aid to FFT and to the group to which it belonged, in breach of Article 108(3) TFEU, that that aid was incompatible with the internal market and that, consequently, the Grand Duchy of Luxembourg was required to recover it from FFT or, in the event of FFT failing to repay the full amount of the aid, from Fiat Chrysler Automobiles (recital 371 of the contested decision).

46. The operative part of the contested decision is worded as follows:

> '*Article 1*
> The tax ruling [at issue], which enables [FFT] to determine its tax liability in Luxembourg on a yearly basis for a period of five years, constitutes aid within the meaning of Article 107(1) [TFEU] that is incompatible with the internal market and that was unlawfully put into effect by [the Grand Duchy of] Luxembourg in breach of Article 108(3) [TFEU].
>
> *Article 2*
> 1. [The Grand Duchy of] Luxembourg shall recover the incompatible and unlawful aid referred to in Article 1 from [FFT].
> 2. Any sums that remain unrecoverable from [FFT], following the recovery described in the paragraph 1, shall be recovered from Fiat Chrysler Automobiles NV.
> 3. The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
> 4. The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
>
> *Article 3*
> 1. Recovery of the aid granted referred to in Article 1 shall be immediate and effective.
> 2. [The Grand Duchy of] Luxembourg shall ensure that this Decision is implemented within four months following the date of notification of this Decision.
>
> *Article 4*
> 1. Within two months following notification of this Decision, [the Grand Duchy of] Luxembourg shall submit to the Commission information regarding the methodology used to calculate the exact amount of aid.
> 2. [The Grand Duchy of] Luxembourg shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.
>
> *Article 5*
> This Decision is addressed to the Grand Duchy of Luxembourg.'

## II – Procedure and forms of order sought

### *A – The written part of the procedure and the forms of order sought in Case T-755/15*

47. By application lodged at the Court Registry on 30 December 2015, the Grand Duchy of Luxembourg brought the action in Case T-755/15 seeking annulment of the contested decision.

1. Composition of the formation of the Court and priority treatment

48. By document lodged at the Court Registry on 6 June 2016, the Grand Duchy of Luxembourg requested that the case be heard and determined by a Chamber sitting in extended composition. The Court took formal note, pursuant to Article 28(5) of its Rules of Procedure, of the fact that Case T-755/15 had been referred to the Fifth Chamber, Extended Composition.

49. Following a change in the composition of the Chambers of the Court on 26 September 2016, the Judge-Rapporteur was assigned, pursuant to Article 27(5) of the Rules of Procedure, to the Seventh Chamber, Extended Composition, to which Case T-755/15 was accordingly allocated.

50. Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit in the present case, the President of the General Court, by decision of 6 February 2017, designated the Vice-President of the General Court to complete the Chamber.

51. By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-755/15 be given priority under Article 67(2) of the Rules of Procedure.

2. Request that the case be dealt with under the expedited procedure

52. By separate document lodged at the Court Registry on 30 December 2015, the Grand Duchy of Luxembourg requested that Case T-755/15 be dealt with under the expedited procedure provided for in Article 151 of the Rules of Procedure. On 2 February 2016, the Court decided not to grant that request.

3. Interventions

53. By document lodged at the Court Registry on 6 April 2016, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in support of the form of order sought by the Commission.

54. By document lodged at the Court Registry on 7 April 2016, Ireland applied for leave to intervene in support of the form of order sought by the Grand Duchy of Luxembourg.

55. By order of 25 May 2016, the President of the Fifth Chamber of the General Court granted the applications to intervene of the United Kingdom and Ireland.

56. By document lodged at the Court Registry on 9 November 2016, the United Kingdom withdrew its intervention.

57. By order of 15 December 2016, the President of the Seventh Chamber, Extended Composition, of the General Court removed the United Kingdom as intervener from Case T-755/15.

4. Applications for confidential treatment

58. By documents lodged at the Court Registry on 29 April, 27 June and 24 October 2016, the Grand Duchy of Luxembourg requested that certain information contained in the application, in the reply, in the rejoinder and in certain annexes to those pleadings be treated as confidential vis-à-vis the United Kingdom and Ireland. By document lodged at the Court Registry on 3 January 2017, the Grand Duchy of Luxembourg informed the Court that it wished to maintain its applications for confidential treatment vis-à-vis Ireland, in the event of any joinder of Cases T-755/15 and T-759/15.

5. Forms of order sought

59. The Grand Duchy of Luxembourg claims that the Court should:
- declare the present action admissible and well founded;
- principally, annul the contested decision;
- alternatively, annul the contested decision in so far as it orders the recovery of the aid;
- order the Commission to pay the costs.

60. Ireland, intervening in support of the form of order sought by the Grand Duchy of Luxembourg, claims that the Court should annul the contested decision in whole or in part.

61. The Commission contends that the Court should:
- declare the action unfounded;
- order the Grand Duchy of Luxembourg to pay the costs.

*B – The written part of the procedure and the forms of order sought in Case T-759/15*

62. By application lodged at the Court Registry on 29 December 2015, FFT brought the action in Case T-759/15 seeking annulment of the contested decision.

1. Composition of the formation of the Court and priority treatment

63. Following a change in the composition of the Chambers of the Court on 26 September 2016, the Judge-Rapporteur was assigned, pursuant to Article 27(5) of the Rules of Procedure, to the Seventh Chamber, Extended Composition, to which Case T-759/15 was accordingly allocated.

64. On a proposal from the Seventh Chamber, the Court decided, on 15 February 2017, to refer the case to a Chamber sitting in extended composition.

65. Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit in the present case, the President of the General Court, by decision of 23 February 2017, designated the Vice-President of the General Court to complete the Chamber.

66. By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-759/15 be given priority under Article 67(2) of the Rules of Procedure.

2. Request that the case be dealt with under the expedited procedure

67. By separate document lodged at the Court Registry on 29 December 2015, FFT requested that Case T-759/15 be dealt with under the expedited procedure provided for in Article 151 of the Rules of Procedure. On 2 February 2016, the Court decided not to grant that request.

3. Interventions

68. By document lodged at the Court Registry on 6 April 2016, the United Kingdom applied for leave to intervene in support of the form of order sought by the Commission.

69. By document lodged at the Court Registry on 7 April 2016, Ireland applied for leave to intervene in support of the form of order sought by FFT.

70. By order of 18 July 2016, the President of the Fifth Chamber of the General Court granted the applications to intervene of the United Kingdom and Ireland.

71. By document lodged at the Court Registry on 9 November 2016, the United Kingdom withdrew its intervention.

72. By order of 15 December 2016, the President of the Seventh Chamber, Extended Composition, removed the United Kingdom as intervener from Case T-759/15.

4. Applications for confidential treatment

73. By documents lodged at the Court Registry on 20 May, 11 June, 27 July and 28 July 2016, FFT requested that certain information contained in the application, in the defence, in the reply and in certain annexes to those pleadings be treated as confidential vis-à-vis the United Kingdom and Ireland.

74. By document lodged at the Court Registry on 17 January 2017, FFT stated that it maintained its claims of confidentiality with regard to Ireland, in the event of the case being joined with Case T-755/15.

5. Forms of order sought

75. FFT claims that the Court should:
 – declare the action admissible;
 – annul Articles 1 to 4 of the contested decision;
 – order the Commission to pay the costs.

76. Ireland, intervening in support of the form of order sought by FFT, claims that the Court should annul the contested decision in whole or in part.

77. The Commission contends that the Court should:
 – declare the action unfounded;

– order FFT to pay the costs.

*C – Joinder for the purposes of the oral part of the procedure, and the oral part of the procedure in Cases T-755/15 and T-759/15*

1. Joinder

78. By document lodged at the Court Registry on 1 December 2016, the Grand Duchy of Luxembourg applied for Cases T-755/15 and T-759/15 to be joined for the purposes of the oral part of the procedure and of the decision which closes the proceedings.

79. By document lodged at the Court Registry on 1 December 2016, FFT also applied for Cases T-755/15 and T-759/15 to be joined for the purposes of the oral part of the procedure and of the decision which closes the proceedings.

80. By order of the President of the Seventh Chamber, Extended Composition, of the General Court of 27 April 2018, the parties having been heard, Cases T-755/15 and T-759/15 were joined for the purposes of the oral part of the procedure, in accordance with Article 68(1) of the Rules of Procedure. By the same order, it was decided to exclude the confidential information from the case file to be made available to Ireland.

2. Oral part of the procedure in Cases T-755/15 and T-759/15

81. By letter lodged at the Court Registry on 7 February 2017, the Grand Duchy of Luxembourg requested that a hearing be held, in accordance with Article 106(2) of the Rules of Procedure.

82. By letter lodged at the Court Registry on 10 February 2017, FFT requested that a hearing be held, in accordance with Article 106(2) of the Rules of Procedure.

83. Acting on a report from the Judge-Rapporteur, the Court decided to open the oral part of the procedure in Cases T-755/15 and T-759/15. By way of measures of organisation of procedure under Article 89 of the Rules of Procedure, the Court asked the parties to answer questions in writing. The parties complied with those requests within the prescribed periods.

84. On 24 May 2017, FFT lodged a submission containing further evidence, on which the parties submitted their observations.

85. The parties presented oral argument and their answers to the questions put by the Court at the hearing on 21 June 2018.

**III – Law**

*A – Joinder of the cases for the purposes of the present judgment*

86. In accordance with Article 19(2) of the Rules of Procedure, the President of the Seventh Chamber, Extended Composition, of the General Court referred the decision as to whether Cases T-755/15 and T-759/15 should be joined for the purposes of the decision closing the proceedings, which fell within his remit, to the Seventh Chamber, Extended Composition, of the General Court.

87. The parties having been heard at the hearing with respect to a possible joinder of the cases, it is appropriate for Cases T-755/15 and T-759/15 to be joined for the purposes of the decision which closes the proceedings, on account of the connection between them, in accordance with Article 68(1) of the Rules of Procedure.

*B – Pleas in law relied on and the structure of the examination of the present actions*

88. By the actions brought in Cases T-755/15 and T-759/15, annulment is sought of the contested decision in so far as it classifies the tax ruling at issue as State aid within the meaning of Article 107(1) TFEU and in so far as it orders the recovery of sums which have allegedly not been collected from FFT and the Fiat/Chrysler group by the Grand Duchy of Luxembourg as corporate income tax.

89. In support of its action, the Grand Duchy of Luxembourg puts forward three pleas in law.

90. The first plea in law, which covers, in essence, the condition for a finding of selective aid and the Commission's competence in fiscal matters, is divided into three parts. First, the Grand Duchy of Luxembourg submits that, in the context of its examination of the selectivity of the contested measure, the Commission incorrectly considered the relevant reference framework to be the general corporate income tax regime (first part). Second, the Grand Duchy of Luxembourg claims that the Commission failed to demonstrate that the tax ruling at

issue constituted a derogation from the reference framework used, or that it derogated from the arm's length principle (second part). Third, the Grand Duchy of Luxembourg submits that the Commission infringed Articles 4 and 5 TEU and Article 114 TFEU by engaging in tax harmonisation in disguise, consisting in the imposition of a sui generis arm's length principle (third part).

91. The second plea in law, which is divided into two parts, alleges infringement of Article 107(1) TFEU and of the Commission's obligation to state reasons as provided for in Article 296 TFEU, in that the Commission failed to demonstrate that there was any advantage (first part) or any restriction of competition (second part).

92. The third plea in law, advanced in the alternative, alleges infringement of Article 14(1) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1). However, since that regulation has been repealed by Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), which was applicable at the date of the contested decision, this plea must be understood as alleging infringement of Article 16(1) of the latter regulation. The plea is divided into two parts. The Grand Duchy of Luxembourg claims that the Commission ordered recovery of the aid contrary to the principle of legal certainty (first part) and to its rights of defence (second part).

93. In support of its action, FFT puts forward four pleas in law.

94. The first plea in law, which is divided into two parts, alleges infringement of Article 107 TFEU. In support of the first part of its first plea, FFT submits that the Commission misapplied the concept of selective advantage. In that respect, it raises four complaints. The first alleges an error in the determination of the relevant reference framework. The second alleges an error in that an unprecedented and undefined concept of the arm's length principle was applied. The third alleges that there was no proof that an advantage had been given to the Fiat/Chrysler group. The fourth complaint is that, even if the tax ruling at issue derogates from the general corporate income tax system, that derogation is justified. In support of the second part of its first plea, FFT claims that the Commission failed to show that the tax ruling at issue was liable to distort competition.

95. The second plea in law, which is also divided into two parts, alleges infringement of the second paragraph of Article 296 TFEU. FFT claims that the Commission failed to fulfil its obligation to state reasons through its failure to explain in the contested decision how it derived the arm's length principle from EU law and what that principle is (first part). Next, it claims that the Commission failed to set out the reasons for its view that the tax ruling at issue distorted competition (second part).

96. The third plea in law alleges breach of the principle of legal certainty. FFT submits that the Commission's formulation of the arm's length principle introduces legal uncertainty and confusion as to when a tax ruling might breach the rules on State aid.

97. The fourth plea in law alleges breach of the principle of protection of legitimate expectations, in so far as the Commission did not assess the tax ruling at issue in the light of the relevant OECD rules.

98. It is apparent from all of the above that the Grand Duchy of Luxembourg and FFT are advancing, albeit in a different order, five series of pleas, alleging, in essence:

– in the first series, infringement of Articles 4 and 5 TEU, in so far as the Commission's analysis would lead to tax harmonisation in disguise (third part of the first plea in Case T-755/15);

– in the second series, infringement of Article 107 TFEU, of the obligation to state reasons provided for in Article 296 TFEU and breach of the principles of legal certainty and protection of legitimate expectations, in so far as the Commission considered that the tax ruling at issue conferred an advantage, notably on the ground that that tax ruling did not comply with the arm's length principle (second part of the first plea and first part of the second plea in Case T-755/15, second and third complaints in the first part of the first plea, first part of the second plea, third plea and fourth plea in Case T-759/15);

– in the third series, infringement of Article 107 TFEU, in so far as the Commission found that that advantage was selective (first part of the first plea in Case T-755/15 and first complaint in the first part of the first plea in Case T-759/15);

– in the fourth series, infringement of Article 107 TFEU and of the obligation to state reasons provided for in Article 296 TFEU, in so far as the Commission found that the measure at issue restricted competition and distorted trade between Member States (second part of the second plea in Case T-755/15 and second part of the first and second pleas in Case T-759/15);

– in the fifth series, breach of the principle of legal certainty and infringement of the rights of the defence, in so far as the Commission ordered that the aid at issue be recovered (third plea in Case T-759/15).

99. The Court will examine the pleas in the order of the series of pleas set out in paragraph 98 above.

*C – First series of pleas, alleging infringement of Articles 4 and 5 TEU, in so far as the Commission has allegedly engaged in tax harmonisation in disguise*

100. The Grand Duchy of Luxembourg claims, in essence, that the Commission exceeded its powers and infringed Articles 4 and 5 TEU by engaging in tax harmonisation in disguise, despite direct taxation falling within the exclusive competence of the Member States pursuant to Article 114 TFEU. It adds that the Commission established itself as a national 'tax administrations appeal chamber', by reviewing whether the tax ruling at issue was abnormal having regard to Luxembourg law and the OECD.

101. Ireland submits that the contested decision disturbs the division of powers between the European Union and the Member States established, in particular, by Article 3(6) TEU and Article 5(1) and (2) TEU, direct taxation being a matter that falls within the exclusive competence of the Member States. In its view, therefore, the Commission is engaging in harmonisation in disguise.

102. The Commission contests those arguments.

103. In essence, the parties disagree as to whether the Commission infringed the rules on the allocation of powers in so far as it allegedly engaged in tax harmonisation in disguise in the contested decision.

104. In that regard, it should be recalled that, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, intervention by the Member States in areas which have not been harmonised in the European Union, such as direct taxation, is not excluded from the scope of the rules on the monitoring of State aid. Accordingly, the Commission can classify a tax measure as State aid provided that the conditions for that classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28; of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81; and of 25 March 2015, *Belgium* v *Commission*, T-538/11, EU:T:2015:188, paragraphs 65 and 66).

105. It is true that, in the absence of EU rules governing the matter, it falls within the competence of the Member States to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97).

106. However, that does not mean that every tax measure, which affects, inter alia, the basis of assessment taken into account by the tax authorities, will escape the application of Article 107 TFEU. If such a measure in fact discriminates between companies that are in a comparable situation with regard to the objective of that tax measure and as a result confers selective advantages on the beneficiaries of the measure which favour 'certain' undertakings or the production of 'certain' goods, it can be considered State aid within the meaning of Article 107(1) TFEU (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104).

107. It follows from the foregoing that, since the Commission has the power to monitor compliance with Article 107 TFEU, it cannot be accused of having exceeded its powers when it examined the tax ruling at issue in order to determine whether it constituted State aid and, if it did, whether it was compatible with the internal market, within the meaning of Article 107(1) TFEU.

108. The Grand Duchy of Luxembourg is therefore wrong to claim that the Commission established itself as a tax appeal chamber for the Grand Duchy of Luxembourg, since the Commission merely exercised its powers under Article 107 TFEU in examining whether the tax ruling at issue complied with the law on State aid.

109. In those circumstances, it must be concluded that the Commission did not infringe Articles 4 and 5 TEU or Article 114 TFEU by adopting the contested decision.

110. That conclusion is not undermined by the arguments of the Grand Duchy of Luxembourg and Ireland.

111. First, in so far as the Grand Duchy of Luxembourg and Ireland claim that the Commission has engaged in tax harmonisation in disguise by disregarding the Luxembourg rules in order to conclude that the tax calculation did not comply with the arm's length principle and by relying on rules that are not part of the Luxembourg tax system, that argument must be rejected as unfounded.

112. It does indeed follow from the case-law set out in paragraph 105 above that the Commission does not, at this stage of the development of EU law, have the power autonomously to define the 'normal' taxation of an integrated undertaking, disregarding national tax rules.

113. However, although 'normal' taxation is defined by the national tax rules and the actual existence of an advantage must be demonstrated by reference thereto, the fact remains that, as is recalled in paragraph 106 above, a tax measure which affects the tax base that is taken into account by the tax authorities may come within the scope of Article 107(1) TFEU. Thus, when considering whether the tax ruling at issue complied with the rules on State aid, the Commission did not engage in any 'tax harmonisation' but exercised the power conferred on it by Article 107(1) TFEU notably by verifying, in a specific case, whether that tax ruling conferred on its beneficiary an advantage as compared to 'normal' taxation, as defined by national tax law.

114. Second, the Grand Duchy of Luxembourg and Ireland claim that the contested decision creates 'total legal uncertainty', not only in the Member States but also in third countries, that that measure has been strongly criticised notably by leaders of the United States of America, that it is a 'first' which is illegal and that it will cause the Member States to notify all their tax rulings and to question existing tax rulings. Such arguments must be rejected as unfounded.

115. First, it does not follow from the contested decision that the Commission has concluded that every tax ruling necessarily constitutes State aid within the meaning of Article 107 TFEU. Provided that it does not grant any selective advantage, notably in that it does not result in a reduction of the tax burden of its beneficiary by derogating from the 'normal' taxation rules, such a tax ruling does not constitute State aid within the meaning of Article 107 TFEU and is not subject to a notification obligation under Article 2 of Regulation 2015/1589.

116. Second, contrary to what is maintained by the Grand Duchy of Luxembourg and Ireland, the contested decision does not create 'total legal uncertainty' in the Member States or third countries. It merely represents the application to the tax ruling at issue of Articles 107 and 108 TFEU, according to which a State measure which constitutes aid that is incompatible with the internal market is prohibited and the aid must be recovered.

117. It follows from all of the foregoing that the plea intended to establish that the Commission has engaged in tax harmonisation in disguise must be rejected as unfounded.

*D – Second series of pleas, alleging the absence of an advantage*

1. Preliminary observations

118. As a preliminary point, it must be borne in mind that, according to the case-law, classification as State aid requires all the conditions referred to in Article 107 TFEU to be fulfilled. It is thus established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and, fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

119. In the present case, it must be noted that, as is apparent from paragraphs 21 to 37 above, in the contested decision, the Commission examined the two criteria of the existence of an advantage and the selectivity of the measure at issue concurrently.

120. Specifically, principally, the Commission considered that the tax ruling at issue conferred a selective advantage on FFT with regard to the general Luxembourg corporate income tax system, because the methodology accepted in that tax ruling did not comply with the arm's length principle, which necessarily formed part of the Commission's assessment under Article 107(1) TFEU of tax measures granted to group companies, independently of whether a Member State had incorporated that principle into its national legal system, and according to which intra-group transactions should have been remunerated as if they had been negotiated between independent undertakings ('the arm's length principle as described by the Commission in the contested decision') (see recitals 219 to 231 of the contested decision and, in particular, recital 228 of that decision). The Commission then set out, in recitals 234 to 311 of the contested decision, its reasoning according to which the methodology for determining FFT's taxable profit, accepted by the tax ruling at issue, could not result in a reliable approximation of an outcome obtained under market conditions (arm's length outcome).

121. Moreover, as a subsidiary point, the Commission considered that the tax ruling at issue conferred an advantage on FFT because it derogated from Article 164(3) of the Tax Code and the Circular, which established the arm's length principle under Luxembourg law (see recitals 316 and 317 of the contested decision). The Commission then referred to its analysis, according to which the method validated by the tax ruling at issue could not result in a reliable approximation of a market-based outcome, as set out in the context of its main line of reasoning (see recitals 234 to 311 of the contested decision).

122. The Commission's approach of examining the criteria of advantage and selectivity concurrently is not in itself incorrect, in so far as, as the Commission observes, both the advantage and the selective nature of that advantage are examined. Nevertheless, the Court considers it appropriate to consider, first of all, whether the Commission was entitled to conclude that there was an advantage, before going on, if necessary, to examine whether that advantage had to be considered to be selective.

123. In that regard, it must be noted that, although some of the arguments raised by the Grand Duchy of Luxembourg and FFT, including those put forward in the second part of the first plea of the Grand Duchy of Luxembourg, are presented as relating to the selectivity of the measure at issue, the Court considers that they are also intended to elicit a finding that the Commission wrongly concluded that the measure at issue conferred an advantage on FFT. The Court will therefore examine the arguments raised in the second part of the first plea of the Grand Duchy of Luxembourg in conjunction with the pleas challenging the Commission's conclusion that the tax ruling at issue conferred an advantage on FFT.

124. In the light of these observations, the Court will examine the pleas put forward in support of the argument that FFT did not enjoy an advantage, distinguishing, first, the complaints made in respect of the Commission's principal line of reasoning and, second, those relating to what was set out as a subsidiary line of reasoning. Third, the Court will examine the complaint by which the Grand Duchy of Luxembourg argues that the Commission has failed to prove the existence of an advantage at the level of the Fiat/Chrysler group.

2. The Commission's principal line of reasoning, that the tax ruling at issue derogated from the general Luxembourg corporate income tax system

125.The pleas put forward by the Grand Duchy of Luxembourg and FFT to challenge the examination of the advantage, the principal facet of the Commission's approach, may be summarised as follows. First, the Grand Duchy of Luxembourg and FFT, supported by Ireland, dispute the existence of the arm's length principle as described by the Commission in the contested decision and the Commission's application of that principle as a criterion for assessing the existence of a selective advantage. Second, the Grand Duchy of Luxembourg disputes the Commission's conclusion that the method validated by the tax ruling at issue for determining the amount of tax payable by FFT does not comply with the arm's length principle.

*a. Pleas alleging an error in the application of the arm's length principle in the monitoring of State aid*

126. In essence, the Grand Duchy of Luxembourg and FFT claim that the Commission identified an arm's length principle that is specific to EU law, in breach of the fiscal autonomy of the Member States, and that it examined the tax ruling at issue in the light of that principle, without taking account of Luxembourg law. They also submit that, by applying the arm's length principle as described in the contested decision, the Commission breached the principles of legal certainty and protection of legitimate expectations, and failed to fulfil its obligation to state reasons.

127. The Commission contests those arguments.

128. It will be recalled that, in recitals 219 to 231 of the contested decision, the Commission explained that it was entitled, in order to identify a selective advantage, to examine whether a tax ruling, such as that at issue, deviated from the arm's length principle as described in the contested decision. It then outlined the scope of that arm's length principle.

129. First and foremost, it must be noted that, as is apparent in particular from recitals 216, 231 and 311 of the contested decision, the examination in the light of the arm's length principle as described by the Commission in the contested decision forms part of its principal analysis of the selective advantage. As is apparent from recitals 216, 219 and 301 of the contested decision, that analysis entails examining whether the tax ruling at issue derogates from the general Luxembourg corporate income tax system. It must be noted in that regard that the Commission had previously indicated, in recitals 194 to 199 of the contested decision, that the objective of the general Luxembourg corporate income tax system was to tax the profits of all companies resident in Luxembourg, whether or not integrated, and that both types of company are in a similar factual and legal situation in the light of that objective.

130. As regards the definition of the arm's length principle, the Commission asserted, in recitals 222 and 225 of the contested decision, that, according to that principle, intra-group transactions should be remunerated as if they had been agreed to by independent companies. It added, in recital 226 of the contested decision, that the purpose of that principle was to ensure that intra-group transactions were treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by inde-

pendent companies. The Commission moreover argued during the hearing that the arm's length principle was, in its view, a tool for assessing the price level of intra-group transactions.

131. With regard to the legal nature of the arm's length principle, the Commission considered, in recital 228 of the contested decision, that the arm's length principle necessarily formed part of the assessment, under Article 107 TFEU, of tax measures granted to group companies, irrespective of whether the Member State had incorporated that principle into its national legal system. It stated that the arm's length principle which it was applying was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU. The Commission based that statement on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416) concerning the tax regime for coordination centres in Belgium, in which the Court of Justice had held that the method for determining taxable income under that regime conferred a selective advantage on those centres. Specifically, the Commission referred to paragraph 96 of that judgment, in which the Court of Justice held that the effect of the method of assessment of the taxable income of the centres '[was] that the transfer prices [did] not resemble those which [were] charged in conditions of free competition'.

132. As regards the application of the arm's length principle, in recital 227 of the contested decision, the Commission indicated that, 'the Commission's assessment of whether [the Grand Duchy of] Luxembourg [had] granted a selective advantage to FFT [had] therefore [to] consist in verifying whether the methodology accepted by the Luxembourg tax administration by way of the [tax ruling at issue] for the determination of FFT's taxable profits in Luxembourg depart[ed] from a methodology that [led] to a reliable approximation of a market-based outcome and thus from the arm's length principle'. It added, in recital 228 of the contested decision, that the arm's length principle was used to establish whether the taxable profit of a group company for corporate income tax purposes had been determined on the basis of a methodology that approximated market conditions, so that that company was not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit was determined by the market.

133. The Court must thus consider whether the Commission was entitled to analyse the measure at issue in the light of the arm's length principle as described in the contested decision and set out in paragraphs 130 to 132 above, which consists in verifying whether intra-group transactions are remunerated as if they had been negotiated under market conditions.

134. As has been stated in paragraph 104 above, according to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, intervention by the Member States in matters of direct taxation, even if it relates to issues that have not been harmonised in the European Union, is not excluded from the scope of the rules on the monitoring of State aid.

135. It follows that the Commission can classify a tax measure as State aid provided that the conditions for that classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28, and of 22 June 2006, *Belgium and Forum 187* v *Commission*, C-182/03 and C-217/03, EU:C:2006:416, paragraph 81). Member States must exercise their competence in respect of taxation in accordance with EU law (judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37). Consequently, Member States must refrain from taking, in that context, any measure likely to constitute State aid that is incompatible with the internal market.

136. As regards the condition that the measure at issue must grant an economic advantage, it should be borne in mind that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

137. Specifically, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see also judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

138. In the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Accordingly, such a measure confers an economic advantage on its recipient if it mitigates the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

139. Consequently, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 114), and under the normal rules of taxation.

140. In the context of determining the fiscal position of an integrated company which is part of a group of undertakings, it must be noted at the outset that the pricing of intra-group transactions carried out by that company is not determined under market conditions. That pricing is agreed to by companies belonging to the same group, and is therefore not subject to market forces.

141. Where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. In those circumstances, it must be held that, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated undertaking, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under the national law of an undertaking placed in a comparable factual situation, carrying on its activities under market conditions.

142. Furthermore, and as the Commission correctly stated in the contested decision, those findings are supported by the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416) concerning Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the 'ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'.

143. In that context, although, through that fiscal measure granted to an integrated company, the national authorities have accepted a certain level of pricing for an intra-group transaction, Article 107(1) TFEU allows the Commission to check whether that pricing corresponds to pricing under market conditions, in order to determine whether, as a result, charges normally included in the budget of the undertaking concerned are mitigated, thus conferring on that undertaking an advantage within the meaning of that article. The arm's length principle, as described by the Commission in the contested decision, is thus a tool for making that determination in the exercise of the Commission's powers under Article 107(1) TFEU. The Commission also stated, correctly, in recital 225 of the contested decision, that the arm's length principle was a 'benchmark' for establishing whether an integrated company was receiving, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU.

144. It should also be stated that when the Commission uses that tool to check whether the taxable profit of an integrated undertaking pursuant to a tax measure corresponds to a reliable approximation of a taxable profit generated under market conditions, the Commission can identify an advantage within the meaning of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation.

145. In the present case, the tax ruling at issue concerns the determination of FFT's remuneration for its intra-group financing and treasury activities for the purpose of establishing its taxable profit under the Luxembourg Tax Code the objective of which, irrespective of whether the normal rules of taxation are to be broadly or narrowly defined, is to tax integrated and stand-alone undertakings in Luxembourg in the same way with regard to corporate income tax. The Commission was therefore in a position to verify whether FFT's taxable profit pursuant to the tax ruling at issue was lower than its tax burden in the absence of that tax ruling and under the normal rules of taxation in Luxembourg law. Given that FFT is an integrated undertaking and that the Luxembourg Tax Code is intended to tax the profit resulting from the economic activity of such an integrated undertaking as if it had resulted from transactions carried out at market prices, it is necessary, in examining the tax ruling at issue, to compare FFT's taxable profit as a result of the application of that tax ruling with the

position, as it would be if the normal tax rules under Luxembourg law were applied, of an undertaking in a factually comparable situation, carrying on its activities in conditions of free competition. Against that background, although the tax ruling at issue accepted a certain level of pricing for intra-group transactions, it is necessary to check whether that pricing corresponds to prices that would have been charged under market conditions.

146. In that context, it must be stated that, with regard to the examination as to whether an integrated undertaking has obtained an advantage within the meaning of Article 107(1) TFEU, the Commission cannot be criticised for having used a methodology for determining transfer pricing that it considers appropriate in this instance in order to examine the level of transfer pricing for a transaction or for several closely connected transactions forming part of the contested measure. The Commission is nevertheless required to justify its choice of methodology.

147. Even though the Commission correctly observed that it cannot be formally bound by the OECD Guidelines, the fact remains that those guidelines are based on important work carried out by groups of renowned experts, that they reflect the international consensus achieved with regard to transfer pricing and that they thus have a real practical significance in the interpretation of issues relating to transfer pricing, as the Commission acknowledged in recital 87 of the contested decision.

148. Consequently, the Commission correctly concluded that it was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions. That finding is not called into question by the other arguments of the Grand Duchy of Luxembourg and FFT.

149. First, as regards FFT's argument that the Commission failed to provide any legal basis for its arm's length principle, it must admittedly be pointed out that, in recitals 228 and 229 of the contested decision, the Commission stated that the arm's length principle as described in the contested decision existed independently of the incorporation of that principle into the national legal system. It also made clear that it had not examined whether the tax ruling at issue complied with the arm's length principle laid down in Article 164(3) of the Tax Code or in the Circular, which incorporate the arm's length principle into Luxembourg law. The Commission also confirmed that the arm's length principle which it applied was distinct from that enshrined in Article 9 of the OECD Model Tax Convention.

150. However, the Commission also made clear, in recital 228 of the contested decision, that the arm's length principle necessarily formed part of the examination, under Article 107(1) TFEU, of tax measures granted to group companies and that the arm's length principle was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU.

151. It is therefore apparent from the contested decision that the arm's length principle, as described by the Commission, is a tool which it used, correctly, in the context of the examination carried out under Article 107(1) TFEU.

152. It is true that, at the hearing, the Commission stated that the arm's length principle as described in the contested decision did not fall within EU law, or international law, but that it was inherent in the ordinary system of taxation as provided for by national law. Thus, according to the Commission, if a Member State chooses, in the context of its national tax system, the approach of the separate legal entity, according to which tax law is concerned with legal entities, and not with economic entities, the arm's length principle is necessarily a corollary of that approach, which is binding in the Member State concerned, independently of whether the arm's length principle has, expressly or impliedly, been incorporated into national law.

153. In that regard, the Grand Duchy of Luxembourg and FFT indicated at the hearing that, by those assertions, the Commission seemed to be changing its stance on the arm's length principle as described in the contested decision. However, on the assumption that the interpretation put forward by the Grand Duchy of Luxembourg and FFT is found to be correct, it must be stated, in any event, that the Commission cannot change the legal basis of the arm's length principle, as set out in the contested decision, at the hearing stage (see, to that effect, judgment of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 116). In all events, it must be noted that the clarification provided at the hearing does not call into question the finding in paragraph 151 above that it is apparent from the contested decision that the arm's length principle is being applied in the context of the examination under Article 107(1) TFEU. It is, moreover, apparent from all of the written submissions of the Grand Duchy of Luxembourg and FFT that they understood the contested decision to mean that the arm's length principle as described by the Commis-

sion in the contested decision was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU.

154. The Court must therefore reject FFT's argument that the Commission did not provide any legal basis for the arm's length principle as described in the contested decision.

155. Second, in so far as FFT maintains that the Commission failed to define the content of the arm's length principle as described in the contested decision, suffice it to note that it is apparent from the contested decision that that principle is a tool for checking that intra-group transactions are remunerated as though they had been negotiated between independent undertakings (see paragraph 151 above). That argument must therefore be rejected.

156. Third, the Grand Duchy of Luxembourg criticises the Commission, in essence, for having examined the tax ruling at issue in the light of the arm's length principle as described in the contested decision even though that is a criterion that is extraneous to Luxembourg tax law. It maintains that the arm's length principle as described by the Commission in the contested decision would enable the Commission to prescribe methodological standards for determining taxable profit which do not appear in national legislation, and that that would result in the harmonisation in disguise of direct taxation, contrary to the fiscal autonomy of the Member States. That argument must, however, be rejected.

157. Suffice it to note in that regard that, as has been stated in paragraphs 138 and 141 above, although 'normal' taxation is defined by the national tax rules and the actual existence of an advantage must be demonstrated by reference thereto, the fact remains that if those national rules provide that integrated companies are to be taxed on the same terms as stand-alone companies, Article 107(1) TFEU allows the Commission to check whether the pricing of intra-group transactions, accepted by the national authorities for determining the taxable base of an integrated undertaking, corresponds to prices that would have been charged at arm's length.

158. Consequently, when the Commission examines whether the method validated by a national tax measure leads to an outcome that has been achieved in a manner consistent with the arm's length principle as defined in paragraph 151 above, it is not exceeding its powers.

159. In addition, to the extent that the Grand Duchy of Luxembourg and FFT maintain that the Commission made an assessment in the light of the arm's length principle without considering the existence of an advantage having regard to national tax law, suffice it to note that it is clear from recitals 231, 266, 276, 291, 301 and 339 of the contested decision that the Commission examined whether the tax ruling at issue resulted in a reduction of FFT's tax burden as compared with the tax that it would otherwise have had to pay under Luxembourg rules of taxation. It did therefore examine whether the tax ruling at issue had resulted in a lowering of the tax burden under national legislation. While the Commission did, in that context, carry out its examination in the light of the arm's length principle, it used that principle, as has been noted in paragraph 151 above, as a tool enabling it to verify whether FFT's transfer pricing had been artificially lowered in comparison with a situation in which prices would have been established under market conditions. Consequently, the argument that the Commission substituted an extraneous rule for Luxembourg rules of tax law must be rejected.

160. Fourth, FFT and Ireland submit, in essence, that the Commission wrongly asserted, in the contested decision, that there was a general principle of equal treatment in taxation.

161. It is true that the Commission indicated, in recital 228 of the contested decision, that the arm's length principle was a general principle of equal treatment in taxation, which fell within the scope of Article 107(1) TFEU. However, that wording must not be taken out of context and cannot be interpreted as meaning that the Commission asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU, which would give that article too broad a scope.

162. In any event, it is implicitly but necessarily evident from recitals 222 to 231 of the contested decision, and in particular from recitals 226 and 229 of that decision, that the arm's length principle as described by the Commission in the contested decision was perceived by the Commission only as a tool enabling it to check that intra-group transactions are remunerated as though they had been negotiated between independent companies. The argument of FFT and Ireland does not alter the finding in paragraph 146 above that the Commission was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions.

163. Accordingly, the Court must reject the argument of FFT and Ireland in that respect.

164. Fifth, FFT claims that the Commission deviated in the contested decision from the conception of the arm's length principle that it had used in the opening decision. It submits, in that regard, that the Commission had referred, in recitals 14 and 62 of the opening decision, to Article 9 of the OECD Model Tax Convention.

165. It must be pointed out in that regard that FFT does not draw any legal inference from its claim that the arm's length principle as described by the Commission in the contested decision differs from the arm's length principle to which the Commission referred in the opening decision. Consequently, that argument must be rejected as ineffective.

166. In any event, that argument must also be rejected as unfounded.

167. First, although the Commission referred, in recital 14 of the opening decision, to the '"arm's length principle" as set [out] in Article 9 of the OECD Model Tax Convention', that reference appeared in the section entitled 'Introduction to transfer pricing rulings'. It is not evident from recital 14 of the opening decision, invoked by FFT, that the Commission based its provisional assessment on Article 9 of the OECD Model Tax Convention. Likewise, although the Commission referred, in recital 62 of the opening decision, invoked by FFT, to the OECD Guidelines, the Commission presents them only as a 'reference document' or as 'appropriate guidance'. This presentation is no different from the Commission's presentation of those guidelines in the contested decision.

168. Second, it must be noted that it is apparent from recitals 58 and 59 of the opening decision that, even at that stage of the procedure, the Commission explained its stance that it can apply the arm's length principle, in the context of its review under Article 107 TFEU, for the purpose of examining whether a tax measure confers a selective advantage on an integrated undertaking.

169. In that regard, it must be noted that, in recital 61 of the opening decision, the Commission explained that a method of taxation applied to transfer pricing that does not comply with the arm's length principle and leads to a lowering of the taxable base of its beneficiary would confer an advantage. It based that statement on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), as it subsequently did in the contested decision.

170. Sixth, the Court must reject FFT's argument that the Commission's position on the arm's length principle departed from its previous practice in taking decisions, in so far as that practice in other cases cannot affect the validity of a contested decision, which can be assessed only in the light of the objective rules of the FEU Treaty (see, to that effect, judgment of 20 May 2010, *Todaro Nunziatina & C.*, C-138/09, EU:C:2010:291, paragraph 21).

171. Seventh, inasmuch as FFT indicates that the Commission was very opaque with regard to the concept of the arm's length principle adopted by the Commission, refusing to provide FFT with the slides the Commission had used at a conference on State aid in Brussels, that argument must be rejected as ineffective. The Commission's position concerning the arm's length principle can be seen from recitals 219 to 231 of the contested decision, and therefore the fact that it failed to provide slides after a conference has no bearing on the lawfulness of the contested decision.

172. Eighth, FFT submits that the arm's length principle as described by the Commission in the contested decision is distinct from that used by the OECD. It submits that the OECD allows for 'appropriate adjustments', such as shareholdings in its subsidiaries not being taken into account in calculating the remuneration of FFT's functions. According to FFT, that is, moreover, explained in the report by an economic consultancy company that is annexed to the application. That argument must be rejected as, in part, inadmissible and, in part, unfounded.

173. As regards the assertion that the arm's length principle is distinct from that used by the OECD, FFT does not advance any specific argument, with the exception of that relating to the taking into account of its shareholdings. In so far as FFT claims that the Commission disregarded paragraph 2.74 of the OECD Guidelines, according to which appropriate adjustments must be made in applying the TNMM, it must be noted not only that the Commission, as has been stated in paragraph 147 above, is not formally bound by those guidelines but that, contrary to FFT's contention, the Commission did not rule out the possibility of making 'appropriate adjustments'. The Commission merely found that, in the present case, the exclusion of FFT's shareholdings in FFNA and FFC was not justified, an issue which will, moreover, be examined in paragraphs 273 to 278 below.

174. Furthermore, in so far as FFT refers to the report of an economic consultancy company in which an expert put forward arguments to show that the Commission should not have taken into account FFT's shareholdings in the subsidiaries, the reference to that line of argument is, in accordance with settled case-law, inadmissible, as it does not appear in the actual body of the application. It should be borne in mind that, according to the

case-law, although the text of the application may be supported and supplemented in regard to specific points by references to particular passages in documents appended thereto, a general reference to other documents cannot compensate for the lack of essential information in the application itself, even if those documents are attached to the application, since the annexes have a purely evidential and instrumental function (see judgment of 30 January 2007, *France Télécom* v *Commission*, T-340/03, EU:T:2007:22, paragraph 167 and the case-law cited).

175. Moreover, and in any event, even on the assumption that the Commission failed, wrongly, to make the ‘appropriate adjustments’ to which FFT refers, it should be noted that that would not alter the finding that FFT has not put forward any argument that would serve to explain why the arm’s length principle used by the Commission is allegedly incorrect. The fact that ‘appropriate adjustments’ are provided for by the OECD Guidelines to take account of each factual situation, and that the circumstances giving rise to such adjustments may exist in the present case, does not call into question the finding that, in essence, the arm’s length principle requires integrated undertakings to charge transfer prices that reflect those which would be charged under conditions of competition, which corresponds to the examination undertaken by the Commission in the contested decision.

176. Ninth, the Court must reject the argument of the Grand Duchy of Luxembourg that the arm’s length principle as described by the Commission in the contested decision is subjective and arbitrary. First, it is sufficient to note that the examination in the light of the arm’s length principle consists, as is evident from recital 231 of the contested decision, in examining whether the methodology for the determination of transfer pricing accepted in the tax ruling at issue can result in a reliable approximation of a market-based outcome. Second, the Commission refers broadly, for the purposes of its analysis, to the OECD Guidelines, about which there is a broad consensus. The Grand Duchy of Luxembourg and FFT do not, moreover, dispute that last point.

177. Tenth, FFT submits that the Commission failed to explain how it had derived the arm’s length principle as described in the contested decision, or the content of that principle, contrary to its obligation to state reasons, as laid down in Article 296 TFEU.

178. In that regard, it should be borne in mind that, according to settled case-law, the statement of reasons required by Article 296(2) TFEU must be appropriate to the measure at issue and disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296(2) TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 73 and the case-law cited).

179. In the present case, it has already been found, in paragraphs 149 to 151 and 154 above, that, contrary to FFT’s submission, the Commission specified the legal basis and the content of the arm’s length principle in recitals 219 to 231 of the contested decision. It must therefore be held that, so far as those issues are concerned, the reasons given for the contested decision are sufficient. As has been stated in paragraph 153 above, it is, moreover, apparent from all of the written submissions of the Grand Duchy of Luxembourg and FFT that they understood the contested decision to mean that the arm’s length principle as described by the Commission in that decision was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU.

180. Eleventh, in so far as FFT claims that the arm’s length principle as described by the Commission in the contested decision in recitals 219 to 231 and, specifically, in recital 228 of the contested decision introduces legal uncertainty and confusion so that it is difficult to understand whether a tax ruling based on transfer pricing will infringe the law on State aid or not, that argument must be rejected.

181. According to the case-law, the principle of legal certainty, which is a general principle of EU law, requires that legal rules be clear and precise, and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (judgment of 15 February 1996, *Duff and Others* v *Commission*, C-63/93, EU:C:1996:51, paragraph 20).

182. It must be borne in mind that the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 87). It follows from this that Article 107 TFEU prohibits any aid measure, irrespective of its form or the legislative means used to grant such aid (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 79).

183. Moreover, it should be noted that Luxembourg tax law provides that integrated undertakings and stand-alone undertakings are subject, under the same conditions, to corporate income tax. In those circumstances, it was foreseeable that the Commission would be able to verify, in the examination provided for by Article 107 TFEU, whether the methodology for determining transfer pricing accepted in the tax ruling deviated from pricing that would have been set under market conditions, in order to examine whether that tax ruling conferred an advantage on its beneficiary.

184. In any event, in so far as FFT merely asserts that, in its view, the wording of recital 228 of the contested decision lacks clarity and generates legal uncertainty, it is sufficient to observe that the contested decision must be read as a whole. As is apparent from paragraphs 130 to 132 above, the Commission specified, in the contested decision, the definition, scope and legal nature of the arm's length principle. In addition, as has been stated in paragraph 115 above, it does not follow from the contested decision that the Commission found that every tax ruling necessarily constitutes State aid within the meaning of Article 107 TFEU. Provided that it does not grant any selective advantage, notably in that it does not result in a reduction of the tax burden of its beneficiary, such a tax ruling does not constitute State aid within the meaning of Article 107 TFEU and is not subject to a notification obligation under Article 2 of Regulation 2015/1589.

185. Twelfth, in so far as FFT maintains that the Commission breached the principle of protection of legitimate expectations since no one foresaw, or could have foreseen, that the Commission would apply an arm's length principle other than that of the OECD, this complaint must be rejected.

186. Suffice it to recall that, according to settled case-law, any economic operator whom an institution has, by giving him precise assurances, caused to entertain justified expectations may rely on the principle of protection of legitimate expectations (see judgment of 24 October 2013, *Kone and Others* v *Commission*, C-510/11 P, not published, EU:C:2013:696, paragraph 76 and the case-law cited). In the present case, however, FFT has neither established nor even claimed in what respect it might have received precise assurances from the Commission that the tax ruling at issue would not fulfil the requirements for aid within the meaning of Article 107 TFEU. Furthermore, the mere fact that, in FFT's view, the Commission expressly based certain earlier State aid decisions on the arm's length principle laid down in Article 9 of the OECD Model Tax Convention does not amount to precise assurances within the meaning of the case-law set out above.

187. In those circumstances, all the complaints put forward by the Grand Duchy of Luxembourg and FFT concerning the arm's length principle as described by the Commission in the contested decision must be rejected as, in part, unfounded and, in part, ineffective.

*b. Plea regarding an incorrect method of calculation in the determination of FFT's remuneration*

188. The Grand Duchy of Luxembourg claims, in essence, that the tax ruling at issue did not confer an advantage on FFT, as it did not involve a reduction of the amount of tax paid by FFT. In that context, the Grand Duchy of Luxembourg disputes the existence of alleged errors in the methodology for calculating FFT's remuneration that were allegedly validated by the Luxembourg tax authorities, and to which the Commission referred in the contested decision.

189. The Commission contests the arguments of the Grand Duchy of Luxembourg.

*1. Preliminary observations*

190. By the second part of its first plea, the Grand Duchy of Luxembourg states that the Commission failed to demonstrate that the methodology validated in the tax ruling at issue did not comply with the arm's length principle, whether that is the arm's length principle incorporated into Luxembourg national law, the OECD Guidelines or the arm's length principle as described by the Commission in the contested decision.

191. In essence, the Grand Duchy of Luxembourg disputes the five errors in the methodology for calculating FFT's remuneration that were identified by the Commission.

192. First of all, the Grand Duchy of Luxembourg challenges, in essence, the Commission's assessment that FFT's capital should not have been segmented, as a single rate should have been applied to FFT's accounting equity in its entirety ('the first error').

193. Next, the Grand Duchy of Luxembourg submits that, contrary to the Commission's assertion in the contested decision, it did not make an error by endorsing the use of hypothetical regulatory capital ('the second error') or in calculating the amount of that hypothetical regulatory capital ('the third error'). Further, it denies that it made an error in accepting the deduction of FFT's shareholdings in FFC and FFNA ('the fourth error'). The second, third and fourth errors are connected to the first error, relating to the segmentation of the capital.

194. Last, the Grand Duchy of Luxembourg takes issue with a fifth error identified by the Commission, concerning the calculation of the rate of return of 6.05%, applied to the hypothetical regulatory capital ('the fifth error').

195. Although the five errors contested by the Grand Duchy of Luxembourg were not clearly identified as such in the contested decision, in particular the first error, relating to the segmentation of the capital, it must be noted that those five errors are apparent, in essence, from the text of that decision.

196. It will be recalled that the Commission found, in recitals 248 to 301 of the contested decision (Sections 7.2.2.5 to 7.2.2.9 of that decision), that the methodology for determining the remuneration for FFT's financing activity, endorsed by the tax ruling at issue, contained several errors in the methodological choices and in the choices of parameters and adjustments. In that regard, it must be noted that the errors identified concern, on the one hand, the amount of capital to be remunerated, namely the profit level indicator, and, on the other, the rate of return to be applied.

197. As regards, first, the amount of capital to be remunerated, the Commission considered, in essence, that the decision to segment the capital into three categories to be subject to different rates of return is incorrect, which corresponds to the first error. As can be seen, in particular, from recitals 265, 278 and 287 of the contested decision, the Commission found that a single rate of return should have been applied to the accounting equity in its entirety. The Commission thus stated, in recital 265 of the contested decision, that using accounting equity would have obviated the need to calculate a separate 'functions remuneration'.

198. The first error underlies the second, third and fourth errors, each of which is addressed in a clearly identified section of the contested decision. First of all, in recitals 249 to 266 of the contested decision (Section 7.2.2.6 of that decision), the Commission found that the use of hypothetical regulatory capital as a profit level indicator was incorrect, which corresponds to the second error. Next, in recitals 267 to 276 of the contested decision (Section 7.2.2.7), the Commission stated that, even if the hypothetical regulatory capital could be used, the application by analogy of the Basel II framework, for the purpose of determining the level of FFT's hypothetical regulatory capital, was incorrect, which corresponds to the third error. Last, in recitals 277 to 291 of the contested decision (Section 7.2.2.8), the Commission found that the deduction of the FFNA and FFC shareholdings was incorrect, which corresponds to the fourth error.

199. As regards, second, the rate of return, the Commission considered, in recitals 292 to 301 of the contested decision (Section 7.2.2.9), that the level of the rate of return on capital to be remunerated, calculated as 6.05%, using the CAPM, was incorrect, which corresponds to the fifth error.

200. The Court will therefore examine in turn each of the five errors identified by the Commission and disputed by the Grand Duchy of Luxembourg, as set out in paragraphs 196 to 199 above.

201. In that regard, the Court notes that, in connection with the second part of the first plea in Case T-755/15, the Grand Duchy of Luxembourg and the Commission disagree as to the scope of the review which the Commission was entitled to carry out in respect of the methodology used by the Grand Duchy of Luxembourg to calculate FFT's remuneration in the tax ruling at issue, given the inherent uncertainties in the evaluation of transfer pricing and the fact that this represented an intrusion into the national authorities' freedom to act.

202. It must be borne in mind that, in its review of State aid, the Commission must, in principle, provide proof in the contested decision of the existence of the aid (see, to that effect, judgments of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 34, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 95). In that context, the Commission is required to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting a final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible (see, to that effect, judgments of

2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).

203. By contrast, it is for the Member State which has made a distinction between undertakings to show that it is actually justified by the nature and the general scheme of the system in question. The concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see, to that effect, judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraphs 120 and 121 and the case-law cited).

204. In the light of the above, it was for the Commission to show, in the contested decision, that the requirements for a finding of State aid, within the meaning of Article 107(1) TFEU, were met. In that regard, it must be held that, while it is common ground that the Member State has a margin of appreciation in the approval of transfer pricing, that margin of appreciation cannot lead to the Commission being deprived of its power to check that the transfer pricing in question does not lead to the grant of a selective advantage within the meaning of Article 107(1) TFEU. In that context, the Commission must take into account the fact that the arm's length principle allows it to verify whether the transfer pricing accepted by a Member State corresponds to a reliable approximation of a market-based outcome and whether any variation that may be identified in the course of that examination does not go beyond the inaccuracies inherent in the methodology used to obtain that approximation.

205. The Grand Duchy of Luxembourg and the Commission also disagree as to the extent to which the Court can review the Commission's assessments in relation to the calculation of FFT's taxable profit. According to the Commission, the Court should undertake a limited review of those economic findings, which are complex. In that regard, it should be noted that, as is clear from Article 263 TFEU, the object of an action for annulment is to review the legality of the acts adopted by the EU institutions named therein. Consequently, the analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see, to that effect, judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 84).

206. In the field of State aid, it must be recalled that State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgments of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 15, and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87).

207. As to whether a method for determining transfer pricing of an integrated company complies with the arm's length principle, it should be borne in mind that, as has already been indicated above, when using that tool in carrying out its assessment under Article 107(1) TFEU, the Commission must take into account its approximate nature. The purpose of the Court's review is therefore to verify whether the errors identified in the contested decision, and on the basis of which the Commission found there to be an advantage, go beyond the inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome.

208. The various errors identified by the Commission must be examined in the light of these matters.

*2. The first error, relating to the failure to take into consideration the whole of FFT's equity*

209. The Grand Duchy of Luxembourg submits that the Commission wrongly considered it appropriate to take into consideration the whole of the accounting equity in order to apply a uniform return of 10% to FFT, irrespective of its various activities. It maintains that the methodology accepted by the tax ruling at issue applies the principle of 'functional analysis' in a manner that is consistent with Luxembourg rules and OECD rules, to take account of the mixed nature of FFT's activities, taking into consideration the assets used and risks assumed. According to the Grand Duchy of Luxembourg, it is therefore appropriate to isolate, for the purpose of determining FFT's remuneration, the assets or the capital connected with the operation of relevant transactions or functions, so that only operating assets and capital employed are to be taken into account, in accordance with the OECD Guidelines. It submits that those requirements are transposed by the Circular, in so far as, first, the Circular excludes holding functions from its scope; second, it reproduces the terminology of the OECD Guidelines; and, last, it identifies the capital covering the risks related to financing activities.

210. The Commission contests those arguments.

i. Observations on the tax ruling at issue

211. First, as is apparent from the tax ruling at issue and as was stated in the contested decision (see in particular recital 70 of that decision), the tax ruling at issue relates to the determination of FFT's remuneration for its intra-group financing and treasury activities. FFT's tax liability in Luxembourg is then calculated by applying the standard corporate tax rate applicable in Luxembourg to the net profits earned by FFT on the basis of the remuneration accepted by the tax ruling at issue.

212. In that regard, first of all, it must be recalled that the tax ruling at issue determines FFT's remuneration for transactions falling within its intra-group financing and treasury activities. It is common ground that that type of transaction is subject to tax under the Tax Code.

213. Next, the parties do not dispute that, since the transactions that constitute FFT's intra-group financing and treasury activities are intra-group transactions, the tax ruling at issue concerns the determination of transfer pricing for those transactions at a level corresponding to the level that would have been charged if that type of transaction had been concluded between stand-alone companies, subject to market conditions. Nor do they dispute that that tax ruling allows FFT to determine its taxable base in Luxembourg.

214. Last, in the contested decision, the Commission did not take issue with the choice, endorsed by the tax ruling at issue, of the TNMM as the method for determining the appropriate level of transfer pricing for transactions that constitute FFT's financing and treasury activities. In that regard, it is common ground that the correct application of the TNMM, in this instance, consists of an analysis of the return on capital.

215. The parties disagree therefore, in essence, only as to the level of FFT's remuneration for transactions falling within its intra-group financing and treasury activities.

216. Second, as is apparent from the transfer pricing report, and as the Commission found in Table 2 of the contested decision and in recitals 61, 62, 65 and 70 of that decision, for the purposes of calculating the return on capital, the report segmented FFT's equity, the total amount of which is EUR 287 477 000, into three categories of funds:

– first, the hypothetical regulatory capital, within the meaning of the Basel II framework, to remunerate the 'risks', that is EUR 28 523 000, to which a rate of return of 6.05% is applied;

– second, the equity used to offset the shareholdings in FFNA and FFC, and linked to FFT's 'holding' activities, that is EUR 165 244 000, on which no return was applied;

– last, the equity used to perform the 'functions', that is EUR 93 710 000, to which a rate of return of 0.87% is applied. This corresponds to the total accounting equity, minus the hypothetical regulatory capital and the amount of FFT's shareholdings in FFNA and FFC.

217. In that respect, the parties do not dispute that the segmentation of the capital limits the capital base taken into account for the purpose of calculating that return. They disagree, in essence, on the principle itself, in the context of the TNMM, of assigning capital to specific functions that are subject to different rates of return. The Grand Duchy of Luxembourg and FFT take the view that that segmentation of the capital is not only consistent with the OECD Guidelines and the Circular but is also appropriate in view of the different activities of FFT. According to the Commission, however, such segmentation is wrong.

218. The Court must therefore consider whether the Commission was right to find that the segmentation of the capital, to which different rates of return are applied, did not enable a reliable approximation of an arm's length outcome to be obtained, and thus contributed to a lowering of FFT's tax burden.

ii. The possibility in the OECD Guidelines and in the Circular of segmenting capital

219. As the parties recognised, in essence, at the hearing, the Circular and the OECD Guidelines, to which the Circular refers, neither authorise nor prohibit the possibility of segmenting the capital of an integrated company by reference to its various activities.

220. In any event, none of the arguments advanced by the Grand Duchy of Luxembourg in its written submissions would support a finding that the OECD Guidelines or the Circular permitted segmentation of the capital for the purposes of obtaining an arm's length outcome.

221. First, the Grand Duchy of Luxembourg maintains that the application of a uniform rate of return to the whole of FFT's equity is contrary to the recommendations in the OECD Guidelines and in particular the requirement to carry out a 'functional' analysis of the activity of the undertaking concerned, consisting in dis-

tinguishing the various activities of an undertaking and identifying the assets and risks associated with those activities. In that regard, it should be noted that, contrary to what is claimed by the Grand Duchy of Luxembourg, it cannot be concluded from point D.1.2.2 of the OECD Guidelines, on ‘Functional analysis’, that it was correct in this case to segment FFT’s capital by reference to its various activities.

222. Indeed, it is evident from paragraph 1.42 of the OECD Guidelines that it is the assets associated with each activity, and not the capital, that may be isolated and related to specific risks or activities. While, as the Grand Duchy of Luxembourg submits, both the profitability of the capital and that of the assets can be used as an indicator for the application of the TNMM, that does not mean that capital is to be treated in the same way as operating assets. Unlike operating assets, capital is fungible and is exposed to risk irrespective of the activity thereby served.

223. Second, in so far as the Grand Duchy of Luxembourg refers to paragraphs 2.77 and 2.78 of the OECD Guidelines, suffice it to note in that regard, as does the Commission, that, while it is apparent that, in essence, only those items that are related to a transaction must be taken into account, neither paragraph provides that only capital that is related to taxable activities should be taken into consideration. As the Commission correctly contends, capital is, by nature, fungible.

224. Third, in so far as the Grand Duchy of Luxembourg submits that it is possible, under Luxembourg law, to relate certain capital to certain functions, it must be noted that, as has been stated in paragraphs 212 to 215 above, the tax ruling at issue concerns only the determination of FFT’s remuneration for transactions falling within its intra-group financing and treasury activities, at arm’s length level. As is evident from paragraphs 137 to 139 above, the Commission was in a position to review, under Article 107(1) TFEU, whether the level of that remuneration was lower than it would have been on an arm’s length basis and, therefore, whether the tax ruling at issue had conferred an advantage on FFT. The functional analysis of the controlled transaction makes it possible in particular to choose the part tested, the most appropriate method of transfer pricing and the financial indicator to be tested, as the case may be, or to identify the key comparability factors to be taken into account.

225. By contrast, the tax ruling at issue does not concern the question whether, as a result of a functional analysis of FFT, certain parts of FFT’s capital are not subject to tax under the Luxembourg Tax Code.

226. Moreover, the Grand Duchy of Luxembourg bases its claim on a legal article on Luxembourg taxation and on a Grand-Ducal regulation. Nevertheless, it must be noted that, assuming that those items, relating to Luxembourg law, are relevant for the purpose of examining in the context of the application of Article 107(1) TFEU whether FFT’s remuneration was lower than it would have been on an arm’s length basis, they do not demonstrate that FFT’s capital could be segmented by reference to its various activities for the purposes of calculating the return on capital.

227. First, in so far as the Grand Duchy of Luxembourg refers to the règlement grand-ducal du 16 juillet 1987, modifiant le règlement grand-ducal du 23 juillet 1983 portant exécution de l’article 1er de la loi du 23 juillet 1983 modifiant certaines dispositions de la loi du 4 décembre 1967 concernant l’impôt sur le revenu (Grand-Ducal Regulation of 16 July 1987 amending the Grand-Ducal Regulation of 23 July 1983 implementing Article 1 of the Law of 23 July 1983 amending certain provisions of the Law of 4 December 1967 on income tax) (published in Mémorial A No 65 of 6 August 1987, p. 1540), it should be pointed out that this provides that ‘it shall be accepted that the assets are financed by the equity in the following order: tangible and intangible fixed assets, financial fixed assets, available and realisable securities’. It must therefore be noted that that Grand-Ducal regulation does not, contrary to what is claimed by the Grand Duchy of Luxembourg, provide that a company’s capital may be assigned to particular assets of a company.

228. Second, in so far as the Grand Duchy of Luxembourg relies on an extract from a legal journal on Luxembourg taxation, according to which, ‘on the basis of purely economic considerations, it is accepted in the German legal literature that long-term resources are assigned primarily to the financing of long-term assets’ and that ‘accordingly, it may be concluded that the equity finances fixed assets first’, it must be noted that that element of the legal literature is not sufficient to support the position of the Grand Duchy of Luxembourg that a company’s capital can be segmented, in the context of the application of the TNMM, so as to be assigned to specific assets or activities. Although that extract may be understood to mean that the shareholdings of a company would be the first to be financed by the equity, the answer to the question as to whether that is relevant to the application of the TNMM and, specifically, for the purposes of determining a return on capital is not clear from the text of that extract. Furthermore, the extract is presented without a precise indication of the context in which it appears and is not corroborated by other elements of the legal literature, so that its evidential value is extremely limited.

229. Consequently, it must be concluded that the segmentation of the capital of an integrated company by reference to its various activities is neither expressly authorised nor prohibited. In those circumstances, the Court must ascertain whether the segmentation in the tax ruling at issue is appropriate, given the particular circumstances of the present case.

iii. Whether the segmentation of the capital is appropriate

230. The parties disagree as to whether the Commission erred in finding that the segmentation of the capital was inappropriate in this case.

231. In the first place, it must be noted that, in the present case, the segmentation of FFT's capital is not justified by the need to differentiate the remuneration for the various functions of FFT.

232. Contrary to what is maintained in essence by the Grand Duchy of Luxembourg, the segmentation of capital, accepted in the tax ruling at issue, does not reflect the various functions or activities identified in the transfer pricing report, in the context of the 'functional' analysis and in respect of which the level of remuneration is validated by the tax ruling at issue.

233. As has been found in paragraph 211 above, the methodology endorsed in the tax ruling at issue does not relate to the determination of the remuneration for FFT's holding activities, but only the remuneration for its intra-group financing and treasury functions.

234. In that regard, it must be noted that the transfer pricing report [confidential].

235. The three categories of capital validated by the tax ruling at issue relate, respectively, to risk remuneration, remuneration for holding activities and functions remuneration. Furthermore, as regards the last category, it must be pointed out that the transfer pricing report makes clear that [*confidential*]. This segment therefore corresponds to all the activities of FFT that are covered by the tax ruling at issue.

236. It therefore follows from these findings that, contrary to what is claimed by the Grand Duchy of Luxembourg, the segmentation of capital is not likely to satisfy the requirement of differentiation of FFT's functions.

237. In the second place, it must be held that the Commission did not err in finding that the segmentation of capital as accepted in the tax ruling at issue was inappropriate, since it is based on an entirely artificial analysis of the use of FFT's equity.

238. First, it must be noted that, as the Commission stated, in essence, in recital 282 of the contested decision, the segmentation of FFT's equity was not appropriate, since such funds are, by nature, fungible. In so far as all of FFT's equity is exposed to risk and is available to support FFT's solvency, it should be remunerated in full and it is not necessary to segment it.

239. In that regard, even if it is true that part of FFT's capital is assigned to the shareholdings in FFNA and FFC, which would already have been taxed and would therefore no longer be taxable, that fact has no bearing at all on the finding that that part of the capital is also exposed to risk and should therefore be covered by risk remuneration.

240. As is apparent from recitals 247 and 286 of the contested decision, by opting for the segmentation of the capital, instead of using the whole of the capital as a base from which the return on capital is calculated, the Grand Duchy of Luxembourg overlooks the fact that the full capital is necessary for the provision of the financing functions and to absorb any losses linked to the financing activities. As the Commission observed at the hearing, if the leverage ratio between capital and lending went from [*confidential*]% to 1.3 or 1.5%, it would be lower than would be acceptable for a credit institution.

241. In addition, it must be pointed out that, as the Commission found in recital 247 of the contested decision and is not disputed by the Grand Duchy of Luxembourg, FFT plays a maturity transformation and financial intermediation role, since it borrows on the markets to fund the group's financing needs. As is apparent from recital 43 of the contested decision, FFT funding comes from instruments such as bond issuance, bank term loans, committed and uncommitted credit lines. It must therefore be noted that, as the Grand Duchy of Luxembourg moreover acknowledged in its answers to questions put at the hearing, when it borrows on the market in order to fund its activities, it is FFT's total capital that is taken into consideration by the market operators from which it borrows. The segmentation of capital by reference to the activities of FFT takes no account of the fact that its taxable profits will vary according to its borrowing costs, which depend, in particular, on the size of its capital.

242. Second, and in any event, the three segments, as endorsed in the tax ruling at issue, are artificial.

243. First of all, as regards the first segment, namely equity used to bear risk, it is sufficient to recall that, as has been stated in paragraph 238 above, all of FFT's capital is exposed to risk.

244. Next, as regards the second segment, namely equity used for the shareholdings in FFNA and FFC, it is sufficient to recall that, in so far as capital is fungible, the share of that equity that corresponds to the amount of the shareholdings in FFNA and FFC cannot be separated from the rest of FFT's equity. Contrary to what is claimed both by the Grand Duchy of Luxembourg and by FFT in its observations at the hearing, even though the shareholdings in FFNA and FFC would not give rise to any taxable dividend, FFNA's and FFC's dividends having been taxed before being distributed to FFT as holding company, the fact remains that, in the event of FFT's insolvency, the equity linked to the holding of those shares, like the rest of the equity, would be used to cover FFT's debts. In those circumstances, FFT's capital, whether or not it can be linked to the shares it holds, is in any event exposed to risk and must be taken into consideration in the calculation of FFT's remuneration.

245. In addition, in an intra-group context, the shares which a parent company holds in its subsidiaries might in fact be designed as a form of capital injection as an alternative to the grant of an intra-group loan. Thus, the distinction between the second segment and the first – which corresponds, according to the transfer pricing report, to equity exposed to risks, notably credit and counterparty risks (recital 58 of the contested decision) – is, for that reason also, artificial in so far as both could ultimately represent an intra-group financing operation, as the Grand Duchy of Luxembourg essentially confirmed during the hearing.

246. Last, as regards the third segment, namely equity used to perform the functions, it must be noted, as the Commission pointed out in recital 277 of the contested decision, that this corresponds to the remaining capital, obtained after deducting the first two segments from the total capital. It follows from this that, given its residual nature, this segment does not in fact correspond to any particular function or activity. In addition, as the Commission correctly stated in recital 265 of the contested decision, that segment does not correspond to any customary capital component used in the calculation of return requirements. Furthermore, [*confidential*]. Those functions correspond to the functions in respect of which FFT's remuneration, as accepted by the tax ruling at issue, is calculated. Consequently, it must be held that this segmentation is necessarily inappropriate.

247. It therefore follows from these findings that the Commission did not err in concluding, in essence, that the segmentation of capital was erroneous and that the whole of FFT's capital had to be taken into account for the purposes of the risk remuneration.

248. The other arguments of the Grand Duchy of Luxembourg are not convincing.

249. In so far as the Grand Duchy of Luxembourg claims that FFT would have had to pay the same amount of tax if its activities had been divided between three separate entities, that argument cannot succeed.

250. First, as has been noted in paragraph 235 above, the segmentation of the capital does not correspond to the different functions performed by FFT. Second, as has been noted in paragraph 241 above, all of FFT's capital is taken into consideration by the market operators from which it borrows and its borrowing capacity necessarily affects its financing activities and its profits. It cannot therefore be concluded that FFT would have to pay a single rate of tax if its capital were held by three separate companies in order to carry out activities with a different return. In addition, as has been established in paragraph 240 above, the capital linked to FFT's financing activities would be insufficient in view of the risks run if they were to be taken into consideration. In any event, that argument must be rejected since it relates to a hypothetical situation that is outwith the subject matter of the present case.

251. In the light of all of the foregoing, it must be held that the Commission correctly found that FFT's capital should have been taken into account in its entirety for the purposes of calculating the remuneration for its intra-group financing and treasury activities.

*3. The second error, relating to the taking into consideration of the hypothetical regulatory capital*

252. The Grand Duchy of Luxembourg disputes, in essence, the Commission's assessment that it was wrong to take account of the hypothetical regulatory capital for remuneration of the risks linked to FFT's intra-group financing and treasury activities. The Grand Duchy of Luxembourg disputes the Commission's assessment that there is no economic rationale in applying a return on capital to a base made up of FFT's regulatory capital when the TNMM requires the capital assigned to the various functions of FFT to be evaluated, and adds that the Basel II framework and the CAPM are international standards.

253. The Commission objects to those arguments on the ground that FFT's calculation of the taxable base on the basis of the hypothetical regulatory capital is incorrect and inconsistent.

254. In the first place, it must be recalled that, as the Commission observed in recitals 254 and 262 of the contested decision, and which is not disputed by the Grand Duchy of Luxembourg, the Basel II framework defines required regulatory capital as a proportion of assets held by a bank or financial institution, weighted by the underlying risk of each such asset. The regulatory capital thus constitutes the estimate, by the regulator, of a minimum level of capitalisation that a bank or other financial institution must maintain and does not constitute a right to the profits of the entity concerned, or to the remuneration of the risks borne by that entity.

255. In the second place, as regards the Commission's assessment, principally, that choosing to take FFT's hypothetical regulatory capital into consideration - a choice endorsed by the tax ruling at issue - is wrong, it should be noted, as the Commission submits, that, unlike the accounting equity used for FFT's financing activities, regulatory capital has no connection with the profits that an investor would claim from the company in which he invests. Regulatory capital is not an appropriate indicator of the profits obtained by a bank or financial institution, but only the implementation of a prudential obligation to which those institutions are subject. Hypothetical regulatory capital, determined by the application by analogy of the Basel II framework, cannot, a fortiori, constitute an appropriate indicator for determining the remuneration in respect of the risk to which FFT's capital is exposed.

256. None of the arguments raised by the Grand Duchy of Luxembourg is such as to call that finding into question.

257. First, the fact, relied on by the Grand Duchy of Luxembourg, in response to questions put by the Court at the hearing, that the tax administration queried whether FFT was correctly capitalised, does not justify the hypothetical regulatory capital having been used as a profit level indicator.

258. Second, the argument of the Grand Duchy of Luxembourg that FFT was obliged, as a financing company, to have minimum capital in accordance with the Circular must be rejected as ineffective. It is sufficient to note, as the Commission points out, that such an obligation does not justify the minimum capital, held in accordance with that obligation, constituting an appropriate profit level indicator, since a regulatory obligation does not reflect the shares of profits obtained.

259. In the third place, with regard to the Commission's assessment, as a subsidiary point, that there is an inconsistency in taking into consideration the hypothetical regulatory capital for the purpose of determining the return on accounting equity, unlike the return on regulatory capital, first, it must be noted that, even if it was correct to use only the hypothetical regulatory capital as a profit level indicator, the Grand Duchy of Luxembourg offers no convincing explanation to justify the inconsistency in the methodology applied.

260. As the Commission stated in recitals 253 and 254 of the contested decision, a return on equity is a profitability ratio. Taking into consideration the accounting equity enables the net profit to be established, which constitutes the shareholders' remuneration, whereas the regulatory capital does not reflect any claim to the company's profits, but represents only the capital which a regulated company is obliged to hold.

261. The arguments of the Grand Duchy of Luxembourg that the method used to determine the return on equity is not 'inconsistent' because (i) it enables the separate activities of FFT to be taken into account, and (ii) the Basel II framework is an international benchmark just like the CAPM must be rejected as ineffective in that respect. None of them can explain why the regulatory capital can be used to determine the return on accounting equity.

262. Second, it should also be noted that, as the Commission found in recital 263 of the contested decision, since the comparison of FFT, in the transfer pricing report for the purpose of calculating the CAPM, with 66 companies identified by the tax adviser is not based on the hypothetical regulatory capital of those 66 companies, the choice of FFT's hypothetical regulatory capital as a profit level indicator is inconsistent.

263. In the light of the foregoing, it must be held that the Commission was fully entitled to consider that the Grand Duchy of Luxembourg should not have used the hypothetical regulatory capital of FFT as a base for calculating the risk remuneration.

264. Since it has been held that the Commission correctly found that the hypothetical regulatory capital could not be used to calculate FFT's remuneration, there is no need to examine the arguments by which the Grand Duchy of Luxembourg seeks to challenge the Commission's assessment that the calculation of FFT's hypothetical regulatory capital was incorrect (the third error). That reasoning was put forward by the Commission as a subsidiary point, as is evident from recital 276 of the contested decision, and is based on the erroneous premiss that the hypothetical regulatory capital could be used as a profit level indicator to calculate the remuneration in respect of the risks borne by FFT.

*4. The fourth error, relating to the failure to take FFT's shareholdings into consideration*

265. The Grand Duchy of Luxembourg disputes the Commission's assessment that the capital linked to FFT's shareholdings in FFC and FFNA should have been taken into consideration in calculating the remuneration for FFT's intra-group financing and treasury activities.

266. First of all, the Grand Duchy of Luxembourg maintains that the Commission should have found that the remuneration for the shareholdings in FFNA and FFC was by definition excluded from the scope of transfer pricing. In its submission, dividends from shareholdings are exempt from tax and no financial burden is associated with that financing, or deducted.

267. The Grand Duchy of Luxembourg goes on to claim that, contrary to the Commission's assertion in recital 282 of the contested decision, under Luxembourg law, any source of funding must be allocated so far as possible to every company asset. It submits that FFT's shareholdings are funded by equity, in the amount of EUR 165 244 000, which is outside the scope of transfer pricing and should be excluded from the calculations in respect of the remuneration for the risks borne by FFT for its intra-group financing activity.

268. In addition, the Grand Duchy of Luxembourg submits that, under the rules of the Basel II framework, shareholdings in other credit institutions may be excluded. In so far as the Commission rejected that argument, in recital 281 of the contested decision, on the ground that FFT was not a credit institution, the Grand Duchy of Luxembourg considers that approach to be inconsistent with the rest of the contested decision, in which the Commission applied the Basel II framework.

269. Furthermore, the Grand Duchy of Luxembourg takes issue with the Commission's finding in recital 286 of the contested decision that, in essence, the shareholdings in FFNA and FFC could not be deducted from the accounting equity, because that would bring down FFT's leverage effect, which corresponds to the ratio of indebtedness to equity, which is [confidential]% taking into account those shareholdings, [*confidential*] the ratio of indebtedness of the European banks' average, which is 2.9% or 3.3% according to sampling. It argues that the panel of banks used by the Commission and the average resulting therefrom are certainly not a decisive benchmark, since other banks have higher debt ratios. Moreover, it was not individual accounting equity but consolidated accounting equity that would have had to have been taken into account. Furthermore, the sample used by the Commission is not representative.

270. Last, according to the Grand Duchy of Luxembourg, the comparison drawn by the Commission, in recital 288 of the contested decision, with Fiat Finance SpA ('FF'), a treasury company established in Italy, is neither relevant nor conclusive. In that respect, it disputes that it was necessary to apply to FF the same methodology as that applied to FFT, namely that of deducting shareholdings from the equity, because that would result in FF having negative capital. First, FF is an Italian taxable entity, not a Luxembourg entity. Second, the Commission had merely shown that, in the case of FF, the shareholdings were funded by debt.

271. As a preliminary point, it must be noted that, in recitals 277 to 290 of the contested decision, the Commission found, in essence, that the Grand Duchy of Luxembourg had made an error of assessment by isolating the 'financial investments in FFNA and FFC', which FFT had assessed as EUR 165 244 000 (Table 2 of the contested decision) and by according it a zero remuneration. That will have led, according to the Commission, to a reduction in FFT's tax liability.

272. It must also be pointed out that it is common ground that the method endorsed by the Grand Duchy of Luxembourg in the tax ruling at issue is intended, for the purposes of establishing the tax payable by FFT, to determine the remuneration which FFT would have obtained for its intra-group financing and treasury activities if it had operated under market conditions. The method in question consists in calculating the return on capital. In that context, admittedly, the fact that FFT is not subject to tax, as a holding company, on the dividends it receives from FFNA and FFC - which, as is undisputed, are taxed on the dividends - might suggest that the capital assigned to those shareholdings does not have to be taken into consideration in determining the tax that would be payable by FFT if it operated at arm's length. However, such an assertion cannot be accepted for the following reasons.

273. First, it must be noted that, as the Commission correctly argues in recital 282 of the contested decision, equity is fungible. In the event of FFT's insolvency, the creditors will be repaid on the basis of the whole of the equity. Therefore, contrary to what is claimed by the Grand Duchy of Luxembourg, and by FFT in its observations at the hearing, even though the shareholdings in FFNA and FFC would not give rise to any taxable dividend, the latter's dividends having been taxed before being distributed to FFT as holding company, the fact remains that, in the event of FFT's insolvency, the equity linked to the holding of those shares, like the rest of the equity, would be used to cover FFT's debts. In those circumstances, FFT's capital, whether or not it can be

linked to the shares it holds, is in any event exposed to risk and must be taken into consideration in the calculation of FFT's remuneration even though the shareholdings in FFNA and FFC would not give rise to any taxable income.

274. Second, it must be pointed out that, as the Commission correctly notes, the Grand Duchy of Luxembourg has not established that the other companies with which the Commission compared FFT deducted their shareholdings in subsidiaries from their capital or that it is not common for financial institutions operating on the market to have such shareholdings. In those circumstances, the Commission was entitled to find that excluding FFT's shareholdings in its two subsidiaries did not enable an appropriate comparison to be made of FFT with other undertakings operating on the market.

275. Third, it must be stated that, even if the Basel II framework principles were applied in the present case, FFT would not satisfy the prerequisite for deducting part of the amount of its capital equal to the shareholdings in FFNA and FFC, namely that FFT, FFNA and FFC do not have consolidated accounts in Luxembourg. As the Commission noted in recitals 112 and 281 of the contested decision, and as the Grand Duchy of Luxembourg confirmed in response to measures of organisation of procedure, FFT's accounts were consolidated in Luxembourg.

276. Fourth, it must be noted that, while the Grand Duchy of Luxembourg disputes that FFT's leverage ratio must be compared to the Commission's sample of banks, the fact remains that it has not put forward any argument or any evidence to explain why – if it must be concluded that the equity covering the financial investments in FFNA and FFC is not to be taken into consideration even though it constitutes almost 60% of FFT's total equity (Table 2 in the contested decision) – that ratio would not be significantly lower than that identified by the Commission and even that used by the Grand Duchy of Luxembourg itself.

277. In so far as the leverage ratio is calculated by reference to the amount of equity, it must be noted that, while the leverage ratio of [*confidential*]%, identified by the Commission, [*confidential*] when all of FFT's equity was taken into account, [*confidential*] if the proportion of equity equal to the shareholdings in FFNA and FFC was not taken into account. That finding applies irrespective of whether the market standard is 2.9% or 3.3%, as identified by the Commission, or even 4 to 4.5%, as is evident from the sample of ratios used by the Grand Duchy of Luxembourg.

278. In the light of the considerations set out in paragraphs 271 to 277 above, it must be held that the Commission correctly found that the Grand Duchy of Luxembourg had wrongly excluded part of FFT's capital, equal to its shareholdings in its subsidiaries, from the capital to be taken into consideration for the purpose of determining FFT's remuneration for its intra-group financing and treasury activities.

279. It follows from all of the findings set out in paragraphs 209 to 278 above that the Commission was fully entitled to find that FFT's capital should have been taken into account in its entirety for the purposes of calculating FFT's remuneration and that a single rate should have been applied. In any event, it also correctly considered that the method consisting, on the one hand, in using FFT's hypothetical regulatory capital and, on the other, in excluding FFT's shareholdings in FFNA and FFC from the amount of the capital to be remunerated could not result in an arm's length outcome.

280. In those circumstances, it must be held that the methodology approved by the Grand Duchy of Luxembourg minimised FFT's remuneration, on the basis of which FFT's tax liability is determined, and it is not necessary to examine the complaints put forward by the Grand Duchy of Luxembourg in relation to the fifth error identified by the Commission, concerning the rate of return. The finding that the amount of capital to be remunerated was underestimated alone is sufficient, in the present case, to establish the existence of an advantage.

281. First, the ratio between the capital actually taken into account in the methodology used by the tax ruling at issue and the total capital is so great that the error in the determination of the capital to be remunerated necessarily leads to a reduction of FFT's tax burden, irrespective of the single rate of return to be applied. The amount of the hypothetical regulatory capital, which is EUR 28 million, represents only approximately 10% of the total amount of the equity, which is EUR 287 million.

282. Second, as has been stated in paragraph 211 above, the method for determining the remuneration for FFT's intra-group financing and treasury activities, as endorsed in the tax ruling at issue, consists of two steps: first, determination of the amount of capital to be remunerated and, second, determination of the rate of return to be applied. In the first step, the methodology accepted by the tax ruling at issue distinguishes between three separate amounts to which three separate rates are applied, determined by different methods. Consequently, since the first step of the calculation is incorrect, it is not necessary to examine the second step.

The finding of an error in the first step of the methodology endorsed in the tax ruling at issue necessarily makes the examination of any errors in the calculation of the rate of return – the second step – redundant. The return should be entirely recalculated by the Grand Duchy of Luxembourg in the light of the amount of capital that should have been taken into consideration. It is apparent, moreover, from recital 311 of the contested decision that an accurate estimate of the taxable base of FFT should be calculated on the basis that a single rate is applied to the full amount of its accounting equity.

283. It must be noted that, as regards the amount of the rate of return, the parties disagree as to whether this should be 10%, as the Commission contends, or 6.05%, as is maintained by the Grand Duchy of Luxembourg (recital 304 of the contested decision). Consequently, even if it is the lower rate that is to be applied, the amount of FFT's resulting remuneration would still be considerably higher than that accepted by the tax ruling at issue. That rate, which corresponds to that applied to the first segment, would be applied to the full amount of the capital, which represents an amount 10 times greater than that to which the rate was applied pursuant to the tax ruling at issue. In that context, it must be stated that, in any event, none of the arguments of the Grand Duchy of Luxembourg relating to the rate of return can invalidate the Commission's finding of the existence of an advantage.

284. The Court therefore considers that, although the Grand Duchy of Luxembourg has disputed the fifth error identified by the Commission, concerning the rate of return (see paragraph 194 above), it is not necessary to examine the merits of those arguments.

285. In those circumstances, all the complaints raised by the Grand Duchy of Luxembourg concerning the Commission's examination of the methodology for determining FFT's remuneration must be rejected.

286. It follows from all of the findings in paragraphs 211 to 285 above that the Commission correctly considered that the tax ruling at issue had endorsed a methodology for determining FFT's remuneration that did not enable an arm's length outcome to be achieved and that resulted in a reduction of FFT's tax burden. Accordingly, it was fully entitled to find, in the context of its principal line of reasoning, that the tax ruling at issue conferred an advantage on FFT.

3. The Commission's subsidiary line of reasoning according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from the Circular

287. The finding, in paragraph 286 above, that the Commission did not make an error in its principal line of reasoning alone is sufficient for it to be concluded that the Commission has established that the tax ruling at issue conferred an advantage on FFT. Nevertheless, the Court considers it appropriate to examine, for the sake of completeness, the Commission's subsidiary line of reasoning, according to which the tax ruling at issue derogated from Article 164(3) of the Tax Code and from the Circular.

288. In that regard, the Court notes that, in the second part of its first plea, the Grand Duchy of Luxembourg submits that the tax ruling at issue is in line with the arm's length principle as provided for in the domestic law of Luxembourg.

289. The Commission contests those arguments.

290. It must be observed in that regard that, as a subsidiary point, in Section 7.2.4 of the contested decision, entitled 'Subsidiary line of reasoning: Selective advantage due to a derogation from Article 164 [of the Tax Code] and/or the Circular' (recitals 315 to 317 of the contested decision), the Commission found that the tax ruling at issue conferred an advantage on FFT on the ground that it derogated from the arm's length principle under Luxembourg law, provided for in Article 164(3) of the Tax Code and in the Circular (see recitals 316 and 317 of the contested decision).

291. In recital 316 of the contested decision, the Commission stated the following:

> 'As a subsidiary line of reasoning, … the [tax ruling at issue] also grants FFT a selective advantage in the context of the more limited reference system composed of group companies applying transfer pricing to which Article 164(3) [of the Tax Code] and the Circular apply. Article 164(3) [of the Tax Code] and the Circular are considered to establish the "arm's length principle" under Luxembourg tax law, according to which transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length. Section 2 of the Circular, in particular, contains a description of the arm's length principle as set out in the OECD … Guidelines and transposed into domestic law.'

292. Next, in recital 317 of the contested decision, the Commission recalled that it had already demonstrated, in the context of Section 7.2.2 of that decision, that the tax ruling at issue did not enable a reliable approximation of an arm's length outcome to be achieved. On the basis of that finding, it concluded that the tax ruling at issue 'also [gave] rise to a selective advantage under the more limited reference system of Article 164(3) [of the Tax Code] or the Circular, since it [resulted] in a lowering of FFT's tax liability as compared to the situation where the arm's length principle laid down in that provision had been properly applied'.

293. It is clear from recitals 316 and 317 of the contested decision that the Commission concluded that the tax ruling at issue conferred a selective advantage on FFT, since it resulted in a lowering of the tax liability as compared to the situation where the arm's length principle laid down by Article 164(3) of the Tax Code and in the Circular had been properly applied.

294. It must be noted that the Commission based that conclusion on the examination of the tax ruling at issue which it undertook in the context of its principal analysis. It thus confirmed that it had already demonstrated, in Section 7.2.2 of the contested decision, that the tax ruling at issue did not enable a reliable approximation of an arm's length outcome to be achieved.

295. In that regard, first, it must be noted that Article 164(3) of the Tax Code provides that 'taxable income comprises hidden profit distributions' and that 'a hidden profit distribution arises in particular when a shareholder, a stockholder or an interested party receives either directly or indirectly benefits from a company or an association which he normally would not have received if he had not been a shareholder, a stockholder or an interested party'. In addition, the Circular states, in Section 2, that 'where an intra-group service has been rendered, as with other types of intra-group transfers, one should ascertain whether an arm's length price is charged for such service, i.e. a price corresponding to the price which would have been charged and agreed to by independent enterprises in comparable circumstances'. It follows that Article 164(3) of the Tax Code and the Circular provide that the remuneration for intra-group transactions must be determined as though the price of those transactions had been agreed between stand-alone undertakings. The Grand Duchy of Luxembourg and FFT do not, moreover, dispute the Commission's assessment, in recital 75 of the contested decision, that those provisions establish the arm's length principle under Luxembourg law.

296. Second, it must be noted that the Circular refers to Article 9 of the OECD Model Tax Convention and to the OECD Guidelines as the international benchmark for transfer pricing purposes. In its principal analysis of the selective advantage, the Commission largely referred to the OECD Guidelines, notably in identifying the five errors in the methodology for determining FFT's remuneration. It follows that the same analytical framework could be used by the Commission both in its principal analysis and in its subsidiary analysis.

297. Accordingly, in the circumstances of the present case, it must be concluded that the Commission did not make an error in considering itself entitled to transpose the analysis undertaken in the light of the arm's length principle as described in the contested decision, entailing the determination of FFT's remuneration, in order to conclude that the tax ruling at issue conferred an advantage on FFT because FFT had paid less tax than it would have had to pay under Article 164(3) of the Tax Code and the Circular.

298. The arguments of the Grand Duchy of Luxembourg that the tax ruling at issue complies with Luxembourg law cannot call into question the finding in paragraph 297 above. Those arguments have already been rejected in paragraphs 226 and 227 above.

299. It follows from all of these findings that the Commission was fully entitled to consider that, in any event, the tax ruling at issue conferred a selective advantage on FFT because it resulted in a lowering of FFT's tax liability as compared to the tax it would have had to pay under Article 164(3) of the Tax Code and the Circular.

4. Plea alleging the lack of any advantage at group level

300. The Grand Duchy of Luxembourg and FFT claim, in essence, that the Commission has not demonstrated that there is an advantage at the level of the Fiat/Chrysler group and has thus infringed its obligation to state reasons as provided for in Article 296 TFEU and also Article 107 TFEU.

301. Specifically, the Grand Duchy of Luxembourg contends that the statement of reasons for the contested decision is manifestly deficient and contradictory in that the Commission refused, in recital 314 of that decision, to take account of its effects at the level of the Fiat/Chrysler group, whilst simultaneously relying on the effects of that advantage in designating that group, in recitals 342 and 344 of the decision, the beneficiary of the alleged aid at issue.

302. The Grand Duchy of Luxembourg maintains that, unlike the facts in the case giving rise to the order of 31 August 2010, *France Télécom* v *Commission* (C-81/10 P, not published, EU:C:2010:475, paragraph 43), any charges borne by the other subsidiaries, such as higher taxation, are not 'unconnected' with the advantage that FFT allegedly obtained. Moreover, it relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004, paragraphs 115 and 116), in criticising the Commission for having failed to investigate or to explain how the Fiat/Chrysler group had actually been given an advantage.

303. For its part, FFT claims that the Commission misapplied Article 107 TFEU by ignoring the effect of the tax ruling at issue on the Fiat/Chrysler group as a whole when determining whether FFT and the Fiat/Chrysler group had benefited from an advantage.

304. First, FFT observes that, in recital 155 of Commission Decision 2011/276/EU of 26 May 2010 concerning State aid in the form of a tax settlement agreement implemented by Belgium in favour of Umicore SA (formerly Union Minière SA) (State aid C 76/03 (ex NN 69/03)) (OJ 2011 L 122, p. 76, 'the Umicore decision'), the Commission recognised that national tax authorities had to have a margin of appreciation in the assessment of transfer pricing. The alleged advantage to FFT is, in its submission, not out of proportion and is only a consequence of that margin of appreciation.

305. Second, FFT observes that, in recital 314 of the contested decision, the Commission wrongly considered it unnecessary to examine whether the impact of the tax ruling at issue was neutral at group level. FFT thus submits that, even if the transactions between FFT and another group company had given it a higher profit margin in Luxembourg, that would have meant that the other company of the Fiat/Chrysler group would have been entitled to a correspondingly higher deductible interest expense.

306. Furthermore, FFT maintains that the contested decision is contradictory in that the Commission, on the one hand, concludes that the tax advantage benefits the whole group and, on the other, refuses to take into consideration the effect of the measure on the whole group. FFT claims that, in the present case, unlike the facts in the case giving rise to the judgment of 30 November 2009, *France and France Télécom* v *Commission* (T-427/04 and T-17/05, EU:T:2009:474), the effects of the measure are neutralised at group level, and that therefore there is no advantage.

307. In addition, FFT submits that the seven judgments to which the Commission refers are no authority for the latter's position that it is not obliged to review the existence of an advantage at the level of the Fiat/Chrysler group.

308. In that regard, FFT notes that the importance of the effect on the Fiat/Chrysler group when determining whether the tax ruling at issue conferred an advantage is illustrated by the difficulties faced by that group, since the Italian tax administration found that FFT's taxable profit was too high to be considered arm's length. Consequently, FFT had overstated its taxable profit and paid too much corporate income tax in Luxembourg.

309. Last, as regards the various methodological points, FFT submits that the Commission should have applied a proportionality test when determining whether the tax ruling at issue conferred an advantage on it. Furthermore, FFT states that it fully supports the arguments of the Grand Duchy of Luxembourg, in Case T-755/15, concerning the methodology for determining its remuneration and challenging the errors identified by the Commission.

310. The Commission contests those arguments.

311. As a preliminary point, it must be stated that the Grand Duchy of Luxembourg does not make any distinction between the arguments it puts forward, whether to establish the existence of an infringement of Article 107 TFEU or of a failure to state reasons in that regard. However, it must be noted that, in essence, its arguments are intended to establish, on the one hand, a failure to state reasons, in so far as there is allegedly an inconsistency in the contested decision, and, on the other hand, an infringement of Article 107 TFEU in so far as, in its view and according to FFT, the Commission was not entitled to conclude that FFT and the Fiat/Chrysler group had been given an advantage.

312. As regards, in the first place, the alleged inconsistency of the contested decision, it should be noted that, in recital 314 of the contested decision, the Commission concluded, in essence, that FFT had received a selective advantage in so far as its tax burden in Luxembourg had been lowered. In that regard, the Commission also noted in that recital that, according to the case-law, the fact that that lowering of the tax in Luxembourg had led to a greater tax burden in another Member State would have no bearing on the categorisation of that measure as aid.

313. Moreover, in recitals 341 to 345 of the contested decision, the Commission found that, while the tax ruling at issue granted a selective advantage to FFT within the meaning of Article 107(1) TFEU, the favourable tax treatment afforded to FFT would benefit that group as a whole, since FFT and the Fiat/Chrysler group formed an economic unit. The Commission made clear in that respect that, since the amount of tax paid by FFT influenced the pricing conditions of the intra-group loans granted by it to the companies of that group, reductions of FFT's tax liability reduced the pricing conditions of its intra-group loans.

314. It must therefore be held - as regards the requirement that there be an advantage, which is the third prerequisite for a finding of State aid according to the case-law cited in paragraph 118 above - that there is no inconsistency in the Commission's assessments in the contested decision with regard to determining the beneficiary of the aid, who is identified, in essence, as being FFT, directly, and the Fiat/Chrysler group, indirectly, inasmuch as FFT forms an economic unit and, therefore, an undertaking, for the purposes of the law on State aid, with the Fiat/Chrysler group.

315. That first complaint of the Grand Duchy of Luxembourg, alleging a failure to state reasons, must therefore be rejected as unfounded.

316. As regards the complaint that the Commission infringed Article 107 TFEU by finding that FFT and the Fiat/Chrysler group had been given an advantage, it must be stated at the outset that, as the Commission indicates, the Grand Duchy of Luxembourg has not put forward any argument to establish that the Fiat/Chrysler group and FFT do not constitute an economic unit for the purposes of State aid law. In any event, as the Commission pointed out in recital 342 of the contested decision, FFT is fully controlled by Fiat SpA, which in turn controls the Fiat/Chrysler group. Therefore, any advantage that would benefit FFT would benefit that group as a whole, in particular if it involves, as the Commission observes, without being contradicted in that respect by the Grand Duchy of Luxembourg, conditions of loans granted by FFT to other group companies that are more advantageous because of the lowering of FFT's tax burden.

317. In addition, and in any event, assuming that that factor may be relevant, it must be noted that neither the Grand Duchy of Luxembourg nor FFT has established that the tax reductions from which FFT benefits in Luxembourg are 'neutralised' by higher taxes in other Member States.

318. Furthermore, even if that were the case, such 'neutralisation' would not permit the inference that FFT or the Fiat/Chrysler group had not benefited from an advantage in Luxembourg. It must be noted that, in the context of a tax measure, the existence of an advantage is determined by reference to normal taxation rules, so that the tax rules of another Member State are not relevant (see, by analogy, judgment of 11 November 2004, *Spain* v *Commission*, C-73/03, not published, EU:C:2004:711, paragraph 28). Consequently, where it has been established that an integrated undertaking benefits, under a tax measure granted by a Member State, from a reduction of the tax burden that it would otherwise have had to bear in accordance with the normal rules of taxation, the tax situation of another undertaking of the same group in another Member State has no bearing on the existence of an advantage. For the same reason, and without it being necessary to rule on the admissibility of the documents lodged by FFT following the reply to show that an arbitration procedure had been initiated to avoid double taxation of FFT in Luxembourg and in Italy, the Court must reject as unfounded FFT's argument that, in essence, in any event, its income is taxed either in Italy or in Luxembourg, so that it does not benefit from an advantage.

319. None of the arguments which the Grand Duchy of Luxembourg and FFT advance in that respect can call that finding into question.

320. First, in so far as the Grand Duchy of Luxembourg claims that the Commission could not refer to the order of 31 August 2010, *France Télécom* v *Commission* (C-81/10 P, not published, EU:C:2010:475, paragraph 43), since it did not investigate whether the Fiat/Chrysler group had actually benefited from an advantage, that argument must be rejected as unfounded. Suffice it to note in that regard that, in recital 343 of the contested decision, the Commission found that any favourable tax treatment afforded to FFT necessarily benefited the other group companies in respect of which it charged transfer prices.

321. Second, in so far as the Grand Duchy of Luxembourg relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004, paragraphs 115 and 116), in order to establish that the Commission should have investigated whether the Fiat/Chrysler group actually benefited from an advantage, it must be pointed out not only that that judgment has been set aside by the Court of Justice (judgment of 25 July 2018, *Commission* v *Spain and Others*, C-128/16 P, EU:C:2018:591), but that the facts in the case that gave rise to that judgment are, in all events, unconnected with the facts of the present case.

322. In the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), the General Court held that the Commission had made an error in finding that the beneficiaries of aid were Economic Interest Groupings (EIG) and their members, when it could not be established that their members, who were the only entities referred to by the recovery order, benefited from selective advantages.

323. In the present case, the Commission has established to the requisite legal standard that not only FFT but also all the companies forming part of the group and dealing with FFT would benefit from the tax advantage granted by FFT, in view of its impact on the pricing conditions of its intra-group loans. That argument of the Grand Duchy of Luxembourg must therefore be rejected as unfounded.

324. Third, in so far as FFT takes the view that the Commission should have applied a proportionality test to determine whether the tax ruling at issue conferred an advantage, notably in the light of the Umicore decision, that argument must be rejected as unfounded. First, it must be borne in mind that the Commission is not bound by its previous practice in taking decisions. Second, as it points out in the Umicore decision, the Commission recognised that the tax authorities have a discretion in the context of a transaction bringing an end to a dispute, thereby avoiding potentially long or uncertain litigation, but not in the context of a tax ruling to determine the tax which a company should pay in the future.

325. It follows from all of the foregoing that the third plea must be rejected as unfounded.

326. Accordingly, in the light of the considerations set out in paragraphs 118 to 325 above, it must be held that the Commission did not infringe Article 107 TFEU by finding that FFT and the Fiat/Chrysler group had benefited from an advantage as a result of the fact that FFT had paid less tax than that which an undertaking transacting on the market would have had to pay.

327. In those circumstances, the second series of pleas raised by the Grand Duchy of Luxembourg and FFT, relating to the existence of an advantage, must be rejected in its entirety.

*E – Third series of pleas, concerning the non-selectivity of the advantage granted to FFT*

328. By the first plea in Case T-755/15 and by the first complaint in the first part of the first plea in Case T-759/15, the Grand Duchy of Luxembourg and FFT claim that the Commission wrongly considered that the tax ruling at issue was a selective measure. They maintain, principally, that the Commission took into consideration an erroneous reference framework in its three-step analysis of selectivity. In their view, the tax ruling at issue does not derogate from the tax regime applicable to integrated companies, which they regard as the relevant reference framework. They thus argue that the Commission failed to demonstrate that the tax ruling at issue had been granted to FFT on more advantageous terms than those given to other integrated companies.

329. In addition, the Grand Duchy of Luxembourg and FFT take issue with the Commission's argument that it could in any event presume that the tax ruling at issue was selective, since it was an individual measure and the Commission had established that that measure conferred an advantage on FFT. They contend that the case-law distinguishes between ad hoc individual measures and individual tax measures applying general tax arrangements. In the latter case, selectivity could not be presumed but would have to be examined by reference to Luxembourg law and practice in order for it to be established whether the conditions of application are discriminatory or whether the discretion afforded to the national authorities is excessive. The Grand Duchy of Luxembourg and FFT go on to argue that the tax ruling at issue is not an ad hoc individual measure but an individual measure which is part of a general system prescribing the imposition of additional charges, that is the transfer pricing legislation, as in the case giving rise to the judgment of 4 June 2015, *Commission* v *MOL* (C-15/14 P, EU:C:2015:362).

330. Ireland submits that, according to the case-law and legal literature, the only relevant reference system for determining whether a tax measure is selective is the Member State's tax system of which that measure forms part, and not an abstract or hypothetical tax system, as applied, wrongly, by the Commission in the contested decision. In its submission the reference system to be taken into consideration is that of the specific tax regime applicable to integrated companies.

331. The Commission contests all of those arguments.

332. As a preliminary point, it should be observed that the requirement as to selectivity under Article 107(1) TFEU must be clearly distinguished from the concomitant detection of an economic advantage, in that, where the Commission has identified an advantage, understood in a broad sense, as arising directly or indirectly from a particular measure, it is also required to establish that that advantage specifically benefits one or more

undertakings. It falls to the Commission to show that the measure, in particular, creates differences between undertakings which, with regard to the objective of the measure, are in a comparable situation. It is necessary therefore that the advantage be granted selectively and that it be liable to place certain undertakings in a more favourable situation than that of others (judgment of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 59).

333. It must, however, be noted that the selectivity requirement differs depending on whether the measure in question is envisaged as a general scheme of aid or as individual aid. In the latter case, the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective ('the presumption of selectivity'). By contrast, when examining a general scheme of aid, it is necessary to identify whether the measure in question, notwithstanding the finding that it confers an advantage of general application, does so to the exclusive benefit of certain undertakings or certain sectors of activity (judgments of 4 June 2015, *Commission* v *MOL*, C-15/14 P, EU:C:2015:362, paragraph 60, and of 30 June 2016, *Belgium* v *Commission*, C-270/15 P, EU:C:2016:489, paragraph 49; see also, to that effect, judgment of 26 October 2016, *Orange* v *Commission*, C-211/15 P, EU:C:2016:798, paragraphs 53 and 54). It should be made clear that, where individual aid is at issue, the presumption of selectivity operates independently of the question whether there are operators on the relevant market or markets which are in a comparable factual and legal situation (judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 79).

334. It is also apparent from settled case-law that, in order to classify a national tax measure which is not an individual measure as 'selective', the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State concerned, and thereafter demonstrate that the tax measure at issue is a derogation from that ordinary system, in so far as it differentiates between operators who, in the light of the objective pursued by that ordinary tax system, are in a comparable factual and legal situation (judgments of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 49; of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 57; and of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraph 85).

335. The concept of 'State aid' does not, however, cover measures that differentiate between undertakings which, in the light of the objective pursued by the legal regime concerned, are in a comparable factual and legal situation, and are, therefore, a priori selective, where the Member State concerned is able to demonstrate that that differentiation is justified since it flows from the nature or general structure of the system of which the measures form part (see judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 58 and the case-law cited).

336. Therefore, using a three-step method, as set out in paragraphs 334 and 335 above, it is possible to conclude that a national tax measure that does not constitute an individual measure is selective.

337. In the present case it must be noted that, in the contested decision, the Commission principally examined the selectivity of the measure at issue by following the three steps mentioned in paragraphs 334 to 336 above. However, it also applied the presumption of selectivity, according to which a measure is presumed to be selective if it confers an advantage and if the aid is individual aid. In recital 218 of the contested decision, and in its written submissions, the Commission recalled that, 'according to the Court, in the case of an individual aid measure, as opposed to a scheme, "the identification of the economic advantage is, in principle, sufficient to support the presumption that it is selective"', and that FFT benefits in the present case from an 'individual aid measure'. The Commission also emphasised at the hearing, in response to questions put by the Court, that it demonstrated the selectivity of the advantage in question in several ways in the contested decision, including by means of the presumption of selectivity, the lawfulness of which was not, however, confirmed by the case-law until after the contested decision was adopted.

338. The Court considers it appropriate to begin by examining the arguments of the Grand Duchy of Luxembourg and FFT to the effect that the Commission was not entitled to presume that the aid was selective, nor to find that they had failed to rebut the presumption of selectivity.

339. In the first place, as regards the presumption of selectivity, it must be recalled that, as is evident, in essence, from the case-law cited in paragraph 333 above, this applies subject to the twofold condition that the measure at issue constitutes individual aid (and not an aid scheme) and that it grants an advantage to the undertaking that is the beneficiary of the aid. In the case of a simple presumption, it is therefore for the applicant to establish that one or other of those two conditions is not met, if the presumption is to be rebutted.

340. First, as regards the condition relating to the existence of an advantage, it must be held that that is met. As has been noted in paragraph 286 above, the Grand Duchy of Luxembourg and FFT were unable to show that the Commission had wrongly concluded that the amount of tax payable by FFT was lower than that which it would have had to pay under normal market conditions.

341. Second, as regards the condition that the measure at issue must be individual aid, the Grand Duchy of Luxembourg and FFT dispute, in essence, both in their written submissions and at the hearing in response to questions put by the Court, that the tax ruling at issue may constitute ad hoc individual aid. According to them, it is an individual implementing measure which is part of a general scheme, as in the case giving rise to the judgment of 4 June 2015, Commission v MOL (C-15/14 P, EU:C:2015:362).

342. In that regard, it should be noted that, under Article 1(e) of Regulation 2015/1589, individual aid is aid that is not awarded on the basis of an aid scheme and awards of aid on the basis of an aid scheme that are notifiable under Article 2 of that regulation.

343. According to Article 1(d) of Regulation 2015/1589, an aid scheme comprises 'any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount'.

344. The following considerations can be extrapolated from the definition of 'aid scheme' provided for in Article 1(d) of Regulation 2015/1589, set out in paragraph 343 above, as interpreted by the case-law.

345. First, the existence of an aid scheme implies, in principle, the identification of provisions on the basis of which the aid is granted. It has nevertheless already been held that, when examining an aid scheme, and no legal act establishing such an aid scheme having been identified, the Commission may rely on a set of circumstances which, taken as a whole, indicate the de facto existence of an aid scheme (see, to that effect, judgment of 13 April 1994, *Germany and Pleuger Worthington* v *Commission*, C-324/90 and C-342/90, EU:C:1994:129, paragraphs 14 and 15).

346. Second, where the individual aid is granted without the need for further implementing measures, the essential elements of an aid scheme must necessarily be apparent from the provisions identified as constituting the basis of that scheme.

347. Third, where the national authorities apply an aid scheme, those authorities cannot have a discretion in determining the essential elements of the aid in question and as to whether it is appropriate to grant it. In order for the existence of such implementing measures to be ruled out, the national authorities' powers should be limited to the technical application of the provisions deemed to constitute the scheme in question, possibly after having verified that applicants satisfy the requirements for benefiting from the scheme.

348. Fourth, it follows from Article 1(d) of Regulation 2015/1589 that the acts underpinning the aid scheme must define the beneficiaries in a general and abstract manner, even if the aid that is granted to them is indefinite.

349. In the present case, it must be stated that, as the Commission emphasised in response to questions at the hearing, the tax ruling at issue cannot be considered to be a measure granted on the basis of an aid scheme.

350. First of all, it must be noted that neither the general system of corporate taxation, nor the specific tax regime applicable to integrated companies, or any other provision identified by the parties constitutes a scheme within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589, on the basis of which the measure at issue was granted to FFT. Nor do the parties rely on a set of circumstances which, taken as a whole, indicate the de facto existence of an aid scheme.

351. Next, it must be pointed out that the measure at issue does not relate in general terms to the adoption of tax rulings by the tax authorities but to a tax ruling which specifically concerns FFT (see judgment of 13 December 2017, *Greece* v *Commission*, T-314/15, not published, EU:T:2017:903, paragraphs 80 and 81). It is common ground that the purpose of the tax ruling at issue is to determine the amount of tax which FFT alone is required to pay under the applicable Luxembourg tax provisions, and therefore that the tax ruling at issue relates exclusively to the individual situation of FFT. It must therefore be stated that the essential elements of the aid measure and notably the elements that constitute the advantage, namely the approval of a methodology for determining FFT's remuneration on the basis of the segmentation of the capital and the application of different rates of return by reference to that segmentation, thereby deviating from an arm's length outcome,

are apparent solely from the tax ruling at issue and not from provisions of Luxembourg tax law on the basis of which the tax ruling at issue was granted.

352. Last, it must be noted, in all events, that, as the Grand Duchy of Luxembourg indicated in response to the oral questions put by the Court, it is evident from the Luxembourg legislation itself that the tax administration has a margin of appreciation in evaluating, in the light of the circumstances of each case, the best method for calculating the taxable amount of each company submitting a request for a tax ruling. The grant of tax rulings by the Luxembourg tax authorities requires, in every case, a specific analysis resulting in a complex assessment. The margin of appreciation which the Luxembourg administration has in every tax ruling thus precludes the tax ruling at issue being nothing more than a measure implementing an aid scheme.

353. In that regard, it must be pointed out that the fact that the tax ruling at issue is not an isolated measure but one of a large number of tax rulings granted to undertakings in Luxembourg has no bearing on the finding that, in so far as the tax ruling at issue granted an advantage to FFT, such a tax ruling constitutes individual aid to that undertaking.

354. It is apparent from all those considerations, and in particular from paragraphs 345 and 350 above, that the tax ruling at issue is not an aid scheme nor an individual aid measure adopted pursuant to an aid scheme, within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589. First, the tax ruling at issue does not contain any provision on the basis of which it would be possible to award aid within the meaning of both parts of the sentence in Article 1(d) of Regulation 2015/1589. Second, there is nothing from which it might be inferred that that tax ruling was adopted on the basis of such a provision.

355. In those circumstances, it must therefore be held that the tax ruling at issue must be considered to constitute individual aid, within the meaning of Article 1(e) of Regulation 2015/1589.

356. That conclusion is not called into question by the other arguments raised by the Grand Duchy of Luxembourg and by FFT.

357. First, the Court must reject as unfounded the argument of the Grand Duchy of Luxembourg that, in essence, the Commission could not call into question aid adopted under an aid scheme without first calling that scheme into question, since the tax ruling at issue was not adopted under an aid scheme.

358. Second, in so far as FFT claims that the tax ruling at issue represents the application of the transfer pricing rules in Luxembourg and the Commission failed to identify undertakings that were in circumstances legally and factually comparable to FFT, and to take account of the significant differences between group companies and stand-alone companies, that argument must be rejected as ineffective. That argument does not call into question the finding that the measure at issue is ad hoc individual aid.

359. In the light of the above, it must be concluded that the Commission did not in any event err in finding that the advantage conferred on FFT by the tax ruling at issue was selective, since the conditions attached to the presumption of selectivity were fulfilled in the present case.

360. In any event, and even if the presumption of selectivity did not in fact apply, it must be noted that the Commission also found that the advantage conferred on FFT by the tax ruling at issue was selective in the light of the three-step examination mentioned in paragraphs 334 to 336 above. It will be recalled that the first step of this examination consists of identifying the relevant reference framework; the second step, of examining whether the measure at issue derogates from that reference framework; and, finally, the third step, of verifying whether any such derogation can be justified by the nature and the general scheme of the rules of which the reference framework is composed. The Commission carried out that examination using as a reference framework, principally, the general Luxembourg corporate income tax system and, on a subsidiary basis, Article 164 of the Tax Code and the Circular.

361. As regards the first and second steps, it should be noted that, irrespective of the reference framework used by the Commission, whether that is the general corporate income tax system or Article 164 of the Tax Code and the Circular, the Commission correctly found that the tax ruling at issue derogated from the rules constituting each of those reference frameworks. As has been found in paragraphs 286 and 299 above, the Commission correctly considered, both in its principal analysis, in the light of the general corporate income tax system, and in its subsidiary analysis, in the light of Article 164 of the Tax Code and the Circular, that the tax ruling at issue conferred an advantage on FFT. As has been found in paragraph 122 above, the Commission considered, concurrently, whether there was an advantage and, in the context of its examination of selectivity, whether there was a derogation from the reference frameworks previously identified. As the Commission stated in recital 217 of the contested decision, the question whether the tax ruling at issue constitutes a dero-

gation from the reference framework coincides with the identification of the advantage granted to the beneficiary by that measure.

362. In those circumstances, it must be held that the arguments by which the parties seek to challenge the reference framework identified by the Commission are ineffective and the Court must reject, as unfounded, the arguments seeking to challenge the Commission's analysis with regard to the second step of its reasoning, that is the examination of a derogation from the reference framework.

363. As regards the third step, it must be noted that, in the contested decision, the Commission found that neither the Grand Duchy of Luxembourg nor FFT had advanced any possible justification for the selective treatment of FFT as a result of the tax ruling at issue. Moreover, it confirmed that it had not identified any ground justifying the preferential treatment from which FFT had benefited (recitals 337 and 338 of the contested decision).

364. In addition, inasmuch as FFT claims, for the purpose of justifying the derogation, that the tax ruling at issue is in line with the arm's length principle, suffice it to note that that argument is based on a false premiss.

365. As regards FFT's argument that the tax ruling at issue would enable double taxation to be avoided, as the Commission correctly points out, FFT has not maintained nor established that it could avoid double taxation only if the tax ruling at issue was adopted. Furthermore, in all events it must be stated that, as the Commission rightly observes, the question of double taxation is unconnected with, and has no bearing on, the question of determining the selectivity of an advantage.

366. It therefore follows from the considerations set out in paragraphs 360 to 365 above that the Commission did not make any error in concluding on the basis of the three-step analysis of selectivity that the measure at issue was selective.

367. In the light of the above, the Court must reject, in its entirety, the third series of pleas put forward by the Grand Duchy of Luxembourg and FFT, concerning the non-selectivity of the advantage granted to FFT.

*F – Fourth series of pleas, concerning a restriction of competition*

368. The Grand Duchy of Luxembourg claims that the Commission has not adduced proof, in breach of Articles 107 and 296 TFEU, of any restriction of competition, actual or potential.

369. According to the Grand Duchy of Luxembourg, the Commission did not establish either in recital 189 of the contested decision or in recitals 343 and 345 of that decision how FFT's being relieved of a tax liability that it would otherwise have been obliged to pay would have the effect of strengthening its position or that of the Fiat/Chrysler group on any market. Moreover, in its submission, the generic reference alone, in recital 189 of the contested decision, to the financial position of that group is manifestly insufficient to characterise such an effect, even a potential effect.

370. FFT also submits that the Commission infringed Articles 107 and 296 TFEU in that the analysis in the contested decision of the competitive effect of the tax ruling at issue was almost non-existent.

371. In the first place, FFT claims that in recital 189 of the contested decision the Commission merely asserted that the tax ruling at issue had strengthened the financial position of FFT and of the Fiat/Chrysler group and was therefore liable to distort competition.

372. In addition, FFT submits that, according to the case-law, a measure must be assessed according to its effects and not according to its objectives. The bald assertion that lower tax liability in Luxembourg strengthened the competitive position of the Fiat/Chrysler group is tantamount to a 'by object' condemnation, when it is only effect that counts. The Commission cannot always presume that competition is distorted. FFT adds that the facts of the case are complex and that it was necessary to take into account the overall effect of the tax ruling at issue on the group.

373. Furthermore, FFT maintains that, even if it were assumed that it benefited from an unduly low corporate income tax in Luxembourg, FFT does not provide services or goods to third parties and therefore does not have a competitive position in any market in which competition could be distorted.

374. In the second place, FFT maintains that the statements in recital 345 of the contested decision, although not part of the competitive effects analysis in the contested decision, are erroneous.

375. In the third place, FFT submits that the Commission's conclusion that the tax ruling at issue affected competition is based on the assumption that FFT paid less corporate income tax than a stand-alone company. However, FFT challenges the validity of that comparison.

376. The Commission contests those arguments.

377. As regards the Commission's finding that there was a restriction of competition, which is the fourth condition for a finding of State aid, it should be noted that, in recital 189 of the contested decision, first of all, the Commission recalled that a measure granted by the State is considered to distort or threaten to distort competition when it is liable to improve the competitive position of the recipient compared to other undertakings with which it competes. Next, it stated that, to the extent that the tax ruling at issue had relieved FFT of a tax liability that it would otherwise have been obliged to pay under the general corporate income tax system, that tax ruling distorted or threatened to distort competition by strengthening the financial position of FFT and the Fiat/Chrysler group.

378. In addition, in recitals 343 to 345 of the contested decision, which concern the beneficiary of the contested measure, the Commission made clear that the tax ruling at issue benefited the whole of the Fiat/Chrysler group, since it provided additional resources not only to FFT but to the entire group. The Commission added that the amount of tax paid by FFT to Luxembourg influenced the pricing conditions of the intra-group loans granted by it to the group companies, since those conditions were based on the average cost of capital of the group. The Commission concluded that reductions of FFT's tax liability had necessarily reduced the pricing conditions of its intra-group loans.

379. As has been stated in paragraph 178 above, according to settled case-law, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the Courts of the European Union to carry out their review.

380. When applied to the classification of a measure as aid, that principle requires a statement of the reasons for which the Commission considers that the measure concerned falls within the scope of Article 107(1) TFEU. In that regard, even in cases where it is apparent from the circumstances under which it was granted that the aid is liable to affect trade between Member States and to distort or threaten to distort competition, the Commission must at least set out those circumstances in the statement of reasons for its decision (judgments of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 89, and of 30 April 2009, *Commission* v *Italy and Wam*, C-494/06 P, EU:C:2009:272, paragraph 49).

381. As regards the condition relating to the distortion of competition, it follows from the case-law that, in principle, aid intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities distorts the conditions of competition (judgments of 19 September 2000, *Germany* v *Commission*, C-156/98, EU:C:2000:467, paragraph 30, and of 3 March 2005, *Heiser*, C-172/03, EU:C:2005:130, paragraph 55).

382. It is settled case-law that, for the purpose of categorising a national measure as 'State aid', it is necessary not to establish that the aid has a real effect on trade between Member States and that competition is actually being distorted, but only to examine whether that aid is liable to affect such trade and distort competition (see judgment of 10 January 2006, *Cassa di Risparmio di Firenze and Others*, C-222/04, EU:C:2006:8, paragraph 140 and the case-law cited).

383. Furthermore, as regards in particular operating aid such as the aid at issue, as the Commission submits, it is apparent from the case-law that such aid is intended to release an undertaking from costs which it would normally have had to bear in its day-to-day management or normal activities and in principle distorts the conditions of competition (see judgment of 9 June 2011, *Comitato 'Venezia vuole vivere' and Others* v *Commission*, C-71/09 P, C-73/09 P and C-76/09 P, EU:C:2011:368, paragraph 136 and the case-law cited).

384. In the present case, it should be noted that it is apparent from recitals 189, 343 and 345 of the contested decision, the content of which is set out in paragraphs 377 and 380 above, that the Commission found that FFT and the group to which it belonged benefited from an advantage resulting from a tax reduction that the other companies with which it competes did not have and which was therefore liable to improve its financial position on the market, so that the tax ruling at issue restricted competition. According to the Commission, the reduction of FFT's tax burden as a result of the tax ruling at issue provided additional resources to the whole group, in so far as it had the effect of reducing the pricing conditions of its intra-group loans. In the light of the case-law set out in paragraphs 379 to 382 above, it must be stated that these points are sufficient for a finding

that the Commission did refer to the circumstances that led it to consider the measure at issue to be liable to affect competition and to distort trade. It should be borne in mind that, as is evident from paragraph 7 above, FFT provides treasury and financing services to the companies of that group which are established in Europe, excluding those established in Italy.

385. It must therefore be held that the Commission did not infringe its obligation to state reasons or make an error of assessment by concluding that the measure at issue was liable to restrict competition on the market, in so far as the corresponding tax reduction improved the financial position of FFT and of the group to which it belonged to the detriment of that of its competitors.

386. That finding is not called into question by the other arguments of the Grand Duchy of Luxembourg and of FFT.

387. In the first place, in so far as the Grand Duchy of Luxembourg relies on the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), it must be noted, as has been indicated in paragraph 321 above, that that judgment of the General Court was set aside by the Court of Justice in its judgment of 25 July 2018, *Commission* v *Spain and Others* (C-128/16 P, EU:C:2018:591).

388. In any event, it must be noted that, in the judgment of 17 December 2015, *Spain and Others* v *Commission* (T-515/13 and T-719/13, EU:T:2015:1004), the General Court found that the statement of reasons for the Commission's decision was insufficient in that the reasons why the advantage conferred on investors, and not on the shipping companies and shipyards that had received the aid, was liable to entail a distortion of competition were not sufficiently clear. However, the facts of the present case are different, since the advantage is conferred on FFT and on the group to which it belongs. Therefore, the circumstances of the present case require no other explanation than that, by being required to pay a reduced tax, FFT, and the companies of the Fiat/Chrysler group, had benefited from an advantage, so that competition on the markets on which the companies of the Fiat/Chrysler group operated was affected as a result.

389. In the second place, FFT refers to three judgments to support its argument that the Commission should have undertaken a more detailed investigation of the facts.

390. First, as regards the judgments of 17 September 1980, *Philip Morris* v *Commission* (730/79, EU:C:1980:209, paragraph 11), and of 15 June 2000, *Alzetta and Others* v *Commission* (T-298/97, T-312/97, T-313/97, T-315/97, T-600/97 to T-607/97, T-1/98, T-3/98 to T-6/98 and T-23/98, EU:T:2000:151, paragraph 80), it must be noted that, contrary to FFT's contention, while the Commission did, in those cases, specifically identify the relevant market, the pre-existing competitive position and the purpose of the aid, it is not apparent from either of those judgments that the Commission must systematically carry out such an analysis when it sets out the reasons why the measure at issue distorts competition. As has been stated in paragraph 384 above, the Commission identified the reasons why the measure at issue constituted operating aid enabling FFT and the Fiat/Chrysler group companies to benefit from an advantage and to improve their financial position and, in FFT's case, to reduce the pricing conditions of its intra-group loans.

391. Furthermore, unlike the facts in the case giving rise to the judgment of 24 October 1996, *Germany and Others* v *Commission* (C-329/93, C-62/95 and C-63/95, EU:C:1996:394), in which the Court annulled the Commission's decision for failure to state reasons, and contrary to the facts that gave rise to the judgment of 13 March 1985, *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* (296/82 and 318/82, EU:C:1985:113), in the present case, the Commission did in fact set out the reasons for its view that there was a restriction of competition.

392. Those arguments must therefore be rejected as unfounded.

393. In the third place, inasmuch as FFT submits that a measure must be assessed according to its effects and not according to its objectives, suffice it to note that it is apparent from the case-law cited in paragraph 118 above that aid must distort or threaten to distort competition. In the present case, as has been stated in paragraph 384 above, the Commission correctly found that the measure at issue had the effect of distorting competition.

394. In the fourth place, in so far as FFT submits that the Commission's conclusion that the tax ruling at issue affected competition is based on the erroneous assumption that FFT paid less corporate income tax than a stand-alone company, that argument must be rejected as unfounded. The Commission correctly found that FFT had benefited from a tax advantage, and was thus entitled to conclude that such an advantage would be liable to distort competition in the markets in which FFT and the group to which it belonged operated.

395. In the fifth place, in so far as FFT maintains that, even if it were assumed that it had benefited from an unduly low corporate income tax in Luxembourg, FFT does not provide services or goods to third parties and does not, therefore, have a competitive position in any market in which competition could be distorted, or that the goods and services which the group companies provide are driven by market conditions, those arguments must be rejected as unfounded. Since FFT benefits from a reduction of its tax burden, it is in a position to finance the activities of other companies of the group at a lower cost, thereby distorting competition in the markets in which the latter operate.

396. In the sixth place, FFT maintains that the statements in recital 345 of the contested decision, although not part of the competitive effects analysis in the contested decision, are erroneous. According to FFT, the Commission was wrong to find that there was a link between the amount of tax paid by FFT in Luxembourg and the amount of interest FFT charges to Fiat/Chrysler group companies on its loans to them. In that regard, it is sufficient to note that, as FFT itself acknowledges, moreover, the fact that the Commission made an error in the amount of interest to be taken into consideration has no bearing on the finding that there is a restriction of competition. That argument must therefore be rejected as ineffective.

397. In the seventh place, inasmuch as FFT claims that there is a similarity between the decision annulled by the Court of Justice in the judgment of 30 April 2009, *Commission* v *Italy and Wam* (C-494/06 P, EU:C:2009:272) and the present case, that argument, which it did not raise in the context of the second part of the first plea, must be rejected as unfounded. As the Commission contends, in the former case, the Court of Justice found that the aid in question was not operating aid. In addition, FFT has not called into question the case-law on which the Commission relied in the present case, according to which, in principle, operating aid distorts the conditions of competition. Nor has FFT established that such a presumption would not apply in the present case.

398. In the light of the foregoing, the Court must reject the pleas advanced by the Grand Duchy of Luxembourg and by FFT to the effect that the Commission failed to establish that there was a restriction of competition.

*G – Fifth series of pleas, relating to recovery of the aid*

399. This series of pleas, raised in the alternative by the Grand Duchy of Luxembourg, which deals with recovery of the aid, is in two parts.

1. First part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is incompatible with the principle of legal certainty

400. The Grand Duchy of Luxembourg contends that the Commission breached the principle of legal certainty and Article 16(1) of Regulation 2015/1589 in ordering the recovery of the alleged aid at issue.

401. Ireland states that it shares the Grand Duchy of Luxembourg's view that the Commission breached the principle of legal certainty.

402. The Commission contests those arguments.

403. It should be noted that Article 16(1) of Regulation 2015/1589 provides as follows:

> 'Where negative decisions are taken in cases of unlawful aid, the Commission shall decide that the Member State concerned shall take all necessary measures to recover the aid from the beneficiary … The Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law.'

404. In the contested decision, first of all, the Commission indicated that, under Article 16(1) of Regulation 2015/1589, it was obliged to order recovery of unlawful and incompatible aid, unless recovery would be contrary to a general principle of law (recitals 354 and 355 of the contested decision). The Commission went on to find that the arguments of the Grand Duchy of Luxembourg to the effect that recovery would breach the principles of protection of legitimate expectations and of legal certainty were without merit (recital 364 of the contested decision). First, with regard to the protection of legitimate expectations, it observes that it did not give any precise assurance to the Grand Duchy of Luxembourg or to FFT (recitals 356 to 358 of the contested decision). Second, with regard to breach of the principle of legal certainty, it states that there is no previous decision-making practice that might have created uncertainty about the fact that tax rulings could lead to the granting of State aid. Moreover, and in particular, the Commission recalls that, according to the case-law, it is not required to state the exact amount of the aid to be recovered (recitals 360 to 363 of the contested decision).

405. According to the case-law, the principle of legal certainty, which is a general principle of EU law, requires that legal rules be clear and precise and aims to ensure that situations and legal relationships governed by EU law remain foreseeable (judgment of 15 February 1996, *Duff and Others* v *Commission*, C-63/93, EU:C:1996:51, paragraph 20).

406. In the present case, first, inasmuch as the Grand Duchy of Luxembourg maintains that, in accordance with Article 16(1) of Regulation 2015/1589, recovery should not be ordered as it would breach the principle of legal certainty, it must be noted that the legal rule that led to the adoption of the contested decision – that is Article 107 TFEU, and the four conditions for a finding of such aid, which are recalled in paragraph 118 above – is clear and precise.

407. In that regard, it must be borne in mind that the concept of State aid is defined on the basis of the effects of the measure on the competitive position of its beneficiary (see, to that effect, judgment of 22 December 2008, *British Aggregates* v *Commission*, C-487/06 P, EU:C:2008:757, paragraph 87). It follows from this that Article 107 TFEU prohibits any aid measure, irrespective of its form or the legislative means used to grant such aid (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 79).

408. Accordingly there is no doubt that any State measure, such as a tax ruling, that fulfils the conditions referred to in Article 107 TFEU is, in principle, prohibited and must be made the subject of a recovery order.

409. Second and in any event, it must be noted that, as the Commission has observed, there was no objective fact on the basis of which the Grand Duchy of Luxembourg or FFT were entitled to conclude that the Commission would not apply Article 107 TFEU to tax rulings. First, it is evident from the Commission's practice in taking decisions, to which it refers in footnote 71 of the contested decision and the validity of which is not disputed by the Grand Duchy of Luxembourg, that the Commission has previously examined the compatibility of tax rulings with Article 107 TFEU. Second, the Grand Duchy of Luxembourg does not dispute that the Commission has already examined individual tax measures and has used the arm's length principle to order the recovery of aid.

410. In those circumstances, the application alone of Article 107 TFEU to the tax ruling at issue does not constitute a breach of the principle of legal certainty. Accordingly, it is not possible properly to rely upon any breach of that principle in order to justify non-recovery of the aid resulting from the tax ruling at issue, pursuant to Article 16(1) of Regulation 2015/1589.

411. The other arguments put forward by the Grand Duchy of Luxembourg and Ireland are not persuasive.

412. First of all, inasmuch as the Grand Duchy of Luxembourg maintains that the framework used by the Commission to analyse FFT's tax base was not sufficiently foreseeable, that it is necessary to display flexibility in not requiring an unrealistic level of precision and that it cannot be concluded that there was bad faith, it should be recalled that the Member States have a margin of appreciation in determining transfer pricing, and that it is only if the Commission finds an error in the determination of that pricing, which is such that that transfer pricing does not represent a reliable approximation of a market-based outcome, that it is entitled to identify an aid measure (see paragraph 204 above). In the present case, the Court has found that the Commission was fully entitled to conclude that the Grand Duchy of Luxembourg had endorsed, by the tax ruling at issue, errors in the methodology for determining FFT's remuneration the effect of which was that the transfer price did not reflect the prices that would have been negotiated under market conditions. In those circumstances, it cannot be concluded that the Commission required an unrealistic level of precision, or that its analytical framework is unforeseeable. The Grand Duchy of Luxembourg cannot therefore properly claim that it was not foreseeable that the Commission would make a finding of aid and order its recovery.

413. Next, in so far as the Grand Duchy of Luxembourg submits that its tax ruling practice was compatible with the Code of Conduct in relation to business taxation and the OECD Guidelines, it is sufficient to note that the Commission found that, by the tax ruling at issue, which was not notified to it, the Grand Duchy of Luxembourg had granted State aid that was incompatible with the internal market within the meaning of Article 107 TFEU. In so doing, the Commission did not call into question the tax ruling practice as such. Moreover, the existence of State aid is examined in the light of the criteria laid down in Article 107 TFEU. In those circumstances, the fact that transfer pricing texts – which are not binding on the Commission – have been approved by the Council of the European Union or by the OECD has no bearing on the finding that the tax ruling at issue grants a selective advantage to FFT.

414. In addition, the Grand Duchy of Luxembourg and Ireland maintain that the application of the principle of legal certainty may require the retroactive effect of an act to be limited if there are serious economic risks and

if the interested parties are acting in good faith, conditions that are met in the present case. In so far as the Grand Duchy of Luxembourg raises that argument in order to challenge the recovery of the aid at issue, it is sufficient to recall that an order for recovery does not constitute the retroactive implementation of an act. Removing unlawful aid by means of recovery is the logical consequence of a finding that it is unlawful and seeks to re-establish the previous situation (judgment of 19 October 2005, *CDA Datenträger Albrechts* v *Commission*, T-324/00, EU:T:2005:364, paragraph 77 and the case-law cited).

415. In any event, in so far as the Grand Duchy of Luxembourg submits that the contested decision would have serious economic repercussions or cause serious difficulties for it and for other Member States, as has been observed in particular by representatives of the United States of America, it must be noted that Article 16(1) of Regulation 2015/1589 does not provide for aid that has been declared incompatible to be unrecoverable for that reason. Moreover, none of the arguments raised by the Grand Duchy of Luxembourg establishes that such serious economic repercussions exist. It is clear that the recovery of the aid at issue cannot, as such, have negative economic effects for the Grand Duchy of Luxembourg, since the sums recovered are allocated to its public finances. Further, contrary to what the Grand Duchy of Luxembourg seems to contend, as such, recovery from FFT of the aid received by FFT pursuant to the tax ruling at issue cannot have the direct effect of possibly 'calling into question a very large number of tax rulings in the Grand Duchy of Luxembourg and potentially thousands in all the other Member States'. The mere fact that the Commission has called into question a tax ruling that grants a selective advantage to an undertaking means only that that tax ruling, issued contrary to Article 107 TFEU, will be subject to recovery, but not that all tax rulings, including those that do not constitute State aid, will be subject to recovery.

416. Therefore, the contested decision cannot be considered to have novel or serious consequences for international taxation, as the Commission has always had the power to investigate whether any tax measure constitutes State aid within the meaning of Article 107 TFEU.

417. Last, in so far as Ireland submits, in essence, that the Commission could not suggest, as it did in the contested decision, that if the Commission does not identify the amount of aid, the Member State is to contact it to determine the amount, suffice it to note that, in the present case, the Grand Duchy of Luxembourg has neither claimed nor established that the Commission's findings, in recital 311 of the contested decision, with respect to the methodology for calculating the tax payable by FFT were so imprecise that it would have been impossible to calculate the amount of aid received without contacting the Commission, and thus that the contested decision created a legal uncertainty. On the contrary, the Grand Duchy of Luxembourg acknowledges having estimated the amount of the aid to be recovered as EUR 23.1 million. That argument must therefore be rejected as unfounded.

418. In the light of the above, the first part of the series of pleas concerning recovery must be rejected as unfounded.

2. Second part, alleging infringement of Regulation 2015/1589 in that recovery of the alleged aid at issue is contrary to the rights of the defence

419. The Grand Duchy of Luxembourg submits that, in accordance with the Commission's practice in taking decisions, where the amount of the aid cannot be assessed, it is not appropriate to order recovery. Where it is not possible to quantify the aid precisely, or to identify criteria by which a Member State, in conjunction with the Commission, could quantify it precisely, the Member State's rights of defence are infringed, precluding recovery.

420. In that regard, the Grand Duchy of Luxembourg states that it has admittedly required the beneficiary of the alleged aid to pay an amount into an escrow account. That amount was calculated according to the information given by the Commission in recital 311 of the contested decision, and it was made clear that that calculation was without prejudice to the challenge to the Commission's methodology. However, the Grand Duchy of Luxembourg considers that that calculation is completely artificial in that it would be impossible to quantify the alleged aid precisely, 'without resorting to the Commission's entirely arbitrary assessments in this case'. It maintains that there is not, in essence, one correct transfer price, according to the OECD and the Commission, but a broad range of correct prices. Further, the Grand Duchy of Luxembourg submits that it has no real flexibility to deviate from the methodology proposed by the Commission in the contested decision.

421. The Commission contests those arguments.

422. In the contested decision, the Commission found first of all in recital 367 that, according to the case-law, although EU law does not require the exact amount of the aid to be recovered to be quantified, it is sufficient

for the Commission's decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty. The Commission went on to explain that it had identified, in recital 311 of the contested decision, a methodology for eliminating the selective advantage granted to FFT if the Grand Duchy of Luxembourg chose to use the TNMM, while also mentioning that the Grand Duchy of Luxembourg could use an alternative method within the deadline for the implementation of the decision (recitals 367 to 369 of the contested decision).

423. In the present case, first, it must be noted that the Grand Duchy of Luxembourg does not dispute the Commission's assessment that it is apparent from the judgment of 18 October 2007, *Commission* v *France* (C-441/06, EU:C:2007:616, paragraph 29 and the case-law cited), that a Commission decision does not necessarily have to indicate the amount of aid to be recovered if it includes information enabling the Member State to work out that amount itself without overmuch difficulty.

424. Second, the Grand Duchy of Luxembourg does not claim that, in the present case, the contested decision failed to provide information enabling it to work out the amount to be recovered itself. It thus acknowledges having calculated and assessed that amount as EUR 23.1 million, for the purpose of its recovery from FFT. Moreover, far from considering the Commission's method of calculation to be imprecise, it merely submits, in essence, that that method does not give it 'real flexibility to deviate from the Commission's dogmatic approach'. In so doing, the Grand Duchy of Luxembourg recognises, at least implicitly, that that method is sufficiently precise to enable it to calculate the amount of aid to be recovered.

425. In those circumstances, the Commission cannot be accused of having infringed the rights of defence of the Grand Duchy of Luxembourg by failing to indicate the amount of aid to be recovered in the contested decision.

426. None of the arguments advanced by the Grand Duchy of Luxembourg is liable to undermine that conclusion.

427. First, in so far as the Grand Duchy of Luxembourg submits that the fact that it asked FFT to pay an amount of EUR 23.1 million into an escrow account is without prejudice to the fact that it challenges the Commission's method of calculation, that argument must be rejected as ineffective. The Grand Duchy of Luxembourg has not established that the contested decision is insufficiently precise to the extent that it is unable to determine the amount that must be recovered. It merely challenges the methodology used by the Commission for the purposes of calculating the amount of aid to be recovered, which it describes as arbitrary. The question as to whether or not the methodology is correct is unconnected with infringement of the rights of the defence, to which the second part of the fifth series of pleas relates.

428. Next, in so far as the Grand Duchy of Luxembourg maintains that, by identifying a 'broad range' of possible amounts, the contested decision fails to comply with the requirement that the amount of the aid be identified relatively precisely, it is sufficient to note that, by identifying a method which was followed by the Grand Duchy of Luxembourg, the Commission satisfied the condition set out in the case-law mentioned in paragraph 423 above, according to which the method must enable the amount to be recovered to be determined without difficulty. Moreover, the range proposed by the Commission does not relate to the amount of aid to be recovered but to the amount it considers appropriate for FFT's tax base. That information is sufficiently precise to enable the Grand Duchy of Luxembourg to calculate the amount of aid to be recovered. Furthermore, the fact that the Commission confirmed that other methods could have resulted in other amounts and that it provided an opportunity to propose an alternative method for calculating the amount to be recovered does not affect the fact that the contested decision contains sufficiently precise information regarding recovery, nor in itself prevent recovery of the aid.

429. In those circumstances, the second part of the fifth series of pleas relating to recovery, and this series as a whole, must be rejected as unfounded.

430. It follows from all of the above considerations that the actions in Cases T-755/15 and T-759/15 must be dismissed.

## IV – Costs

### *A – In Case T-755/15*

431. …

432. …

*B – In Case T-759/15*

433. …

434. …

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition),

hereby:

**1. Joins Cases T-755/15 and T-759/15 for the purposes of the judgment;**

**2. Dismisses the actions;**

**3. Orders the Grand Duchy of Luxembourg to bear its own costs and to pay those incurred by the European Commission in Case T-755/15;**

**4. Orders Fiat Chrysler Finance Europe to bear its own costs and to pay those incurred by the Commission in Case T-759/15;**

**5. Orders Ireland to bear its own costs.**

# EU Court of Justice, 24 September 2019*

## Cases T-760/15 and T-636/16

## *Kingdom of the Netherlands (T-760/15), Starbucks Corp., Starbucks Manufacturing Emea BV (T-636/16) v European Commission*

*General Court (Seventh Chamber, Extended Composition) : M. van der Woude, President, V. Tomljenovic (Rapporteur), E. Bieliunas, A. Marcoulli and A. Kornezov, Judges*

*Registrar: S. Spyropoulos, Administrator*

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* Languages of the case: Dutch and English.

## I – Background to the dispute and legal framework

1. Starbucks Manufacturing Emea BV ('SMBV') is a subsidiary of the Starbucks group ('the Starbucks group'), established in the Netherlands. The Starbucks group is composed of Starbucks Corp. and all the companies controlled by that corporation. Starbucks Corp. is headquartered in Seattle, Washington (United States). Alki LP ('Alki') is a subsidiary of the Starbucks group, established in the United Kingdom, which indirectly controls SMBV. Alki and SMBV concluded a roasting agreement ('the roasting agreement'), which provides inter alia that SMBV is to pay Alki a royalty for the use of Alki's intellectual property (IP) rights, including roasting methods and other roasting know-how ('the royalty').

2. Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks (OJ 2017 L 83, p. 38; 'the contested decision') concerns a measure relating to the application of the Netherlands corporate tax system to the specific case of SMBV.

### *A – National legislative framework*

3. According to the general Netherlands corporate income tax system, corporate income tax must be paid by companies established in the Netherlands – which are resident taxpayers – and by non-established companies

– which are non-resident taxpayers – that have an economic activity in the Netherlands. According to Article 2 of the Wet op vennootschapsbelasting (Law on corporation tax; 'CIT') of 1969, established companies – which necessarily includes companies incorporated under Netherlands law – are subject to corporate income tax on their worldwide income. According to Article 3 of the CIT, non-established companies, for their part, are taxed on their income from Netherlands sources.

4. In that context, the corporate tax base is made up of the profits made by the corporate taxpayer. It follows from Article 8 of the CIT, read in conjunction with Section 3.8 of the Wet inkomstenbelasting (Income Tax Act) of 2001, that all taxpayers must be taxed according to the total profit concept. According to that concept, all corporate profits are taxed, provided that they derive from an economic or commercial activity. Section 3.8 of the Income Tax Act provides that 'the profit from a business enterprise is the amount of the aggregate benefits that, under whatever name and in whichever forms, are derived from a business enterprise'. According to Section 3.25 of the Income Tax Act 2001, which applies also to corporate taxpayers by virtue of Article 8 of the CIT, the taxable yearly profits must be determined on the principles of sound business practice and in a consistent manner independently of the likely outcome.

5. In general, the taxable profits correspond to the accounting profits as reflected in the company's profit and loss accounts. However, adjustments can be made based on specific tax provisions, such as applicable tax incentives, the participation exemption, corrections to the tax result from transactions not executed at arm's length and the application of different depreciation rules under tax and accounting rules.

6. Article 8b(1) of the CIT provides that, 'where an entity participates, directly or indirectly, in the management, control or capital of another entity, and conditions are made or imposed between these entities in their commercial and financial relations (transfer prices) which differ from conditions which would be made between independent parties, the profit of these entities will be determined as if the last mentioned conditions were made'.

7. Decree IFZ2001/295M of the Netherlands State Secretary for Finance of 30 March 2001, entitled 'Transfer pricing method, application of the arm's length principle and the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations' ('the transfer pricing decree'), describes the manner in which the Netherlands tax administration interprets the arm's length principle on the basis of Article 8b(1) of the CIT. The preamble of the transfer pricing decree provides the following:

> 'The policy of the Netherlands on the arm's length principle in the field of international tax law is that this principle forms an integral part of the Netherlands system of tax law as a result of its incorporation in the broad definition of income recorded in Section 3.8 of the Income Tax Act. In principle, this means that the [Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the Committee on Fiscal Affairs of the Organisation for Economic Co-operation and Development (OECD) on 27 June 1995] apply directly to the Netherlands under Section 3.8 of the Income Tax Act. There are a number of areas in which the OECD Guidelines provide scope for individual interpretation by the member countries. In a number of other areas, practical experience has shown that the OECD Guidelines are in need of clarification. This decree explains the Netherlands' position in relation to these particular points and seeks, where possible, to remove any confusion.'

8. The transfer pricing decree is divided into twelve parts on the arm's length principle, on transfer pricing methods, on administrative approaches aimed at preventing and resolving transfer pricing disputes, on secondary adjustments, on determination of the arm's length price where the assessment is highly uncertain at the time of the transaction, on the provision of services within a group, on contributions to a cost-sharing agreement with a profit mark-up, on arm's length remuneration for financial services, on subsidies, fiscal advantages and partially deductible costs, on the allocation of profits to a parent company and to a permanent establishment, on the entry into force of that decree and on the application of the current policy.

9. More specifically, the transfer pricing decree states in point 1 thereof, inter alia, that the arm's length principle under Netherlands law is based, in general, on comparing the conditions of a transaction between affiliated companies with the conditions of a transaction between independent companies. The administration is entitled to expect a taxpayer to demonstrate that the transfer prices it applies comply with the arm's length principle. In that context, the premiss must be that each of the companies concerned receives a remuneration which reflects the functions performed, taking into account the assets mobilised and the risks run. In addition, arm's length remuneration must in theory be determined on the basis of transactions. In the event of difficulty, transactions may be assessed together in order to determine compliance with the arm's length principle. Moreover, in examining multiannual data, the tax administration may not use hindsight.

10. In point 2 thereof, the transfer pricing decree refers to five methods, set out in the Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, adopted by the Committee on Fiscal Affairs of the Organisation for Economic Co-operation and Development on 27 June 1995 and revised on 22 July 2010 ('the OECD Guidelines'), concerning the determination of transfer prices. Those methods include the comparable uncontrolled price method ('the CUP method') and the transactional net margin method (the 'TNMM'). According to the transfer pricing decree, the OECD Guidelines assume a certain hierarchy between the methods, preference being given to the traditional transactional methods. The Netherlands tax administration must always conduct a transfer pricing audit from the perspective of the method chosen by the taxpayer at the date of the transaction. The decree states that that rule complies with paragraph 1.68 of the 1995 version of the OECD Guidelines. It follows that the taxpayer is in principle free to choose a transfer pricing method as long as the selected method leads to a result in conformity with the arm's length principle. Even though, where it chooses a transfer pricing method, the taxpayer is deemed to take into account the reliability of that method in the situation in question, that approach is not specifically aimed at encouraging it to assess all the methods and justifying, thereafter, the reasons why the method it has chosen gives the best result under the conditions present.

11. Point 5 of the transfer pricing decree provides inter alia that it may be difficult, during the transfer of intangible goods such as patents, for example, to assess the value of those assets at the time of the transfer on account of insufficient knowledge about future advantages and risks. In the event that independent companies have opted for a price revision clause, in comparable circumstances, the tax administration must have the possibility of determining the price on the basis of such a clause. The objective is to have a regime in which the remuneration is in conformity with the advantages the intangible good will generate in the future.

*B – Advance pricing arrangement*

12. On 28 April 2008, the Netherlands tax authorities concluded an advance pricing arrangement with SMBV ('the APA'), the objective of it being to determine SMBV's remuneration for its production and distribution activities, as described in the APA, within the Starbucks group ('SMBV's remuneration'). Thereafter, SMBV's remuneration served to determine annually its taxable profit on the basis of Netherlands corporate income tax. According to its preamble, the APA is a tax agreement relating to the conformity with the arm's length principle of the transfer prices to be used in the calculation of profit within an international group. It is apparent from [*confidential*][**] the APA that the agreement was intended inter alia to be used for the purposes of the annual corporate income tax declarations in the Netherlands. The APA was valid for the period between 1 October 2007 and 31 December 2017.

13. The APA provided for a method for determining SMBV's remuneration in accordance with the arm's length principle for its production and distribution activities within the Starbucks group. In addition, the APA endorsed the amount of the royalty, paid by SMBV to Alki for the use of roasting technologies, coffee blends and coffee roasting curves ('the roasting IP'), in the context of the process of producing and providing coffee to shop operators.

14. More specifically, as regards the scope of the APA, [*confidential*]. Regarding SMBV's functions, [*confidential*] it was mainly responsible for the production of roasted coffee beans and for the provision of roasted coffee beans and related products to Starbucks shops in the Europe, Middle East and Africa region ('the EMEA region') and that it was the owner of a roasting facility in the Netherlands. Moreover, the APA indicated that SMBV was licensing certain intellectual property rights belonging to Alki and that those rights were necessary to the process of producing and providing coffee to store operators. It was stated that, to that end, SMBV paid the royalty to Alki. [*confidential*] Furthermore, according to [*confidential*] the APA, SMBV carried out a distributor function for a number of other coffee-related products and, besides the logistics functions relating to its own production activities, also provided logistics support for other products on certain markets.

15. Regarding the transfer pricing method for SMBV's production and distribution activities, [*confidential*] the APA stated inter alia that SMBV's remuneration had to be determined on the basis of the cost plus method (see paragraph 187 below in relation to the meaning of that expression), and that it was at arm's length if the 'operating margin' reached [*confidential*]% of the relevant cost base ('SMBV's cost base'). In addition, according to the APA, SMBV's cost base did not include:

- the costs of the Starbucks cups, paper napkins, etc.;
- the costs of green coffee beans;

** Confidential information omitted.

– the logistics and distribution cost relating to services provided by third parties and to the remuneration for activities provided by third parties under consignment manufacturing contracts;
– the royalty payment.

16. So far as concerns the royalty that SMBV had to pay annually to Alki, [*confidential*] the APA provided that it was fixed on the basis of the difference between the operational profit made in respect of the production and distribution function, before royalty expenses, and SMBV's remuneration. The royalty payment was deductible for corporate income tax purposes and was not subject to Netherlands withholding tax.

*C – Background to the dispute*

1. Administrative procedure before the Commission

17. On 30 July 2013, the European Commission sent the Kingdom of the Netherlands an initial request for detailed information on its national tax ruling practice in the area of corporate taxation. To that effect, it requested that all rulings concerning SMBV and Starbucks Coffee Emea BV, two subsidiaries of the Starbucks group established in the Netherlands, be sent to it. In response to that request, the Kingdom of the Netherlands inter alia sent the APA.

18. On 11 June 2014, the Commission initiated the formal investigation procedure under Article 108(2) TFEU ('the opening decision') in respect of the APA, on the ground that that agreement might constitute State aid within the meaning of Article 107(1) TFEU.

19. Following the adoption of the opening decision, the Commission exchanged, on numerous occasions, correspondence with the Kingdom of the Netherlands and with those entities of the Starbucks group that were the correspondents of the Commission during the administrative procedure ('the Starbucks correspondents') in relation inter alia to the APA.

2. Contested decision

20. On 21 October 2015, the Commission adopted the contested decision. In that decision, the Commission, first, found that the APA constituted aid incompatible with the internal market and, second, ordered the recovery of that aid. The contested decision is divided into 11 sections.

*a. Description of the contested measure*

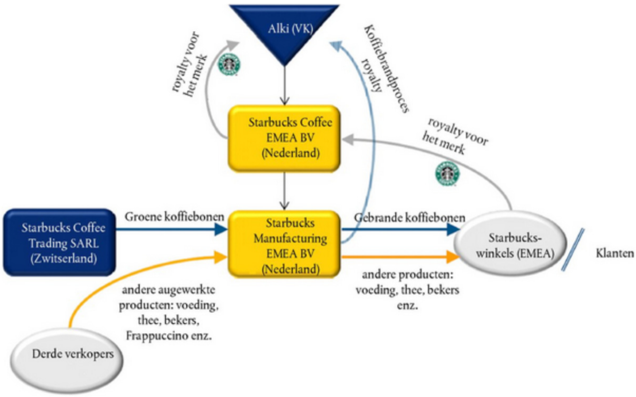
21. In Section 2 of the contested decision, entitled 'Description of the contested measure', the Commission identified the APA as the measure at issue. It stated that the APA had been concluded on the basis of the transfer pricing report prepared by the Starbucks group's tax advisor ('the transfer pricing report') and found that that document formed an integral part of the APA (recitals 40 and 46 of the contested decision).

22. First, the Commission noted that, in adopting the APA, the Netherlands tax authorities had accepted that the remuneration for SMBV's activities in the Netherlands, as determined by the Starbucks group's tax advisor, constituted an arm's length remuneration. The Commission then noted that the Netherlands authorities had also accepted that the level of the royalty payment from SMBV to Alki corresponded to the difference between the realised operating profit before royalty payments and SMBV's remuneration as provided for by the APA. It found that the APA provided that the royalty payment would be deductible from SMBV's taxable profit and would not be subject to withholding tax in the Netherlands (recitals 40 to 44 of the contested decision).

23. Second, the Commission set out the content of the transfer pricing report. First of all, the Commission stated that the transfer pricing report presented Starbucks Coffee Emea as the principal establishment of the Starbucks group in the EMEA region. It was described as sublicensing the Starbucks group's intellectual property rights (trade mark, technology and know-how) – for which it itself was paying a royalty to Alki – to third parties operating Starbucks branches. Those then paid Starbucks Coffee Emea for IP rights corresponding to a percentage of their turnover. In that regard, the Commission noted that the Starbucks group's tax advisor considered that the CUP method could be used to determine the arm's length price of payments of intra-group IP rights to Starbucks Coffee Emea.

24. Next, as regards SMBV, first, the Commission noted that the transfer pricing report was limited to describing it as an entity with the primary function of roasting green coffee beans and selling the roasted coffee on to affiliated and non-affiliated entities. As part of those activities, SMBV was required to observe the specifications provided by the companies of the Starbucks group that were established in the territory of the United States ('Starbucks US') and had the responsibility of ensuring that its production was in conformity with the

quality standards of Starbucks US. SMBV also acted as distribution intermediary for various products not derived from café and provided 'support to the supply chain'. Second, the Commission stated that, to carry out that activity, SMBV supplied itself with green coffee beans from a subsidiary of the Starbucks group established in Switzerland, Starbucks Coffee Trading SARL ('SCTC'). SMBV also paid a royalty to Alki for the use of roasting processes and for the right to provide Starbucks branches with coffee. In that regard, the Commission observed that the transfer pricing report did not list the licensing arrangement under which SMBV paid a royalty to Alki among the most important transactions. The relationships between SMBV and the various entities of the Starbucks group were restated in Figure 1 of the contested decision, reproduced below:




25. Last, the Commission stated that, as regards the choice of transfer pricing method, the transfer pricing report selected the TNMM, a method whereby account was taken of the net margins that had been received in comparable transactions by non-affiliated companies. According to the transfer pricing report, that method was appropriate in the case at hand, since the differences between the transactions and the functions of the entities to be compared to determine the net margin were less the sources of error than in traditional methods (recital 55 of the contested decision).

26. The Commission stated that, in order to apply the TNMM, the tax advisor had chosen as profit level indicator the operating costs for the activities where SMBV provided added value. After a comparability search, the tax advisor had considered that the net profit of the entities comparable to SMBV corresponded to a mark-up on total costs. Thereafter, the Starbucks group's tax advisor had made two adjustments in order to take account of the differences between the compared entities and SMBV, such as the risks assumed or the functions performed. The first adjustment sought to take into account the fact that SMBV's cost base, to which the mark-up was applied, did not include the cost of green coffee beans. The second adjustment purported to take into account the fact that the comparable undertakings bore the cost of raw materials and that their return was calculated on a cost base including raw materials. Applying those two adjustments, the mark-up had thus been set at [confidential]% of SMBV's cost base (recitals 56 to 61 of the contested decision).

27. Third, the Commission set out the content of the OECD Guidelines in their 1995 and 2010 versions. According to the Commission, the OECD Guidelines described five methods to approximate an arm's length pricing of transactions and profit allocation between companies of the same group. In its view, they classified those five methods either as traditional transaction methods or as transactional profit methods. According to the contested decision, the traditional transaction methods were to be given priority. The CUP method and the TNMM were included among the five methods listed in the OECD Guidelines (recitals 67 to 70 of the contested decision).

28. The first method, the CUP method, is, as the Commission described, a traditional transaction method, consisting in comparing the price charged for the transfer of property or services in a transaction between two associated undertakings with the price charged for the transfer of property or services in a comparable transaction carried out in comparable circumstances between two independent undertakings (recitals 67 and 71 of the contested decision).

29. The second method, the TNMM, is, as the Commission describes, a transactional profit method, which involves estimating the potential amount of arm's length profit for an entire activity, rather than for specific

transactions. In that context, a profit level indicator would be selected, such as costs, turnover or fixed investment, to which would be applied a profit ratio reflecting that observed in comparable transactions on the market (recitals 67 and 72 to 74 of the contested decision).

*b. Assessment of the contested measure*

30. In Section 9 of the contested decision, entitled 'Assessment of the contested measure', the Commission concluded that State aid had been granted. It found that the four conditions for the existence of State aid had been satisfied.

31. After recalling the conditions for the existence of State aid, set out in Article 107(1) TFEU, the Commission found that the first condition for the existence of State aid, the requirement of an intervention by the State or through State resources, had been satisfied. It noted, to that end, first, that the APA contained the acceptance by the Netherlands tax administration of a method for allocating profits to SMBV within the Starbucks group, as proposed by the Starbucks group's tax advisor. SMBV then calculated on that basis the annual amount of corporate income tax it was required to pay in the Netherlands. According to the Commission, the APA was therefore imputable to the Kingdom of the Netherlands. Second, the Commission found that the APA resulted in a lowering of SMBV's tax liability in the Netherlands by deviating from the tax that SMBV would otherwise – in the absence of the APA – have been obliged to pay under the general Netherlands corporate income tax system. The Commission thus took the view that the APA had given rise to a reduction of the Kingdom of the Netherlands' tax revenue (recitals 223 to 226 of the contested decision).

32. As regards the second and fourth conditions for a finding of State aid, first, the Commission found that the APA was liable to affect intra-Union trade, since SMBV was part of the Starbucks group, a globally active entity operating in all Member States of the European Union. Second, it maintained that, given that the APA reduced the tax burden that SMBV would otherwise have had to bear under the general corporate income tax system, it distorted or threatened to distort competition by strengthening SMBV's financial position (recital 227 of the contested decision).

33. As regards the third condition for a finding of State aid, the Commission considered that the APA conferred a selective advantage on SMBV, in so far as it had resulted in a lowering of SMBV's tax liability in the Netherlands as compared with what it would have had to pay under the general corporate income tax system and as compared with stand-alone undertakings (recital 228 of the contested decision).

34. As a preliminary point, the Commission observed that the case-law had established a three-step analysis to be used in determining whether a particular tax measure was selective. The first step is to identify the 'reference system', namely, the tax regime normally applicable to the beneficiary of the tax measure. In the second step, it is necessary to determine whether the tax measure derogates from that reference system, in so far as it differentiates between economic operators who, in the light of the objectives intrinsic to the reference system, are in a comparable legal and factual situation. In the third and final step, if the measure constitutes a derogation from the reference system, the Member State must establish that the derogation is justified by the nature or the general scheme of the reference system (recital 230 of the contested decision).

35. As regards the first step, identification of the reference system, the Commission considered the reference system to be the general Netherlands corporate income tax system, the objective of which is to tax the profits of all companies subject to tax in the Netherlands. It stated in that regard that companies established in the Netherlands are resident taxpayers and are subject to corporate income tax on their worldwide income. Companies not established in the Netherlands are non-resident companies and are subject to tax with regard to income from Netherlands sources. According to the Commission, integrated companies and stand-alone companies were in a comparable legal and factual situation in the light of that objective and were therefore subject to corporate income tax without distinction. In that regard, the difference in the modalities of calculating the taxable profits of integrated companies had no bearing on the objective of the reference system, taxation of the profits of all companies subject to tax in the Netherlands (recitals 231 to 244 of the contested decision).

36. As regards the second step set out in paragraph 34 above, namely, demonstrating a derogation from the reference system, the Commission indicated, first of all, that the question of whether a tax measure constituted a derogation from the reference system would generally coincide with identification of the advantage granted to the beneficiary under that measure. In its view, where a tax measure results in a reduction of the tax liability of a beneficiary compared to what it would otherwise have to pay were it not for that measure, that reduction constitutes both the advantage granted by the tax measure and the derogation from the reference system (recital 253 of the contested decision).

37. Next, the Commission recalled the case-law according to which, in the case of an individual measure, the identification of the economic advantage is, in principle, sufficient to support the presumption that that measure is selective. It stated that, in the case at hand, the APA granted to SMBV was an individual aid measure (recital 254 of the contested decision).

38. Last, the Commission asserted that, in the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), the Court of Justice had found that a tax measure which results in an integrated company charging transfer prices that did not reflect those which would have been charged in conditions of free competition, that is prices negotiated by independent undertakings negotiating under comparable circumstances at arm's length, conferred an advantage on that group company in so far as it resulted in a reduction of its taxable base and thus its tax liability under the ordinary corporate income tax system. The Commission recalled that the arm's length principle consisted in the notion that transactions between intra-group companies were to be remunerated as if they had been agreed to by stand-alone companies negotiating under conditions of free competition. Accordingly, the Commission stated that it had to verify whether the methodology accepted by the Netherlands tax administration via the APA for the purposes of determining SMBV's taxable profits in the Netherlands departed from a methodology that resulted in a reliable approximation of a market-based outcome and, therefore, from the arm's length principle. In that case, the APA would be regarded as conferring a selective advantage on SMBV within the meaning of Article 107(1) TFEU (recitals 259 to 263 of the contested decision).

39. Consequently, the Commission found that the arm's length principle necessarily formed an integral part of its assessment, under Article 107(1) TFEU, of the tax measures granted to integrated companies, independently of whether a Member State had incorporated that principle into its national legal system. The Commission then stated that, in response to the arguments of the Kingdom of the Netherlands raised during the administrative procedure, it had not examined whether the APA observed the arm's length principle, as defined in Article 8b of the CIT and by the transfer pricing decree, but that it had sought to determine whether the Netherlands tax administration had conferred a selective advantage on SMBV within the meaning of Article 107(1) TFEU (recitals 264 and 265 of the contested decision).

40. In the light of those elements, the Commission set out a series of lines of reasoning to prove that the APA conferred a selective advantage on SMBV. In a primary reasoning, the Commission elaborated several lines of reasoning, some of which were subsidiary to each other, to demonstrate that the APA derogated from the general Netherlands corporate income tax system. In a subsidiary reasoning, the Commission maintained that the APA derogated from Article 8b(1) of the CIT and from the transfer pricing decree.

41. In particular, in the first place, in its primary reasoning aimed at demonstrating that the APA derogated from the general Netherlands corporate income tax system, the Commission noted that the Starbucks group's tax advisor had chosen the TNMM for the purposes of determining SMBV's taxable profits. It considered that different methodological choices, proposed by the Starbucks group's tax advisor and endorsed by the Kingdom of the Netherlands, led to a reduction in the corporate income tax paid by SMBV as compared to stand-alone companies whose taxable profits were determined under market conditions (recitals 268 to 274 of the contested decision).

42. First, the Commission considered that the transfer pricing report had failed to examine whether the intra-group transfer for which the APA had actually been requested and granted – namely, the royalty SMBV paid to Alki for the licence to use the roasting IP – was in conformity with the arm's length principle. Consequently, the transfer pricing report failed to identify or analyse controlled and uncontrolled transactions, which was a necessary first step in assessing the arm's length nature of commercial conditions applicable between related parties for transfer pricing purposes (recitals 275 to 285 of the contested decision).

43. Second, regarding the level of the royalty, the Commission considered that, had the transfer pricing report correctly identified and examined the royalty, it should have resulted in an arm's length value of zero. It noted inter alia that SMBV generated no profit from the use of the IP rights that were the subject of the royalty, in so far as it did not exploit them on the market. The Commission then considered that the profits paid to Alki by means of the royalty should have been fully taxed in the Netherlands (recitals 286 to 341 of the contested decision).

44. In examining the arm's length nature of the royalty, the Commission applied the CUP method and identified a number of manufacturing agreements between the Starbucks group and third entities, or between third entities to the Starbucks group, as being comparable transactions.

45. In addition, the Commission rejected the arguments raised by the Kingdom of the Netherlands and Starbucks seeking to justify the amount of the royalty. First, it took the view that the consideration for the royalty payment could not be Alki's taking over of SMBV's entrepreneurial risks; otherwise, integrated companies could contractually reallocate risk and thereby prevent any application of the arm's length principle. Second, the Commission added that the royalty payment could not be justified by size of the amounts paid by Alki to Starbucks US.

46. Third, regarding the level of the purchase price of green coffee beans, the Commission noted that that transaction had not been examined in the transfer pricing report, when that report identified it as one of the main transactions effected by SMBV. Using SCTC's financial data, the Commission calculated the average gross margin on the costs of green coffee beans for the APA's validity period. The Commission considered that the gross margin between 2011 and 2014, which resulted in a significant increase in the price of green coffee beans to be borne by SMBV compared to the costs borne by SCTC, did not reflect a reliable approximation of a market-based outcome. It concluded that the price premium paid by SMBV, in lowering the latter's recorded profits and therefore taxable base, constituted a selective advantage (recitals 342 to 361 of the contested decision).

47. In the second place, still in its primary line of reasoning to demonstrate that the APA derogated from the general Netherlands corporate income tax system, but subsidiary to the criticisms set out in paragraphs 42 to 46 above, the Commission considered that, in any event and even assuming that the TNMM were appropriate for identifying the profits made by SMBV, the transfer pricing report had incorrectly applied the TNMM. It concluded that, since that method did not result in an arm's length outcome, the Netherlands tax authorities could not approve it in the APA (recitals 362 to 408 of the contested decision).

48. First, the Commission considered that the transfer pricing report had erroneously identified SMBV as being the least complex entity, and therefore as being the 'tested party', for the purposes of the application of the TNMM. It added that, on the contrary, SMBV should have been identified as the most complex entity, in so far as, first, Alki performed only limited functions and, second, apart from the fact that SMBV performed functions other than roasting, that function was not a routine activity but an essential one (recitals 362 to 377 of the contested decision).

49. Second, the Commission considered that the profit level indicator used in the transfer pricing report, namely, operating costs, was inappropriate. According to the Commission, the Starbucks group's tax advisor had erroneously found that roasting was SMBV's principal function rather than reselling and distribution. The Commission then concluded that the use of the sales recorded by SMBV as profit level indicator was more appropriate and would have led to a higher remuneration of SMBV's activity. In support of that conclusion, the Commission calculated a profitability ratio from a group of independent entities exercising the same reselling and roasting activities as SMBV. It concluded, after comparison with Starbucks Manufacturing Corporation ('SMC') – the only other entity of the group to exercise roasting activities for the group – that SMC was [*confidential*] times more profitable than SMBV on the basis of the APA (recitals 379 to 400 of the contested decision).

50. Third, the Commission considered that, in any event and even assuming that operating costs were a profit level indicator appropriate for calculating SMBV's transfer prices, the two adjustments made by the tax advisor in the transfer pricing report did not enable a reliable approximation of a market-based outcome to be reached. The Commission criticised, first, the use of a 'working capital adjustment' and, second, the exclusion of the costs of the undertakings designated in recital 300 of the contested decision as published in the *Official Journal of the European Union* by the term 'unaffiliated manufacturing company 1' ('unaffiliated manufacturing company 1') from the cost base used as profit level indicator (recitals 401 to 408 of the contested decision).

51. The Commission then concluded that the methodology accepted by the Netherlands tax authorities, whereby the profits generated by SMBV in excess of the [*confidential*]% margin of operating costs had to be paid as a royalty to Alki, was not in line with the arm's length principle and led to a reduction in SMBV's tax burden.

52. It is thus apparent from the foregoing that, in the examination in respect of the general Netherlands corporate income tax system, the Commission raised six errors justifying the conclusion that there was a selective advantage in the case at hand. In that examination, the first three errors come under a principal position, whereas the other three errors come under a subsidiary position and are subsidiary to each other.

53. Specifically, as regards the principal position, the Commission considered that the method accepted by the APA departed from a methodology that led to a reliable approximation of a market-based outcome in line with the arm's length principle, in so far as:

– the choice of the TNMM was erroneous and the transfer pricing report did not examine the intra-group transaction for which the APA had effectively been requested and granted ('the first line of reasoning');

– first, the APA did not establish a methodology to ensure that the royalty paid by SMBV to Alki was in line with the arm's length principle; however, the CUP method should have been applied in order to determine the amount of the royalty paid by SMBV to Alki; under that method, the royalty should have been zero ('the second line of reasoning');

– second, the APA did not examine whether the level of purchase price of green coffee beans was in line with the arm's length principle; that level was overvalued ('the third line of reasoning').

54. With regard to the subsidiary position, the Commission considered that, even assuming that the TNMM were the appropriate method for determining the profits made by SMBV, the transfer pricing report had incorrectly applied the TNMM. In that regard, the Commission took the view that:

– the method accepted by the APA derogated from a method that gave a reliable approximation of a market-based outcome in line with the arm's length principle, in so far as SMBV had been incorrectly identified as the least complex entity and thus as the tested entity for the purposes of the application of the TNMM ('the fourth line of reasoning');

– in the alternative, the method accepted by the APA did not give a reliable approximation of a market-based outcome in line with the arm's length principle, in so far as SMBV's functions had been incorrectly analysed and the choice of operating costs as profit level indicator was incorrect ('the fifth line of reasoning');

– in the alternative, the method accepted by the APA did not give a reliable approximation of a market-based outcome in line with the arm's length principle, in so far as the adjustments made to the mark-up were inappropriate ('the sixth line of reasoning').

55. In the third place, in its subsidiary reasoning aimed at demonstrating that the APA derogated from Article 8b(1) of the CIT and from the transfer pricing decree, the Commission considered that, even supposing that the relevant reference system were not composed of the general rules on corporate income tax, but, as the Netherlands authorities maintained, only of the provisions enshrining the arm's length principle in Netherlands law, namely Article 8b(1) of the CIT and the transfer pricing decree, the APA, in approving a method of determining SMBV's profits that did not result in an arm's length outcome, also derogated from that reference system. To that end, the Commission referred to its analysis conducted in respect of the general Netherlands corporate income tax system and the six lines of reasoning set out in paragraphs 52 to 54 above (the 'reasoning in respect of the limited reference system') (recitals 409 to 412 of the contested decision).

56. So far as concerns the third step of the analysis of the selectivity of tax measures, as identified in paragraph 34 above, the Commission found that the derogation from the reference system was not justified. In that regard, it noted that neither the Netherlands authorities nor Starbucks had put forward any possible justifications for SMBV's selective treatment, when the burden of proof in that regard lay with them. The Commission moreover added that it had not been able to identify any possible justification (recitals 413 and 414 of the contested decision).

57. The Commission concluded that SMBV's APA conferred on SMBV a selective advantage, within the meaning of Article 107(1) TFEU, in so far as it had validated a method for allocating profits to SMBV which could not be regarded as resulting in a reliable approximation of a market-based outcome in line with the arm's length principle. According to the Commission, that method had led to a reduction in SMBV's tax burden, primarily, under the general Netherlands corporate income tax system, by comparison with stand-alone companies, and, in the alternative, under Article 8b(1) of the CIT and the transfer pricing decree, by comparison with other integrated companies (recitals 415 and 416 of the contested decision).

58. Consequently, the Commission concluded that the APA constituted State aid (recitals 422 and 423 of the contested decision).

59. The Commission then considered that the aid granted to SMBV was incompatible with the internal market. In its view, the Kingdom of the Netherlands had not invoked any of the grounds for a finding of compatibility provided for in Article 107(2) and (3) TFEU. The aid in question, which was to be considered operating aid, could not normally be considered compatible with the internal market (recitals 431 to 434 of the contested decision).

60. Moreover, the Commission found that the Kingdom of the Netherlands had not notified it, in accordance with Article 108(3) TFEU, of any plan corresponding to the APA and had not complied with the standstill obli-

gation incumbent on it under that article. It could therefore only be unlawful State aid, put in effect in contravention of that provision (recitals 435 and 436 of the contested decision).

61. Furthermore, the Commission specified that the information on which it had based its decision was available for the Netherlands tax administration at the time the APA was adopted. It added, in respect of the cost of green coffee beans, that the transfer pricing report did not examine the prices charged by SCTC to SMBV under their green coffee bean sourcing agreement and that, had that transaction been examined in the APA in 2008 in order to determine its arm's length price, the APA would not have been able to leave room for the price increases observed in 2011 (recitals 424 to 427 of the contested decision).

62. Last, the Commission identified SMBV and the Starbucks group as a whole as aid beneficiaries, on the ground that they formed a single economic entity (recitals 417 to 419 of the contested decision).

*c. Recovery of the State aid*

63. In Section 10 of the contested decision, entitled 'Recovery', first, the Commission inter alia considered that it was not required to quantify the exact amount of the aid to be recovered, but rather it was sufficient for its decision to include information enabling the addressee of the decision to work out that amount itself without overmuch difficulty. In the present case, the Commission considered that, since the royalty amount had to be zero, SMBV's accounting profits should have been used to calculate its taxable profits. Moreover, those profits should have been increased by the difference between the price paid for the green coffee beans and the price that ought to have been paid. In that regard, the Commission considered that a gross margin of [*confidential*]% for SCTC constituted an arm's length price for the purchase of the coffee beans. It then specified that the sum to be recovered corresponded to the difference between the tax that should have been paid on the basis of that price and the amount actually paid under the APA (recitals 442 to 448 of the contested decision).

64. Second, the Commission found that, in the first instance, the Kingdom of the Netherlands was required to recover from SMBV the aid and that, should SMBV not have been in a position to make the repayment, the Kingdom of the Netherlands was to recover the balance from Starbucks Corp., since it was the entity which controlled the Starbucks group (recital 449 of the contested decision).

*d. Conclusion*

65. In conclusion, the Commission found that the Kingdom of the Netherlands, by concluding the APA, had unlawfully granted State aid to SMBV and to the Starbucks group, in breach of Article 108(3) TFEU, that the Kingdom of the Netherlands was required to recover it, by virtue of Article 16 of Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9), from SMBV and, if SMBV failed to repay the full amount of the aid, from Starbucks Corp. for the amount of aid outstanding (recital 450 of the contested decision).

66. The operative part of the contested decision reads as follows:

> '*Article 1*
> The advanced pricing arrangement entered into by the [Kingdom of the] Netherlands on 28 April 2008 with [SMBV], which enables the latter to determine its corporate income tax liability in the Netherlands on a yearly basis for a period of 10 years, constitutes aid within the meaning of Article 107(1) of the Treaty on the Functioning of the European Union that is incompatible with the internal market and that was unlawfully put into effect by the [Kingdom of the] Netherlands in breach of Article 108(3) of the Treaty.
>
> *Article 2*
> The [Kingdom of the] Netherlands shall recover the incompatible and unlawful aid referred to in Article 1 from [SMBV].
> Any sums that remain unrecoverable from [SMBV], following the recovery described in the preceding paragraph, shall be recovered from Starbucks [Corp.].
> The sums to be recovered shall bear interest from the date on which they were put at the disposal of the beneficiaries until their actual recovery.
> The interest shall be calculated on a compound basis in accordance with Chapter V of Regulation (EC) No 794/2004.
>
> *Article 3*
> Recovery of the aid granted referred to in Article 1 shall be immediate and effective.
> The [Kingdom of the] Netherlands shall ensure that this Decision is implemented within four months following the date of notification of this Decision.

*Article 4*
Within two months following notification of this decision, the [Kingdom of the] Netherlands shall submit information regarding the methodology used to calculate the exact amount of aid.

The [Kingdom of the] Netherlands shall keep the Commission informed of the progress of the national measures taken to implement this Decision until recovery of the aid granted referred to in Article 1 has been completed. It shall immediately submit, on simple request by the Commission, information on the measures already taken and planned to comply with this Decision.

...'

## II – Procedure and forms of order sought

### *A – Written part of the procedure in Case T-760/15*

67. By application lodged at the Registry of the General Court on 23 December 2015, the Kingdom of the Netherlands brought the action in Case T-760/15. The Commission lodged a defence on 30 March 2016. The reply and the rejoinder were lodged on 14 June 2016 and 9 September 2016, respectively.

#### 1. Composition of the formation of the Court and priority treatment

68. By document lodged at the Court Registry on 20 June 2016, the Kingdom of the Netherlands requested that Case T-760/15 be heard and determined by a Chamber sitting in extended composition. The Court took formal note, pursuant to Article 28(5) of its Rules of Procedure, of the fact that Case T-760/15 had been referred to the Fifth Chamber, Extended Composition.

69. Following a change in the composition of the Chambers of the Court on 26 September 2016, the Judge-Rapporteur was assigned, pursuant to Article 27(5) of the Rules of Procedure, to the Seventh Chamber, Extended Composition, of the General Court to which Case T-760/15 was accordingly allocated.

70. Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit, the President of the General Court, by decision of 26 April 2017, designated the Vice-President of the General Court to complete the chamber.

71. By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-760/15 be given priority under Article 67(2) of the Rules of Procedure.

#### 2. Interventions

72. By document lodged at the Court Registry on 6 April 2016, the United Kingdom of Great Britain and Northern Ireland applied for leave to intervene in Case T-760/15 in support of the form of order sought by the Commission.

73. By document lodged at the Court Registry on 7 April 2016, Ireland applied for leave to intervene in Case T-760/15 in support of the form of order sought by the Kingdom of the Netherlands.

74. By order of 13 June 2016, the President of the Fifth Chamber of the General Court granted the applications for leave to intervene of the United Kingdom and Ireland.

75. By document lodged at the Court Registry on 9 November 2016, the United Kingdom withdrew its intervention. By order of 12 December 2016, the President of the Seventh Chamber, Extended Composition, of the General Court removed the United Kingdom as intervener from Case T-760/15.

#### 3. Applications for confidential treatment

76. By document lodged at the Court Registry on 26 February 2016, the Kingdom of the Netherlands applied for confidential treatment, vis-à-vis the public, of part of the application and certain documents annexed to it.

77. By document lodged at the Court Registry on 17 May 2016, the Kingdom of the Netherlands applied for confidential treatment, vis-à-vis Ireland, of part of the application and certain documents annexed to it, as well as the contested decision and part of the defence.

78. By document lodged at the Court Registry on 17 May 2016, the Commission applied for confidential treatment, vis-à-vis Ireland, of part of the defence.

79. By document lodged at the Court Registry on 1 July 2016, the Kingdom of the Netherlands applied for confidential treatment, vis-à-vis Ireland, of part of the reply and certain documents annexed to it.

80. By document lodged at the Court Registry on 21 July 2016, the Kingdom of the Netherlands informed the Court that it had reached an agreement with the Commission concerning the non-confidential version of the contested decision for publication and that it was amending the applications for confidential treatment it had made in Case T-760/15 with regard to the contested decision in accordance with that agreement.

81. By document lodged at the Court Registry on 11 October 2016, the Kingdom of the Netherlands applied for confidential treatment, vis-à-vis Ireland, of part of the rejoinder and certain documents annexed to it.

82. Following its admission as intervener, Ireland received only non-confidential versions of the procedural documents and raised no objection to the applications for confidential treatment made with regard to it.

83. On the proposal of the Judge-Rapporteur, the Seventh Chamber, Extended Composition, of the General Court adopted a measure of organisation of procedure provided for in Article 89 of the Rules of Procedure by which the Kingdom of the Netherlands was invited to revise its applications for confidential treatment of the APA, the roasting agreement between SMBV and Alki, mentioned in recital 142 of the contested decision, and the transfer pricing report, in order to remove certain inconsistencies in those applications. The Kingdom of the Netherlands provided new non-confidential versions of those documents within the prescribed period.

4. Forms of order sought

84. The Kingdom of the Netherlands claims that the Court should:
- annul the contested decision;
- order the Commission to pay the costs in Case T-760/15.

85. The Commission contends that the Court should:
- dismiss the application in Case T-760/15 as unfounded;
- order the Kingdom of the Netherlands to pay the costs in Case T-760/15.

86. Ireland claims that the Court should annul the contested decision in accordance with the form of order sought by the Kingdom of the Netherlands.

*B – Written part of the procedure in Case T-636/16*

87. By application lodged at the Court Registry on 5 September 2016, Starbucks Corp. and Starbucks Manufacturing Emea (together, 'Starbucks') brought the action in Case T-636/16. The Commission lodged a defence on 16 March 2017. The reply and the rejoinder were lodged on 26 June and 20 October 2017, respectively.

1. Composition of the formation of the Court and priority treatment

88. On the proposal of the Seventh Chamber of the General Court, the Court decided, on 12 July 2017, pursuant to Article 28 of the Rules of Procedure, to refer the case to a Chamber sitting in extended composition.

89. Since a member of the Seventh Chamber, Extended Composition, of the General Court was unable to sit, the President of the General Court, by decision of 1 August 2017, designated the Vice-President of the General Court to complete the Chamber.

90. By decision of 12 December 2017, the President of the Seventh Chamber, Extended Composition, of the General Court approved the proposal of the Judge-Rapporteur that Case T-636/16 be given priority under Article 67(2) of the Rules of Procedure.

2. Applications for confidential treatment

91. By document lodged at the Court Registry on 7 April 2017 and regularised by documents lodged on 23 April 2018, Starbucks applied for confidential treatment, vis-à-vis Ireland, of certain information in the application, in the defence, in the reply, in the rejoinder as well as in certain of the annexes to those submissions.

3. Forms of order sought

92. Starbucks claims that the Court should:
- annul Articles 1 to 4 of the contested decision;
- in the alternative, annul Article 2(1) of the contested decision;
- order the Commission to pay the costs in Case T-636/16.

93. The Commission contends that the Court should:
- dismiss the action in Case T-636/16 as unfounded;
- order Starbucks to pay the costs in Case T-636/16.

*C – Joinder for the purposes of the oral part of the procedure, and the oral part of the procedure*

94. By document lodged at the Court Registry on 23 February 2017, Starbucks applied for Cases T-760/15 and T-636/16 to be joined for the purposes of the oral part of the procedure.

95. By decision of 7 June 2017, the President of the Seventh Chamber, Extended Composition, of the General Court decided not to join, at that stage of the procedure, Cases T-760/15 and T-636/16.

96. By decision of the President of the Seventh Chamber, Extended Composition, of the General Court of 8 May 2018, Cases T-760/15 and T-636/16 were joined for the purposes of the oral part of the procedure, in accordance with Article 68 of the Rules of Procedure.

97. Acting on a report from the Judge-Rapporteur, the Court decided to open the oral part of the procedure and, by way of the measures of organisation of procedure under Article 89 of the Rules of Procedure, asked the parties to answer questions in writing. The parties responded to that measure of organisation of procedure within the prescribed period.

98. By documents lodged at the Court Registry on 7 and 15 June 2018, Starbucks requested confidential treatment of certain information contained in its response to the measure of organisation of procedure and in that of the Commission.

99. By document lodged at the Court Registry on 8 June 2018, Starbucks submitted observations on the report for the hearing.

100. By document lodged at the Court Registry on 14 June 2018, the Commission requested that Starbucks' observations on the report for the hearing be withdrawn from the case file.

101. After having received the only non-confidential versions of the documents mentioned in paragraphs 91, 98 and 99 above, Ireland raised no objection to the applications for confidential treatment made with regard to it.

102. By document lodged at the Court Registry on 26 June 2018, Starbucks requested authorisation to use technical means during the hearing and proposed having recourse, during the hearing, to an expert. At the hearing, the Commission was requested to submit orally its observations on that request and in turn requested authorisation to use technical means during the hearing.

103. The parties presented oral argument, with the use of the technical means requested, and answered the questions put by the Court at the hearing on 2 July 2018.

104. The parties were heard during the hearing on a possible joinder of Cases T-760/15 and T-636/16 for the purposes of the decision closing the proceedings, and the Court took formal note of it in the minutes of the hearing.

**III – Law**

105. For the purposes of the present actions, it is necessary, at the outset, to address certain procedural questions raised by the parties, before analysing the substantive pleas the parties raise.

*A – Procedural matters*

106. Regarding the procedural matters that are at issue in the case at hand, first of all, it is necessary to examine the possible joinder of the present case for the purposes of the decision closing the proceedings. Next, it is appropriate to examine the Commission's request that Starbucks' observations of 8 June 2018 on the report for the hearing be withdrawn from the case file. Last, it is appropriate to examine the issue of the admissibility of Annex A.7 to the application in Case T-760/15, which has been disputed by the Commission.

1. Joinder of the present cases for the purposes of the decision closing the proceedings

107. In accordance with Article 19(2) of Rules of Procedure, the President of the Seventh Chamber, Extended Composition, of the General Court referred the decision as to whether Cases T-760/15 and T-636/16 should be

joined for the purposes of the decision closing the proceedings, which fell within his remit, to the Seventh Chamber, Extended Composition, of the General Court.

108. The parties having been heard at the hearing with respect to a possible joinder of the cases, it is appropriate for Cases T-760/15 and T-636/16 to be joined for the purposes of the decision which closes the proceedings, on account of the connection between them.

2. Request that Starbucks' observations on the report for the hearing be withdrawn from the case file

109. By letter of 14 June 2018, the Commission requested the General Court to withdraw from the case file of Cases T-760/15 and T-636/16 Starbucks' letter of 8 June 2018 (see paragraph 100 above), to the extent that it contained observations on the report for the hearing, on the ground that such observations are provided for neither in the Rules of Procedure nor in the practice rules for the implementation of the latter.

110. First, it is appropriate to recall that, by decision of 13 June 2018, the President of the Seventh Chamber, Extended Composition, of the General Court decided to place on the case file Starbucks' letter of 8 June 2018. Second, it must be recalled that the General Court is the sole judge of whether documents not provided for in the Rules of Procedure need to be placed on the case file. Accordingly, the Commission's request that the letter of 8 June 2018 be withdrawn from the case file must be rejected.

111. However, according to Article 84(1) of the Rules of Procedure, no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or fact which have come to light in the course of the procedure.

112. Given that Starbucks has not provided any justification for the late submission of the arguments raised in its letter of 8 June 2018, it is necessary, as the Commission has argued, to reject them as inadmissible to the extent that they go beyond mere observations on the confidentiality and accuracy of the report for the hearing by amending the pleas raised in the application.

3. Admissibility of Annex A.7 to the application in Case T-760/15

113. The Commission disputes the admissibility of Annex A.7 to the application in Case T-760/15, which contains a schematic comparison of certain aspects of the functioning of the contracts concluded between the Starbucks group and certain third parties. According to the Commission, the essential factual and legal elements on which the action is based must be set out – or otherwise be deemed inadmissible – at least in summary form, but coherently and intelligibly, from the actual text of the application. That condition is not, in its view, satisfied in this case.

114. It must be noted that, under Article 21 of the Statute of the Court of Justice of the European Union and Article 76(d) of the Rules of Procedure, each application is required to state the subject matter of the proceedings, the pleas in law and arguments on which the application is based and a summary of those pleas. That statement must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court to rule on the application, if necessary, without any further information. It is necessary, for an action to be admissible, that the basic matters of law and fact relied on be indicated, at least in summary form, coherently and intelligibly in the application itself. Whilst the body of the application may be supported and supplemented on specific points by references to extracts from documents annexed thereto, a general reference to other documents, even those annexed to the application, cannot make up for the absence of the essential arguments in law which, in accordance with the abovementioned provisions, must appear in the application. The annexes may be taken into consideration only in so far as they support or supplement pleas or arguments expressly set out by applicants in the body of their pleadings and in so far as it is possible to determine precisely what are the matters they contain that support or supplement those pleas or arguments. Furthermore, it is not for the Court to seek and identify in the annexes the pleas and arguments on which it may consider the action to be based, since the annexes have a purely evidential and instrumental function (see judgment of 14 March 2013, *Fresh Del Monte Produce* v *Commission*, T-587/08, EU:T:2013:129, paragraphs 268 to 271 and the case-law cited).

115. In the case at hand, it is appropriate to observe that, as regards the contracts concluded between the Starbucks group and external roasters and manufacturers of coffee-derived products, the Kingdom of the Netherlands submits that Annex A.7 contains a 'schematic overview of the points of comparison of the contracts produced by the Commission ... which includes the three differences cited' in the application in Case T-760/15. However, the Kingdom of the Netherlands sets out, in paragraphs 140 to 155 of the application in Case T-760/

15, the reasons which demonstrate, in its view, that the contracts that the Commission invokes in the contested decision are not comparable with the contractual relationship between Alki and SMBV.

116. In that regard, it must be held that all the arguments contained in Annex A.7 to the application in Case T-760/15 are set out in a sufficiently clear and precise manner in paragraphs 140 to 155 of the application in Case T-760/15. Thus, even without Annex A.7 to the application in Case T-760/15, the Commission would have been capable of preparing its defence and the Court of ruling on the action. The only added value of Annex A.7 to the application in Case T-760/15 consists, therefore, in indicating which specific contracts are concerned by the respective arguments of the Kingdom of the Netherlands when it refers, in paragraphs 140 to 155 of the application, to the 'majority' or 'most' of those contracts.

117. It is therefore appropriate to reject the Commission's argument that Annex A.7 to the application in Case T-760/15 should be rejected as inadmissible.

*B – Pleas raised and structure of the examination of the present actions*

118. The actions brought in Cases T-760/15 and T-636/16 seek the annulment of the contested decision to the extent that it classifies the APA as State aid for the purposes of Article 107(1) TFEU and to the extent that it orders the recovery of sums that were not collected by the Kingdom of the Netherlands from SMBV by way of corporate income tax.

119. In support of their actions, the Kingdom of the Netherlands and Starbucks put forward five and two pleas, respectively, which overlap for the most part.

120. By the first plea in Case T-760/15 as well as by the first part of the first plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks call into question the Commission's examination of the selective nature of the APA. Specifically, they argue that the Commission used an erroneous reference system for the examination of the selectivity of the APA.

121. By the second, third and fourth pleas in Case T-760/15 as well as by the second part of the first plea and the second plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks argue that the Commission's analysis according to which the APA conferred an advantage on SMBV is erroneous.

122. Specifically, by the second plea in Case T-760/15 as well as by the second part of the first plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks invoke, in essence, an infringement of Article 107 TFEU, in that the Commission erroneously examined whether there was an advantage in relation to the arm's length principle particular to EU law and thereby violated the Member States' fiscal autonomy.

123. By the third plea in Case T-760/15 as well as by the third part of the first plea and the first, second, fourth and fifth parts of the second plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks claim, in essence, infringement of Article 107 TFEU in that the Commission erroneously considered the choice of the TNMM to set transfer pricing to constitute an advantage. The Kingdom of the Netherlands and Starbucks dispute, in essence, the Commission's principal line of reasoning regarding the existence of a tax advantage in favour of SMBV, set out in recitals 255 to 361 of the contested decision. Those pleas concern the first to third lines of reasoning mentioned in paragraph 53 above.

124. By the fourth plea in case T-760/15 as well as by the third part of the second plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks claim infringement of Article 107 TFEU to the extent that the Commission erroneously considered the detailed rules for the application of the TNMM as validated in the APA to confer an advantage on SMBV. Those pleas concern the fourth to sixth lines of reasoning mentioned in paragraph 54 above.

125. By the fifth plea in Case T-760/15, the Kingdom of the Netherlands claims breach of the principle of due diligence.

126. With regard to the analysis of the pleas raised by the Kingdom of the Netherlands and Starbucks, first of all, it is necessary to examine, the plea disputing the existence of the arm's length principle as the Commission describes it in the contested decision. Next, it is appropriate to examine the pleas disputing that, in its first six lines of reasoning set out in paragraphs 53 and 54 above, the Commission demonstrated that the APA derogated from the general Netherlands corporate income tax system and conferred an advantage, within the meaning of Article 107 TFEU, on SMBV. Additionally, it is necessary to examine the plea disputing that, in its reasoning in respect of the limited reference system, set out in paragraph 55 above, the Commission demonstrated that the APA derogated from the limited reference system composed of Article 8b of the CIT and from the transfer pricing decree and conferred an advantage, within the meaning of Article 107 TFEU, on SMBV.

Last, should the examination carried out on the existence of an advantage lead to the rejection of those pleas, it will be appropriate to examine the pleas alleging an absence of selectivity of the contested measure and breach of the obligation of due diligence.

127. In that regard, it must moreover be borne in mind that, according to the case-law, classification as State aid requires all the conditions referred to in Article 107(1) TFEU to be fulfilled. It is thus established that, for a measure to be categorised as State aid within the meaning of that provision, there must, first, be an intervention by the State or through State resources; second, the intervention must be liable to affect trade between Member States; third, it must confer a selective advantage on the recipient; and, fourth, it must distort or threaten to distort competition (see judgment of 21 December 2016, *Commission* v *Hansestadt Lübeck*, C-524/14 P, EU:C:2016:971, paragraph 40 and the case-law cited).

128. In the case at hand, however, as is apparent from the presentation of the pleas, which is set out in paragraphs 118 to 125 above, the Kingdom of the Netherlands and Starbucks do not dispute the assessment made by the Commission regarding the first two conditions and the fourth condition to be satisfied in order for a measure to be classified as State aid. They do not dispute that, supposing that the Commission demonstrated that the APA conferred a tax advantage, that advantage constituted intervention by the State or through State resources, that it was liable to affect trade between Member States and that it distorted or threatened to distort competition. The four first pleas raised in Case T-760/15 seek, in essence, to call into question the Commission's finding that the APA conferred a selective advantage on SMBV.

129. Moreover, as regards demonstrating the selective advantage, it must be noted that the Commission's approach of examining the criteria of advantage and selectivity concurrently is not itself incorrect, given that both the advantage and the selective nature of that advantage are examined. Nevertheless, the Court considers it appropriate to consider, first of all, whether the Commission was entitled to conclude that there was an advantage, before going on, if necessary, to examine whether that advantage had to be considered to be selective.

130. Thereafter, it will be appropriate to analyse the arguments of the Kingdom of the Netherlands and of Starbucks on the absence of an advantage, within the meaning of Article 107 TFEU, conferred on SMBV by the APA.

*C – Existence of an arm's length principle in the field of State aid control and compliance with the principle of Member States' fiscal autonomy*

131. By its second plea, the Kingdom of the Netherlands argues that the Commission erred in identifying an arm's length principle particular to EU law and in identifying it as a criterion for assessing the existence of State aid. Starbucks raises, in essence, the same complaints, in the second part of its first plea.

132. First, the Kingdom of the Netherlands argues that the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), on which the Commission relies to identify an arm's length principle particular to EU law, is not authority for the existence of such a principle. In addition, the Commission neither stated the basis from which it had identified the existence of an arm's length principle in EU law nor explained the content of that principle. Starbucks adds that, notwithstanding the fact that observance of Article 107 TFEU effectively constitutes a limit on Member States' fiscal autonomy, the Commission exceeded the powers conferred on it by Article 107 TFEU. Starbucks criticises the Commission for having replaced, purportedly under the principle of equal treatment, Netherlands rules of tax law with a transfer pricing principle developed autonomously and, thus, for having imposed substantive rules of tax law.

133. Second, the Kingdom of the Netherlands argues that the Commission could not examine the APA under an arm's length principle particular to EU law, since only the legislation and national rules of the Member State concerned are relevant for the purposes of State aid control. Specifically, the Kingdom of the Netherlands contends that the existence of an advantage can be examined only by reference to the charges which are normally included in the budget of the undertaking under national law and not by reference to an arm's length principle particular to EU law. Starbucks adds, furthermore, that the Commission did not take Netherlands law into account and that its reasoning deviates from – and indeed conflicts with – Netherlands transfer pricing rules.

134. First of all, Ireland adds that the Commission, which was required to identify a derogation, did not compare Starbucks' situation to that of any other taxpayer but merely sought to apply the arm's length principle. Next, it argues that the Commission cannot impose rules that have never been incorporated into the national system. Accepting a principle of equal treatment in tax matters would then encroach on the sovereignty and

the autonomy of the Member States. Last, Ireland submits that the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), did not identify an arm's length principle particular to EU law, in so far as, in that case, first, the arm's length principle had been incorporated into Belgian national law and, second, the judgment referred to the OECD Guidelines, which had also been incorporated into Belgian national law.

135. The Commission disputes those arguments. It contends inter alia that it examined the existence of a selective advantage by reference to the reference framework deriving from national law and not by reference to the arm's length principle. It maintains that it is clear from the contested decision that the existence of an advantage was assessed by comparison with the tax burden that would normally have been borne by SMBV under the general Netherlands system of corporate income tax.

136. Under the present plea, in essence, the Kingdom of the Netherlands and Starbucks therefore criticise the Commission for having identified an arm's length principle specific to EU law in breach of the fiscal autonomy of the Member States and for having examined the APA only by reference to that principle without taking Netherlands law into account.

137. First and foremost, it must be noted that, as is apparent in particular from recitals 252, 267 and 408 of the contested decision, the examination in the light of the arm's length principle as described by the Commission in the contested decision forms part of its principal analysis of the selective advantage. As has been set out in paragraph 35 above, that analysis entails examining whether the APA derogates from the general Netherlands corporate income tax system. It must be noted in that regard that the Commission had previously indicated, in recitals 232 to 244 of the contested decision, that the objective of the general Netherlands corporate income tax system was to tax the profits of all companies resident in the Netherlands, whether or not integrated, and that both types of company are in a similar factual and legal situation in the light of that objective.

138. As regards the definition of the arm's length principle, the Commission asserted, in recitals 258 and 261 of the contested decision, that, according to that principle, intra-group transactions should be remunerated as if they had been agreed to by independent companies. It added, in recital 262 of the contested decision, that the purpose of that principle was to ensure that intra-group transactions were treated for tax purposes by reference to the amount of profit that would have arisen if the same transactions had been executed by independent companies. The Commission moreover argued during the hearing that the arm's length principle was, in its view, a tool for assessing the price level of intra-group transactions, and the Court took formal note of that in the minutes of the hearing.

139. With regard to the legal nature of the arm's length principle, the Commission considered, in recital 264 of the contested decision, that the arm's length principle necessarily formed part of its assessment, under Article 107 TFEU, of tax measures granted to group companies, irrespective of whether the Member State had incorporated that principle into its national legal system. It stated that the arm's length principle which it was applying was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU. The French-language version of the contested decision mentions in that connection a '*principe de traitement équitable*' (principle of equitable treatment) which is a translation error of the expression 'principle of equal treatment'. The Commission based that statement on the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), concerning the tax regime for coordination centres in Belgium, in which the Court of Justice had held that the method for determining taxable income under that regime conferred a selective advantage on those centres. Specifically, the Commission referred to paragraph 96 of that judgment, in which the Court of Justice held that the method for determining the taxable income of the centres '[meant] that the transfer prices [did] not resemble those which [were] charged in conditions of free competition'.

140. As regards the application of the arm's length principle, in recital 263 of the contested decision, the Commission indicated that, to assess whether the Kingdom of the Netherlands had granted a selective advantage to SMBV, it accordingly had to verify whether the methodology accepted by the Netherlands tax administration through the APA for the purposes of determining SMBV's taxable profits in the Netherlands departed from a methodology that resulted in a reliable approximation of a market-based outcome and, therefore, from the arm's length principle. It added, in recital 264 of the contested decision, that the arm's length principle was used to establish whether the taxable profit of a group company for corporate income tax purposes had been determined on the basis of a methodology that approximated market conditions, so that that company was not treated favourably under the general corporate income tax system as compared to non-integrated companies whose taxable profit was determined by the market.

141. It must therefore be examined whether the Commission was entitled to analyse the measure at issue in the light of the arm's length principle as described in the contested decision, summarised in recitals 138 to 140 above, which consists in verifying whether intra-group transactions are remunerated as if they had been negotiated under market conditions.

142. According to settled case-law, while direct taxation, as EU law currently stands, falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law (see judgment of 12 July 2012, *Commission* v *Spain*, C-269/09, EU:C:2012:439, paragraph 47 and the case-law cited). Thus, intervention by the Member States in matters of direct taxation, even if it relates to issues that have not been harmonised in the European Union, is not excluded from the scope of the rules on the monitoring of State aid.

143. It follows that the Commission can classify a tax measure as State aid provided that the conditions for classification are met (see, to that effect, judgments of 2 July 1974, *Italy* v *Commission*, 173/73, EU:C:1974:71, paragraph 28, and of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416, paragraph 81). Member States must exercise their competence in respect of taxation in accordance with EU law (judgment of 3 June 2010, *Commission* v *Spain*, C-487/08, EU:C:2010:310, paragraph 37). Consequently, they must refrain from taking, in that context, any measure likely to constitute State aid that is incompatible with the internal market.

144. As regards the condition that the measure at issue must grant an economic advantage, it should be borne in mind that, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (see judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 40 and the case-law cited; judgment of 9 October 2014, *Ministerio de Defensa et Navantia*, C-522/13, EU:C:2014:2262, paragraph 21).

145. Specifically, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than that of other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU (judgment of 15 March 1994, *Banco Exterior de España*, C-387/92, EU:C:1994:100, paragraph 14; see, also, judgment of 8 September 2011, *Paint Graphos and Others*, C-78/08 to C-80/08, EU:C:2011:550, paragraph 46 and the case-law cited).

146. In the case of tax measures, the very existence of an advantage may be established only when compared with 'normal' taxation (judgment of 6 September 2006, *Portugal* v *Commission*, C-88/03, EU:C:2006:511, paragraph 56). Accordingly, such a measure confers an economic advantage on its recipient if it mitigates the burdens normally included in the budget of an undertaking and which, accordingly, without being subsidies in the strict meaning of the word, are similar in character and have the same effect (judgment of 9 October 2014, *Ministerio de Defensa and Navantia*, C-522/13, EU:C:2014:2262, paragraph 22).

147. Consequently, in order to determine whether there is a tax advantage, the position of the recipient as a result of the application of the measure at issue must be compared with his position in the absence of the measure at issue (see, to that effect, judgment of 26 April 2018, *Cellnex Telecom and Telecom Castilla-La Mancha* v *Commission*, C-91/17 P and C-92/17 P, not published, EU:C:2018:284, paragraph 114), and under the normal rules of taxation.

148. In the context of determining the fiscal position of an integrated company which is part of a group of undertakings, it must be noted at the outset that the pricing of intra-group transactions carried out by that company is not determined under market conditions. That pricing is agreed to by companies belonging to the same group, and is therefore not subject to market forces.

149. Where national tax law does not make a distinction between integrated undertakings and stand-alone undertakings for the purposes of their liability to corporate income tax, that law is intended to tax the profit arising from the economic activity of such an integrated undertaking as though it had arisen from transactions carried out at market prices. In those circumstances, it must be held that, when examining, pursuant to the power conferred on it by Article 107(1) TFEU, a fiscal measure granted to such an integrated company, the Commission may compare the fiscal burden of such an integrated undertaking resulting from the application of that fiscal measure with the fiscal burden resulting from the application of the normal rules of taxation under national law of an undertaking, placed in a comparable factual situation, carrying on its activities under market conditions.

150. Furthermore, and as the Commission correctly stated in the contested decision, those findings are supported by the judgment of 22 June 2006, *Belgium and Forum 187* v *Commission* (C-182/03 and C-217/03, EU:C:2006:416), concerning Belgian tax law, which provided for integrated companies and stand-alone companies to be treated on equal terms. The Court of Justice recognised in paragraph 95 of that judgment the need to compare a regime of derogating aid with the 'ordinary tax system, based on the difference between profits and outgoings of an undertaking carrying on its activities in conditions of free competition'.

151. In that context, although, through that fiscal measure granted to an integrated company, national authorities have accepted a certain level of pricing for an intra-group transaction, Article 107(1) TFEU allows the Commission to check whether that pricing corresponds to pricing under market conditions, in order to determine whether there is, as a result, any mitigation of the burdens normally included in the budget of the undertaking concerned, thus conferring on that undertaking an advantage within the meaning of that article. The arm's length principle, as described by the Commission in the contested decision, is thus a tool for making that determination in the exercise of the Commission's powers under Article 107(1) TFEU. The Commission also stated, correctly, in recital 261 of the contested decision, that the arm's length principle was a 'benchmark' for establishing whether an integrated company was receiving, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU.

152. It should also be stated that when the Commission uses that tool to check whether the taxable profit of an integrated undertaking pursuant to a tax measure corresponds to a reliable approximation of a taxable profit generated under market conditions, the Commission can identify an advantage within the meaning of Article 107(1) TFEU only if the variation between the two comparables goes beyond the inaccuracies inherent in the methodology used to obtain that approximation.

153. In the present case, the APA concerns the determination of SMBV's taxable profits under the CIT the objective of which, irrespective of whether the normal rules of taxation are to be broadly or narrowly defined, is to tax integrated and stand-alone undertakings in the Netherlands in the same way with regard to corporate income tax. The Commission was therefore in a position to verify whether SMBV's taxable profit pursuant to the APA was lower than its tax burden in the absence of the APA and under the normal rules of taxation in Netherlands law. Given that SMBV is an integrated undertaking and that the CIT is intended to tax the profit resulting from the economic activity of such an integrated undertaking as if it had resulted from transactions carried out at market prices, it is necessary, in examining the APA, to compare SMBV's taxable profit as a result of the application of the APA with the position, as it would be if the normal tax rules under Netherlands law were applied, of an undertaking in a factually comparable situation, carrying on its activities in conditions of free competition. Against that background, although the APA accepted a certain level of pricing for intra-group transactions, it is necessary to check whether that pricing corresponds to prices that would have been charged under market conditions.

154. In that context, it must be stated that, with regard to the examination as to whether an integrated undertaking has obtained an advantage within the meaning of Article 107(1) TFEU, the Commission cannot be criticised for having used a methodology for determining transfer pricing that it considers appropriate in this instance in order to examine the level of transfer pricing for a transaction or for several closely connected transactions that is part of the contested measure. The Commission is nevertheless required to justify its choice of methodology.

155. Even though the Commission correctly observed that it cannot be formally bound by the OECD Guidelines, the fact remains that those guidelines are based on important work carried out by groups of renowned experts, that they reflect the international consensus achieved with regard to transfer pricing and that they thus have a certain practical significance in the interpretation of issues relating to transfer pricing, as the Commission acknowledged in recital 66 of the contested decision.

156. Consequently, the Commission correctly concluded that it was entitled to examine, in the context of its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions. That finding is not called into question by the other arguments of the Kingdom of the Netherlands and of Starbucks.

157. First, as regards the argument of the Kingdom of the Netherlands that the Commission failed to explain the content of the arm's length principle as defined in the contested decision, it is sufficient to recall that the contested decision highlights it as a useful tool that can be used to verify that intra-group transactions are remunerated as if they had been negotiated between stand-alone undertakings (see paragraph 138 above). That argument must therefore be rejected.

158. Second, to the extent that the Kingdom of the Netherlands and Starbucks maintain that the arm's length principle as described by the Commission in the contested decision would permit it alone to prescribe the taxable profit of an undertaking and that it would have the effect of disguised direct tax harmonisation in contravention with Member States' fiscal autonomy, that argument must be rejected.

159. While, in the absence of EU rules governing the matter, it falls within the competence of the Member States to designate bases of assessment and to spread the tax burden across the different factors of production and economic sectors (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 97), it does not mean that every tax measure, which affects, inter alia, the basis of assessment taken into account by the tax authorities, will escape the application of Article 107 TFEU (see, to that effect, judgment of 15 November 2011, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, C-106/09 P and C-107/09 P, EU:C:2011:732, paragraph 104). It follows that the Commission does not have, at this stage of the development of EU law, competence to allow it to define in an autonomous manner the 'normal' taxation of an integrated undertaking, by disregarding national tax rules. However, although 'normal' taxation is defined by national tax rules and although the very existence of an advantage must be established by reference to them, the fact remains that, if those national rules provide that stand-alone companies and integrated companies must be dealt with under the same conditions, Article 107(1) TFEU allows the Commission to verify whether the price level of intra-group transactions, accepted by the national authorities for determining the tax base of an integrated undertaking, corresponds to a price level of a transaction which has been negotiated in market conditions.

160. Consequently, when the Commission examines whether the method validated in a national tax measure leads to an outcome established in conformity with the arm's length principle as has been defined in paragraph 137 above, it is not exceeding its competences.

161. Third, as regards the argument of the Kingdom of the Netherlands that the Commission has failed to provide any legal basis for its arm's length principle, it must be pointed out that, in recitals 264 and 265 of the contested decision, the Commission stated that the arm's length principle as described in the contested decision existed independently of the incorporation of that principle into the national legal system. It also made clear that it had not examined whether the APA complied with the arm's length principle laid down in Article 8b of the CIT or in the transfer pricing decree, which incorporate the arm's length principle into Netherlands law. The Commission also asserted that the arm's length principle which it applied was distinct from that enshrined in Article 9 of the OECD Model Tax Convention on Income and on Capital.

162. However, the Commission also made clear, in recital 264 of the contested decision, that the arm's length principle necessarily formed an integral part of the examination, under Article 107(1) TFEU, of tax measures granted to group companies and that the arm's length principle was a general principle of equal treatment in taxation, which fell within the application of Article 107 TFEU.

163. It is therefore apparent from the contested decision that the arm's length principle, as described by the Commission, is a tool which it used, correctly, in the context of the examination carried out under Article 107(1) TFEU.

164. It is true that, at the hearing, the Commission inter alia stated that the arm's length principle as described in the contested decision did not fall within EU law or international law, but that it was inherent in the ordinary system of taxation as provided for by national law. Thus, according to the Commission, if a Member State chooses, in the context of its national tax system, the approach of the separate legal entity, according to which tax law is concerned with legal entities, and not with economic entities, the arm's length principle is necessarily a corollary of that approach, which is binding in the Member State concerned, independently of whether the arm's length principle has, expressly or impliedly, been incorporated into national law.

165. In that regard, the Kingdom of the Netherlands and Starbucks indicated at the hearing that, by those assertions, the Commission seemed to be changing its stance on the arm's length principle as described in the contested decision. However, on the assumption that the interpretation put forward by the Kingdom of the Netherlands and Starbucks is found to be correct, it must be stated, in any event, that the Commission cannot change the legal basis of the arm's length principle, as set out in the contested decision, at the hearing stage (see, to that effect, judgment of 25 June 1998, *British Airways and Others* v *Commission*, T-371/94 and T-394/94, EU:T:1998:140, paragraph 116).

166. In all events, it must be noted that the clarification provided at the hearing does not call into question the finding in paragraph 156 above that it is apparent from the contested decision that the arm's length principle

is being applied in the context of the examination under Article 107(1) TFEU. It is, moreover, apparent from all of the written submissions of the Kingdom of the Netherlands and Starbucks that they understood the contested decision to mean that the arm's length principle as described by the Commission in the contested decision was being applied in the context of the examination of a national tax measure under Article 107(1) TFEU.

167. Fourth, the Kingdom of the Netherlands and Ireland submit, in essence, that the Commission wrongly asserted, in the contested decision, that there was a general principle of equal treatment in taxation on the profits of integrated and non-integrated undertakings.

168. It is true that the Commission indicated, in recital 264 of the contested decision, that the arm's length principle was a general principle of equal treatment in taxation, which fell within the scope of Article 107(1) TFEU. However, that wording must not be taken out of context and cannot be interpreted as meaning that the Commission asserted that there was a general principle of equal treatment in relation to tax inherent in Article 107(1) TFEU, which would give that article too broad a scope.

169. In any event, it is implicitly but necessarily evident from recitals 258 to 267 of the contested decision, and in particular from recitals 262 and 265 of that decision, that the arm's length principle as described by the Commission in the contested decision was perceived by the Commission only as a tool enabling it to check that intra-group transactions are remunerated as though they had been negotiated between independent companies. The argument of the Kingdom of the Netherlands and of Ireland does not alter the finding in paragraphs 147 to 156 above that the Commission was entitled to examine, in its analysis under Article 107(1) TFEU, whether intra-group transactions were remunerated as though they had been negotiated under market conditions.

170. Accordingly, the Court must reject the argument of the Kingdom of the Netherlands and of Ireland in that respect.

171. Fifth, the Kingdom of the Netherlands and Starbucks argue that the Commission made an assessment in the light of the arm's length principle, but that it did not examine whether there was an advantage by reference to national tax law. In that regard, it must be noted that it is clear from recitals 267, 341, 415 and 416 of the contested decision that the Commission carried out its examination of whether there was an advantage by reference to the general Netherlands corporate income tax system. It will be necessary to verify whether that examination was vitiated by error in respect of the specific examination of the six lines of reasoning and, if necessary, in respect of the limited reference system.

172. On the basis of the foregoing, it is necessary to reject the second plea in Case T-760/15 and the second part of the first plea in Case T-636/16, according to which the Commission committed an error in identifying an arm's length principle as a criterion for assessing the existence of State aid. It is therefore in the light of the considerations set out in paragraphs 137 to 170 above that the merits of each line of reasoning set out in the contested decision should be analysed (see paragraphs 53 and 54 above).

*D – Dispute as to the principal reasoning regarding the existence of a tax advantage in favour of SMBV (recitals 275 to 361 of the contested decision)*

1. Choice of the TNMM in the case at hand and the lack of examination of the intra-group transaction for which the APA had in reality been requested (first line of reasoning)

173. The first part of the third plea in Case T-760/15 as well as the third part of the first plea and the first and second parts of the second plea in Case T-636/16 concern the Commission's analysis, conducted in the contested decision, according to which, first, the transfer pricing report had not identified or analysed the transaction for which a price was effectively determined in the APA, namely, the royalty, and, second, the CUP method should have been given priority, in order to determine the level of the royalty, over the TNMM, in order to determine the net profit of SMBV's production and distribution activities. Those two complaints made against the APA, as a question of principle, precede the Commission's concrete analysis, according to which the level of the royalty paid by SMBV to Alki should have been zero and the level of the prices of green coffee beans from 2011 onwards was too high, questions which will be examined in paragraphs 217 to 404 below.

174. By the first part of the third plea in Case T-760/15, the Kingdom of the Netherlands disputes the Commission's argument that the TNMM does not allow the conformity of the royalty with the arm's length principal to be examined and assessed distinctly. It maintains that that argument is erroneous and is not such as to cast into doubt the relevance of the choice of the TNMM in the case at hand.

175. First, the Kingdom of the Netherlands submits that it is apparent from the contested decision that the Commission made the transfer pricing method an end in itself, when it was merely a means of determining the conformity of the conditions of intra-group transactions with the arm's length principle. If the method chosen led to an arm's length outcome, the Commission cannot cast it into doubt on the ground that the royalty and the mark-up applied to the resale price of green coffee beans were not examined individually. In addition, according to the Kingdom of the Netherlands, the Commission could not take the view that the OECD Guidelines prioritised the use of traditional methods, such as the CUP method, over transactional methods, such as the TNMM. However, it is apparent from point 2 of the transfer pricing decree and from paragraph 4.9 of the 1995 version of the OECD Guidelines that the taxpayer is free to choose a transfer pricing method, provided that the method chosen leads to an arm's length outcome.

176. Second, the Kingdom of the Netherlands considers that, unlike what the Commission maintains in the contested decision, the only transactions concerned by the APA are the roasting of coffee beans and the provision of logistics and administrative services on behalf of Alki. The purpose of the APA is not to determine whether the royalty is in conformity with the arm's length principle. Moreover, the Kingdom of the Netherlands observes that, in the contested decision, the Commission did not explain the reasons which led it to assume that the APA had been requested and concluded for a licensing arrangement and for the royalty.

177. Third, the Kingdom of the Netherlands submits that the TNMM was the method the best suited to the case at hand. According to the Kingdom of the Netherlands, the main reason for choosing that method was the lack of similar unrelated external or internal transactions, necessary for the purposes of applying the CUP method, with which it would be possible to compare the transactions between Alki and SMBV and, therefore, the remuneration that was associated with them. However, according to the Kingdom of the Netherlands, the TNMM could be applied in SMBV's case since information was indeed available on the operational profit of the undertakings that were comparable to it in terms of function, namely, coffee bean roasting.

178. By the third part of the first plea and by the second part of the second plea in Case T-636/16, Starbucks claims that the TNMM was the most appropriate method for calculating transfer pricing in the case at hand and that the Commission could not reject that method for the reasons it provided in the contested decision. According to Starbucks, as the TNMM was correctly applied to calculate an arm's length remuneration for SMBV, there is no need to assess separately the royalty payments by SMBV, given that those payments could not have impacted SMBV's remuneration, as calculated on the basis of the TNMM.

179. More specifically, first, Starbucks argues that Commission's assertion that there is a strict rule favouring use of the CUP method has no basis in Netherlands tax law or in the OECD Guidelines. In addition, Starbucks is of the view that the use of a different transfer pricing method does not in itself result in a lower tax liability, as all methods attempt to achieve a profit allocation reflecting arm's length transfer prices. Merely alleging a methodological error does not equate to proving that an advantage exists.

180. Second, according to Starbucks, the Commission compared the price of green coffee beans and the royalty with 'controlled' transactions (intra-group) in disregard of Netherlands tax law. Starbucks chose the TNMM since the roasting contract combined various intra-group transactions by which routine, low-risk activities were entrusted to SMBV, namely, coffee roasting and conditioning activities as well as administrative and logistical support activities.

181. Third, Starbucks submits that the contested decision contains no argument asserting that the mere absence of identification and analysis of SMBV's intra-group transactions is sufficient to prove the existence of an advantage and that that argument was raised for the first time in the defence in Case T-636/16 and is thus inadmissible.

182. The Commission disputes those arguments.

183. First, the Commission explains that nowhere in the contested decision does it impose a strict rule concerning the application of the CUP method rather than another method for determining transfer pricing, but that the most reliable method should be chosen based on the circumstances of the case. It first of all established that the APA had been requested and granted for setting the price of the IP licensing arrangement between SMBV and Alki and then concluded that, since a comparable price for the price of that transaction could be determined, the use of the CUP method was preferable, in the case at hand, to the TNMM. The Commission contends that, in doing so, it relied on the guidance set out in the OECD Guidelines.

184. Second, the Commission maintains that the method approved in the APA for determining the royalty amount, by which SMBV pays Alki the residual profit of the sale of roasted beans and of non-coffee products, cannot result in an arm's length outcome. According to the Commission, as there were comparable transac-

tions allowing the value of the royalty to be assessed, the tax advisor should have used the CUP method to define the royalty price owed by SMBV to Alki, which was the transaction for which the APA was actually requested and granted. In addition, the prices invoiced by SCTC to SMBV for green coffee beans should also have been subject to a transfer pricing analysis. The Commission argues that, contrary to what the Kingdom of the Netherlands and Starbucks maintain, setting the price of individual transactions is the very essence of that principle. Thus, the establishment and analysis of controlled and uncontrolled transactions is a necessary first step of the evaluation of the arm's length nature of transfer pricing.

185. Third, the Commission contends that the Kingdom of the Netherlands has not proved that the TNMM was more appropriate, in the case at hand, than the CUP method. The Commission contends, first of all, that the 1995 version of the OECD Guidelines, which was in force at the time the APA was concluded, and the 2010 version, give preference to traditional transaction methods, such as the CUP method, over transactional profit methods. According to the Commission, the particular circumstances justifying the preference of the TNMM over the CUP method are not present in the case at hand.

*a. Preliminary observations*

186. As a preliminary point, it must be noted that the APA, as set out in paragraphs 12 to 16 above, calls for two important clarifications.

187. First, it is undisputed among the parties that the method applied in the APA is indeed the TNMM. In that regard, the Kingdom of the Netherlands has specified in the application in Case T-760/15 and stated at the hearing that the reference to the cost plus method in the APA constituted a non-technical use of that expression.

188. Second, in their answers to measures of organisation of procedure and during the hearing, the parties specified that, in reality and contrary to what is set out in the APA, the royalty to be paid to Alki was not set on the basis of the difference between the operating profit made in connection with the production and distribution function, before royalty-related expenses, and SMBV's remuneration, but on the basis of the difference between SMBV's total revenue, on the one hand, and SMBV's cost base, increased by SMBV's remuneration, on the other.

189. In addition, it should be recalled that the Commission set out its first line of reasoning regarding the existence of a selective advantage in recitals 272 and 275 to 285 of the contested decision, primarily in Section 9.2.3.2, entitled 'The transfer pricing report fails to examine the intra-group transaction for which the … APA was effectively requested and granted'.

190. First, in recitals 272, 276 to 279 and 285 of the contested decision, the Commission considered, in essence, that the transfer pricing report, accepted by the Netherlands tax authorities upon the conclusion of the APA with SMBV, failed to identify or analyse SMBV's controlled and uncontrolled transactions, which was a necessary first step of the evaluation of the arm's length nature of transfer pricing. More specifically, it considered that the royalty payment for the roasting IP licence between Alki and SMBV was the transaction for which the APA had effectively been requested.

191. Second, in recitals 280 to 284 of the contested decision, the Commission asserted, in essence, that an approach consisting in determining transfer prices for each transaction taken individually was to be prioritised over an approach consisting in determining transfer prices for a function as a whole. In other words, the Commission took the view that the CUP method was to be given priority over transactional profit methods, such as the TNMM. In recital 285 of the contested decision, the Commission maintained that, since the analysis of an arm's length remuneration for SMBV had been conducted in the transfer pricing report starting from an incorrect point of departure, that remuneration was, by necessity, improperly estimated by using the TNMM. Moreover, it took the view that the transfer pricing report, in order to establish transfer pricing in the case at hand, should have made use of reliable comparisons with available information on transactions between unrelated parties which owned Starbucks at the time the request for the APA was made.

192. The Commission moreover confirmed in its submissions that its first line of reasoning consisted in criticising the use of the TNMM to determine the net profit of SMBV's production and distribution activities rather than the CUP method to determine the level of the royalty. It maintained that the validity of its first line of reasoning was not dependent on the conclusion that the arm's length value of the royalty was zero. The fact that the transfer pricing report failed to identify or analyse SMBV's controlled and uncontrolled transactions means that a necessary first step in assessing the arm's length nature of commercial conditions applicable between related parties for transfer pricing purposes was not taken.

193. Without it being necessary, at this stage, to analyse Starbucks' complaint that the contested decision contains no argument asserting that the mere absence of identification and analysis of SMBV's intra-group transactions is sufficient to prove the existence of an advantage, an argument raised for the first time in the defence in Case T-636/16 and thus inadmissible, it is appropriate to examine whether the criticisms formulated by the Commission as part of its first line of reasoning justified the finding that the APA conferred an advantage on SMBV on the ground that the very choice of the transfer pricing method, proposed in transfer pricing report, did not result in a reliable approximation of a market-based outcome, in line with the arm's length principle.

*b. Burden of proof*

194. It must be borne in mind that, in its review of State aid, the Commission must, in principle, provide proof in the contested decision of the existence of the aid (see, to that effect, judgments of 12 September 2007, *Olympiaki Aeroporia Ypiresies* v *Commission*, T-68/03, EU:T:2007:253, paragraph 34, and of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 95). In that context, the Commission is required to conduct a diligent and impartial examination of the measures at issue, so that it has at its disposal, when adopting a final decision establishing the existence and, as the case may be, the incompatibility or unlawfulness of the aid, the most complete and reliable information possible (see, to that effect, judgments of 2 September 2010, *Commission* v *Scott*, C-290/07 P, EU:C:2010:480, paragraph 90, and of 3 April 2014, *France* v *Commission*, C-559/12 P, EU:C:2014:217, paragraph 63).

195. By contrast, it is for the Member State which has made a distinction between undertakings to show that it is actually justified by the nature and the general scheme of the system in question. The concept of State aid does not refer to State measures which differentiate between undertakings and which are, therefore, prima facie selective where that differentiation arises from the nature or the general scheme of the system of which they form part (see, to that effect, judgment of 21 June 2012, *BNP Paribas and BNL* v *Commission*, C-452/10 P, EU:C:2012:366, paragraphs 120 and 121 and the case-law cited).

196. It follows that it was for the Commission to show, in the contested decision, that the requirements for a finding of State aid, within the meaning of Article 107(1) TFEU, were met. In that regard, it must be held that, while it is common ground that the Member State has a margin of appreciation in the approval of transfer pricing, that margin of appreciation cannot lead to the Commission being deprived of its power to check that the transfer pricing in question does not lead to the grant of a selective advantage within the meaning of Article 107(1) TFEU. In that context, the Commission must take into account the fact that the arm's length principle allows it to verify whether the transfer pricing accepted by a Member State corresponds to a reliable approximation of a market-based outcome and whether any variation that may be identified in the course of that examination does not go beyond the inaccuracies inherent in the methodology used to obtain that approximation.

*c. Intensity of review to be conducted by the Court*

197. With regard to the intensity of the review to be conducted by the Court in the present case, it should be noted that, as is clear from Article 263 TFEU, the object of an action for annulment is to review the legality of the acts adopted by the EU institutions named therein. Consequently, the analysis of the pleas in law raised in such an action has neither the object nor the effect of replacing a full investigation of the case in the context of an administrative procedure (see, to that effect, judgment of 2 September 2010, *Commission* v *Deutsche Post*, C-399/08 P, EU:C:2010:481, paragraph 84).

198. In the field of State aid, it must be recalled that State aid, as defined in the FEU Treaty, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the Courts of the European Union must, in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission's assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 107(1) TFEU (judgments of 4 September 2014, *SNCM and France* v *Corsica Ferries France*, C-533/12 P and C-536/12 P, EU:C:2014:2142, paragraph 15, and of 30 November 2016, *Commission* v *France and Orange*, C-486/15 P, EU:C:2016:912, paragraph 87).

199. As to whether a method for determining transfer pricing of an integrated company complies with the arm's length principle, it should be borne in mind that, as has already been indicated above, when using that tool in carrying out its assessment under Article 107(1) TFEU, the Commission must take into account its approximate nature. The purpose of the Court's review is therefore to verify whether the errors identified in the contested decision, and on the basis of which the Commission found there to be an advantage, go beyond

the inaccuracies inherent in the application of a method designed to obtain a reliable approximation of a market-based outcome.

*d. Failure to identify and analyse the royalty paid by SMBV to Alki in the APA*

200. With regard to the finding made by the Commission, according to which the transfer pricing report did not identify or analyse the transaction for which a price was actually determined in the APA, it must be noted that, in recital 276 of the contested decision, the Commission explained that SMBV's taxable profit was lower than that actually recorded on account of the acceptance by the Netherlands tax authorities because the actual level of profits generated by SMBV in the Netherlands was to be reduced, for corporate tax purposes, by the amount of the royalty for the roasting IP. In recitals 277 and 278 of the contested decision, the Commission inferred that the royalty for the roasting IP was the transaction for which the APA had effectively been requested and that the methodology for determining the level of that royalty as an adjustment variable was the transaction effectively being transfer priced by the APA. It also considered that the price of coffee beans should have undergone an analysis.

201. In that regard, first, it is sufficient to hold that mere non-compliance with methodological requirements does not necessarily lead to a reduction of the tax burden. It is further necessary for the Commission to demonstrate that the methodological errors that it identified in the APA do not allow a reliable approximation of an arm's length outcome to be reached and that they led to a reduction in the taxable profit compared with the tax burden resulting from the application of normal taxation rules under national law on an undertaking placed in a comparable factual situation to SMBV and carrying out its activities under market conditions. Thus, the mere finding of a methodological error does not in itself suffice, in principle, to demonstrate that the APA conferred an advantage on SMBV and, thus, to establish that there is State aid within the meaning of Article 107 TFEU.

202. Second, it should be recalled that the various methods for setting transfer prices – whether it be the CUP method or the TNMM – endeavour to attain profit levels reflecting arm's length transfer prices and that it cannot be concluded, as a rule, that one method does not allow a reliable approximation of an arm's length outcome to be reached.

203. It follows that the mere fact that, according to the Commission, neither the transfer pricing report nor the APA identified the royalty as the transaction for which a transfer price was in reality determined in the APA and that they did not analyse whether the royalty was in conformity with the arm's length principle does not suffice to demonstrate that that royalty was not actually in conformity with the arm's length principle. That finding alone therefore did not prove that the APA conferred an advantage on SMBV.

204. In addition, it must be pointed out that the Commission's argument that the transfer pricing report did not identify or analyse the royalty as the transaction for which a price was actually determined in the APA is based on the assertion that, in the transfer pricing report, the payment of a royalty is not regarded as the adjustment variable of the structure of that suggested remuneration. In that regard, it should be noted that the transfer pricing report in no way disregards the licensing arrangement concluded between SMBV and Alki. That arrangement is mentioned both in the description of the Starbucks group's activities in the EMEA region and the Netherlands and in the graphic representation of the EMEA region's transactions. Therefore, the Starbucks group's tax advisor did indeed take into account those transactions when he proposed SMBV's remuneration.

205. Accordingly, it is necessary to uphold the complaint of the Kingdom of the Netherlands and of Starbucks according to which the Commission wrongly found that the absence of separate analysis of the royalty in transfer pricing report and in the APA conferred an advantage on SMBV.

*e. Necessity of prioritising the CUP method over the TNMM*

206. So far as concerns the Commission's position that the CUP method should have been given priority over the TNMM, since that first method was applicable in the case at hand, first, it should be noted that, in the present case, the APA accepted the use of the TNMM in order to determine the operating margin for SMBV's production and distribution activities. The APA, however, accepted that the royalty was determined as, in essence, the difference between the operating profit generated in connection with the production and distribution function and the operating margin. It follows that the APA does not directly provide for the use of a transfer pricing method to calculate the level of the royalty, which is defined as a purely residual value.

207. It is true that it follows from the considerations set out in paragraphs 148 to 156 above that, since the royalty was an intra-group transaction the level of which was determined in the APA, the Commission was entitled to examine as part of its analysis under Article 107(1) TFEU, using a transfer pricing method which it regarded as appropriate in the case at hand, whether the royalty amount was determined as if it had been negotiated in market conditions.

208. However, with regard to the contested decision, while the Commission contends that the CUP method should have been given priority over the TNMM in order to be able to determine the arm's length level of the royalty, it fails to consider that, actually, in the APA, the level of the royalty was not calculated using a transfer pricing method, in particular the TNMM. On the contrary, the TNMM was used in the APA to determine SMBV's remuneration for the production and distribution activities. Thus, the Commission's position essentially amounts to criticising the fact that the TNMM was used to determine SMBV's remuneration for the production and distribution activities instead of the CUP method, which should in the Commission's view have been used to calculate the level of the royalty.

209. In that connection, it must be held that the two methods are applied to calculate the price level of different intra-group transactions. However, while the Commission argues that the OECD Guidelines expressed a certain preference towards using traditional methods, such as the CUP method, it cannot mandate the examination of another transaction than that for which the APA determined a transfer price on the basis of the TNMM solely because, for that other transaction, a transfer price should have been determined on the basis of the CUP method. The rule invoked by the Commission merely allows for a choice of the transfer pricing method appropriate for the same type of transaction or closely linked transactions. Choosing the transfer pricing method is not an end in itself, but is done with a view to the intra-group transaction for which the arm's length level must be determined and not the other way around.

210. Second, it must be recalled that, as has been set out in paragraphs 146 and 147 above, a tax measure confers an economic advantage where it leads to a reduction of the tax burden compared to what it would normally have had to bear in the absence of that measure.

211. As has been held in paragraph 201 above, mere non-compliance with methodological requirements does not necessarily lead to a reduction of the tax burden. It follows that the mere finding by the Commission of errors in the choice or application of the transfer pricing method does not, in principle, suffice to demonstrate the existence of an advantage.

212. However, in recitals 275 to 285 of the contested decision, the Commission invokes no element grounding the conclusion – without a comparison being carried out with the result that would have been obtained using the CUP method – that the choice of the TNMM necessarily leads to a result that is too low. In that context, the Commission merely contends, in recital 284 of the contested decision, that the taxpayer was under an obligation to verify whether the transfer pricing method chosen by the latter led to a reliable approximation of an arm's length price, before the tax authorities can accept an APA request based on that method.

213. In addition, it must be held that the obligation stated by the Commission falls within the area of tax law and, while breach of it may have consequences in terms of taxation, in the field of State aid, such a breach does not necessarily mean that the method chosen by the taxpayer does not produce a reliable approximation of a market-based outcome, in accordance with the arm's length principle.

214. For the sake of completeness, it should be recalled (see paragraph 10 above) that point 2 of the transfer pricing decree provides that the Netherlands tax administration must always conduct a transfer pricing audit from the perspective of the method adopted by the taxpayer at the date of the transaction. That rule complies with paragraph 1.68 of the 1995 OECD Guidelines. It follows that the taxpayer is in principle free to choose a transfer pricing method as long as the method selected leads to an arm's length outcome for the transaction in question. Even though the taxpayer is expected to take into account, when choosing a transfer pricing method, the reliability of that method in the situation in question, that step does not specifically seek to incentivise the taxpayer to assess all methods and then justify how the method he has chosen produces the best result under the conditions present.

215. It follows that, in the case at hand, the Commission was not entitled to find that the CUP method had to be given priority, in principle, over the TNMM.

216. It is therefore necessary to uphold the complaint of the Kingdom of the Netherlands and of Starbucks according to which the Commission wrongly found that the mere choice of the TNMM in the case at hand conferred an advantage on SMBV, without it being necessary to examine Starbucks' argument disputing the admissibility of certain arguments put forward by the Commission.

2. Whether the royalty paid by SMBV to Alki should have been zero (second line of reasoning)

217. Under the second part of the third plea in Case T-760/15, the Kingdom of the Netherlands claims that the Commission is wrong to argue that the remuneration paid by SMBV to Alki should have been zero and that it resulted in an advantage within the meaning of Article 107(1) TFEU. The contracts concluded between the Starbucks group and external roasters and manufacturers of coffee-derived products on which the comparison conducted by the Commission is based cannot be used for a comparison of the contractual arrangements between Alki and SMBV, based on the CUP method. The Kingdom of the Netherlands is of the view that the Commission did not demonstrate that the TNMM had not led to an arm's length outcome.

218. Under the fourth part of the second plea in Case T-636/16, Starbucks maintains, in essence, that the Commission's analysis of the royalty relies almost exclusively on evidence that was not available in April 2008. In addition, contrary to Netherlands law and to the OECD Guidelines, the Commission did not establish an arm's length range for the royalty, but concluded that it should equal zero. Like the Kingdom of the Netherlands, Starbucks is of the view that all third-party manufacturers, mentioned in the contested decision, which, similar to SMBV, supply Starbucks-branded coffee products to stores or retailers, pay substantial royalties for the use of Starbucks' roasting IP. No royalties are paid by subcontractors which, unlike SMBV, do not supply such products to customers, but merely provide a roasting service to the Starbucks group. Contrary to what is stated in the contested decision, the value of the roasting IP is generated when Starbucks-branded coffee products are sold to stores and retailers, which are willing to pay premium prices for those products. Additionally, Starbucks contends that, contrary to what the contested decision finds, for the period examined, SMBV's roasting activities have always been profitable.

219. The Commission disputes those arguments.

220. First, the Commission argues, in essence, that it compared the amount of the royalties under the seven contracts mentioned in recital 300 of the contested decision with that of the royalty in connection with the relationship between SMBV and Alki. In addition, the Commission explains, in Case T-760/15, that it also relied on the contracts mentioned in recital 303 of the contested decision and, in Case T-636/16, that that was not, in principle, the case. The Commission adds that it also relied on the agreements between competitors of the Starbucks group and third coffee roasting companies, mentioned in recitals 305 to 308 of the contested decision, to arrive at the conclusion that the arm's length value of the royalty paid in the context of the relationship between SMBV and Alki had to be zero. It adds that, in recitals 292 to 298 of the contested decision, it explained the reasons why it had taken the view that those transactions constituted a direct point of comparison enabling the amount of the royalty owed by SMBV to Alki in exchange for the roasting IP to be determined.

221. Second, the Commission argues that it does not deny that the roasting IP may represent a value. However, the value of that IP is not captured before the Starbucks-branded coffee products are sold by Starbucks stores to final consumers. According to the Commission, the roasting IP therefore cannot be considered to represent a benefit for SMBV for which a royalty should be paid.

*a. Preliminary observations*

222. It must be recalled that the Commission set out its second line of reasoning in recitals 286 to 341 of the contested decision, under Section 9.2.3.3, entitled 'The royalty payment to Alki ... resulting from the ... APA is not priced at arm's length'.

223. As a preliminary point, two observations should be made.

224. First, it must be recalled that it is settled between the parties that the royalty constituted, in principle, a deductible charge under Netherlands tax law. It is moreover undisputed that, since it is a transaction within the Starbucks group, the royalty is an intra-group transaction. It is apparent from paragraphs 147 to 156 above that the level of such a transaction must, for the purposes of the determining SMBV's corporate income tax, be assessed as if it had been determined in market conditions.

225. Second, it must be noted that, although the Commission considered that the level of the royalty paid by SMBV to Alki should have been zero, it acknowledged in recital 310 of the contested decision that coffee roasting know-how and coffee roasting curves could represent a value. Similarly, in paragraph 126 of its defence in Case T-636/16, the Commission explains that it does not deny that the roasting IP might represent a value.

226. It follows that the only matter on which the parties are in disagreement is the level the royalty transfer price would have been if it had been set in market conditions.

227. In that regard, it should be recalled that, in recitals 286 to 341 of the contested decision, the Commission maintains that the royalty paid by SMBV to Alki should have been zero. According to the wording of the contested decision, the Commission does not contend that the level of that royalty should have been lower than the level of the royalty accepted by the APA, but that no royalty should have been paid. The Commission itself asserts that it did not estimate a range for the level of the royalty on the ground that it should have been exactly zero (recital 340 of the contested decision).

228. In the contested decision, the Commission based its demonstration according to which the royalty paid by SMBV should have been zero (recital 318 of the contested decision), in essence, on three elements.

229. So far as concerns the first element, the Commission stated that the variable nature of the royalty payment during the period from 2006 to 2014 gave a 'first indication' that the level of that payment bore no relation to the value of the roasting IP (recital 289 of the contested decision). As far as the second element is concerned, the Commission maintained that SMBV did not capture the value of the roasting IP in its relationship with Alki (recitals 310 to 313 of the contested decision). With regard to the third element, the Commission explained that the manufacturing agreements concluded by Starbucks with third parties did not require any royalty for the use of the roasting IP (recitals 291 to 309 of the contested decision).

230. In addition, in the contested decision, the Commission rejected the arguments raised by the Kingdom of the Netherlands and Starbucks during the administrative procedure. More specifically, the Commission took the view that the royalty did not represent remuneration for the transfer of business risks (recitals 319 to 332 of the contested decision) and that the amount of the royalty was not justified by the amounts paid by Alki to Starbucks US for the technology under the cost sharing agreement (recitals 333 to 338 of the contested decision).

231. Next, first of all, it is necessary briefly to set out the theory advanced by the Commission in the contested decision concerning SMBV's royalty-related functions and concerning the relevant normal taxation rules. Those elements are the basis underpinning the analysis of the level of the royalty, conducted by the Commission in the contested decision. Second, it is appropriate to examine Starbucks' argument that the Commission's analysis of the royalties could not rely on evidence that was not available in April 2008. Third, it is appropriate to analyse the arguments of the Kingdom of the Netherlands and of Starbucks on the question of who exploited the roasting IP. Fourth, it is necessary to examine whether the Commission was justified in finding, based on a comparison with the royalties provided for in contracts with third parties, that the royalty should have been zero. Fifth, it is appropriate to examine the Commission's argument, raised at the hearing, according to which, in reality, it maintained in the contested decision that the royalty should have been lower than the level endorsed by the APA.

*b. SMBV's royalty-related functions*

232. With regard to the functions of SMBV that are relevant for the analysis of the royalty, first of all, it is settled that it roasts green coffee beans which it purchases from SCTC.

233. Next, the Commission maintains in the contested decision, in particular in recitals 49, 96, 137, 313 and 330, as well as in its submissions, that Starbucks stores, both affiliated and unaffiliated, are required to purchase roasted coffee from SMBV and that SMBV is therefore also the vendor of the roasted coffee.

234. In addition, in the contested decision, the Commission takes the view that, in line with accounting standards, the stocks that SMBV purchases and sells need to appear on its balance sheet, since it is the entity responsible for contracting and invoicing with stores.

235. Last, it is apparent from the contested decision, read as a whole, that the Commission considers it incorrect that SMBV is presented in the transfer pricing report as a low-risk coffee producer. In that regard, in recitals 319 to 332 of the contested decision, the Commission inter alia rejected the arguments of the Kingdom of the Netherlands and of the Starbucks correspondents according to which the contractual arrangements between SMBV and Alki, on which the tax advisor's report was based, effectively cause a transfer of business risks from SMBV to Alki. In addition, the Commission explained that SMBV assumed commercial risks in its relations with SCTC and Starbucks stores.

236. It follows that, according to the Commission, SMBV is not, with regard to its sales of roasted coffee to Starbucks stores, a toll manufacturer or a supplier, but roasts coffee for its own behalf and acts as vendor. According to the contested decision, 'toll manufacturing' is usually understood to mean an arrangement in which a company processes raw materials or semi-finished goods on behalf of another company.

*c. Normal taxation rules under Netherlands law*

237. As has been found in paragraph 146 above, the examination under Article 107(1) TFEU of a tax measure granted to an integrated undertaking means determining, first, the normal taxation rules applicable to the beneficiary of that measure.

238. In recital 232 of the contested decision, the Commission asserted that the Netherlands rules against which the APA must be examined are the rules of the general Netherlands corporate income tax system. Those rules are summarised in paragraphs 3 to 11 and 35 above.

239. In the case at hand, it is settled that the APA was concluded in order to enable SMBV to anticipate the application of corporate income tax rules by determining its taxable profit. It follows that the APA forms part of the general Netherlands corporate income tax system, with the objective of taxing undertakings – integrated or stand-alone – subject to corporate income tax.

240. Therefore, it is in the light of SMBV's functions as identified in paragraphs 232 to 236 above and the normal taxation rules as identified above that it is appropriate to analyse the question of whether the level of the royalty corresponded to a level that would have been practised under market conditions.

*d. Use of evidence by the Commission that was not available when the APA was concluded*

241. Starbucks claims that, in the contested decision, the Commission relied predominantly on information that was not available in April 2008, when the APA was concluded. More specifically, Starbucks cites the case-law of the EU Courts on the private investor criterion according to which, in order to assess the economic rationality of a certain measure, it is necessary to place oneself in the context of the time at which the financial support measures were adopted, and thus to refrain from any assessment based on events that happened at a later date. According to Starbucks, the same principle is well established under Netherlands tax law and in the OECD Guidelines.

242. The Commission does not dispute that that principle is applicable in the case at hand and merely argues that a considerable number of arguments in support of its conclusion that the APA did not comply with the arm's length principle relied on information and data available to the Netherlands tax administration at the time the APA was concluded.

243. At the outset, it must be stated that the fact that Netherlands tax law and the OECD Guidelines provide, according to Starbucks, that it is necessary to refrain from any assessment based on events that happened after the adoption of an advance pricing agreement to examine whether it complies with the arm's length principle has no bearing on the examination in this case of the APA in the light of the conditions of Article 107 TFEU.

244. Starbucks bases its argument on an analogous application of the case-law of the EU Courts according to which, in order to examine whether or not the Member State or the public body concerned has adopted the conduct of a prudent private operator operating in a market economy, it is necessary to place oneself in the context of the period during which the measures at issue were taken in order to assess the economic rationality of the conduct of the Member State or of the public body, and thus to refrain from any assessment based on a later situation (judgment of 25 June 2015, *SACE and Sace BT* v *Commission*, T-305/13, EU:T:2015:435, paragraph 93; see also, to that effect, judgments of 16 May 2002, *France* v *Commission*, C-482/99, EU:C:2002:294, paragraphs 69 and 71, and of 5 June 2012, *Commission* v *EDF*, C-124/10 P, EU:C:2012:318, paragraph 105).

245. In that regard, it is sufficient to note that the determination of a transfer price in line with market conditions does not find its basis in the principle of equal treatment between public and private undertakings, but, as the Commission recognises, in the legitimate objective of a prior tax agreement, such as the APA, which is to establish, for reasons of legal certainty, in advance, the application of a tax provision.

246. It must be held that, to the extent that the Commission considers that the adoption of a prior tax agreement, such as the APA, gave rise to new aid, it should have been notified of that aid before its implementation, in accordance with Article 108(3) TFEU. Had the Commission stated a position on such a notification, however, it could not have taken into consideration information that was not known or reasonably foreseeable at the time of its decision. It therefore cannot criticise the Member State concerned for not having taken into account information that was not known or reasonably foreseeable at the time of the adoption of the agreement in question.

247. In that context, first, it must be recalled, that it is apparent from Article 1 and recital 40 of the contested decision that the measure contested by the Commission is the APA alone.

248. Second, while it is true that the APA could be revoked or amended during its validity period, from 2007 to 2017, it is important to note that, in the contested decision, the Commission did not consider that the fact that the Netherlands authorities had not revoked or modified the APA during its validity had conferred an advantage on SMBV. Point 6, second indent, of the APA, read in conjunction with point 4, first indent, stipulates that it comes to an end when a significant change of the facts and circumstances approved by the APA occurs, unless the parties have amicably agreed a revision arrangement. There was therefore nothing to prevent the Commission from finding that a substantial change of the facts and circumstances approved by the APA had taken place and that, consequently, a continued application of the APA conferred a selective advantage on SMBV.

249. Third, regarding the Commission's argument that the APA was subject to a half-term check after the sixth accounting year, ending on 31 December 2013, and that the APA was not modified on that occasion, it is sufficient to point out that nowhere in the contested decision did the Commission argue that the absence of modification or revocation of the APA, following that half-term check, had conferred an advantage on SMBV under Article 107(1) TFEU.

250. It follows that, in those circumstances, the examination of the existence of an advantage conferred by a prior agreement, such as the APA, should be determined in view of the context of the time at which that agreement was concluded. The implication of that finding is that the Commission is required to refrain from assessments based on a situation subsequent to the adoption of the APA.

251. Accordingly, it is necessary to uphold Starbucks' argument that, in the circumstances of the case at hand, the Commission could not base its analysis on information that was not available or reasonably foreseeable in April 2008, when the APA was concluded.

*e. Whether the roasting IP represented a value for SMBV*

252. By the second argument set out in recitals 310 to 332 of the contested decision (see paragraph 230 above), the Commission sought, in essence, to demonstrate that the payment of a royalty by SMBV to Alki was not justified, in principle, since SMBV did not, according to the Commission, benefit from the value of the roasting IP. That argument is divided into two parts. In essence, first, the Commission took the view that SMBV did not exploit the roasting IP directly on the market. Second, it found that the coffee roasting activity did not generate sufficient profit to allow for royalty payments.

1. Whether SMBV exploited the roasting IP directly on the market

253. As regards the argument that SMBV did not exploit the roasting IP directly on the market, the Commission explained, in recitals 310 to 313 of the contested decision that, first of all, in the specific relationship between Alki and SMBV, the value of the roasting IP was not 'captured' by the roaster, namely, SMBV. According to the Commission, the importance of the roasting know-how and curves lay in ensuring a consistent taste associated with the brand and its individual products. It inferred that the value of Starbucks' roasting know-how and curves was 'exploited' only when Starbucks products were sold by stores under the Starbucks brand. In addition, the Commission maintained that, on their own, the roasting know-how and curves did not generate value for the roaster on an ongoing basis if they could not be exploited on the market. As far as it was concerned, in the case of SMBV, the roasting know-how and curves 'appear[ed]' to constitute a technical specification according to which the roasting ought to proceed due to a preference or a choice of the purchasing company. The fact that the specifications laid down by Alki regarding the roasting process and, in particular, the roasting curves allowed SMBV to roast coffee sold under the Starbucks brand did not, according to the Commission, bring any benefit to SMBV in terms of increased sales or sales price, given that SMBV did not, in principle, sell its production to final customers who valued the Starbucks brand. Last, the Commission added that SMBV sold virtually all its production to Starbucks-franchised stores and that it therefore did not exploit the roasting IP directly on the market.

254. In its submissions, the Commission adds that the value of the roasting IP is exploited only where the products are sold to final customers who valued the consistent taste associated with the brand in question. Economically, it would be irrational for the roaster/coffee producer to pay a royalty to use the roasting IP when it does not market the finished product directly. That lies in the fact that, in such a scenario, the roaster/coffee producer uses that IP to roast coffee beans at the request of the contractor.

255. As a preliminary point, first, [*confidential*]. It follows that, under the roasting agreement, SMBV was obliged to pay the royalty in return for the use of the roasting IP.

256. Second, it must be pointed out that the Commission did not argue, in the contested decision, that its thesis according to which the roasting IP is exploited with end consumers constituted a test prescribed by Netherlands tax law. On the contrary, it is apparent from recitals 310 to 313 of the contested decision, read in combination with the introductory recitals setting out the Commission's position upon the adoption of the opening decision, that the Commission conducted a purely economic examination that it based on the 1995 and 2010 versions of the OECD Guidelines.

257. In the light of those considerations, it is necessary to examine the merits of the proposition of the Commission, set out in recitals 298, 300 and 310 to 313 of the contested decision, according to which SMBV did not directly exploit the IP on the market on the ground that it did not sell products to final consumers.

258. In that regard, it must be held that the explanations given in recitals 310 to 313 of the contested decision lack plausibility. The reasoning followed by the Commission in recitals 310 to 313 of the contested decision as well as in its submissions before the Court is, in essence, based on the premiss that the value of the roasting IP is exploited only where the products are sold to final consumers who value the consistent taste associated with the mark in question and where, economically, it would not be rational for the roaster/coffee producer to pay a royalty to use the roasting IP when it does not market the finished product directly. However, that premiss is not borne out by the facts established in the contested decision.

259. First, it is settled between the parties that the roasting IP was, in principle, capable of representing an economic value. Second, it is also settled between the parties that SMBV is a roaster that was obliged to use the roasting IP to roast its coffee. Third, the Commission maintains that Starbucks stores, both affiliated and unaffiliated, are required to purchase roasted coffee from SMBV and that SMBV is thus also the vendor of the roasted coffee.

260. In that context, it must be held that the Commission was wrong to focus its analysis on the premiss that the value of the roasting IP is exploited only where the products are sold to final consumers. The question of who ultimately bears the costs corresponding to the compensation of the value of the IP used for coffee production is clearly separate from the question of whether the roasting IP was necessary to allow SMBV to produce roasted coffee according to the criteria stipulated by Starbucks stores, to which it sells, on its own behalf, the coffee.

261. In the event that SMBV sells the coffee it has roasted to Starbucks stores which require coffee to have been roasted according to Starbucks' specifications, it is plausible that, in the absence of the right to use, or – to use the terminology of the contested decision – exploit the roasting IP, SMBV would not have been in a position to produce and supply roasted coffee according to Starbucks' specifications in stores of the same name.

262. From this it must be concluded that, contrary to what the Commission argues, SMBV's payment of a royalty to use the roasting IP is not devoid of all economic rationality. The IP was, after all, necessary for exercising SMBV's economic activity, namely, the production of roasted coffee according to Starbucks' specifications. It follows that SMBV does indeed derive added value from the use of the roasting IP, without which it could not then resell the roasted coffee to Starbucks stores.

263. Furthermore, it is necessary to reject the Commission's argument that it is Starbucks stores which pay royalties to Starbucks Coffee Emea which also include a remuneration [confidential]. First, the submissions under the present line of reasoning in the contested decision do not contain any element such as to substantiate that proposition. Second, the circumstance that Starbucks stores pay a royalty to Starbucks Coffee Emea does not preclude SMBV from being able to pass on [*confidential*] in the prices invoiced to stores. In addition, the fact that, according to the Commission, Starbucks stores pay a second royalty [*confidential*] to Starbucks Coffee Emea, [*confidential*], is capable of conferring an advantage, at most, on the latter, but not on SMBV.

264. It follows from the foregoing that the Commission was wrong to consider, in recitals 298 and 300 of the contested decision, that an unaffiliated manufacturing company exploits a roasting IP only if it sells its products to end customers. The exploitation of roasting IP is not limited to situations in which a roaster sells its coffee on the retail market to end consumers, but also includes situations such as that of SMBV, in which a roaster is active as a seller on the wholesale market. On the contrary, merely processing coffee on behalf of a contractor that procures the technical specifications for manufacture does not suffice to demonstrate that such an IP is being exploited.

265. Accordingly, it must be held that the Commission erred in finding that SMBV, as described in the contested decision, did not have to pay a royalty since it did not exploit the roasting IP directly on the market.

2. Whether SMBV has been loss-making on its roasting activities

266. The Kingdom of the Netherlands and Starbucks dispute the argument of the Commission, set out in recitals 314 to 317 of the contested decision, that SMBV has generated a loss on its roasting activities since 2010, a situation which did not permit the payment of a royalty for the roasting IP. According to the Kingdom of the Netherlands, the Commission inter alia did not take sufficient account of the fact that the beans purchased by SMBV were also used for the production of coffee by third parties. The Commission accordingly took the view that this demonstrated that the method used to determine the royalty as an adjustment variable, as approved by the APA, was not in conformity with the arm's length principle.

267. The Commission retorts that, according to the information it received from Starbucks during the administrative procedure, only a limited portion of roasted coffee was processed by external manufacturers. It was thus right to find that virtually all the beans purchased by SMBV were processed as part of its own coffee-production activities.

268. In the contested decision, the Commission found, in essence, that SMBV has generated a loss on its roasting activities since 2010 and that the royalty paid by SMBV to Alki was financed in part by SMBV's other activities, without it having had any prospects of future profits resulting from the roasting. According to the Commission, the coffee roasting activity did not generate sufficient profits to enable the payment of the royalty. Moreover, the Commission contends that the royalty paid by SMBV to Alki for the roasting IP in an intragroup context 'appear[ed]' to serve structurally the sole purpose of shifting profits derived from SMBV's reselling function to Alki.

269. At the outset, it must be pointed out that the Commission's reasoning is based on the premiss according to which it is necessary to achieve profits on the roasting activities in order to be in a position to pay a royalty for the roasting IP. The Commission does not, however, demonstrate that the Netherlands tax rules provide that the obligation to pay a royalty is dependent on the profitability of the activity in question. In addition, the question of whether SMBV's roasting activities were profitable is unrelated to whether an obligation to pay a royalty such as that at issue in the present case could be economically justified.

270. In that regard, first of all, it must be pointed out that the Commission argues that the roasting activity did not generate sufficient profit for the period commencing in 2010. That finding therefore does not concern the entirety of the validity period of the APA (commencing in 2007).

271. Next, it must be stated that, as has been indicated in paragraphs 243 to 251 above, in the circumstances of the case at hand, the Commission was required to refrain from any assessment based on a situation subsequent to the APA's conclusion. The Commission does not explain, in the contested decision, however, how the losses it mentions in recitals 314 to 317 thereof would have been foreseeable when the APA was adopted, when they pertained to SMBV's situation only from 2010. The Commission has therefore not demonstrated that it was entitled to rely on the fact that SMBV had sustained a loss on its roasting activities since 2010.

272. Last, in any event, to the extent that Starbucks claims that SMBV's roasting activities have always been profitable, it is worth recalling that the Commission conducted its analysis based on a comparison of the revenue received from Starbucks stores with the value of SMBV's purchase of green coffee beans from SCTC. However, under the third line of reasoning, the Commission specifically maintains that the increase of the price of green coffee beans, from 2010 onwards, was too high. It is thus already apparent from the Commission's arguments in the contested decision that the costs of green coffee were considerably overvalued and that, accordingly, the losses it mentions in the contested decision did not exist, at least in the proportions found in recitals 314 to 317 of the contested decision.

273. Those findings are sufficient to reject the Commission's argument that SMBV was not in a position to pay a royalty for the roasting IP due to its having been loss-making on its roasting activities.

274. In any event, Starbucks claims that the Commission's calculation is erroneous since no account was taken of the fact that a considerable volume of the total purchased green coffee had not been roasted by SMBV. The Commission contends that that argument is inadmissible, on the ground that that information is new and moreover contradicts the information provided during the administrative procedure.

275. In that regard, it must be pointed out that the Commission acknowledges, both in footnote 155 of the contested decision and in its submissions, that the information provided by Starbucks during the administrative procedure led to the conclusion that practically all the green coffee purchased by SMBV, apart from 'limited volumes' that had been provided to third parties, had also been roasted by SMBV. In that context, the Commission makes reference to the letter of the Starbucks correspondents that it was sent on 23 September

2015. However, it is apparent from that letter that the third party in question had a custom production contract with the Starbucks group which 'predominantly' concerned the production of products other than roasted coffee, 'but also the roasting of green coffee as such (be it in limited volumes)'. The reference to 'limited volumes' indicates that the third party in question produced a limited quantity of roasted coffee compared to its production of products other than coffee powder, but not that it produced negligible quantities of roasted coffee. The Commission was thus informed during the administrative procedure that a portion of the green coffee purchased by SMBV had not been roasted by SMBV. The objection made by the Commission as to the admissibility of Starbucks' argument, based on the notion that that argument is based on information not brought to its attention during the administrative procedure, therefore has no basis in fact and must be rejected.

276. So far as concerns the merits of Starbucks' argument that the Commission took into account the entirety of the sums corresponding to SMBV's purchases of green coffee as costs for its calculation when a considerable volume of the total purchased green coffee had not been roasted by SMBV, it must be noted that the Commission contends that Starbucks did not indicate, in the documents communicated on 29 May 2015, that a meaningful portion of green coffee beans had been roasted by third parties. However, as Starbucks rightly argues, the response to question 2 in the letter of the Starbucks correspondents of 29 May 2015 that the Commission cites in its submissions pertained to the allocation of SMBV's profits to its various functions, and not to the allocation of its costs to those functions. It follows that the responses of the Starbucks correspondents on which the Commission, according to its submissions, based its finding that SMBV's roasting function had been loss-making from 2010 did not suffice to enable the Commission to arrive at that conclusion.

277. Furthermore, as has been set out in paragraph 275 above, when the contested decision was adopted, the Commission already had indication that its calculation, set out in recital 314 of the contested decision, consisting in subtracting the price paid by SMBV to SCTC for green coffee beans from the revenue generated from coffee roasting, was erroneous.

278. If follows that the Commission has not demonstrated that SMBV has generated a loss on its roasting activities since 2010, a situation which did not permit the payment of a royalty for the roasting IP.

*f. Comparison with coffee roasting agreements concluded by Starbucks with third parties and against similar licensing arrangements 'on the market'*

279. By the third argument set out in the contested decision (see paragraph 229 above), the Commission sought to explain, in essence, that the manufacturing agreements concluded by Starbucks with third parties and certain agreements between Starbucks' competitors and third roasters did not provide for any royalty for the use of the roasting IP (recitals 291 to 309 of the contested decision).

280. In that context, the Commission explained, in recital 309 of the contested decision, that a transfer pricing analysis of the arm's length value of the royalty paid to Alki by SMBV for the roasting IP led to the conclusion that no royalty ought to be due for that IP in that specific relationship. It based that finding, first, on an analysis of the manufacturing agreements concluded by Starbucks with third parties and, second, on a comparison with agreements concluded between Starbucks' competitors and third roasters. It is apparent inter alia from recitals 291 and 299 of the contested decision that the Commission sought to determine the level of an arm's length royalty between SMBV and Alki.

281. The Kingdom of the Netherlands and Starbucks are at odds with the Commission, in essence, on whether the contracts concluded by Starbucks with external roasters and with manufacturers of coffee-derived products, on which the comparison conducted by the Commission is based, were relevant to carrying out a comparison with the contractual arrangements between Alki and SMBV, under the CUP method.

282. In essence, in respect of the question of whether the manufacturing agreements concluded by Starbucks with third parties imply that the royalty should have been zero, the Kingdom of the Netherlands and Starbucks claim that:

– the contracts concluded between Starbucks and external roasters and manufacturers of coffee-derived products, on which the contested decision is based, could not be used for a comparison with the contractual arrangements between Alki and SMBV, based on the CUP method;

– the Commission's analysis of the royalties relies almost exclusively on evidence that was not available in April 2008;

– the majority of the contracts used by the Commission for comparing transactions pertained to specific coffee-derived products other than roasted coffee beans;

– Alki's remuneration was inextricably linked to the purchase of green coffee beans from SCTC, but none of the transactions derived from the contracts used by the Commission for the comparison was inextricably linked to another transaction in that way;

– all third-party manufacturers, mentioned in the contested decision, which – similar to SMBV – supplied Starbucks-branded coffee products to stores or retailers, paid substantial royalties for the use of the IP for the roasting of Starbucks' coffee.

283. As for the manufacturing agreements concluded by Starbucks with third parties, the Commission examined, as a first step, in recitals 291 to 298 of the contested decision, whether the coffee roasting contracts concluded by the Starbucks group with 10 third companies offered a direct point of comparison enabling the amount of the royalty owed by SMBV to Alki to be determined. In that regard, the Commission based its examination on paragraph 1.36 of the 2010 version of the OECD Guidelines, which, for the purposes of the comparability analysis of the controlled transactions of the corporate taxpayer and the comparable transactions on the free market, lists five comparability factors, including the characteristics of the property or services transferred, the functions performed by the parties, the contractual terms, the economic circumstances of the parties and the business strategies pursued by the parties. The Commission also referred, in footnote 147 of the contested decision, to paragraph 1.17 of the 1995 version of the OECD Guidelines. According to the latter, for the purposes of the comparability analysis, the characteristics that may be important are those of the property or services transferred, the functions performed by the parties, the contractual terms, the respective economic circumstances of the parties and the business strategies that they pursue.

284. As a second step, in recitals 299 to 304 of the contested decision, the Commission found that, on the basis of those 10 uncontrolled transactions, the level of an arm's length royalty between SMBV and Alki could be determined by using the CUP method.

285. More specifically, first, in order to determine the level of the royalty using the CUP method, it compared the payment of the royalty from SMBV to Alki with the payments due from third parties to other Starbucks group undertakings, in comparable transactions concluded under similar uncontrolled conditions. Second, the Commission analysed contracts concluded by the Starbucks group with unaffiliated manufacturing company 1 and with the companies designated, in recital 300 of the version of the contested decision published in the *Official Journal of the European Union*, by the terms 'unaffiliated manufacturing companies 2, 3, 4, 8, 9 and 10' (respectively, 'unaffiliated manufacturing company 2', 'unaffiliated manufacturing company 3', 'unaffiliated manufacturing company 4', 'unaffiliated manufacturing company 8', 'unaffiliated manufacturing company 9' and 'unaffiliated manufacturing company 10'). It then found that those third parties did not pay royalties under their licensing agreements with the Starbucks group if they did not exploit the roasting IP directly on the market. Third, the Commission found, in respect of the relationships between the Starbucks group and the companies designated, in recital 303 of the version of the contested decision published in the *Official Journal of the European Union*, by the terms 'unaffiliated manufacturing companies 5, 6 and 7' (respectively, 'unaffiliated manufacturing company 5', 'unaffiliated manufacturing company 6' and 'unaffiliated manufacturing company 7'), that only the trade mark and technology licence agreements concluded with those third parties by Starbucks contained a royalty payment.

286. As a third step, the Commission found, in recital 309 of the contested decision, that the coffee roasting contracts concluded by the Starbucks group with ten third companies did not require any royalty for the use of the roasting IP. The Commission thus concluded that no royalty ought to be due for that IP in the specific relationship between SMBV and Alki.

287. Without it being necessary, at this stage, to examine whether the choice by the Commission of the elements relevant to the comparability analysis, namely, the characteristics of the property or services transferred, the functions performed by the parties, the contractual terms, the respective economic circumstances of the parties and the business strategies that they pursued, was vitiated by error, it must be stated that there exist a number of elements in the context of that analysis that are at odds with the comparability between, on the one hand, the relationships between the Starbucks group and third parties and, on the other hand, the relationships between SMBV and Alki. Those elements are set out in paragraphs 288 to 345 below.

1. Contracts concluded subsequent to the APA

288. It must be noted that 7 of the 10 contracts examined by the Commission, namely, those concluded with unaffiliated manufacturing companies 1, 3, 4, 7, 8, 9 and 10, were examined after the APA's conclusion. Given that the Commission does not explain how those contracts were available or reasonably foreseeable at the time of the APA's conclusion, it was not in a position, for the reasons set out in paragraphs 243 to 251 above, to

base its analysis of the APA on elements subsequent to its conclusion. It is therefore necessary to exclude those seven contracts from the comparison exercise.

2. Contracts concluded with undertakings which do not roast coffee

289. As has been set out in paragraphs 232 to 236 above, SMBV is a roaster of green coffee that pays Alki a royalty to use the roasting IP.

290. In recital 295 of the contested decision, the Commission acknowledged that, of the 10 third companies that concluded a contract with the Starbucks group, certain of them did not roast coffee. It is commonly known, however, that a company which does not roast coffee will not pay a royalty to the Starbucks group for the use of the roasting IP in order to produce roasted coffee.

291. In addition, in the contested decision, the Commission did not provide elements indicating that the contracts under which the third party did not produce roasted coffee would be comparable with the contract concluded between SMBV and Alki. It is true that that finding does not rule out that the Commission could have based its analysis on the transactions of an undertaking which did not exercise exactly the same functions as SMBV or which was in a different factual situation. In that case, the onus would have been on it to justify such a choice and to explain the adjustments that it would have made in its analysis so as to take into consideration the differences between the undertakings.

292. Therefore, a contract concluded with an undertaking that was not a roaster could not be used, in the case at hand, without adjustments or amendments, for the purposes of the comparison exercise to demonstrate that the level of the royalty paid by SMBV to Alki should have been zero.

293. In that regard, the contracts concluded with unaffiliated manufacturing companies 5, 6 and 7 did not concern, according to their description in the contested decision, the roasting of green coffee. Given that, under the contracts at issue, unaffiliated manufacturing companies 5, 6 and 7 did not exercise the function of coffee roaster, it must be concluded that the contracts concluded with the said undertakings could not be used, in the case at hand, for the purposes of the comparison exercise.

3. Contracts with undertakings that did not engage in the sale of roasted coffee to stores or to consumers

294. As has been set out in paragraph 235 above, the stock that SMBV purchased from SCTC and sold to stores appears on SMBV's balance sheet because SMBV is the entity responsible for contracting and invoicing with stores. It follows that SMBV became the owner of the stock of green coffee that it roasted and sold to stores. It must be stated, however, that, if SMBV was a stand-alone company, it would not have been in a position to produce its coffee according to the Starbucks group's specifications without having obtained the right to use the roasting IP. Therefore, it would not have been able to produce its roasted coffee without paying a royalty.

295. On the contrary, as has been set out in paragraph 236 above, a toll manufacturer or a supplier processes raw materials or semi-finished products on behalf of the contractor. Consequently, the roasting IP does not represent for it a technical specification for which it will not pay a royalty to the contractor.

296. In that regard, first, it must be noted that, in the defence in Case T-636/16, the Commission maintains that, as regards their contractual relationship with the Starbucks group, unaffiliated manufacturing companies 1, 8 and 9 operated under toll-manufacturer agreements and that they mainly produced coffee products such as flavoured coffee, powder for a coffee-based product protected by a registered trade mark or soluble coffee. According to the Commission, unaffiliated manufacturing companies 1, 8 and 9 did not acquire title to the Starbucks components. In addition, the Commission recognised that the agreements with unaffiliated manufacturing companies 1, 8 and 9 differ from the coffee roasting agreement between SMBV and Alki.

297. Second, in terms of the contract concluded between the Starbucks group and unaffiliated manufacturing company 4, the Commission specified, in recital 148, third indent, of the contested decision, that that manufacturing company subcontracted coffee roasting. In that regard, Starbucks claims that unaffiliated manufacturing company 4 purchases green coffee from the Starbucks group and then roasts it in accordance with the brand curves and recipes for mixing beans provided. It then sells all of its roasted coffee to a subsidiary wholly owned by the Starbucks group, which sells the roasted coffee on to stores.

298. It follows from that description that unaffiliated manufacturing company 4 did not sell the coffee it roasted to stores. It merely provided roasted coffee, as a subcontractor, to a Starbucks group company engaged in the sale of coffee. In those conditions, the roasting IP constituted a mere technical specification for manu-

facture. Therefore, the fact that unaffiliated manufacturing company 4 did not pay a royalty to use the roasting IP to the Starbucks group does not mean that SMBV did not have to pay a royalty to Alki.

299. Third, with regard to unaffiliated manufacturing company 10, the Commission explains in its submissions in Case T-636/16 that that company manufactured and roasted green coffee beans, purchased directly from green coffee suppliers, and sold all Starbucks-branded coffee products to a single entity of the Starbucks group engaged in their sale.

300. It follows from that description that unaffiliated manufacturing company 10 did not, therefore, sell its roasted coffee to stores, but to a Starbucks group company engaged in its sale. In those conditions, the roasting IP constituted a mere technical specification for manufacture. It is therefore unsurprising that that company did not pay a royalty to the Starbucks group to use the roasting IP.

301. The Commission retorts that both unaffiliated manufacturing companies 4 and 10 and SMBV manufacture coffee products of which they are not the independent supplier on the market and that, therefore, they are in comparable situations. However, that argument is unconvincing. It must be recalled that, in order to determine whether SMBV has benefited from an advantage within the meaning of Article 107(1) TFEU, it is appropriate to compare SMBV's situation, under the measure in question, with the situation of a comparable undertaking exercising its activities autonomously in conditions of free competition (see paragraphs 148 and 149 above). The object of comparison in such an analysis is thus a stand-alone company in SMBV's situation, namely, a company that roasts coffee and sells it to stores, on the market.

302. In view of those differences between the situation of SMBV and that of unaffiliated manufacturing companies 1, 4, 8, 9 and 10 and in the absence of additional elements indicating that there was nevertheless comparability between the contracts at issue, it was thus necessary to reject the analysis of the comparability of the contracts concluded between the Starbucks group and those companies.

4. Contracts concerning products other than roasted coffee

303. In recital 295 of the contested decision, the Commission recognised that, of the 10 third companies that concluded a contract with the Starbucks group, certain of them produced ready-to-drink beverages or other products and ingredients for drink preparation and that, therefore, not all of the 10 third companies produced roasted coffee. According to the same recital, the contracts which concerned the roasting of green coffee were those concluded with unaffiliated manufacturing companies 2, 3, 4 and 10.

304. As has been set out in paragraph 296 above, the Commission recognised that, as regards their contractual relationship with the Starbucks group, unaffiliated manufacturing companies 1, 8 and 9 mainly produced coffee products such as flavoured coffee, powder for a coffee-based product protected by a registered trade mark or soluble coffee. Moreover, the Commission recognised that the agreements with unaffiliated manufacturing companies 1, 8 and 9 differ, in that regard, from the coffee roasting agreement between SMBV and Alki.

305. In addition, it should be recalled that the Commission maintains, in the defence in Case T-636/16, that its assessment of the third-party agreements does not, in principle, rely on the agreements concluded with unaffiliated manufacturing companies 5, 6 and 7, due to the differences in the licensed know-how – the roasting IP as opposed to the ready-to-drink production know-how – and the place of those companies in the supply chain – the fact that SMBV roasts coffee beans and them sells them on to distributors or third-party manufacturers, whereas unaffiliated manufacturing companies 5, 6 and 7 produce coffee-related products that they sell directly to their customers, in this case mainly supermarkets.

306. So far as concerns the contractual relationships between the Starbucks group and unaffiliated manufacturing companies 1, 5, 6, 7, 8 and 9, it must be pointed out that, in the contested decision, the Commission does not provide elements indicating that the contracts under which the third party does not produce roasted coffee to be sold to stores related or unrelated to the Starbucks group are comparable to that concluded between SMBV and Alki. It is apparent in particular from recitals 298 and 300 of the contested decision that, in the context of the comparison exercise between the royalty paid by SMBV to Alki and the royalties provided for, depending on the case, in the 10 contracts concluded between the Starbucks group and the third parties, the Commission considered that the element relevant for comparability was the question of whether the third party directly exploited the IP on the market by selling products to final consumers.

307. However, unaffiliated manufacturing companies 1, 5, 6, 7, 8 and 9 did not have, according to the Commission, a roasting function which involved the same product as SMBV's coffee roasting function. The Commission therefore has not managed to demonstrate that those contracts were sufficiently comparable with the roasting contract concluded between SMBV and Alki.

308. Consequently, in the case at hand, for that reason, the contracts between the Starbucks group and unaffiliated manufacturing companies 1, 5, 6, 7, 8 and 9 must also be excluded from the comparison exercise.

5. Contract which provides for the payment of a royalty for the use of the roasting IP

309. In respect of the contract concluded between the Starbucks group and unaffiliated manufacturing company 3, the Commission maintained, in the second indent of recital 148 of the contested decision, that, under a roasting licence arrangement, unaffiliated manufacturing company 3 provided coffee roasting services. Coffee was sold to the Starbucks group and to a joint venture, held by unaffiliated manufacturing company 3 and the Starbucks group ('the joint venture'), that was operating Starbucks stores in a country outside the European Union. Unaffiliated manufacturing company 3 paid the Starbucks group a royalty for the roasting of coffee, the amount of which was fixed, for a certain quantity of green coffee produced and sold to the joint venture.

310. In recital 301 of the contested decision, the Commission added that unaffiliated manufacturing company 3 paid a royalty to the Starbucks group only when it sold its production to the joint venture. In that case, according to the Commission, unaffiliated manufacturing company 3 'directly exploit[ed] the roasting IP on the market through a related party', so that the royalty payment 'appears' to cover the distribution of Starbucks-branded products to third parties by the joint venture. According to that Commission, that conclusion is confirmed by the fact that, when unaffiliated manufacturing company 3 sold the roasted coffee on to the Starbucks group, rather than to the joint venture, and the distribution and exploitation on the market of the brand was ensured by the Starbucks group, no royalty was paid by unaffiliated manufacturing company 3 to Starbucks for the roasting IP.

311. In that regard, it must be found that it is settled between the Commission and Starbucks that, when unaffiliated manufacturing company 3 sells its roasted beans to the joint venture for a given territory, it pays the Starbucks group a roasting licence fee at a fixed amount per quantity of roasted and packaged coffee and that, when it sells its roasted beans to Starbucks [*confidential*] no roasting licence fee is paid.

312. That finding clearly contradicts the Commission's theory that unaffiliated manufacturing company 3 did not pay a royalty under its licensing agreement concluded with the Starbucks group if it did not exploit the roasting IP directly in respect of end consumers on the market. As Starbucks argues – rightly – the obligation of unaffiliated manufacturing company 3 to pay a royalty depends solely on its sales of roasted coffee to stores in the territory concerned, irrespective of whether the stores distribute the roasted coffee to end consumers or not.

313. In that context, the Commission contends that there is a difference between the situation of unaffiliated manufacturing company 3 and that of SMBV, which lies in the fact that unaffiliated manufacturing company 3 and Starbucks stores in the territory concerned are controlled by the same party, namely, the parent company of unaffiliated manufacturing company 3. The Commission adds that the payment of a royalty by unaffiliated manufacturing company 3 'appears' to be made on behalf of the joint venture, rather than remuneration for the use of the roasting IP by unaffiliated manufacturing company 3.

314. First of all, it must be stated that, as has been set out in paragraphs 194 to 196 above, it is, in principle, for the Commission to provide proof, in the contested decision, of the existence of aid.

315. That obligation is not met if the Commission merely makes prima facie findings, such as, in the case at hand, when it is limited to finding that the payment of a royalty 'appears' to cover the distribution of Starbucks-branded products to third parties or it 'appears' to be made on behalf of the joint venture.

316. Next, it should be noted that the difference between SMBV's situation and that of unaffiliated manufacturing company 3 noted by the Commission, namely, the fact that unaffiliated manufacturing company 3 sold its roasted coffee through the joint venture to Starbucks stores present in the territory concerned, does not call into question the fact that a roasting licence fee was paid, at a fixed amount per quantity of roasted and packaged coffee, by unaffiliated manufacturing company 3 to the Starbucks group. [*confidential*]

317. Last, the Commission itself maintains, in its submissions, that, since unaffiliated manufacturing company 3 and the joint venture are related parties, it is not possible to make a direct comparison to the relationship between SMBV and Starbucks stores in the EMEA region. That finding undermines all the more the Commission's theory that the contractual relationships between unaffiliated manufacturing company 3 and the Starbucks group are comparable to those between SMBV and Alki and permit the conclusion that the royalty should be zero.

318. In summary, it follows from the foregoing that, contrary to what the Commission asserted in the contested decision, unaffiliated manufacturing company 3 was a roaster that paid a royalty to the Starbucks group for the use of a roasting IP.

319. Accordingly, for the reasons set out in paragraphs 289 to 318 above, it must be held that the Commission has not managed to demonstrate that a comparison between, on the one hand, the contractual relationships between Alki and SMBV and, on the other hand, the contractual relationships between the Starbucks group and unaffiliated manufacturing companies 1 and 3 to 10 permit the conclusion that the level of the royalty paid by SMBV to Alki should have been zero.

6. Contract concluded with unaffiliated manufacturing company 2

320. It is apparent from recital 148, first indent, of the contested decision that, in order to subcontract the roasting of coffee, the Starbucks group entered into two types of agreements with unaffiliated manufacturing company 2, which were amended at several instances. First, pursuant to a technology licence agreement, concluded before 2008, an affiliate of the Starbucks group granted a non-exclusive licence to unaffiliated manufacturing company 2 to use, inter alia, Starbucks' technology and know-how to produce and sell roasted coffee to selected third parties with which Starbucks entered into supply agreements, namely, in essence, unaffiliated manufacturing company 5. In return, unaffiliated manufacturing company 2 was to perform services to ensure that the roasted coffee was of high quality. To that end, unaffiliated manufacturing company 2 was to comply, inter alia, with certain quality assurance standards established by Starbucks. The technology licence agreement stipulated that unaffiliated manufacturing company 2 did not have to pay any fees for the licence. Second, a green coffee supply agreement stipulated that unaffiliated manufacturing company 2 had the obligation to buy green coffee exclusively from the Starbucks group for a fixed fee per a certain quantity. The technology licence agreement and the supply agreement were concluded with two different entities within the Starbucks group.

321. In recitals 300 and 302 of the contested decision, the Commission added that unaffiliated manufacturing company 2 did not pay a royalty under its licensing agreement concluded with the Starbucks group if it did not exploit directly on the market the roasting IP by selling products to end consumers. However, it must be stated that it is apparent from the description in recital 148 of the contested decision that unaffiliated manufacturing company 2 did not sell its roasted coffee to end consumers.

322. As regards the question of whether unaffiliated manufacturing company 2 was in a situation comparable to that of SMBV, it must be held that the contractual arrangement between unaffiliated manufacturing company 2 and the Starbucks group is closely linked to that concluded between unaffiliated manufacturing company 5 and the Starbucks group. Several years before the APA's conclusion, unaffiliated manufacturing company 5 and SMBV concluded a supply agreement in which the Starbucks group undertook to supply roasted coffee beans, concentrate and other coffee ingredients to unaffiliated manufacturing company 5.

323. At a later stage, but before the APA's conclusion, unaffiliated manufacturing company 5 and SMBV concluded a [*confidential*] delegation agreement [*confidential*] to which unaffiliated manufacturing company 2 acceded on the same day. [*confidential*]

324. [*confidential*]

325. [*confidential*]

326. It follows from those provisions that the role of unaffiliated manufacturing company 2 was different from that of SMBV, which, according to the Commission, was a roaster that engaged also in the sale of roasted coffee to Starbucks stores. According to the delegation agreement, unaffiliated manufacturing company 2 supplied unaffiliated manufacturing company 5, for the purposes of enabling the Starbucks group to meet its contractual obligations towards the latter, as followed from the supply agreement.

327. In that context, it must be recalled that, in the contested decision, the Commission categorised the contractual arrangement between the Starbucks group and unaffiliated manufacturing company 2 as a subcontract (see paragraph 320 above). However, as has been set out in paragraph 236 above, such a subcontractor is limited to carrying out roasting in accordance with the instructions of the contractor in order to meet its contractual obligation to provide roasted coffee. In those conditions, the roaster is merely following the ordering party's technical requirements.

328. It must be pointed out that the Commission does not provide, in the contested decision, sufficient evidence indicating that such a subcontract would be comparable to that concluded between SMBV and Alki for the purposes of determining the level of the royalty.

329. In any event, even supposing that, for the purposes of the determination of the level of the royalty, the contractual arrangements between the Starbucks group and unaffiliated manufacturing company 2 were comparable to those concluded between SMBV and Alki, the Commission is limited, in recital 302 of the contested decision, to rejecting Starbucks' argument that the higher mark-up on green coffee beans that unaffiliated manufacturing company 2 paid to the Starbucks group represented a 'disguised' remuneration for the roasting IP. In that context, first, it asserted that the mark-up 'appears' to have been passed on entirely to unaffiliated manufacturing company 5. Second, it maintained that there '[we]re no indications that any mark-up to a purchase price would not be passed on directly to [unaffiliated manufacturing company 5] or otherwise affect the commercial conditions between [unaffiliated manufacturing company 5] and [unaffiliated manufacturing company 2], as this contractual arrangement was not concluded independently of the contractual arrangement between [the Starbucks group] and [unaffiliated manufacturing company 5]'.

330. However, the considerations set out in paragraph 302 of the contested decision have no bearing on the finding according to which the position of unaffiliated manufacturing company 2 as 'subcontractor' is not sufficient to conclude that SMBV, as a seller of its roasted coffee, should not have paid any royalty for the use of the roasting IP.

331. In addition, regarding the question of whether the higher mark-up on green coffee beans paid by unaffiliated manufacturing company 2 to the Starbucks group represented the remuneration for a coffee roasting IP, it must be noted that the Commission's argument that the higher mark-up on coffee beans paid by unaffiliated manufacturing company 2 'appears' to be transferred to unaffiliated manufacturing company 5 is speculative and does not rule out, as such, the possibility that a remuneration for the use of the roasting IP was actually paid to the Starbucks group by unaffiliated manufacturing company 2.

332. On the contrary, a number of elements raise doubts about the Commission's argument that, in the case at hand, unaffiliated manufacturing company 2 paid no remuneration to the Starbucks group for the use of the roasting IP.

333. First, it must be stated that, at first sight, the level of the price of the green coffee beans provided by SMBV and paid by unaffiliated manufacturing company 2 to the Starbucks group appears to be high in the light of the figures Starbucks cites in footnote 189 of the application in Case T-636/16. The Commission does not dispute those figures. Moreover, in recital 302 of the contested decision, the Commission did not dispute the Starbucks correspondents' assertion that that price was high.

334. Second, the Commission submits that it found in the contested decision that the technology licence agreement stipulated that unaffiliated manufacturing company 2 ought not to pay any royalty for the use of the roasting IP. It considers that, consequently, it was for the Kingdom of the Netherlands and Starbucks to prove that the difference in the prices of green coffee represented a 'disguised' remuneration for the roasting IP, which they have not managed to do.

335. It must be recalled that the 1995 and 2010 versions of the OECD Guidelines, on which the Commission bases its comparability analysis, expressly provide, in paragraph 6.17 thereof, that the compensation for the use of intangible property may be included in the price charged for the sale of goods when, for example, one enterprise sells unfinished products to another and, at the same time, makes available its experience for further processing of those products. In that context, it must be noted that the Commission maintains – rightly – that a price difference is, in principle, different from a royalty, which potentially has different tax consequences, which is moreover restated, in essence, in paragraph 6.19 of the 2010 version of the OECD Guidelines.

336. In the case at hand, it is clear from the contested decision that Starbucks had argued during the administrative procedure that the higher mark-up on the costs of green coffee beans that unaffiliated manufacturing company 2 paid to the Starbucks group represented a remuneration for the roasting IP.

337. In those circumstances, the Starbucks correspondents' arguments, raised during the administrative procedure, could not be rejected on the basis of the mere finding that the technology licence agreement stipulated that unaffiliated manufacturing company 2 ought not to pay any royalty for the use of the roasting IP.

338. Third, while the Commission is right to argue that the supply of green coffee beans and the sublicensing of IP are separate transactions on the basis of two contracts concluded with two different counterparties

within the Starbucks group, the fact remains that the technology licence agreement between the Starbucks group and unaffiliated manufacturing company 2 indicates, [confidential].

339. Fourth, the Commission adds, in essence, that the difference in price between the green coffee beans unaffiliated manufacturing company 2 buys and those that SMBV buys can have various explanations, such as, first of all, the strong bargaining power of Starbucks [*confidential*]; then, the fact that unaffiliated manufacturing company 2 does not buy its green coffee beans directly from SCTC but from Starbucks [*confidential*] – which buys them from SCTC and sells them on to it – which could also lead to an extra mark-up on the cost to cover the value added by Starbucks [*confidential*], or, last, the differences in delivery terms.

340. First of all, it must be noted that the Commission's argument that Starbucks [*confidential*] had a bargaining power that was so strong compared to unaffiliated manufacturing company 2 that it could demand a far higher price than that which it was capable of obtaining from [*confidential*] SMBV is unconvincing.

341. Next, while the Commission contends that the fact that unaffiliated manufacturing company 2 does not buy its green coffee beans directly from SCTC but from Starbucks [*confidential*] – which buys them from SCTC and sells them on to it – could also lead to an additional mark-up on the cost to cover [*confidential*], it does not explain [*confidential*]. Starbucks retorts, in that respect, that SCTC takes care of the entire procurement process, including transportation from the port of origin to the port of destination, whereby the coffee beans are delivered to unaffiliated manufacturing company 2 without any processing whatsoever. Moreover, according to Starbucks, for reasons of administrative efficiency, [*confidential*]. That argument of the Commission should therefore also be rejected.

342. Last, the Commission argues that there is a difference in the delivery terms of green coffee beans enjoyed by unaffiliated manufacturing company 2 and SMBV. It contends that Starbucks [*confidential*] sells green coffee beans to unaffiliated manufacturing company 2 CIF (cost, insurance and freight) at the port of entry in the territory in which that manufacturing company carries out its economic activity, while the green coffee beans that SMBV obtains from SCTC are delivered FOB (free on board) at the port of Amsterdam (Netherlands). However, it must be pointed out, first, that the Commission does not quantify its contention that the difference in costs for an FOB delivery as opposed to a CIF delivery may be considerable. Second, Starbucks, for its part, claims that the difference in costs between an FOB delivery and a CIF delivery is too low to explain the 'higher mark-up'. The Commission has therefore not managed to substantiate its contention that the 'higher mark-up' could not represent, even in part, a remuneration for the use of the roasting IP, since it was due entirely to the difference in delivery terms between the contracts in question.

343. In those circumstances, neither the succinct reasoning set out in recital 302 of the contested decision nor the other explanations provided by the Commission – which Starbucks disputes – allowed the Commission to conclude that the contracts between the Starbucks group and unaffiliated manufacturing company 2 demonstrated, to a requisite legal standard, that that undertaking paid no remuneration to the Starbucks group for the use of the roasting IP.

344. It follows that, on the basis of what has been set out in the contested decision, the Commission has not managed to demonstrate to a requisite legal standard that the contract between the Starbucks group and unaffiliated manufacturing company 2 indicates that the royalty paid by SMBV to Alki should have been zero.

345. In summary, it follows that the Commission has not managed to demonstrate, on the basis of its comparison with the contracts concluded with the 10 unaffiliated manufacturing companies, that the royalty should have been zero. The contracts concluded with unaffiliated manufacturing companies 1, 3, 4, 7, 8, 9 and 10 were concluded subsequent to the adoption of the APA. The contracts concluded with unaffiliated manufacturing companies 5, 6 and 7, for their part, involve undertakings which do not roast coffee. The contracts concluded with unaffiliated manufacturing companies 1, 4, 8, 9 and 10 are not resale contracts. The contracts concluded with unaffiliated manufacturing companies 1, 5, 6, 7, 8 and 9 involve products other than roasted coffee and the contract concluded with unaffiliated manufacturing company 3 mentions the possibility of the payment of a royalty. Regarding the analysis of the contract concluded with unaffiliated manufacturing company 2, the Commission's succinct and speculative arguments do not suffice to demonstrate that that company did not pay any remuneration to the Starbucks group for the use of the roasting IP.

346. Accordingly, it is apparent from the considerations set out in paragraphs 288 to 345 above that the Commission has not demonstrated that applying the CUP method on the basis of a comparison with the contracts concluded between the Starbucks group and the 10 unaffiliated manufacturing companies would have led to the conclusion that the royalty paid by SMBV to Alki for the roasting IP, had it been set in market conditions, ought to have been zero.

*g. Arrangements between Starbucks' competitors and third-party roasters*

347. The Commission also compared the royalty paid by SMBV to Alki with what was provided for in a number of arrangements between Starbucks and third-party roasters. The Commission found that it was apparent from that comparability analysis that no royalty for the use of the roasting IP ought to have been paid by SMBV to Alki.

348. It is apparent from recital 309 of the contested decision that, for the purposes of assessing whether SMBV paid an arm's length royalty to Alki for the roasting IP, the Commission compared the arrangement between Alki and SMBV to a number of arrangements between Starbucks' competitors and third-party roasters. In that context, the Commission made reference to the responses of Melitta, Dalmayr and Company Y.

349. Starbucks disputes the analysis conducted by the Commission. It is of the view that the arrangements concerning Melitta and Company X are 'toll or contract manufacturer agreements, which – unlike SMBV – supply the finished products back to their principal and not directly to the principal's customers'. That, in its view, makes those arrangements inherently different from the roasting agreement and, therefore, examining them is irrelevant to the present case. It is thus appropriate to examine whether those three contractual relationships were comparable to the roasting agreement between SMBV and Alki.

350. First, so far as concerns Melitta, the Commission indicated, in recital 306 of the contested decision, that that competitor company of Starbucks explained to the Commission that when outsourcing the roasting of coffee it did not perceive royalties from third parties, even though it put its roasting curves at their disposal.

351. In that regard, it must be noted that it is apparent from recitals 207 and 208 of the contested decision that, in certain conditions where roasting capacities were exhausted, Melitta outsourced the roasting of coffee. However, it does not follow from that description that the third party roaster did in fact sell roasted coffee to stores or to other customers.

352. It must thus be held that, according to the findings set out in the contested decision, Melitta's situation is not comparable to that of SMBV.

353. Second, regarding Company Y, which belongs to a group of companies, the Commission indicated, in recitals 211 and 307 of the contested decision, that that company's roasting was ensured by a group company designated as a toll manufacturer and that that company did not pay any royalty to the group.

354. It must be stated that it is apparent from that description that the roaster of the group to which Company Y belonged operated as a toll manufacturer. The roaster processed green coffee on behalf of another company within the group to which Company Y belonged. This means that the roaster did not sell roasted coffee to stores or to other customers.

355. It thus follows from the findings made in the contested decision that Company Y's situation is not comparable to that of SMBV.

356. Third, as regards Dallmayr, it is indicated in recital 308 of the contested decision that that competitor considered the payment of a royalty by a company providing roasting to be unusual, as it would have expected the customers to pay the roaster, not the other way around. It is apparent from recitals 204 and 205 of the contested decision that Dallmayr stated that coffee roasting was performed either as a stand-alone business or vertically integrated within a company. It stated that the sourcing function was 'typically' integrated with the roasting function. Dallmayr thus considered the payment of a royalty by a third party that provided the roasting services to be rather unusual. In fact, Dallmayr would have expected the customer to pay the roaster, not the other way around.

357. In that regard, it must be noted that Dallmayr merely states that it considers the payment of a royalty in the area of roasting to be 'rather unusual'. At the same time, that statement does not preclude such a royalty from being provided for. Dallmayr's declarations therefore do not rule out the existence of a royalty such as that paid by SMBV.

358. It is thus apparent from the considerations set out in paragraphs 347 to 357 above that the Commission has not demonstrated that the arrangements between Starbucks' competitors and third-party roasters, identified in the contested decision, were relevant for the purposes of the analysis of SMBV's situation. After all, the findings made in the contested decision in that regard do not support the conclusion that those arrangements were comparable to the roasting agreement. Accordingly, even supposing it were proved that no royalty was paid under the arrangements between Starbucks' competitors and third-party roasters, that circumstance would not suffice to demonstrate that no royalty for the roasting IP ought to have been paid by SMBV to Alki.

359. For the reasons set out in paragraphs 279 to 358 above, it is therefore appropriate to hold that the Commission has not demonstrated, to the standard required by the case-law cited in paragraphs 194 to 196 above, that the royalty ought to have been zero. Therefore, it is necessary to uphold, on that basis, the actions of the Kingdom of the Netherlands and of Starbucks to the extent that they concern the second line of reasoning of the contested decision. Accordingly, it is not necessary to examine the arguments of the Kingdom of the Netherlands and of Starbucks by which they dispute the rejection of their arguments raised, during the administrative procedure, to justify the royalty's existence (see paragraph 230 above).

*h. Argument that the level of the royalty should have been lower than the level endorsed by the APA*

360. As has been set out in paragraph 229 above, the Commission indicated, in the contested decision, that the variable nature of the royalty payment during the period from 2006 to 2014 gave a 'first indication' that the level of that payment bore no relation to the value of the roasting IP. In that regard, the Commission explained, during the hearing, that it was apparent from recitals 287 to 289 and from footnote 146 of the contested decision that the royalty should have been set at a lower level than that endorsed by the APA.

361. First of all, it must be noted that, in recital 287 of the contested decision, the Commission merely reproduced certain findings made in the opening decision, but without drawing any consequence whatsoever for the contested decision. Next, in recital 288 of the contested decision, the Commission explained that, for the period from 2006 to 2014, it calculated the annual amount of the royalty paid by SMBV to Alki as a percentage of the annual sales of roasted coffee by SMBV to stores, which, in its view, confirmed its doubts about the fluctuation of the royalty. Last, in recital 289 of the contested decision, the Commission added that the variable nature of the royalty payment gave a 'first indication' that the level of that payment bore no relation to the value of the IP for which it was being paid. Footnote 146 of the contested decision mentions, in essence, that, 'for illustration ... no contract [examined by the Commission] was identified whereby remuneration was paid for coffee roasting technology licen[sed] on the market'.

362. It must therefore be pointed out that neither recitals 287 to 289 of the contested decision nor footnote 146 of that decision contains any argument according to which the level of the royalty ought to have been lower than the level endorsed by the APA. Those recitals merely state, first, that the variability of the royalty indicate that it was not linked to the value of the roasting IP, and, second, that that royalty in no way had to be paid.

363. On the contrary, it should be held that it apparent, inter alia, from recitals 290, 318, 339 and 445 of the contested decision that the Commission found that the royalty should have been precisely zero. A fortiori, in recital 340 of the contested decision, the Commission stated that the level of the royalty did not need to be estimated and that, in other words, the profits paid by SMBV to Alki as a royalty for the roasting IP should have been fully taxable in the Netherlands.

364. It follows from those considerations that the contested decision does not contain any consideration that would have been identifiable by the Kingdom of the Netherlands and Starbucks whereby the royalty should have been set at a lower level than that endorsed by the APA.

365. In any event, even assuming that it followed reasonably clearly from the contested decision that the royalty should have been set at a lower level than the level endorsed by the APA, the Kingdom of the Netherlands and Starbucks dispute, in essence, the Commission's argument that the level of the royalty is dissociated from its economic value.

366. In that context, it should be noted that, indeed, it cannot be denied that the variable nature of the royalty raises questions regarding the economic rationality of the royalty. In the case at hand, the Kingdom of the Netherlands and Starbucks have not provided any convincing explanation justifying the choice of an unusual method to determine the level of the royalty.

367. However, the residual nature of that royalty simply means that it was calculated, in principle, from the determination of the level of other relevant charges and incomes as well as from an estimate of the level of SMBV's taxable profit. If those parameters were correctly identified, the mere residual nature of the royalty would not preclude the level of the residual royalty from corresponding to its economic value.

368. It must be held that the findings made in recitals 287 to 289 of the contested decision were not sufficient to demonstrate that the royalty should have been set at a lower level than that endorsed by the APA for the entire period between 2006 and 2014, inter alia on the ground that the contested decision does not specify what is the level of royalty that the Commission would have regarded as appropriate.

369. In addition, it must be noted that, in the context of the finding made in recital 289 of the contested decision, the Commission made reference to footnote 146 of the contested decision, which indicated the following:

> '[A]n analysis using RoyaltyStat, at 2Q 2015, shows that out of the 168 agreements available through the database across sector whereby only technology was licen[sed], the median value of the royalty was 5 % of sales (based on 143 of these agreements where the licence fee was determined as a percentage of the value of sales rather than amount paid per unit sold). Among all the contracts available through the RoyaltyStat database, no contract was identified whereby remuneration was paid for coffee roasting technology licen[sed] on the market. Such technology was only licen[sed] out in certain instances in combination with trademarks.'

370. In that regard, it must be stated, first, that those considerations were made only 'for illustration', second, that while the Commission argues that a royalty was paid 'across sector whereby only technology was licen[sed]' and that there were examples of a 'licen[sing] out in certain instances in combination with trademarks', it nevertheless does not explain what the appropriate level of such a royalty would be and, third, that the Commission has not explained the reasons why it is of the view that the data relating to 2015 were reasonably foreseeable at the time of the APA's conclusion in 2008.

371. The Commission has thus not substantiated to a requisite legal standard its assertion that, for the entire period between 2006 and 2014, the level of the royalty was not linked to the value of the IP for which it had been paid and that, as a result, an economic advantage had been conferred on SMBV.

372. It follows that it is necessary to reject the Commission's argument that it demonstrated in the contested decision that the royalty should have been set at a lower level than that endorsed by the APA.

373. Accordingly, it is appropriate to uphold the second part of the third plea in Case T-760/15 and the fourth part of the second plea in Case T-636/16, to the extent that the Kingdom of the Netherlands and Starbucks dispute that the Commission demonstrated, under the second line of reasoning, that the royalty paid by SMBV to Alki should have been zero and that it resulted in an advantage within the meaning of Article 107(1) TFEU, without it being necessary to examine Starbucks' argument that the Commission was obliged to determine an arm's length range for the royalty.

### 3. Annual determination of the costs of green coffee beans (third line of reasoning)

374. The Kingdom of the Netherlands and Starbucks raise, in essence, two complaints against the analysis conducted by the Commission under the third line of reasoning of the contested decision, according to which the level of the price of green coffee beans was overvalued when the question of whether their price was in conformity with the arm's length principle had not been examined in the APA. By the first complaint, Starbucks claims that the third line of reasoning concerns an element of SMBV's costs that was outside the scope of the contested measure as defined in the contested decision. By the second complaint, the Kingdom of the Netherlands and Starbucks dispute the finding that the level of the mark-up applied to the costs of green coffee beans sold by SCTC to SMBV was not in conformity with an arm's length level.

#### *a. Whether the price of green coffee beans was outside the scope of the contested measure*

375. With regard to the first complaint, Starbucks claims, in essence, that the Commission's third line of reasoning, relating to the price of green coffee beans, concerns an element of SMBV's costs that was outside the scope of the contested measure as defined in the contested decision. Starbucks notes that the Commission did not examine the matter of the price of green coffee from the perspective of the time of the APA's conclusion, that is to say, in April 2008. It adds, in the reply, that certain arguments raised in the defence in Case T-636/16 indicate that the tax advantages identified by the Commission resulting from the price of green coffee beans for the years 2011 to 2014 cannot be attributed to the APA. The alleged tax advantages resulting from the price of green coffee beans cannot be attributed to the APA, but only to the annual assessments endorsing those prices, and thus fall outside the scope of the 'contested decision'.

376. The Commission argues that it is clear from the contested decision as well as from the defence in Case T-636/16 that the price for green coffee beans should have been examined in order to establish whether the level of that price was too high and led to a reduction in SMBV's taxable profit.

377. As regards the scope of the contested measure as established by the contested decision, it must be stated that, according to the wording of Article 1 of the contested decision, the measure which constitutes aid within the meaning of Article 107(1) TFEU and which was implemented by the Kingdom of the Netherlands in

infringement of Article 108(3) TFEU is the APA, 'entered into by the Netherlands on 28 April 2008 with [SMBV]'. It is apparent from that provision and from the definition set out in recital 40 of the contested decision that the contested measure is therefore made up solely of the APA.

378. In that regard, it must be noted that it follows from the provisions of the APA (see paragraphs 12 to 16 above) that that agreement determines the method for calculating SMBV's remuneration for its production and distribution activities, which serves to establish the taxable base for SMBV's payment of Netherlands corporate income tax. In that context, although the APA makes reference to the price of green coffee beans paid by SMBV to SCTC by noting that those costs are excluded from SMBV's cost base, it does not resolve the question of what level of transfer pricing should be set for the purchase of green coffee beans. It is necessary to distinguish the question of whether the cost of green coffee beans is part of the cost base for the calculation of the taxable base from the question of what is the amount of the transfer price of those transactions which was actually determined for a given year. The APA does not contain any element, however, enabling that amount to be determined, meaning that the Netherlands authorities did not validate, in the framework of the APA, any transfer pricing method or price level in respect of green coffee beans.

379. It must be specified that, in the absence of determination of price level for the purchase of green coffee beans in the APA, the annual setting of the price of coffee beans, in particular for the years from 2011 to 2014, should have been carried out, if necessary, in the context of annual tax assessments.

380. It follows that the APA did not make provision for determining annually the level of the costs of green coffee beans and that was, consequently, outside the scope of the contested measure. That finding is not called into question by the Commission's arguments.

381. First, the Commission is of the view that the APA, which constitutes the contested measure, should have predetermined transfer pricing for green coffee beans from the 2011 fiscal year onwards. According to recital 447 of the contested decision, SMBV's taxable profits resulting from the costs of green coffee beans for the fiscal years from 2011 onwards should have been set at a higher level. It is apparent from recitals 360 and 361 of the contested decision that, according to the Commission, the transfer pricing report failed to examine whether the price of green coffee beans, paid by SMBV to SCTC, was at arm's length. According to the Commission, that 'means' that the method proposed in that report for determining SMBV's taxable profits confers a selective advantage on it. In addition, the Commission maintained, in recital 348 of the contested decision, that the APA should have prescribed an arm's length price in 2008 from which no deviation would have been possible in 2011, including an increase in the mark-up, unless those prices were replaced or amended in the APA.

382. However, it must be pointed out that the transfer pricing report contains no examination of the transfer pricing applicable for specific transactions such as the price of green coffee beans requested by SCTC of SMBV. On the contrary, it sets out the method for calculating SMBV's remuneration for its production and distribution activities, which constitutes the taxable base for the purpose of Netherlands corporate income tax.

383. The APA consists merely of the acquisition of confirmation, in advance, of the tax treatment of a taxpayer. An anticipatory decision such as the APA does not necessarily cover all aspects of a taxpayer's tax treatment, but may deal only with certain specific issues. It is moreover apparent from page 28 of the transfer pricing report that the Starbucks group's tax advisor considered that the transactions relating to green coffee were different transactions from those for which the APA had been requested.

384. First, the Commission has not provided any evidence indicating that, under Netherlands law – the relevant law in this regard – the question of whether the level of the price of green coffee beans paid by SMBV to SCTC was at arm's length should have been examined in the APA.

385. Second, the mere fact that the APA does not predetermine a level of transfer price for green coffee beans does not in itself mean that the APA, in setting the method for determining SMBV's remuneration, conferred an advantage on SMBV for its production and distribution activities.

386. Second, the Commission observes, in its submissions, that the technical implementation of the APA, via the annual tax assessments, also constitutes the grant of aid. However, such a finding does not follow from the contested decision. The Commission refers in that regard to Article 1 of the contested decision, which makes reference to the fact that, on the basis of the APA, SMBV '[is] enable[d] ... to determine its corporate income tax liability in [the Kingdom of] the Netherlands on a yearly basis for a period of 10 years'. The Commission adds that the contested decision makes numerous references to SMBV's taxable profit as determined by the APA. In its view, the APA has no value unless it is used 'to prepare those tax declarations'. In that regard, it cites recital 225 of the contested decision, which states that the APA entails an acceptance by the Netherlands tax admin-

istration of a profit allocation proposed by Starbucks on the basis of which SMBV determines the amount of its corporate income tax liability to the Netherlands on a yearly basis.

387. Contrary to the assertions of the Commission as described above, it must be held that the annual tax assessments relating to SMBV do not implement the APA in a purely technical manner. While it is certainly true that the APA and the transfer pricing report on which it is based predetermine the method for calculating SMBV's taxable profit on the basis of Netherlands corporate income tax, they in no way allowed for a forecast of the income and annual charges declared by SMBV with a view to the actual transactions that took place during the year in question.

388. Additionally, the Commission's assertion that the technical implementation of the APA via the annual tax assessments also constitutes the grant of aid is incorrect. The annual tax assessments implementing the APA are not part of the measure at issue as defined by the Commission – the APA – as is apparent from Article 1 of the contested decision. More specifically, the APA did not determine SMBV's taxable profit on the basis of the costs of green coffee beans nor did it deal with the issue of the annual determination of the costs of green coffee beans. In addition, nowhere in the contested decision did the Commission criticise the Netherlands authorities for having conferred a selective advantage on SMBV on account of the exclusion of the costs of green coffee beans from the taxable base, but merely disputed the fact that the level of their price had not been verified by the Netherlands tax authorities.

389. In any event, it should be stated that there was nothing preventing the Commission from defining the contested measure more broadly so as to cover the annual tax assessments relating to SMBV, yet it limited the scope of the contested measure to the APA alone.

390. Furthermore, it has been set out in paragraph 248 above that the APA could be revoked or modified during its validity, from 2007 to 2017. It must be noted that, in the contested decision, the Commission did not find that the fact that the Netherlands authorities had not revoked or modified the APA during its validity on the ground that the costs of green coffee beans were excessive had conferred an advantage on SMBV.

391. Accordingly, it is necessary to uphold the complaint that the third line of reasoning concerns an element of SMBV's costs that was outside the scope of the contested measure. In so far as the level of the costs of green coffee beans for the fiscal years from 2011 onwards was not part of the contested measure, the Commission was not entitled to request the Kingdom of the Netherlands, in accordance with Article 2(1) of the contested decision, read in conjunction with recitals 447 and 448 thereof, to recover the difference between the amount actually paid by way of corporate income tax and the amount that would have been due had the taxable profit of SMBV resulting from the costs of green coffee beans for the fiscal years from 2011 onwards been set at a higher level.

*b. Whether the level of the mark-up applied to the costs of green coffee beans sold by SCTC to SMBV was not in conformity with an arm's length level*

392. In any event, assuming that the third line of reasoning concerns an element of SMBV's costs that was covered by the contested measure, it must be stated that the second complaint set out in paragraph 374 above would have to be upheld. From the outset, it should be recalled that the cost of the green coffee beans purchased by SMBV is excluded from the cost base of SMBV determined in the APA. In essence, the price of green coffee beans to be paid by SMBV to SCTC is made up of the costs of SCTC's goods and a mark-up on those costs.

393. The contested decision explains that, for the period from 2005 to 2010, the average mark-up on the costs of the green coffee beans delivered by SCTC was [*confidential*]%, compared to [*confidential*]% for the period from 2011 to 2014. The corresponding average gross margin on the cost of goods ('COGS') for the period from 2005 to 2010 was [*confidential*]%, whereas the average gross margin on COGS for the period from 2011 to 2014 was [*confidential*]%. According to the contested decision, Starbucks claimed that the mark-up of [*confidential*]% applicable on average for the period from 2005 to 2010 corresponded to an arm's length mark-up. The Commission next assumed that the increase in the mark-up from 2011 onwards could have constituted a remuneration recorded by SMBV on the coffee roasting activities. As the [*confidential*]% mark-up was also within the range for the supply function put forward by Starbucks during the administrative procedure, the Commission concluded that the [*confidential*]% mark-up on the costs of green coffee beans during the period from 2005 to 2010 was at arm's length. Since Starbucks had not provided, according to the contested decision, any 'valid' justification for the increase in the average mark-up to [*confidential*]% from 2011 onwards, the Commission considered that no corresponding deduction to SMBV's accounting profits as a result of that increase ought to be accepted from that period onwards.

394. However, to arrive at a reliable approximation of an arm's length mark-up for the period from 2011 onwards, the Commission accepted increasing the [*confidential*]% mark-up for the period from 2005 to 2010 by the costs of the C.A.F.E. Practices programme and up to the amount of the costs of [confidential]. According to the Commission, those costs represented [*confidential*]% of the costs of green coffee beans purchased by SCTC at the end of 2014 and translated into [*confidential*]% of the price charged to SMBV. An arm's length mark-up recorded by SCTC for the period from 2011 onwards would therefore be up to [*confidential*]% of the costs of green coffee beans purchased by SCTC, corresponding to a gross margin of up to [*confidential*]% on SCTC's COGS, charged by SCTC to SMBV.

395. The Commission concluded that the [*confidential*]% average mark-up on the costs of green coffee beans supplied by SCTC to SMBV effectively applied from 2011 to 2014 did not reflect a reliable approximation of a market-based outcome in line with the arm's length principle.

396. First, it must be stated that, as has been indicated in paragraphs 243 to 251 above, in the circumstances of the case at hand, the Commission was required to refrain from any assessment based on a situation subsequent to the APA's conclusion. The Commission does not explain, however, in the contested decision, how the high level of the costs of green coffee beans for the fiscal years from 2011 onwards, which it discusses in recitals 342 to 359 of that decision, would have been foreseeable at the time of the APA's adoption, when that was SMBV's situation from 2011 onwards. The Commission has thus not demonstrated that it was entitled to rely on the fact that SCTC had applied a higher mark-up on the costs of green coffee beans for the fiscal years from 2011 onwards.

397. Second, even assuming that the gradual increase in the mark-up from 2011 onwards was foreseeable at the time of the APA's conclusion, it must be stated that the Commission's approach is unconvincing. As Starbucks rightly contends, the Commission suggests that the mark-up for SCTC should have been set at the level of the average profit before tax that SCTC earned on its inter-company sales in the years before 2008, when such previous inter-company ('controlled') transactions cannot serve as a benchmark for 'marke[t] based' transfer prices.

398. In that regard, it should be noted that the Commission maintains that the price that SMBV paid to SCTC was too high from 2011 onwards. It must be recalled that that price is one paid within the Starbucks group. To determine a transfer price, however, the Commission should have compared the price paid by SMBV to SCTC to a price for green coffee beans that a stand-alone company would have paid on the market. It should have determined a price range for green coffee beans that a stand-alone roaster in a comparable situation to SMBV's would have paid on the market. However, instead of determining and examining such an uncontrolled transaction, the Commission limited its analysis to the controlled transaction in question and simply verified the plausibility of the structure of the costs and mark-ups of the other (integrated) party to the controlled transaction in question, namely, of SCTC.

399. By way of illustration, it should be recalled that the 2010 version of the OECD Guidelines, to which the Commission repeatedly refers in the contested decision, set out the following in paragraphs 3.24 and 3.25 thereof:

> '3.24 A comparable uncontrolled transaction is a transaction between two independent parties that is comparable to the controlled transaction under examination. It can be either a comparable transaction between one party to the controlled transaction and an independent party ("internal comparable") or between two independent enterprises, neither of which is a party to the controlled transaction ("external comparable").
>
> 3.25 Comparisons of a taxpayer's controlled transactions with other controlled transactions carried out by the same or another MNE group are irrelevant to the application of the arm's length principle and therefore should not be used by a tax administration as the basis for a transfer pricing adjustment or by a taxpayer to support its transfer pricing policy.'

400. In that context, the Commission acknowledges that, in recitals 342 to 361 of the contested decision, the purpose of the analysis had not been to perform a rigorous transfer pricing analysis to establish the arm's length price for green coffee at the time that the APA had been requested. Nevertheless, as has been set out in paragraph 154 above, it was for the Commission to justify the choice of the transfer pricing method it deemed appropriate in the case at hand in order to examine the level of transfer pricing for an intra-group transaction.

401. The Commission's assertion that, for the purposes of its assessment, it had no need to identify comparable external transactions for green coffee beans since it had 'understood' that the [*confidential*]% average mark-up for the period from 2005 to 2010 would correspond to an arm's length mark-up in 2008 does not suffice as

justification in that regard. The purpose of the comparison of the controlled transaction with comparable external transactions, for the period after 2011, is to determine whether the controlled transaction was at arm's length and the fact that another controlled transaction is presumed to be at arm's length, for the period between 2005 and 2010, does not enable the examination of comparable external transactions for the period after 2011 to be avoided. The mere fact that, according to the Commission, the Starbucks correspondents did not provide any valid justification for the increase in the mark-up from 2011 onwards does not prove that the price of the green coffee beans paid by SMBV to SCTC for the fiscal years from 2011 onwards was set at a higher level than the prices that other comparable operators on the market would have had to pay.

402. Those considerations suffice to conclude that the second complaint set out in paragraph 374 above should also be upheld.

403. Consequently, as has been set out in paragraphs 391 and 402 above, it is necessary to uphold the complaint that the third line of reasoning concerns an element of SMBV's costs that was outside the scope of the contested measure and that, moreover, the Commission has not demonstrated, by that line of reasoning, the existence of an advantage within the meaning of Article 107(1) TFEU in favour of SMBV.

404. Accordingly, it is necessary to uphold the plea alleging that, under its first to third lines of reasoning, the Commission has not demonstrated that the APA conferred an advantage on SMBV, within a meaning of Article 107(1) TFEU.

*E – Dispute of the subsidiary reasoning regarding the existence of a tax advantage in favour of SMBV (recitals 362 to 408 of the contested decision)*

405. The fourth plea in Case T-760/15 and the third part of the second plea in Case T-636/16 concern the Commission's subsidiary reasoning on the existence of an advantage, consisting in demonstrating that, even assuming that the TNMM could be used for the purposes of determining SMBV's taxable profits, the detailed rules for the application of that method to SMBV, as validated in the APA, would be erroneous.

406. That subsidiary reasoning is divided into two parts. In the first part, the Commission found that the choice of SMBV as the 'tested party' for the purposes of applying the TNMM, rather than Alki, was incorrect (fourth line of reasoning). In the second part, the Commission took the view that, even assuming that the tested party was indeed SMBV, the profit margin of SMBV obtained after applying the TNMM is not at arm's length. First, the Commission considered that the choice of operating costs as profit level indicator was incorrect (fifth line of reasoning). Second, it found that, in any event, the adjustments applied to the profit margin in order to increase SMBV's comparability with comparable undertakings were inappropriate (sixth line of reasoning).

407. The TNMM, to which the Commission refers in recitals 72 to 74 of the contested decision, is an indirect transfer pricing method. It consists in determining, from an appropriate base, the net profit realised by a taxpayer in a controlled transaction or in controlled transactions that are closely linked or continuous. To determine that appropriate base, it is necessary to choose a profit level indicator, such as costs, sales or assets. The net profit indicator obtained by the taxpayer in a controlled transaction must be determined by reference to the net profit indicator realised by the same taxpayer or a stand-alone undertaking in comparable uncontrolled transactions. The TNMM involves identifying a party to the transaction for which an indicator is tested.

408. The Kingdom of the Netherlands and Starbucks, which maintain that the TNMM was applied correctly, dispute all the criticisms made by the Commission as part of its subsidiary reasoning on the existence of an advantage.

409. First, the first part of the fourth plea in Case T-760/15 and the first complaint of the third part of the second plea in Case T-636/16 concern the identification of SMBV as the least complex entity.

410. Second, the second and third parts of the fourth plea in Case T-760/15 and the second complaint of the third part of the second plea in Case T-636/16 concern the identification of SMBV's main functions and the determination of SMBV's profits on the basis of operating costs.

411. Third, the fourth part of the fourth plea in Case T-760/15 and the third complaint of the third part of the second plea in Case T-636/16 concern the choice of adjustments intended to increase SMBV's comparability with comparable undertakings. It will be appropriate to examine each of those complaints in turn.

412. Moreover, Starbucks argues that the Commission's subsidiary reasoning on the existence of an advantage (recitals 362 to 408 of the contested decision) is vitiated by inadequate reasoning. It complains that the Com-

mission criticised the way in which the TNMM was applied but did not prove that a better application of that method would have resulted in a higher profit for SMBV.

1. Identification of SMBV as the most complex entity (fourth line of reasoning)

413. By the first part of the fourth plea in Case T-760/15, the Kingdom of the Netherlands claims that the Commission's argument that, since SMBV was the most complex entity, it could not be identified as the tested party for the purpose of applying the TNMM is erroneous. It maintains that the choice of SMBV for the application of the TNMM was correct. First, the mere fact that Alki was the holder of the roasting IP as well as the Starbucks brand for the EMEA region justified not designating it as the tested party for the purpose of applying the TNMM. Second, SMBV's functions are less complex than Alki's. None of the arguments relied on by the Commission in the contested decision relating to the functions and risks assumed by SMBV is such as to call that finding into question. In addition, the Kingdom of the Netherlands maintains that the Commission did not calculate the profit that ought to have been allocated to Alki if the TNMM had been applied to it and, consequently, that it did not demonstrate that the application of the TNMM it advocates would have led to a higher profit for SMBV.

414. Under the first complaint of the third part of the second plea in Case T-636/16, Starbucks argues that SMBV was rightly classified in the transfer pricing report as being the less complex entity as compared to Alki. First, it argues that SMBV carries out routine, low-risk coffee roasting and conditioning activities as well as administrative and logistical support. Second, Starbucks considers that Alki is necessarily the more complex entity, since it exploits the roasting IP – which the Commission does not dispute – and it bears the risks in relation to SMBV's activities, in accordance with the terms of the roasting agreement. Starbucks criticises the Commission for not having carried out a proper analysis of SMBV's or Alki's roles.

415. In addition, Starbucks claims that the contested decision is vitiated by inadequate reasoning. It argues that the Commission has not demonstrated that its misclassification of SMBV as the less complex entity conferred an advantage on it. It also argues that the contested decision does not state what SMBV's taxable income would have been had Alki been classified as the less complex entity, or how it should have been applied to Alki.

416. The Commission disputes those arguments. It maintains that it demonstrated, to a requisite legal standard, in the contested decision, that the choice of SMBV as tested entity for the purposes of the application of the TNMM was incorrect and did not enable a reliable approximation of an arm's length outcome to be reached.

417. First, the Commission argues that the circumstance that the transfer pricing report does not contain a complete functional analysis of SMBV and Alki is sufficient to consider that the method used in the APA does not enable an arm's length outcome to be reached. Second, the Commission maintains that the OECD Guidelines do not support the position of the Kingdom of the Netherlands and Starbucks on the choice of tested party. Third, the Commission contends that the complexity of the tested party is relative to that of the other entity involved in the transaction to be tested and that, in that perspective, Alki is less complex than SMBV. Fourth, the Commission maintains that the argument that it failed to conduct a proper functional analysis of SMBV and Alki is inadmissible, in so far as it is a new argument put forward for the first time in the reply. It contends that, in any event, that argument is unfounded.

418. Fifth, regarding the inadequate reasoning raised by Starbucks, the Commission retorts that it concluded, in recital 377 of the contested decision, that, as the TNMM's application was premissed on a flawed assumption, it did not enable a reliable approximation of a market-based outcome to be achieved and thus conferred an advantage on SMBV. It specifies that, had Alki been identified as the more complex entity, the analysis of its functions would have shown that it was not entitled to any remuneration, such that all the profits would have remained with SMBV.

419. In essence, the parties are in disagreement, first, on whether the transfer pricing report, as validated in the APA, correctly identified SMBV as being the tested entity for the purposes of the TNMM and, second, on whether the Commission stated sufficient reasons why it considered that the error in the identification of the tested party led to a reduction in SMBV's taxable profit.

420. It is necessary to examine in the first place, irrespective of whether the tested entity was SMBV or Alki, whether the Commission has satisfied its obligation to state reasons.

421. In that regard, it is settled case-law that the statement of reasons required by Article 296(2) TFEU must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed

by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to exercise its power of review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgments of 15 July 2004, *Spain* v *Commission*, C-501/00, EU:C:2004:438, paragraph 73 and the case-law cited, and of 22 January 2013, *Salzgitter* v *Commission*, T-308/00 RENV, EU:T:2013:30, paragraphs 112 and 113 and the case-law cited).

422. In the case at hand, the Commission set out, in Section 9.2.3.4 of the contested decision, that the choice of SMBV as tested entity for the purposes of the application of the TNMM conferred an advantage on SMBV.

423. First of all, it noted, in recital 364 of the contested decision, that the transfer pricing report should have included a comparison of each of the parties in the related transactions.

424. Next, the Commission considered, in recitals 365 to 368 of the contested decision, that the choice of SMBV as tested party was not in line with the requirements of the 1995 and 2010 versions of the OECD Guidelines, pursuant to which the tested party is the one whose functions are the least complex among the entities that are party to the controlled transaction.

425. Last, after an analysis of the functions of SMBV and Alki, the Commission concluded that the transfer pricing report had erroneously classified SMBV as having the less complex function compared to Alki (recitals 369 to 376 of the contested decision).

426. In recital 377 of the contested decision, the Commission concluded that, since the methodology for determining SMBV's tax base in the transfer pricing report was premissed on the flawed assumption that SMBV should be the tested party for the application of the TNMM, that methodology does not result in a reliable approximation of a market-based outcome in line with the arm's length principle. The Commission adds that, since the APA's endorsement of that methodology leads to a lowering of SMBV's tax liability under the general Netherlands corporate income tax system as compared to stand-alone companies whose taxable profit under that system is determined by the market, the APA should be considered to confer a selective advantage on SMBV for the purposes of Article 107(1) TFEU.

427. As has been set out in paragraph 201 above, the mere finding of non-observance of the methodological requirements for the determination of transfer pricing is not sufficient to establish that there is State aid within the meaning of Article 107 TFEU. The Commission must also demonstrate that the methodological errors that it identified do not enable an approximation of an arm's length outcome to be reached and that they resulted in a reduction of the taxable profit compared to a profit that would have been calculated in accordance with the arm's length principle.

428. Accordingly, in the examination of advantage within the meaning of Article 107 TFEU, in order to satisfy its obligation to state reasons as set out in paragraph 421 above, the Commission was obliged to set out the reasons why it had found that the error as to the choice of the tested entity had had the effect of reducing the level of SMBV's taxable profit in such proportions that it did not correspond to a reliable approximation of an arm's length outcome, thereby leading to a reduction in SMBV's tax burden.

429. It must be stated, however, that Starbucks is right to claim that the contested decision contains no element allowing an understanding of the reasons why the Commission found that the error in the identification of the tested entity for the purposes of the application of the TNMM conferred an advantage on SMBV.

430. First, while the Commission indicated in recital 377 of the contested decision that the error regarding the tested entity had conferred an advantage on SMBV, that recital does not contain sufficient reasons. As is apparent from paragraph 422 above, the Commission merely asserted that the error regarding the determination of the tested entity led to a reduction in taxable profit. It provides no element to establish that the application of the TNMM to Alki and the allocation of residual profits to SMBV led to a higher taxable profit for SMBV.

431. Second, the other recitals of the contested decision contain no element enabling an understanding of the reasons for which the Commission found that SMBV's taxable profit would have been higher had the TNMM been applied to Alki rather than to SMBV.

432. In the light of those considerations, it must be stated that the Commission did not set out the reasons why it considered that the choice of SMBV as tested party for the purposes of the application of the TNMM had led to a reduction in SMBV's taxable profit. Therefore, the Commission did not demonstrate how that error conferred an advantage on SMBV, in breach of its obligation to state reasons, as follows from Article 296(2) TFEU.

433. In any event, it must also be stated that the Commission's reasoning on the choice of tested entity is erroneous. Even assuming that the Commission could review the APA in the light of the 1995 version of the OECD Guidelines, as were available in April 2008, and that it could infer the existence of an advantage from the non-conformity with the requirements contained in those guidelines, those guidelines do not lay down a strict rule on the identification of the tested party.

434. More specifically, as the Kingdom of the Netherlands and Starbucks rightly argue, paragraph 3.43 of the 1995 OECD Guidelines indicates that the associated company, to which the TNMM is applied, must be the company for which reliable data on the most directly comparable transactions can be identified. It is next specified that that will often entail selecting the associated enterprise that is the least complex of the enterprises involved in the controlled transaction and that does not own valuable intangible property or unique assets. It follows that the guidelines do not necessarily oblige choosing the least complex entity, but merely advocate choosing the entity for which the most reliable data are available.

435. The Commission does not, however, prove that more reliable data were available to apply the TNMM to Alki. It is necessary inter alia to note that, first, the purpose of the APA is to determine the level of taxable profit of SMBV and not that of Alki and that, second, Alki was a third party to the procedure aimed at determining SMBV's fiscal situation in the Netherlands.

436. Moreover, the existence of that recommendation in no way means that the choice of either entity as tested entity will necessarily have an impact on the transfer price obtained and that the choice of the more complex entity as tested entity does not enable an arm's length outcome to be achieved.

437. If the choice of the least complex entity as tested party purports to limit errors, it is not at all inconceivable that applying the TNMM to the more complex entity might lead to an arm's length outcome. In addition, in so far as the residual profits are allocated to the other party, the outcome should in theory be the same no matter which entity is tested.

438. Accordingly, it is necessary to uphold the first part of the fourth plea in Case T-760/15 and the first complaint of the third part of the second plea in Case T-636/16, without it being necessary to examine Starbucks' argument seeking to dispute the admissibility of certain arguments put forward by the Commission.

2. Analysis of SMBV's functions and determination of SMBV's profit on the basis of operating costs (fifth line of reasoning)

439. By the second and third parts of the fourth plea in Case T-760/15, the Kingdom of the Netherlands argues that the Commission erroneously considered, first, that SMBV's main functions were the resale of coffee-derived products and non-coffee products as opposed to the roasting of coffee and, second, that operating costs were not the appropriate profit level indicator.

440. First, the Kingdom of the Netherlands claims, in essence, that the Commission was wrong to consider that SMBV's main function was resale rather than roasting. Second, the Kingdom of the Netherlands maintains that, since the Commission wrongly considered that SMBV's main function was resale, its finding that the appropriate profit level indicator was sales is also incorrect. Third, the Kingdom of the Netherlands argues that the alternative comparability analysis proposed by the Commission in recitals 395 to 398 of the contested decision does not prove that the determination of SMBV's profits on the basis of turnover would have resulted in a higher taxable profit for SMBV.

441. Under the second complaint of the third part of its second plea, Starbucks also criticises the Commission for wrongly considering that SMBV's main function was the resale of non-coffee products rather than the roasting of coffee and thereby inferring that sales, and not operating costs, were the appropriate profit level indicator. It maintains in that regard that operating costs were the right profit level indicator for SMBV. In addition, Starbucks claims that the Commission has not demonstrated that the error in determining SMBV's functions conferred an advantage on it, in so far as the Commission's comparability analysis is vitiated by significant errors.

442. The Commission maintains that it correctly demonstrated that SMBV's main function was resale and that, therefore, the relevant profit level indicator for SMBV was sales and not operating costs.

443. In the first place, the Commission contends that SMBV acted primarily as a reseller.

444. In the second place, the Commission disputes the arguments of the Kingdom of the Netherlands and of Starbucks purporting to demonstrate that it erroneously considered that sales were the relevant profit level indicator. It argues that, having established that SMBV's main function was resale, it was right to criticise the Netherlands authorities for having validated the use of operating costs as profit level indicator and that it was entitled to regard sales as the relevant profit level indicator.

445. Furthermore, the Commission states that the profit from sales of products unrelated to coffee must be allocated to SMBV and cannot be paid, via a royalty, to Alki, which is not in a position allowing it to generate profits from the resale of non-coffee products.

446. In the third place, the Commission disputes the arguments of the Kingdom of the Netherlands and of Starbucks that its analysis of the points of comparison is vitiated by a number of errors.

447. In the fourth place, the Commission disputes the criticisms made by the Kingdom of the Netherlands and Starbucks according to which it did not demonstrate that a better application of the TNMM would have resulted in a higher taxable profit for SMBV.

448. First, the Commission argues that those criticisms are irrelevant to the assessment of the validity of the contested decision. It did not seem necessary to it to propose a recovery method for its subsidiary reasoning when it did not agree with using the TNMM in SMBV's case.

449. Second, the Commission maintains that those remarks are unfounded, given that it carried out an analysis on the basis of SMBV's reselling function and calculated a remuneration for SMBV on the basis of a sales margin. Recital 400 of the contested decision, in which it acknowledged that that calculation was not intended to calculate SMBV's arm's length remuneration, does not call into question the fact that its comparability analysis was carried out to demonstrate that a better application of the TNMM would have given rise to a higher taxable profit for SMBV.

450. In essence, the parties are in disagreement on whether the Commission demonstrated that the errors it identified in respect of the analysis of SMBV's functions and the choice of profit level indicator conferred an advantage on SMBV.

451. As a preliminary point, it must be found that, although, in the application in Case T-760/15, those issues are the subject of two separate complaints dealt with in different sections, the issues of the identification of SMBV's functions and the choice of profit level indicator are indissociable. It follows from recitals 386 and 400 of the contested decision that those two questions come under the same evidence according to which the APA conferred an advantage on SMBV.

452. As a first step, the Commission found that SMBV's main function was the resale of non-coffee products and not coffee roasting (recitals 380 to 386 of the contested decision).

453. As a second step, on the basis of that finding, the Commission asserted that sales were a more appropriate profit level indicator than operating costs (recitals 387 to 391 of the contested decision). The Commission considered, in essence, that, for the period from 2008 to 2014, the choice of operating costs as profit level indicator did not reflect the significant increase in SMBV's sales and profit derived from its reselling activity. The Commission inferred that the profit derived from the sales was unduly shifted to Alki by means of the royalty, as Alki was not in a position to generate those profits.

454. The indissociable nature of those two steps set out in paragraphs 452 and 453 above is apparent, first, from the fact that the Commission draws no conclusion on the existence of a selective advantage from the finding of the single error in the identification of SMBV's functions and, second, from the fact that the Commission inferred the error in the choice of profit level indicator for SMBV's profits from the error in the identification of SMBV's functions.

455. As a third step, the Commission also sought to 'illustrate' the impact of the error in the determination of SMBV's main functions and choice of profit level indicator for SMBV's profits. In order to do that, it conducted its own functional analysis departing from the premiss that SMBV's main function was resale (recitals 392 to 400 of the contested decision).

456. For the sake of clarity, it must be noted that, by that reasoning, first, the Commission does not call into question the choice of the TNMM in the case at hand and, second, it does not claim that the profit level indicator used in the APA – operating costs – should have included factors other than costs, but maintains that a profit level indicator wholly separate from costs should have been used in the APA.

457. In order to examine whether the Commission has managed to demonstrate that the choice of profit level indicator had led to an outcome not in conformity with the arm's length principle, it is thus appropriate to examine, first of all, the demonstration by the Commission in the first and second steps (recitals 380 to 391 of the contested decision), and then its comparability analysis conducted in the third step of its reasoning (recitals 392 to 400 of the contested decision).

*a. Choice of profit level indicator*

458. In the contested decision, the Commission found that SMBV's main function was the resale of non-coffee products. It based its reasoning primarily on the fact that, in 2007, only [*confidential*]% of SMBV's income was derived from the sale of roasted coffee. By comparison, [*confidential*]% of SMBV's income was derived from the sale of non-coffee products, which corresponded to what Starbucks identified as the provision of logistics and administrative services, and that a significant portion of SMBV's employees were active in that activity.

459. On the basis of that finding, the Commission took the view that sales were the appropriate profit level indicator. In recital 387 of the contested decision, it first of all noted that, according to paragraph 2.87 of the 2010 version of the OECD Guidelines, sales or operating costs related to distribution might be an appropriate profit level indicator. Next, in recital 388 of the contested decision, the Commission found that, in the case at hand, sales were a more adequate indicator of SMBV's profit generating reselling function, since its profits were generated and recorded through a margin on products distributed. In addition, according to the Commission, between 2008 and 2014, SMBV's total sales practically tripled, while the 'gross margin' more than doubled over that same period and, by comparison, SMBV's operating costs increased by only 6%. It thereby inferred that operating costs could not be regarded as an adequate profit level indicator. On the basis of that finding, in recital 389 of the contested decision, the Commission asserted that the payment of royalties to Alki, corresponding to residual profit, had the effect of shifting the profit SMBV derived from resale to Alki, when Alki, owing to its limited operating capacity, was not in a position to generate profits from that activity. It therefore concluded that the entirety of the profits should have been attributed to SMBV.

460. It must nevertheless be held that, even had the Commission not erred in finding that SMBV's main function was the resale of non-coffee products, its analysis does not suffice to demonstrate that a profit level indicator based on operating costs could not lead to an arm's length outcome.

461. First, it should be noted that, as the Commission itself found in recital 387 of the contested decision, it is apparent from paragraph 2.87 of the 2010 version of the OECD Guidelines that sales or operating costs related to distribution might be an appropriate profit level indicator. It follows that, even assuming the Commission's premiss whereby SMBV's main function was the resale of non-coffee products were correct, it is not inconceivable, in principle, that operating costs could constitute an appropriate profit level indicator.

462. To the extent that the Kingdom of the Netherlands disputes the Commission's assessment that the resale of non-coffee products constituted an appropriate base for determining SMBV's net profit, it should be recalled that it is apparent from the OECD Guidelines, on which the Commission based its analysis, and in particular from paragraphs 1.42, 3.2 and 3.26 of the 1995 version thereof, which correspond, in essence, to paragraphs 2.57, 2.58 and 3.9 of the 2010 version, that the TNMM consists in determining, from an appropriate base, the net profit realised by a taxpayer in a controlled transaction or in controlled transactions that are closely linked or continuous. It follows that the TNMM serves to determine the level of transfer pricing for a type of transaction or for closely linked or continuous transactions on the basis of an analysis of the main functions related to that transaction or to those transactions. However, its purpose is not to determine the level of profit for an undertaking's overall activity, consisting in types of varied transactions, on the basis of the identification of a single main function, by disregarding the other functions performed by that undertaking. Such a practice would not be in line with paragraph 3.4 of the 1995 version of the OECD Guidelines, which corresponds to paragraph 2.7 of the 2010 version of those guidelines, which provides the following:

> 'In no case should transactional profit methods be used so as to result in over-taxing enterprises mainly because they make profits lower than the average, or in under-taxing enterprises that make higher than average profits. There is no justification under the arm's length principle for imposing additional tax on enterprises that are less successful than average when the reason for their lack of success is attributable to commercial factors.'

463. In that context, first, it must be borne in mind that, in the contested decision, the Commission argued that SMBV's functions relating to the resale of coffee-related products and those relating to roasting were not of negligible importance. Consequently, both of those functions – and not one or the other – had to be taken into account for the purposes of determining SMBV's remuneration.

464. Second, in any event, in the contested decision, the Commission did not demonstrate that, in the circumstances of the case at hand, all of SMBV's intra-group transactions that were relevant to the determination of its taxable profit were closely linked or continuous, such that a single pricing level could be determined for their remuneration.

465. That finding is sufficient to reject the position of the Commission according to which sales of non-coffee products were a profit level indicator that could be used for the entirety of SMBV's activity.

466. Second, in any event, the arguments of the Commission seeking to call into question, in the case at hand, the use of operating costs as profit level indicator are unconvincing.

467. First, it must be stated that the Commission's analysis, set out in recitals 388 and 389 of the contested decision, is based on data subsequent to the APA's conclusion. As has been found in paragraph 251 above, however, in the circumstances of the case at hand, the Commission could not base its analysis on information that was not available or reasonably foreseeable in April 2008, when the APA was concluded. In the present case, the Commission has not demonstrated that the data relating to SMBV's sales and its costs over the period from 2008 to 2014 were reasonably foreseeable, such that it was not entitled to base its analysis on those data.

468. Second, even supposing that the data relating to SMBV's activity between 2008 and 2014 could be used by the Commission, it must be stated that the assertion that SMBV's sales tripled while its operating costs increased by only 6% over the same period does not suffice to call into question the choice of operating costs as profit level indicator.

469. It must be recalled that, as has been found in paragraph 458 above, the Commission's argument is based on the premiss that SMBV's main function is the resale of non-coffee products. First, however, the figures relied on by the Commission concern, as it itself indicates, SMBV's total sales and 'gross margin', which necessarily includes sales of coffee and coffee-related products. In addition, regarding 'gross margin', it is equal to gross profit, that is to say, sales turnover minus costs of goods sold, divided by sales (see footnote 70 of the contested decision) and thus does not constitute a rate indicating the profitability of sales before deduction of fixed costs. The Commission does not explain how those figures might be usable or relevant in the present case. Nor does it provide any evidence in support of those figures, or any indication as to their source.

470. Third, the profit level indicator proposed by the Commission, namely, total sales, does not appear to be appropriate for determining SMBV's remuneration, either.

471. As has been set out in paragraph 458 above, the Commission based its line of argument on the premiss that [*confidential*]% of SMBV's income was derived from the function of reselling non-coffee products. It thereby inferred that that function was SMBV's main function.

472. However, it is important to note that that figure on which the Commission based its reasoning concerns SMBV's income, and not profits. It must be stated that a high proportion of income does not necessarily translate into a high proportion of profits, such that that finding alone is not sufficient to prove that SMBV's main function is the resale of non-coffee products.

473. Furthermore, the probative value of that figure is all the more debatable given that, as has been found in paragraphs 275 to 277 above, the Commission should have taken into account the fact that a portion of the income and profits was derived from the sale of roasted coffee by third parties.

474. In the light of the findings made in paragraphs 458 to 473 above, it must be held that the Commission has not demonstrated to a requisite legal standard that the choice of operating costs as profit level indicator did not allow a reliable approximation of a market-based outcome to be reached.

475. Since the Commission has not demonstrated that the choice of profit level indicator was incorrect, it could not take the view, in recital 389 of the contested decision, that a portion of SMBV's profits, relating to its resale activity, was unduly shifted to Alki by means of the royalty. It has not demonstrated that SMBV's profit would have been higher than the level of profit determined under the application of the APA.

*b. Commission's comparability analysis*

476. As has been found in paragraph 455 above, it must be stated that the Commission carried out, in recitals 392 to 399 of the contested decision, its own comparability analysis departing from the premiss that SMBV's main function was the resale of non-coffee products.

477. The Commission sought to determine the arm's length range for SMBV, by comparing it to undertakings whose main function was the wholesale of coffee-derived products and using sales as profit level indicator.

478. In order to do so, the Commission reproduced the analysis of the tax advisor with a corrected group of comparable companies, which it referred to as a 'corrected peer group', identified on the basis of SMBV's resale functions, then calculated, from the corrected peer group, the range of return on sales that corresponded, in the light of its analysis, to an arm's length outcome. The interquartile range obtained for the return on sales corresponded to a range of between 1.5% and 5.5%. The Commission then applied it to SMBV's results obtained from 2007 to 2014. It found that, for each of the years covered by the APA, SMBV's tax base calculated on the basis of the APA was lower than the quartile range of SMBV's tax base, as followed from applying the method selected by the Commission.

479. The Commission's approach consisting, first, in conducting its own analysis and, second, in comparing SMBV's situation under the APA with the results of its analysis is such as to satisfy the Commission's requirements regarding the demonstration of the existence of an advantage. The results of the Commission's analysis demonstrate that SMBV's taxable profit, as obtained under the APA for the years 2007 to 2014, is lower than SMBV's taxable profit, as calculated for the years 2007 to 2014, applying the arm's length range obtained by the Commission, from the corrected peer group.

480. However, in the first place, it must be held that, as the Kingdom of the Netherlands and Starbucks argue, the Commission's comparability analysis is lacking in reliability.

481. First, it must be pointed out that, in recital 400 of the contested decision, the Commission clarified that the 'purpose of [its analysis] ... [wa]s not to calculate an arm's length remuneration for the functions performed by SMBV within the Starbucks group'. It thus 'acknowledge[d] that the range presented above [wa]s not backed by a sufficient comparability analysis'. Such a clarification – made by the Commission itself – weakens the probative value of its analysis for demonstrating that the errors identified as regards SMBV's functions and the choice of profit level indicator led to an advantage being conferred on SMBV.

482. Second, the impossibility, alleged by Starbucks, of replicating the corrected peer group search, done by the Commission, and of obtaining the same results as the Commission is such as to confirm the lack of reliability of the Commission's comparability analysis. When Starbucks' tax advisor attempted to replicate the Commission's comparability analysis using the same criteria as the Commission, it obtained a list of 87 companies. Of the 12 companies identified by the Commission for the purpose of its comparability analysis, however, only 3 were present in the list of 87 companies.

483. It is true that the Commission tried to replicate, at the stage of the defence in Case T-636/16, the corrected peer group search, in order to demonstrate the reliability of its comparability analysis. However, even supposing that using the 'Orbis' database instead of the 'Amadeus' database had made no difference, since the first database contains the same data as the second, it must be pointed out that five of the companies identified in recital 394 of the contested decision did not appear when it replicated its search of comparable companies. The Commission has moreover admitted this, in paragraph 179 of its defence in Case T-636/16.

484. The arguments relied on by the Commission to justify that difference in results between its own comparability analysis and the replication of that analysis are therefore incapable of undermining the finding of lack of credibility and reliability of its comparability analysis. The Commission maintains that that difference in results is explained by the fact that those five companies were reclassified in the database subsequent to its comparability analysis.

485. First, it is apparent from Starbucks' reply – without being contradicted on that point by Commission in the rejoinder in Case T-636/16 – that it is possible to consult the historical versions of the 'Orbis' and 'Amadeus' databases, such that the change in the companies' situation should not have any impact on the replicability of the Commission's comparability analysis. Therefore, since those historical versions of the 'Amadeus' database cannot be updated retroactively, the results could not have been different from those obtained in the Commission's comparability analysis.

486. Second, Starbucks claims that the Commission used, both for its own comparability analysis and for the replication of the comparability analysis, versions of the 'Amadeus' and 'Orbis' databases dating from 2015 and

2017, respectively, which the Commission does not call into question. It follows that the Commission's analysis is based on versions of the databases subsequent to 2008. To the extent that, as the Commission itself maintains, the classification of companies can vary depending on the version of the database, the results of the comparability analysis could be distorted by using a more recent version. Furthermore, as is apparent from paragraphs 243 to 251 above, only information that was available on the day of the adoption of the APA could be taken into account by the Commission.

487. Therefore, the circumstances, on the one hand, that the Commission was not in a position to replicate its comparability analysis and, on the other hand, that those five companies represented a significant portion of the corrected peer group, used for the comparability analysis, as well as the resulting impossibility for the Kingdom of the Netherlands and Starbucks or for this Court to know the precise method used by the Commission in its reasoning and to reproduce that analysis in order to verify whether it correctly identified the comparable companies are such as to call into question its reliability and credibility.

488. In the second place, in any event, it must be held that, as the Kingdom of the Netherlands and Starbucks argue, the Commission's analysis is vitiated by a number of errors.

489. First, it must be stated that the corrected peer group used by the Commission for its comparability analysis is inconsistent with the findings it made as to SMBV's functions and is not such as to prove that the errors it identified led to a reduction in SMBV's taxable profit.

490. It is important to point out, first, that the Commission found, in the contested decision, that SMBV's main function was the resale of non-coffee products. In recital 382 of the contested decision, the Commission clearly stated that SMBV's main function was resale, [*confidential*]% of the company's income in 2007 having derived from that activity. In recital 384 of that decision, the Commission clarified its position according to which the majority of SMBV's activities related to the sale or resale of non-coffee products, such as cups and paper napkins. That finding is, moreover, supported by the Commission's submissions, in which the Commission asserts that SMBV's main function is reselling non-coffee products and that it is the main reason why it criticised the Starbucks group's tax advisor for having chosen operating costs as profit level indicator.

491. Second, the Commission set out in recitals 393 and 394 of the contested decision that, as SMBV's functions had been incorrectly identified in the transfer pricing report, the peer group used to apply the TNMM, identified by the NACE (*Nomenclature générale des activités économiques dans les Communautés européennes*) code 'processing of tea and coffee' was inappropriate. The Commission then reproduced the analysis carried out in the transfer pricing report, using the corrected peer group, identified by the NACE code 'wholesale of coffee, tea, cocoa and spices'. It then excluded companies mainly distributing products other than tea and coffee from the corrected peer group. The result was a corrected peer group made up of 12 companies, each engaged in roasting, as the Commission found in recital 394 of the contested decision.

492. It must be pointed out that the companies making up the corrected peer group have different functions than SMBV's main function, as identified by the Commission, namely, the resale of non-coffee products. This means that those companies are not in a comparable situation to SMBV's. Those companies therefore cannot be regarded as relevant for calculating the profit SMBV would generate under market conditions. Consequently, the alternative comparability analysis consisting in replicating the tax advisor's analysis by using a corrected peer group engaged in the sale of coffee and roasting is necessarily incorrect.

493. Second, it must be held, as Starbucks argues, that, even supposing that the corrected peer group could be used by the Commission, the results of the comparability analysis carried out by the Commission are necessarily distorted, since it compared incomparable data, comparing the operating profits of comparable companies with SMBV's taxable profit.

494. In that regard, first, it must be noted that it is settled between the parties that the interquartile range calculated by the Commission for the period from 2005 to 2007, corresponding to a range of between 1.5% and 5.5% of sales, was calculated on the basis of the operating profits of the companies comprising the corrected peer group. That finding is moreover supported by Table 12 of the contested decision. Second, it is settled that it is SMBV's taxable profit, determined under the APA, and not its operating profit that the Commission compared with the operating profit of the comparable companies from the corrected peer group. That is moreover apparent from Table 13 of the contested decision.

495. The Commission does not dispute, however, that operating profits are not comparable to pre-tax profits, merely asserting that it replicated the analysis of the Starbucks group's tax advisor. Furthermore, it must be stated that operating profits and taxable profits are two separate notions which are reflected, in principle, in

the recording of different amounts in the corresponding accounting tables, as is apparent from recital 82 of the contested decision and from Table 1 of that decision.

496. The circumstance that the Commission asserted, in recital 397 of the contested decision, that it compared SMBV's taxable profit calculated on the basis of the APA with the taxable profit calculated on the basis of the interquartile range determined by the Commission cannot call into question the finding made in paragraph 493 above. Given that the interquartile range was calculated on the basis of the operating profits of comparable undertakings, the result obtained in respect of SMBV when applying that range corresponds not to its taxable profit, but to its operating profit.

497. It follows that the comparison of SMBV's taxable profit with the interquartile range obtained from the operating profit of the companies of the corrected peer group is necessarily distorted.

498. Moreover, for the year 2007-2008, the 1.2% figure is fairly close to the lower part of the range calculated by the Commission. In view of the numerous approximations in the Commission's analysis, that result does not demonstrate a situation clearly contrary to market conditions. It should be borne in mind that, where the Commission checks whether the taxable profit of an integrated undertaking in application of a tax measure corresponds to a reliable approximation of a taxable profit realised under market conditions, it may determine the existence of an advantage within the meaning of Article 107(1) TFEU only provided that the discrepancy between the two factors of comparison goes beyond inaccuracies inherent to the method used to obtain that approximation.

499. Furthermore, even assuming that the error consisting in comparing SMBV's taxable profit with the operating profit of comparable companies was indeed contained in Starbucks' transfer pricing report – which Starbucks disputes – the existence of that error in the transfer pricing report does not prevent the Court from verifying that the contested decision is not vitiated by error. In addition, if the Commission deemed problematic the fact that operating profits were compared with taxable profits, it ought to have examined that matter in the contested decision.

500. It is therefore necessary to consider, on the basis of the findings made in paragraphs 480 to 499 above, that the comparability analysis conducted by the Commission in recitals 392 to 399 of the contested decision, first, lacks reliability and, second, is vitiated by a number of errors.

501. Consequently, in the light of the considerations set out in paragraphs 457 to 500 above, it is necessary to uphold the complaints of the Kingdom of the Netherlands and of Starbucks according to which the Commission has not demonstrated that the APA's validation of SMBV's functions and of the choice of profit level indicator, proposed in the transfer pricing report, conferred an advantage on SMBV. Accordingly, it is no longer necessary to examine whether the Commission was correct to find that the identification of SMBV's functions and the choice of profit level indicator used in the APA were erroneous. It is therefore not necessary to examine the argument of Starbucks disputing the admissibility of certain arguments put forward by the Commission.

3. Choice of adjustments (sixth line of reasoning)

502. Under the fourth part of the fourth plea in Case T-760/15, and the third complaint of the third part of the second plea in Case T-636/16, the Kingdom of the Netherlands and Starbucks claim, in essence, that the Commission has not demonstrated that the adjustments proposed in the transfer pricing report to increase the comparability between SMBV and the comparable companies were such as to confer an advantage on SMBV.

503. The Kingdom of the Netherlands argues that the Commission erroneously found that two of the adjustments proposed in the transfer pricing report for increasing the comparability between SMBV and the 20 comparable unrelated companies did not enable an approximation of an arm's length outcome to be reached. First, the exclusion, from the relevant cost base, of the costs of products related and unrelated to coffee is justified inter alia by the fact that SMBV acts as service provider, does not perform any purchasing function and does not bear stock-related risks, unlike the comparable companies. Second, the mark-up adjustment is justified by the fact that the mark-up before adjustment concerns operating profits, whereas the objective of the APA was to determine taxable profits. That adjustment had the effect of increasing the mark-up.

504. First, Starbucks adds that, in the contested decision, the Commission did not call into question the adjustments applied to the cost base, chosen as profit level indicator. Therefore, the argument of the Commission set forth in paragraph 183 of the defence in Case T-636/16, according to which the cost-base adjustment is inappropriate due to the absence of risk transfer from SMBV to Alki, is inadmissible since it does not appear in the contested decision. Second, it considers that the figures presented by the Commission in paragraphs 184

and 185 of the defence in Case T-636/16, purporting to show that SMBV's taxable income would have been higher if a mark-up had been applied on total costs, are also inadmissible in so far as they do not appear in the contested decision.

505. So far as concerns the adjustments at issue, Starbucks alleges inadequate reasoning. The Commission merely asserts that the adjustments were not appropriate, without demonstrating how SMBV's taxable profit would have been higher if more appropriate adjustments had been made.

506. The Commission disputes those arguments. It maintains that the two adjustments proposed in the transfer pricing report are inadequate and lead to a reduction in SMBV's taxable profit. It argues that the Kingdom of the Netherlands and Starbucks have not demonstrated that it committed an error of assessment.

507. First, regarding the adjustments applied to the cost base, the Commission argues that it did indeed challenge that point in recitals 319 to 332 of the contested decision, asserting that Alki could not bear any of SMBV's entrepreneurial risk. The Commission refers also to recitals 59 and 159 of the contested decision, which explain that the cost-base adjustment is justified, according to the transfer pricing report, by SMBV's status as toll manufacturer, and not assuming any risk. In addition, the Commission disputes the arguments of the Kingdom of the Netherlands and of Starbucks according to which SMBV's profit could be calculated on the basis of operating costs and not total costs.

508. Second, the Commission notes that, although the adjusted mark-up led to a higher percentage, that percentage was applied to a much narrower cost base. It adds that, given that the cost of green coffee beans, the remuneration paid to third parties and non-coffee products should have been included in the cost base, there was no reason to apply the 'working capital adjustment'. Even assuming that the Starbucks group's tax advisor, having prepared the transfer pricing report, committed no error in excluding those different costs from the cost base, the 'working capital adjustment' would not have been appropriate, either. In addition, the Commission argues that it adequately explained, in recitals 402 to 406 of the contested decision, how the 'working capital adjustment', together with the cost-base adjustment, lowered SMBV's annual corporate income tax liability.

*a. Preliminary observations*

509. First of all, it must be pointed out that, in recitals 407 and 408 of the contested decision, the Commission considered that, even if SMBV's functions and the profit level indicator had been correctly identified, two adjustments proposed in the transfer pricing report meant that the methodology proposed in the transfer pricing report did not result in an arm's length outcome.

510. Based on the finding that the two adjustments were erroneous, the Commission concluded that, by accepting that methodology, which led to a lowering of SMBV's tax liability under the general Netherlands corporate income tax system as compared to stand-alone companies whose taxable profit under that system is determined in market conditions, the APA conferred a selective advantage on SMBV for the purposes of Article 107(1) TFEU.

511. It should be noted that it is thus apparent from recitals 407 and 408 of the contested decision that the Commission's approach, consisting in comparing SMBV's taxable profit under the APA with that of a stand-alone company whose profit under the general Netherlands corporate income tax system is determined in market conditions, appears, at first sight, to satisfy the requirements incumbent on the Commission regarding the existence of an advantage.

512. However, it should be recalled that it follows from the considerations set out in paragraphs 151 and 152 above that, in order to determine whether the APA conferred an advantage on SMBV in the case at hand, it is for the Commission to show that the transfer pricing method endorsed in the APA led to a reduction of SMBV's tax burden and, more specifically, to show that the level of SMBV's profits, calculated under the transfer pricing method, is reduced to such an extent that it cannot be regarded as being a reliable approximation of a market-based outcome. As has been found in paragraph 498 above, where the Commission checks whether the taxable profit of an integrated undertaking in application of a tax measure corresponds to a reliable approximation of a taxable profit realised under market conditions, it may determine the existence of an advantage within the meaning of Article 107(1) TFEU only provided that the discrepancy between the two factors of comparison goes beyond inaccuracies inherent to the method used to obtain that approximation.

513. It is therefore appropriate to examine whether the Commission has sufficiently shown that the two adjustments made by the Starbucks group's tax advisor conferred an advantage on SMBV.

*b. Cost-base adjustment*

514. The first adjustment proposed in the transfer pricing report concerns the cost base (the 'cost-base adjustment'). It consists in excluding certain costs from the cost base used as profit level indicator for the purposes of the application of the TNMM. However, it must be stated that it is apparent from recitals 406 and 407 of the contested decision that the criticisms identified by the Commission concern only the exclusion of the costs of unaffiliated manufacturing company 1 from the cost base used for the application of the TNMM. In essence, the Commission found that there was no explanation why the costs of unaffiliated manufacturing company 1 were excluded when they had been taken into account in the preceding APA.

515. In the first place, it should be recalled that, contrary to what the Commission argues, the conclusion in recital 407 of the contested decision, according to which the adjustments proposed in the transfer pricing report and validated in the APA confer an advantage on SMBV, is explicitly limited to excluding the costs of unaffiliated manufacturing company 1 from SMBV's cost base. It is not apparent from the text of the contested decision that the Commission based the finding of advantage on the exclusion of other costs from the cost base used as SMBV's profit level indicator.

516. The circumstance, relied on by the Commission, that that institution called into question, in recitals 319 to 332 of the contested decision, the fact that SMBV's entrepreneurial risks were transferred to Alki does not permit the conclusion that it considered, for those reasons, that certain costs had been erroneously excluded from the cost base used as profit level indicator. That finding is supported by the circumstance that the issue of the adjustments is presented by the Commission itself as being a line of reasoning (see recital 407 of the contested decision) subsidiary to the line of reasoning examined in recitals 319 to 332 of the contested decision.

517. Moreover, contrary to what the Commission essentially maintains, it is not apparent from recitals 59 and 159 of the contested decision that that decision based the finding that the APA had conferred an advantage on SMBV on the cost-based adjustments. So far as concerns recital 59 of the contested decision, it must be stated that, although it does refer to the said adjustments, it merely presents the content of the transfer pricing report. As regards recital 159 of the contested decision, that recital – which is in the section introducing the administrative procedure – merely indicates that the Commission had expressed doubts as to the adjustments proposed in the transfer pricing report, without it being possible to infer the Commission's position in the context of the contested decision.

518. On the basis of the findings made in paragraphs 515 to 517 above, it must therefore be held that the Commission did not contend in the contested decision – let alone prove – that the cost-based adjustment, apart from the exclusion of the costs of unaffiliated manufacturing company 1, had conferred an advantage on SMBV. Accordingly, it is necessary to reject the arguments of the Commission, presented in the defence, according to which the use of operating costs instead of total costs (including the cost of coffee beans, the fees paid to third parties and the costs of non-coffee products) led to a reduction in SMBV's taxable base.

519. In the second place, regarding the exclusion of the costs of unaffiliated manufacturing company 1, the Commission found, in recital 406 of the contested decision, that the transfer pricing report had accepted a considerable reduction in the cost base, by excluding those costs.

520. The Commission, however, is limited to asserting, in recital 406 of the contested decision, without any further clarification, that those costs had been taken into account in the previous arrangement for determining SMBV's tax base, used prior to the APA's conclusion, and that the exclusion of those costs had not been reasoned. It is not clear from the text of the contested decision to what the Commission is referring when it invokes an absence of reasoning of the exclusion of costs, and in particular whether it considers that such explanations should have been contained in the APA or provided during the administrative procedure.

521. In that regard, first, it must be held that the finding as to the insufficient justification of the adjustment, whether it be by the Starbucks correspondents or by the Netherlands authorities, does not suffice to demonstrate, as such, that that adjustment was erroneous, or that it led to a reduction in SMBV's tax burden.

522. Second, in any event, it must be held that it is apparent from recital 407 of the contested decision that the Commission's examination of the erroneous nature of the exclusion of the costs of unaffiliated manufacturing company 1 is a subsidiary analysis that would be at issue if SMBV's main function was indeed the roasting of coffee.

523. First, it is apparent from the Commission's defence in Case T-636/16 that unaffiliated manufacturing company 1 mainly manufactured products such as flavoured coffee, powder for a coffee-based product protected by a registered trademark or soluble coffee and that it roasted green coffee beans only in 'limited vol-

umes'. The Commission did not, however, explain how the costs of unaffiliated manufacturing company 1 were relevant to calculating SMBV's taxable profit, as roaster.

524. Second, it must be stated that the arguments put forward by the Commission in its submissions regarding the exclusion of the costs of unaffiliated manufacturing company 1 are based on the premiss that SMBV's main activity is resale. Those different arguments must therefore be rejected.

525. Third, it is apparent from the transfer pricing report that the tax advisor excluded from the cost base, used for the purposes of applying the TNMM, the costs relating to activities for which SMBV does not provide added value. The Kingdom of the Netherlands and Starbucks moreover contend, in their respective submissions, that the exclusion of the costs of unaffiliated manufacturing company 1 is justified by the fact that SMBV does not provide any added value. They maintain that the costs relating to the transaction between SMBV and unaffiliated manufacturing company 1 merely pass through SMBV's accounts, but cannot be attributed to SMBV's activity. The purchase of the products of unaffiliated manufacturing company 1 thus constitutes a neutral transaction for the determination of that company's taxable profit.

526. In that regard, it must be stated that it is not ruled out that the income derived from the products provided by unaffiliated manufacturing company 1 are equivalent to the costs of unaffiliated manufacturing company 1, such that SMBV does not generate any profit from that company's products. The Commission, however, has not demonstrated that SMBV added any value to the products of unaffiliated manufacturing company 1 and that it did indeed generate profit from the exploitation of those products, such that the costs of unaffiliated manufacturing company 1 should necessarily have been taken into account for the purposes of the application of the TNMM.

527. Nor does the Commission demonstrate that the differences cited in the transfer pricing report between the functions of SMBV and of the 20 companies on the basis of which the comparability analysis was conducted do not justify the application of the adjustment involving the exclusion of the costs of unaffiliated manufacturing company 1.

528. To the extent that the Commission does not provide evidence showing that SMBV generated profit from the transaction with unaffiliated manufacturing company 1 or that the mark-up should apply to a cost base including the costs of unaffiliated manufacturing company 1, it must be held that it was not entitled to conclude that the exclusion of those costs was erroneous and led to a reduction in SMBV's profit.

529. In the third place, it must be stated that, as Starbucks argues, the figures contained in the table produced in paragraph 184 of the Commission's defence in Case T-636/16, which are calculations based on the figures contained in Table 3 of the contested decision, cannot be taken to support the Commission's position. First, those figures relate to SMBV's total costs (operating expenses and COGS) and not only to the operating costs to which the costs of unaffiliated manufacturing company 1 would have been added. Second, those figures demonstrate only that the level of profits would have been higher if the cost base had been broader and do not support the proposition that SMBV would have made a profit from exploiting the products of unaffiliated manufacturing company 1.

530. In the fourth place, it must be noted that the exclusion of the costs of unaffiliated manufacturing company 1 was combined with the adjustment – increasing – of the rate of return. It therefore cannot necessarily be concluded that the adjustments applied in the APA, taken as a whole, necessarily led to a reduction in SMBV's taxable base. The Commission, however, has not quantified the costs of unaffiliated manufacturing company 1 or, at least, the proportion of SMBV's costs they represent. It is thus not apparent from the contested decision that the costs of unaffiliated manufacturing company 1 represent such a proportion of SMBV's costs that merely excluding them would have an impact on SMBV's profits to such an extent that their level would no longer be representative of a profit resulting from an arm's length situation.

531. In the light of those observations, it must be held that the Commission has not managed to demonstrate that the exclusion of the costs of unaffiliated manufacturing company 1 conferred an advantage on SMBV, without it being necessary to examine whether the Commission vitiated its decision by a failure to state reasons.

*c. 'Working capital adjustment'*

1. Scope of the adjustment at issue

532. With regard to the scope of the second adjustment, it must be stated that, in recital 407 of the contested decision, the Commission maintained that the application of the 'working capital adjustment' meant that the

method proposed in the transfer pricing report did not result in a reliable approximation of a market-based outcome in line with the arm's length principle. In that regard, it must be noted that neither the transfer pricing report nor the APA uses the expression 'working capital adjustment'.

533. First of all, in the contested decision, the Commission maintained that, in the transfer pricing report, the Starbucks group's tax advisor proposed a conversion mark-up adjustment, presented by the Netherlands authorities as a 'working capital adjustment' (recital 401 of the contested decision). It follows from that finding that the expression 'working capital adjustment' as used in the contested decision must be understood in the sense used by the Netherlands authorities during the administrative procedure.

534. Next, it is apparent from recital 403 of the contested decision that the Commission had expressed doubts on the 'working capital adjustment' in recitals 101 to 113 of the opening decision. First, it should be noted that, in recitals 101 and 102 of the opening decision, the Commission discussed the 'raw material cost mark-up', while the adjustment relating to the exclusion of the costs of green coffee from the cost base was discussed in recitals 99 and 100 of the opening decision. The contested decision therefore does not refer, in recital 403 thereof, to the latter adjustment. That finding is moreover supported by point (iii) of recital 269 and by footnote 130 of the contested decision.

535. It is true that recitals 103 to 113 of the opening decision also concern, in part, the adjustment relating to the exclusion of the costs of green coffee from the cost base. However, according to recital 107 of the opening decision, the arguments of the Netherlands regarding the 'working capital adjustment' are set out in recital 59 of the same decision. According to recital 59 of the opening decision, the Netherlands authorities stated that 'the adjustment in this case [was] a combination of two comparability adjustments: it combine[d] a working capital adjustment for raw materials inventory on the return of the comparable companies with an adjustment for the raw material costs in the cost base of the comparable companies'. It is apparent from the description of the arguments of the Kingdom of the Netherlands during the administrative procedure that, for it, the expression 'working capital adjustment' concerned only the 'raw materials cost adjustment', identified in the transfer pricing report.

536. Last, it must be pointed out that, in recital 407 of the contested decision, the Commission itself notes a difference between the 'working capital adjustment' and the exclusion of the costs of unaffiliated manufacturing company 1 from SMBV's tax base.

537. It must therefore be concluded that the expression 'working capital adjustment', used in recital 407 of the contested decision, makes reference to the 'raw materials cost adjustment', identified in the transfer pricing report.

538. In any event, even supposing that the expression 'working capital adjustment', used in recital 407 of the contested decision, were also be understood as making reference to the raw materials cost adjustment in SMBV's cost base, it must be held that recitals 401 to 406 of the contested decision contain no argument on the cost base other than the one involving the exclusion of the costs of unaffiliated manufacturing company 1. It has already been found, in paragraphs 514 to 531 above, however, that the Commission has not managed to demonstrate that the exclusion of those costs conferred on advantage on SMBV. In recitals 404 and 405 of the contested decision, the Commission simply rejects the arguments of the Kingdom of the Netherlands on the relevance of a comparability study on the basis of total costs and a scientific article. Moreover, recitals 401 to 403 of the contested decision contain no reference to SMBV's cost base.

2. Complaint alleging the absence of a reduction in SMBV's tax burden

539. In the first place, it should be recalled that, in so far as, first, the 'working capital adjustment' corresponds to the raw materials cost adjustment in the cost base, identified in the transfer pricing report (see paragraph 537 above) and, second, the argument regarding the exclusion of the costs of unaffiliated manufacturing company 1 has been rejected (see paragraphs 514 to 531 above), that adjustment translated into an increase in the cost base mark-up from [*confidential*]% to [*confidential*]%. The use of a higher mark-up for the purposes of determining SMBV's taxable profit could not lead to a reduction in SMBV's taxable profit. That adjustment alone, taken in isolation, is thus not such as to confer an advantage on SMBV.

540. It follows that the Commission has not managed to show that the 'working capital adjustment' had the effect of lowering the level of SMBV's profits or, consequently, that that adjustment conferred an advantage on that company.

541. In the second place, it should be stated that the Commission's reasoning regarding the 'working capital adjustment', set out in recitals 401 to 405 of the contested decision, is not capable of showing that the 'work-

ing capital adjustment' had the effect of lowering the level of SMBV's profits and that it had, consequently, conferred an advantage on that company.

542. First of all, in so far as the Commission based its reasoning on the finding that the method used to determine the 'working capital adjustment' did not take into account the amount of the working capital of the comparable undertakings, or that of SMBV, it is sufficient to state that the Commission does not explain how that fact could demonstrate a lowering of the level SMBV's profits.

543. Next, although the Commission found that there was no constant relation between the COGS used in the adjustment and working capital needs, it should be noted that the Commission has not explained how that fact could concretely demonstrate a lowering of the level of SMBV's profits.

544. In addition, by its assertions that the 'working capital adjustment' made by the Starbucks group's tax advisor is not suited to the declared purpose of adjusting for differences in working capital use, the Commission is limited to general and approximate considerations, such as its contention that that adjustment is 'ill-fitted' or that 'a company with a high amount of raw material cost might have low working capital needs if it processes its stock efficiently'.

545. Last, regarding the finding, in recitals 402 to 405 of the contested decision, that there is no justification for the 'working capital' adjustment in the set of facts presented in the transfer pricing report or in any of the arguments raised by the Kingdom of the Netherlands in the context of the administrative procedure, it must be held that the mere finding of the absence of such justification similarly does not demonstrate that the 'working capital adjustment' led to a reduction in SMBV's taxable profit.

546. It follows that, contrary to what the Commission concluded in recital 407 of the contested decision, it has not proved that the 'working capital adjustment' led to a reduction in SMBV's taxable profit.

547. That finding cannot be called into question by the Commission's arguments. It must be stated that it is apparent from recital 407 of the contested decision that the Commission's examination of the 'working capital adjustment' is a subsidiary analysis that would be at issue if SMBV's main function was indeed the roasting of coffee. The arguments put forward by the Commission, however, in its submissions, regarding the 'working capital' adjustment, are based on the premiss that SMBV's main activity is resale. Those various arguments must therefore be rejected.

548. In the light of the considerations set out in paragraphs 502 to 547 above, it is necessary to uphold the complaints of the Kingdom of the Netherlands and of Starbucks according to which the Commission has not demonstrated that the APA's validation of the working capital adjustment and that relating to the exclusion of the costs of unaffiliated manufacturing company 1 conferred an advantage on SMBV.

549. Accordingly, it is necessary to uphold the plea alleging that, under its fourth to sixth lines of reasoning, the Commission has not demonstrated that the APA conferred an advantage on SMBV, within the meaning of Article 107(1) TFEU.

*F – Whether the APA derogated from Article 8b of the CIT and from the transfer pricing decree (reasoning in respect of the limited reference system, recitals 409 to 412 of the contested decision).*

550. The Kingdom of the Netherlands claims that it puts forward its pleas regarding the absence of an advantage in the case at hand against both the Commission's main position – the first six lines of reasoning – and its reasoning in respect of the limited reference system, in which the Commission concluded that there was an advantage, in the present case, under Article 8b of the CIT and under the transfer pricing decree. Starbucks, for its part, argues that the Commission should have examined the APA in the light of Article 8b(1) of the CIT and the transfer pricing decree, which it did not do.

551. The Commission maintains that it assessed, in recitals 409 to 412 of the contested decision, the APA against Article 8b(1) of the CIT and that it found, following that assessment, that the APA conferred a selective advantage on SMBV.

552. It must be observed in that regard that, as a further subsidiary point, in Section 9.2.4 of the contested decision, entitled 'Subsidiary line of reasoning: Selective advantage due to a derogation from the [transfer pricing] Decree' (recitals 409 to 412 of the contested decision), the Commission found that the APA conferred an advantage on SMBV under an assessment based on the limited reference system of Article 8b(1) of the CIT and the transfer pricing decree (recital 412 of the contested decision).

553. In recital 410 of the contested decision, the Commission stated that, 'in a subsidiary line of reasoning, ... the SMBV APA also grant[ed] SMBV a selective advantage in the context of the more limited reference system composed of group companies applying transfer pricing to which Article 8b(1) of the CIT and the [transfer pricing] Decree appl[ied]'. In recital 411 of the contested decision, the Commission recalled that Article 8b(1) of the CIT and the transfer pricing decree had established 'the "arm's length principle" under Dutch tax law, according to which transactions between intra-group companies should be remunerated as if they were agreed to by independent companies negotiating under comparable circumstances at arm's length'. In the same recital, the Commission noted that the preamble to the transfer pricing decree explained that the OECD Guidelines applied directly to the Netherlands. In recital 412 of the contested decision, the Commission referred to the reasoning set out in recitals 268 to 274 of the contested decision, which summarise the first six lines of reasoning, to conclude that the APA also gave rise to a selective advantage under the more limited reference system of Article 8b(1) of the CIT and the transfer pricing decree.

554. It is clear from those findings that the Commission concluded that the APA at issue conferred a selective advantage on SMBV, since it resulted in a lowering of the tax liability as compared to the situation where the arm's length principle laid down in Article 8b CIT and in the transfer pricing decree was properly applied.

555. It must be noted that the Commission based that conclusion on its examination of the APA conducted as part of its primary analysis. It thus asserted that it had already demonstrated, in Section 9.2.3.1 of the contested decision, that the APA did not enable a reliable approximation of an arm's length outcome to be reached.

556. It is true that the reasoning set out in recitals 409 to 412 of the contested decision concerns, first and foremost, an argument of the Kingdom of the Netherlands and of Starbucks on the choice of reference system, forming part of the analysis of the selectivity of the measure at issue.

557. However, it must be pointed out that the Kingdom of the Netherlands and the Commission are of the view that recital 412 of the contested decision must be interpreted as meaning that the latter concluded, on the basis of an examination under the relevant national law – Article 8b(1) of the CIT and the transfer pricing decree – that the APA conferred an advantage on SMBV, the analysis conducted by the Commission in the first six lines of reasoning applying *mutatis mutandis*. That finding is moreover supported by the wording of recital 416 of the contested decision.

558. Without it being necessary, in the case at hand, to take a position on the exact nature and scope of the reasoning in respect of the Commission's limited reference system, set out in recitals 409 to 412 of the contested decision, it is sufficient to state that, assuming that, by that reasoning, the Commission has examined the errors it had identified in the context of the first six lines of reasoning under Article 8b of the CIT and the transfer pricing decree, which fall under the arm's length principle under Netherlands law, the Commission has not demonstrated, for the same reasons as those set out in paragraphs 173 to 549 above, which apply *mutatis mutandis* to such an examination, that the APA had conferred an advantage on SMBV, within the meaning of Article 107(1) TFEU.

### *G – Conclusion*

559. First, it follows from paragraphs 404 and 549 above that the six lines of reasoning of the contested decision did not suffice to demonstrate that the APA had conferred an advantage on SMBV, within the meaning of Article 107(1) TFEU.

560. Second, it follows from paragraphs 550 to 558 above that the Commission has not demonstrated that the APA derogated from Article 8b of the CIT and from the transfer pricing decree and that it had thus conferred an advantage on SMBV, within the meaning of Article 107(1) TFEU.

561. It therefore follows from all the foregoing that the Commission has not managed, by any of the lines of reasoning set out in the contested decision, to demonstrate to a requisite legal standard the existence of an advantage within the meaning of Article 107(1) TFEU. Accordingly, it is necessary to annul the contested decision in its entirety, without it being necessary to examine the other pleas raised by the Kingdom of the Netherlands and by Starbucks.

## IV – Costs

562. …

563. …

On those grounds,

THE GENERAL COURT (Seventh Chamber, Extended Composition)

hereby:

1. **Joins Cases T-760/15 and T-636/16 for the purposes of the judgment;**

2. **Annuls Commission Decision (EU) 2017/502 of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks;**

3. **Orders the European Commission to bear its own costs and to pay those incurred by the Kingdom of the Netherlands, Starbucks Corp. and Starbucks Manufacturing Emea BV;**

4. **Orders Ireland to bear its own costs.**

# EU Court of Justice, 17 October 2019*

# Case C-459/18

# *Argenta Spaarbank NV v Belgische Staat*

*Seventh Chamber:* *P. G. Xuereb, President of the Chamber, T. von Danwitz and A. Kumin (Rapporteur), Judges*

*Advocate General:* *G. Pitruzzella*

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1. This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2. The request has been made in proceedings between Argenta Spaarbank NV ('Argenta') and Belgische Staat (the Belgian State) concerning calculation of the amount of the deduction for risk capital in respect of the 2015 tax year.

## Legal context

*Belgian law*

3. The deduction for risk capital was inserted into the income tax regime by the wet tot invoering van een belastingaftrek voor risicokapitaal (Law introducing a tax deduction for risk capital) of 22 June 2005 (*Belgisch Staatsblad*, 30 June 2005, p. 30077).

4. According to its explanatory memorandum, the objective of that law is inter alia to reduce the difference in tax treatment between the financing of companies with loan capital, the return on which is entirely tax deductible, and financing with equity capital (risk capital), the return on which was fully taxed until then, and to increase the solvency ratio of companies, the introduction of the deduction for risk capital falling within the general aim of improving the competitiveness of the Belgian economy.

5. Article 205a of the Wetboek van de inkomstenbelastingen 1992 (Income Tax Code 1992), in the version applicable to the 2015 tax year, reads as follows:

> 'For the purpose of determining taxable income, the basis of assessment shall be reduced by the amount fixed in accordance with Article 205c. This reduction is referred to as the "the deduction for risk capital".'

6. Under Article 205c(1) of the Income Tax Code 1992, the deduction for risk capital is equal to the risk capital, determined in accordance with Article 205b of the Income Tax Code 1992, multiplied by a rate laid down in the following paragraphs of Article 205c.

7. The first subparagraph of Article 205b(1) provides that, in order to determine the deduction for risk capital in respect of a tax period, the risk capital to be taken into account corresponds, subject to the provisions of Article 205b(2) to (5), to the amount of the company's equity capital at the end of the previous tax period, determined in accordance with accounting legislation and the annual accounts as shown on the balance sheet. The second subparagraph of Article 205b(1) of the Income Tax Code 1992 provides that the risk capital thus determined is to be reduced by certain values, while Article 205b(2) to (5) of the Income Tax Code 1992 sets out the situations in which equity capital must be adjusted in order to serve as a basis for calculation for the purposes of determining the amount of the deduction for risk capital.

8. Until the 2014 tax year, Article 205b(2) of the Income Tax Code 1992 provided that, when a company had one or more establishments abroad the income from which was exempt under a double taxation convention, the risk capital, determined in accordance with Article 205b(1) of the Income Tax Code 1992, was to be

* Language of the case: Dutch.

reduced by the positive difference between, on the one hand, the net book value of the assets of the foreign establishments and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to those establishments.

9. Article 205d of the Income Tax Code 1992 provided that, if there were no profits for a tax period in respect of which the deduction for risk capital could be made, the relief not granted for that tax period was to be carried over successively to the profits of the following seven years. Following the adoption of the wet houdende fiscale en financiële bepalingen (Law on various tax and financial provisions) of 13 December 2012 (*Belgisch Staatsblad*, 20 December 2012), this carry-over became impossible as from the 2013 tax year.

10. The Court held, in its judgment of 4 July 2013, *Argenta Spaarbank* (C-350/11, EU:C:2013:447) on a request for a preliminary ruling, that Article 49 TFEU must be interpreted as precluding national legislation under which, for calculation of a deduction granted to a company subject to full tax liability in a Member State, the net value of the assets of a permanent establishment situated in another Member State is not taken into account when the profits of that permanent establishment are not taxable in the first Member State by virtue of a double taxation convention, whereas the assets attributed to a permanent establishment situated in the territory of the first Member State are taken into account for that purpose.

11. By the wet houdende diverse fiscale en financiële bepalingen (Law on various tax and financial provisions) of 21 December 2013 (*Belgisch Staatsblad*, 31 December 2013), paragraphs 2 and 3 of Article 205b of the Income Tax Code 1992 were repealed and a new Article 205d, in force since the 2014 tax year ('Article 205d of the Income Tax Code 1992, as amended') was inserted into the Income Tax Code 1992.

12. Article 205d of the Income Tax Code 1992, as amended, reads as follows:

> 'When, in another Member State of the European Economic Area, the company has one or more permanent establishments, immovable property or rights in respect of such immovable property not belonging to a permanent establishment the income from which is exempt under a double taxation conventions, the deduction determined in accordance with Article 205a shall be reduced by the lesser of the following two amounts:
> 1° the amount determined in accordance with subparagraph 3;
> 2° the positive result of those permanent establishments, that immovable property and those rights in respect of such immovable property as determined in this Code.
> …
> The amount referred to in paragraphs 1 and 2 shall be determined by multiplying the rate referred to in Article 205c by the positive difference, established at the end of the preceding tax period subject to the provisions of Article 205b(2) to (5), between, on the one hand, the net book value of the assets of those foreign permanent establishments, immovable property or rights referred to in the first and second subparagraphs respectively, with the exception of the shares and participating interests referred to in the second subparagraph of Article 205b(1) and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to those permanent establishments, immovable property or rights referred to in the first or second subparagraph respectively.'

*Double taxation convention between the Kingdom of Belgium and the Kingdom of the Netherlands*

13. Article 7(1) to (3) of the Verdrag tussen het Koninkrijk België en het Koninkrijk der Nederlanden tot het vermijden van dubbele belasting en tot het voorkomen van het ontgaan van belasting inzake belastingen naar het inkomen en naar het vermogen (Convention between the Kingdom of Belgium and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and capital) of 5 June 2001 (*Belgisch Staatsblad*, 20 December 2002, p. 57534, 'the Belgium-Netherlands Convention') provides:

> '1. The profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein. If the enterprise carries on business as aforesaid, the profits of the enterprise may be taxed in the other State but only so much of them as is attributable to that permanent establishment.
> 2. Subject to the provisions of paragraph 3, where an enterprise of a Contracting State carries on business in the other Contracting State through a permanent establishment situated therein, there shall in each Contracting State be attributed to that permanent establishment the profits which it might be expected to make if it were a distinct and separate enterprise engaged in the same or similar activities under the same or similar conditions and dealing wholly independently with the enterprise of which it is a permanent establishment.

3. In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere.'

14. Article 23(1) of the Belgium-Netherlands Convention provides:

'So far as concerns Belgium, double taxation shall be avoided as follows:
a. Where a resident of Belgium receives income – other than dividends, interest, or royalties covered by Article 12(5) – or possesses assets which are taxed in the Netherlands in accordance with the provisions of this convention, Belgium shall exempt that income or those assets from tax, but it may, in order to calculate the amount of tax on the remainder of that resident's income or assets, apply the same rate as if the income or assets in question had not been exempted.
…'

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

15. Argenta, a company established in Belgium, is subject to Belgian corporation tax.

16. During the tax period from 1 January to 31 December 2014 ('the 2015 tax year'), Argenta carried out part of its activities through a permanent establishment situated in the Netherlands, the income from which is exempt in Belgium pursuant to Article 7(1) to (3) and Article 23 of the Belgian-Netherlands Convention.

17. In its corporation tax declaration for the 2015 tax year, Argenta, pursuant to Article 205d of the Income Tax Code 1992, as amended, reduced the deduction for risk capital by the part of the deduction that is calculated on the equity capital of its permanent establishment.

18. The corporation tax assessment for the 2015 tax year was declared enforceable on 12 November 2015 and the assessment notice was sent on 16 November 2015.

19. It is apparent from the request for a preliminary ruling that, pursuant to Article 205d of the Income Tax Code 1992, as amended, the corporation tax assessment was calculated as follows. First of all, in accordance with the third subparagraph of Article 205d of the Income Tax Code 1992, as amended, the amount of the deduction for risk capital relating to Argenta's Netherlands permanent establishment was calculated and corresponds to an amount of EUR 1 970 290.89. Subsequently, in accordance with the first subparagraph of Article 205d of the Income Tax Code 1992, as amended, the amount of the deduction for risk capital relating to the Netherlands permanent establishment, namely EUR 1 970 290.89, was compared with the result of that permanent establishment, which was positive and amounted to EUR 149 185 743.91. Lastly, the deduction for risk capital relating to the Netherlands permanent establishment, namely the amount of EUR 1 970 290.89, was deducted in full from the total deduction for risk capital because the positive result of the Netherlands permanent establishment was higher than the deduction for risk capital relating to that establishment.

20. On 12 May 2016, Argenta lodged an objection against this assessment alleging that Article 205d of the Income Tax Code 1992, as amended, is inconsistent with Article 49 TFEU. That objection was rejected by decision of 19 December 2016.

21. On 17 March 2017, Argenta lodged an application with the referring court.

22. The referring court notes that the parties disagree on whether, in particular, Article 205d of the Income Tax Code 1992, as amended, is consistent with Article 49 TFEU and the case-law stemming from the judgment of 4 July 2013, *Argenta Spaarbank* (C-350/11, EU:C:2013:447).

23. The referring court states that the deduction for risk capital as calculated according to the detailed rules laid down in Articles 205b and 205c of the Income Tax Code 1992 is reduced by the part of the deduction for risk capital that is calculated on the equity capital of permanent establishments situated in another State of the European Economic Area (EEA) and exempted by a double taxation convention. That reduction is limited to the profits generated by that permanent establishment. The equity capital is defined as the net book value of the assets, reduced by the total liabilities that do not form part of the company's equity capital and that are attributable to those permanent establishments, as provided for in the third subparagraph of Article 205d of the Income Tax Code 1992, as amended.

24. The referring court states that, unlike for the 2008 tax year, which was at issue in the case that gave rise to the judgment of 4 July 2013, *Argenta Spaarbank* (C-350/11, EU:C:2013:447), there is no longer the possibility of

a carry-over to subsequent years if there are no or insufficient profits to make the deduction for risk capital for a particular tax period.

25. The referring court notes that the reduction of the deduction for risk capital provided for in Article 205d of the Income Tax Code 1992, as amended, is not applicable to permanent establishments situated in Belgium, and that Belgian legislation also makes no provision for a similar reduction for Belgian establishments.

26. It follows, according to the referring court, that the scope of the deduction for risk capital is more limited when a company has a permanent establishment in another EEA Member State, particularly where the profits of the establishment exceed the deduction for risk capital attributed to it, than when that permanent establishment is situated in Belgium. The question then arises whether that national legislation is consistent with Article 49 TFEU.

27. According to the referring court, in a situation such as that at issue in the main proceedings, where the profits of the permanent establishment in another Member State exceed the deduction for risk capital calculated on the equity capital attributed to that establishment, the new scheme has a virtually identical effect to the scheme applicable to the 2008 tax year, which was found to be contrary to Article 49 TFEU. However, the assets of the permanent establishment situated in another Member State are, initially in any event, taken into account in the calculation of the deduction, and the limitation of the right to deduction for risk capital in relation to the equity capital of such a permanent establishment, the income from which is exempt under a double taxation convention, remains limited to the amount of the profits of that establishment.

28. In those circumstances, the Rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp, Belgium) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> 'Does Article 49 [TFEU] preclude national tax legislation pursuant to which, for the purpose of calculating the taxable profits of a company subject to full tax liability in Belgium which has a permanent establishment in another Member State, the profits of which are wholly exempt in Belgium by virtue of the application of a double taxation convention between Belgium and the other Member State:
>
> – the deduction for risk capital is reduced by an amount in respect of deduction for risk capital calculated with reference to the positive difference between, on the one hand, the net book value of the assets of the permanent establishment, and, on the other hand, the total liabilities that do not form part of the company's equity capital and that are attributable to the permanent establishment and
>
> – the aforementioned reduction is not applied in so far as the amount of the reduction is lower than the profits of that permanent establishment,
>
> whereas no reduction of the deduction for risk capital is applied if that positive difference can be attributed to a permanent establishment situated in Belgium?'

**Consideration of the question referred**

29. As a preliminary point, it should be noted that the Belgian Government requests the Court to reformulate the question referred for a preliminary ruling, in so far as, in essence, it claims that that question does not correspond to the content of Article 205d of the Income Tax Code 1992, as amended.

30. In that respect, it should be recalled that, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference. It is settled case-law that the Court does not have jurisdiction to interpret the internal law of a Member State (judgment of 17 March 2011, *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia*, C-128/10 and C-129/10, EU:C:2011:163, paragraph 40 and the case-law cited).

31. In the grounds for its request for a preliminary ruling, the referring court interpreted Article 205d of the Income Tax Code 1992, as amended, and found that, under that provision, the deduction for risk capital as calculated according to the detailed rules laid down in Articles 205b and 205c of the Income Tax Code 1992 is reduced by the part of the deduction for risk capital that is calculated on the equity capital of a permanent establishment situated in another Member State the profits of which are exempt under a double taxation convention and that that reduction is limited to the profits generated in that permanent establishment. It also found that the reduction of the deduction for risk capital provided for in Article 205d of the Income Tax Code 1992, as amended, does not apply where the permanent establishment is situated in Belgium.

32. It is therefore on the basis of the premisses resulting from the order for reference that it is necessary to understand and answer the question posed by the referring court.

33. Consequently, it must be held that, by its question referred for a preliminary ruling, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.

34. Freedom of establishment, which Article 49 TFEU grants to EU nationals, includes, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency (judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 15).

35. Even though, according to their wording, the provisions of EU law on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (judgments of 4 July 2013, *Argenta Spaarbank*, C-350/11, EU:C:2013:447, paragraph 20, and of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 16 and the case-law cited).

36. Those considerations also apply where a company established in one Member State carries on business in another Member State through a permanent establishment (judgments of 15 May 2008, *Lidl Belgium*, C-414/06, EU:C:2008:278, paragraph 20; of 4 July 2013, , C-350/11, EU:C:2013:447, paragraph 21; and of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 17).

37. The deduction for risk capital granted to a company subject to corporation tax in Belgium constitutes a tax advantage which has the effect of reducing the effective rate of corporation tax that such a company must pay in that Member State.

38. The Court has already held, in that context, that the taking into account of the assets of a permanent establishment in order to calculate the deduction for risk capital of a company subject to corporation tax in Belgium also constitutes a tax advantage, since taking them into account helps to reduce the effective rate of the corporation tax that such a company must pay in that Member State (judgment of 4 July 2013, *Argenta Spaarbank*, C-350/11, EU:C:2013:447, paragraph 24).

39. The national legislation at issue in the main proceedings, in particular Article 205d of the Income Tax Code 1992, as amended, now provides that the net value of the assets of a permanent establishment situated in another Member State, the income from which is exempt in the Member State of the resident company under a double taxation convention, is to be taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company.

40. A difference in treatment cannot therefore be found in that respect between a company with a permanent establishment in Belgium and a company with a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, in so far as both the assets attributed to the permanent establishment situated in Belgium and those attributed to the permanent establishment situated in another Member State are taken into account in the calculation of the overall deduction for risk capital granted to the resident company.

41. Secondly, however, the amount of the overall deduction for risk capital is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, or the positive result generated by that permanent establishment, whereas, in relation to permanent establishments situated in Belgium, no provision is made for such a reduction of the deduction for risk capital.

42. Consequently, the legislation at issue in the main proceedings establishes, in that respect, a difference in treatment between a company with a permanent establishment in Belgium and a company with a permanent establishment in another Member State the income from which is exempt in Belgium under a double taxation convention.

43. It must therefore be determined whether such a difference in treatment constitutes disadvantageous treatment liable to deter a Belgian company from carrying on its business through a permanent establishment situated in a Member State other than the Kingdom of Belgium and therefore constitutes a restriction prohibited in principle by the TFEU provisions relating to freedom of establishment.

44. As is apparent from the documents before the Court, the application of Article 205d of the Income Tax Code 1992, as amended, may give rise to three different situations.

45. First, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has not generated any positive result, the overall deduction for risk capital granted to the resident company, which is calculated by taking into account the net value of the assets of that permanent establishment, is not reduced. The resident company's basis of assessment is therefore reduced by the full amount of the deduction for risk capital, including by the part of the deduction for risk capital which relates to that permanent establishment.

46. Consequently, in that first situation, the company with a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, is not, subject to verifications to be carried out by the referring court, treated less favourably than a resident company with a resident permanent establishment.

47. Second, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has generated a positive result which is lower than the part of the deduction for risk capital which relates to that permanent establishment, the overall deduction for risk capital calculated by taking into account the net value of the assets of that permanent establishment is reduced. That positive result is deducted from the overall deduction.

48. The consequence of that is that the part of the deduction for risk capital, which relates to that permanent establishment and which exceeds the result of the latter, is however taken into account for the purposes of the overall deduction.

49. The resident company's basis of assessment is therefore reduced by the amount of the deduction for risk capital which relates to that permanent establishment only to the extent that that amount exceeds the positive result of that permanent establishment.

50. Third, in a situation where the permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, has generated a positive result which exceeds the part of the deduction for risk capital that relates to that permanent establishment, the overall deduction for risk capital calculated by taking into account the net value of the assets of that permanent establishment is also reduced, by deducting from that value the deduction for risk capital which relates to that establishment. In that situation, the amount of the deduction for risk capital which relates to that permanent establishment does not result in any reduction of the resident company's basis of assessment.

51. It follows that, in the second and third situations described above, the overall deduction for risk capital is reduced when the resident company has a permanent establishment situated in another Member State, the income from which is exempt in Belgium under a double taxation convention, unlike situations where a permanent establishment is situated in Belgium.

52. It is also necessary that the application of such a mechanism be disadvantageous for a resident company with a permanent establishment situated in another Member State in such a way as to render, following the reduction of the overall deduction for risk capital, that company's basis of assessment higher than that of a resident company whose permanent establishment is situated in Belgium.

53. In that regard, while it is true that, in the second and third situations described above, the overall deduction for risk capital is reduced and is not therefore deducted in full from the resident company's basis of assessment, unlike situations where the permanent establishment is situated in Belgium, it should be noted that, according to the information in the documents before the Court, the basis of assessment of the resident company with a permanent establishment in Belgium is, all other things being equal, also higher than that of a company with a permanent establishment in another Member State, the income from which is exempt in Belgium.

54. According to that information, the basis of assessment of the company whose permanent establishments are situated in Belgium includes the results of those permanent establishments. By contrast, in a situation where, in a double taxation convention, the Kingdom of Belgium has exempted the income of a permanent

establishment situated in another Member State, the resident company's basis of assessment does not include such income.

55. Thus, as regards the second situation described above, the basis of assessment of a resident company with a permanent establishment in Belgium appears to be reduced, beyond the component of the assessment relating to the positive result generated by that permanent establishment, only to the extent that the amount of the deduction for risk capital which relates to that permanent establishment exceeds that result. In the light of the considerations set out in paragraph 49 of this judgement, it is thus apparent that, in that situation, such a company's basis of assessment is not less than that of a resident company with a permanent establishment in another Member State, the income from which is exempt in Belgium.

56. Moreover, a resident company with a permanent establishment in another Member State does not appear to be at a disadvantage in the third situation described above, in which the positive result of the permanent establishment exceeds the amount of the deduction for risk capital which relates to that establishment. Indeed, in the case of a resident company with a permanent establishment in Belgium, the effects of that deduction appear to be limited to the component of its basis of assessment relating to the positive result generated by that permanent establishment, without however reducing the basis of assessment of the latter company, as it results from the income acquired by it. Thus, in that latter situation, the fact that that company may make a deduction for risk capital which relates to its establishment, whereas a resident company with a permanent establishment in another Member State, the income from which is exempt in Belgium under a double taxation convention, cannot do so, does not appear to have the effect of making that latter company's basis of assessment higher than that of a resident company with a permanent establishment in Belgium.

57. Consequently, it must be found, subject to verifications to be carried out by the national court, that, because of the reduction of the overall deduction for risk capital, a resident company whose basis of assessment does not include the profits made by a permanent establishment situated in another Member State is not treated less advantageously, as regards taxable income in Belgium, than a resident company whose basis of assessment includes the profits of a resident permanent establishment and whose deduction for risk capital is not reduced.

58. It follows that the difference in treatment introduced by the national legislation at issue in the main proceedings does not constitute disadvantageous treatment liable to deter a Belgian company from carrying on its business through a permanent establishment situated in a Member State other than the Kingdom of Belgium and does not therefore constitute a restriction prohibited in principle by the TFEU provisions relating to freedom of establishment.

59. In the light of all the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.

**Costs**

60. …

On those grounds,

the Court (Seventh Chamber)

hereby rules:

**Article 49 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, under which, for the calculation of a deduction granted to a company subject to full tax liability in a Member State and having a permanent establishment in another Member State the income from which is exempt in the first Member State under a double taxation convention, the net value of the assets of such a permanent establishment is taken into account, initially, in the calculation of the deduction for risk capital granted to the resident company, but, subsequently, the amount of the deduction is reduced by the lesser of the following amounts, namely the part of the deduction for risk capital which relates to the**

**permanent establishment or the positive result generated by that permanent establishment, whereas such a reduction is not applied in the case of a permanent establishment situated in the first Member State.**

*In this Case, no Opinion of the Advocate General was issued.*

# EU Court of Justice, 24 October 2019*

## Case C-35/19

## *BU v État belge*

*Eighth Chamber:* *L. S. Rossi, President of the Chamber, J. Malenovský and F. Biltgen (Rapporteur), Judges*
*Advocate General:* *E. Sharpston*

**Table of contents**



1. This request for a preliminary ruling concerns the interpretation of Articles 45 and 56 TFEU.

2. The request has been made in proceedings between BU and État belge (the Belgian State) concerning the taxation of allowances received by BU in the Netherlands.

### Legal context

3. Under Article 38(1)(4) of the code des impôts sur le revenue (Income Tax Code) 1992, in the version applicable to the facts in the main proceedings:

> '1. The following are exempt:
> …
> 4. Allowances, paid by the State Treasury, granted to persons with disabilities, in accordance with the relevant legislation'.

### The facts in the main proceedings and the question referred for a preliminary ruling

4. The applicant in the main proceedings, born in the United States, has lived in Belgium since 1973 and acquired Belgian nationality in 2009.

5. In 1996 she suffered an accident in Belgium on her way to work in Limburg in the Netherlands. That accident led to incapacity for work following which she was dismissed from her employment in 2000.

6. As the applicant in the main proceedings worked in the Netherlands at the time she had her accident, she is covered by Netherlands social security and, since the accident, has received an allowance under the Wet arbeidsongeschiktheid (WAO) (Law on insurance against incapacity for work) ('the WAO allowance') and an allowance on the basis of the Algemeen Burgerlijk Pensioenfond (ABP) (pension fund for civil servants including old-age, survivors' and invalidity pensions) ('the ABP allowance').

7. By letter of 23 August 2016, the Belgian tax authorities sent the applicant in the main proceedings a revised assessment of her personal income tax return for the tax year 2014, stating that those allowances are received as pensions and are taxable in Belgium as such.

8. By letter of 16 December 2016, the applicant in the main proceedings lodged a complaint against that decision claiming that those allowances are exempt from taxation in Belgium since the WAO allowance is, in her view, not a pension but a disability allowance, just as the ABP allowance is a pension linked to disability.

9. Although, subsequently, the applicant in the main proceedings accepted the taxation of the ABP allowance in Belgium, she contested its classification by the Belgian tax authorities and has maintained her position that the WAO allowance is not taxable in Belgium.

* Language of the case: French.

10. By decision of 14 June 2017, the complaint lodged by the applicant in the main proceedings was rejected on the ground that she had not provided evidence of her disability or evidence that the WAO allowance received in the Netherlands is a disability allowance. Accordingly, the Belgian tax authorities retained the classification of those allowances as 'allowances for incapacity to work', which is included among the pensions that are taxable in Belgium.

11. The applicant in the main proceedings challenged the decision of the Belgian tax authorities before the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium).

12. The referring court indicates that the dispute in the main proceedings concerns whether the WAO allowance received by the applicant in the Netherlands is taxable in Belgium.

13. According to that court, it is clear from the documents submitted by the applicant in the main proceedings that that allowance is intended to compensate for loss of income linked to disability, in as much as it is calculated by reference to the salary the applicant in the main proceedings received before her accident compared with the salary she is able to receive taking into account her current abilities.

14. The referring court considers that the WAO allowance is intended to encourage persons with a disability to work as far as their remaining capacity allows them by providing them with an allowance intended to compensate for the loss of income due to the reduction of their capacity to work. As a result, the WAO allowance paid to the applicant in the main proceedings amounts to a disability allowance and not to a pension.

15. That court states that the Belgian legislation at issue establishes a tax exemption for disability allowances that applies only when those allowances are paid by the State Treasury, with the result that, although the WAO allowance received by the applicant in the main proceedings does amount to a disability allowance, the applicant cannot benefit from that exemption.

16. The referring court states that, even if, as the Belgian Government claims, the applicant in the main proceedings had made an application in Belgium for a disability allowance so that she could have benefited from the tax exemption – something she did not do – the applicant in the main proceedings had in fact no interest in doing this as she already received such an allowance in the Netherlands. In addition, it is not certain that she could have obtained such an allowance in Belgium.

17. Therefore, the referring court takes the view that the Belgian legislation at issue may hinder the free movement of workers in so far as it treats disability allowances received by Belgian residents differently according to whether they are paid by the Belgian State or by another Member State.

18. In those circumstances, the Tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

> 'Does Article 38[(1)(4) of the Income Tax Code 1992, in the version applicable to the facts in the main proceedings] infringe Article 45 TFEU et seq. (principle of free movement of workers) and Article 56 TFEU et seq. (principle of freedom to provide services) […] in so far as it exempts disability allowances from tax only if those allowances are paid by the State Treasury, that is to say, by the Belgian State, in accordance with Belgian legislation, thereby giving rise to discrimination between taxpayers resident in Belgium who receive disability allowances paid by the Belgian State, which are exempt from tax, and taxpayers resident in Belgium who receive allowances intended to compensate for a disability paid by another Member State of the European Union, which are not exempt from tax?'

**Consideration of the question referred**

19. As a preliminary point, it is important to note that, in its question, the referring court refers both to the principle of the free movement of workers enshrined in Article 45 TFEU and the principle of the freedom to provide services enshrined in Article 56 TFEU.

20. Where a national measure affects both the free movement of workers and the freedom to provide services the Court will, in principle, examine it in relation to only one of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, judgment of 14 October 2004, Omega, C-36/02, EU:C:2004:614, paragraph 26 and the case-law cited).

21. In the present case, it should be noted that neither the order for reference nor the file submitted to the Court contains evidence that the freedom to provide services is relevant in the case in the main proceedings.

22. By contrast, it is clear from the order for reference that the applicant in the main proceedings is covered by the scope of Article 45 TFEU since she exercised her right to freedom of movement for workers and for many years carried out a professional activity in a Member State other than that of her residence.

23. In accordance with settled case-law, any national of the European Union who, irrespective of his or her place of residence and nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his or her residence comes within the scope of Article 45 TFEU (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 21 and the case-law cited).

24. It follows that, in the circumstances of the case in the main proceedings, and in the light of the information available to the Court, it is necessary to examine the question referred for a preliminary ruling with regard to the free movement of workers.

25. Against that background, it must be understood that, by its question, the referring court is asking, in essence, whether Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State.

*Admissibility*

26. The Belgian Government submits that the factual assessment made by the referring court in the request for a preliminary ruling, according to which the WAO allowance received by the applicant in the main proceedings constitutes a disability allowance of the same nature as Belgian disability allowances which benefit from the tax exemption under Belgian law, is incorrect.

27. By that argument the Belgian Government seeks to challenge the premiss on which this request for a preliminary ruling is based and, accordingly, its admissibility.

28. In that regard, it is sufficient to state that, in accordance with the Court's settled case-law, in the preliminary ruling procedure under Article 267 TFEU, based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the dispute in the main proceedings. In that context, the Court is empowered to rule solely on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 20 December 2017, *Schweppes*, C-291/16, EU:C:2017:990, paragraph 21 and the case-law cited).

29. Accordingly, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. That presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject matter of those proceedings depends (see, to that effect, judgment of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraphs 37 and 38).

30. As it is not for the Court to call into question the findings of fact on which the present request for a preliminary ruling is based – in the present case the nature of the allowance from the Netherlands granted to the applicant in the main proceedings – it is necessary, in the context of giving an answer to the question referred, to consider that the WAO allowance received by the applicant in the main proceedings is a disability allowance of the same nature as Belgian disability allowances which benefit from tax exemption under Belgian law, a matter which, in the present case, is for the referring court to verify.

*Substance*

The existence of a restriction of Article 45 TFEU

31. It is important to note, from the outset, that it has been consistently held that, whilst direct taxation falls within their competence, the Member States must nonetheless exercise that competence consistently with EU law (see, to that effect, judgment of 23 January 2014, *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 27 and the case-law cited). Thus, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures

that are contrary to the freedoms of movement guaranteed by the TFEU. As far as concerns the exercise of the power of taxation thus allocated, the Member States must comply with EU rules (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 25 and the case-law cited).

32. In the present case the Belgian legislation at issue in the main proceedings explicitly provides that only disability allowances paid by the State Treasury are exempted from tax. That legislation therefore excludes from that exemption disability allowances paid by a Member State other than the Belgium State.

33. The Belgian legislation at issue in the main proceedings thus establishes a difference in treatment between Belgian residents on the basis of the origin of their income, which is liable to hinder the exercise, by the latter, of their right to freedom of movement as workers, enshrined in Article 45 TFEU.

34. The Court has already ruled that Article 45 TFEU precludes legislation which establishes a difference in tax treatment between EU-citizen couples residing in Belgium according to the source of their incomes –a difference which is liable to discourage those citizens from exercising the freedoms guaranteed by the Treaty and, in particular, the free movement of workers guaranteed by Article 45 TFEU (judgments of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraphs 51 and 52, and of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 43 and the operative part).

35. Therefore, the national legislation at issue in the main proceedings constitutes a restriction on the free movement of workers which is prohibited, in principle, by Article 45 TFEU.

The existence of a justification

36. According to settled case-law, a measure which is liable to hinder the free movement of workers enshrined in Article 45 TFEU can be permissible only if it pursues a legitimate objective which is compatible with the Treaty and justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate for ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain that objective (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 44 and the case-law cited).

37. In the present case, the referring court has not provided any justification, and the Belgian Government, which in the proceedings before the Court merely challenges the nature of the allowances from the Netherlands granted to the applicant in the main proceedings, has not put forward other justifications.

38. Accordingly, the Court can only conclude that there is no justification, a matter which will be for the referring court to verify.

39. In the light of all the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.

**Costs**

40. …

On those grounds,

the Court (Eighth Chamber)

hereby rules:

**Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.**

# EU Court of Justice, 13 November 2019*

# Case C-641/17

# *College Pension Plan of British Columbia v Finanzamt München Abteilung III*

*Second Chamber:* *A. Arabadzhiyev (Rapporteur), President of the Second Chamber, K. Lenaerts, President of the Court, acting as Judge of the Second Chamber, and T. von Danwitz, Judge*

*Advocate General:* *P. Pikamaë*

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1. This request for a preliminary ruling concerns the interpretation of Articles 63 to 65 TFEU.

2. The request has been made in proceedings between College Pension Plan of British Columbia, a group of assets brought together in the legal form of a trust under Canadian law ('CPP'), and the Finanzamt München Abteilung III (Munich Tax Office, Section III, Germany) concerning the taxation of dividends received by CPP in respect of the years 2007 to 2010.

## Legal context

3. In the years 2007 to 2010, pension funds and their activities were governed by the Versicherungsaufsichtsgesetz (Law on the supervision of insurance bodies), in the version published on 17 December 1992 (BGBl. 1993 I, p. 2).

4. In accordance with Paragraph 112 of that law, a pension fund is a provident institution with legal capacity, which provides, by capitalisation, occupational pension benefits for one or more employers in favour of their employees. A pension fund cannot, in relation to any of those benefits, guarantee by insurance the amount of the benefits or of the future contributions to be paid in respect of those benefits. It confers on employees a specific right to benefits in relation to it and is required to provide a pension benefit in the form of a lifetime annuity.

### *The tax system applicable to pension funds with registered offices in Germany*

5. Under Paragraph 1(1) No 1 of the Körperschaftsteuergesetz (Law on corporation tax), in the version applicable to the facts at issue ('the KStG'), a German pension fund is fully liable to corporation tax as a capital company with its registered office in Germany. Under Paragraph 7(1) of the KStG, read in conjunction with Paragraph 23(1) of the KStG, corporation tax amounts to 15% of taxable income.

6. The first sentence of Paragraph 8(1) of the KStG provides that taxable income is determined in accordance with the provisions of the Einkommensteuergesetz (Law on Income Tax), in the version applicable to the facts at issue ('the EStG'). The combined effect of Paragraph 8(2) of the KStG and Paragraph 2(1) No 2 of the EStG is that all the income of a fully taxable pension fund is regarded as arising from industrial or commercial activity.

* Language of the case: German.

Under Paragraph 2(2) No 1 of the EStG, the income arising from industrial or commercial activity is the profit realised during the tax year in question.

7. It is apparent from the first sentence of Paragraph 4(1) of the EStG that the profit is the difference between the assets of the undertaking at the end of the financial year and the assets of the undertaking at the end of the previous financial year, plus the value of withdrawals, less the value of contributions. The referring court states that that comparison between the undertaking's assets is made on the basis of a tax balance sheet which is derived from the commercial balance sheet.

8. That court also states that the income of a pension fund consists of the contributions paid by the insured persons and the profits made from the investment of the share capital.

9. The contributions received, which are first reflected in the 'assets' column of the accounting balance sheet by an increase in assets, are then converted into investments and form part of the pension fund's share capital. The counterpart of the share capital is constituted by the mathematical provisions on the other side in the 'liabilities' column. A mathematical provision is a specific type of provision against uncertain debts, and it is made in anticipation of the occupational pension benefits which the pension fund will be obliged to provide in the future.

10. If the share capital makes it possible to generate profits by means of investments, for example in the form of dividends, the returns on accounting investments are credited directly to the various pension fund agreements in the year in which they are realised, to the extent that those profits correspond to the technical interest rate used to calculate the contributions.

11. When the pension fund, by investing the cover pool, makes profits that are higher than the technical interest rate (called 'surpluses'), returns on non-accounting investments are involved. Those returns must be credited to each pension fund agreement at a rate of least 90% and they increase occupational pension benefits as part of the so-called surplus sharing. Only the remaining part of the surpluses increases the pension fund's profit and is not included in the benefits paid to employees by the pension fund.

12. As a result, returns on accounting investments increase not only the pension fund's assets, but also the value of the mathematical provisions in the 'liabilities' column. The valuation of the 'liabilities' column accords, in that respect, with that of the 'assets' column, so that the profits derived from the receipt of dividends are completely neutralised.

13. Returns on non-accounting investments do not affect the profit to the extent that they are credited to the various pension fund agreements and result in a corresponding increase in a liability.

14. In terms of the tax balance sheet, the hoarding of profits derived from investments thus results in an increase in the assets recorded in the tax balance sheet. Moreover, the increase in the mathematical provisions and other liabilities results in a corresponding increase in the pension fund's liabilities, so that the undertaking's assets, within the meaning of the first sentence of Paragraph 4(1) and Paragraph 5(1) of the EStG, which are relevant for tax purposes, do not increase. It is only to the extent that returns on non-accounting investments do not have to be credited to the various pension fund agreements that they result in a pension fund profit that must also be taken into account for tax purposes.

15. Dividends received by resident pension funds are subject to tax on income from capital, which is levied in accordance with the combined provisions of Paragraph 43(1), first sentence, No 1, and Paragraph 43(4) of the EStG, and of Paragraph 20(1) No 1 and Paragraph 20(8) of the EStG, by a withholding tax of 25% of the gross dividends, in accordance with Article 43a(1), first sentence, No 1 of the EStG.

16. By virtue of the combined provisions of Paragraph 31 of the KStG and Paragraph 36(2) No 2 of the EStG, the tax on income from capital which has been deducted from the dividends paid to pension funds can be set off in its entirety against the corporation tax payable in a tax assessment procedure.

17. Where tax on income from capital withheld exceeds the corporation tax determined, the surplus is reimbursed to the pension fund, as provided for in the second sentence of Paragraph 36(4) of the EStG.

*The tax system applicable to non-resident pension funds*

18. Under Paragraph 2(1) of the KStG, a foreign pension fund, which does not have either its management or its registered office in Germany, is partially liable to corporation tax, so far as concerns its income arising within German territory. In accordance with the combined provisions of Paragraph 8(1) of the KStG, Paragraph

49(1) No 5a and Paragraph 20(1) No 1 of the EStG, dividends received by a foreign pension fund constitute income from capital which is subject to a limited tax obligation.

19. In the case of a partially taxable pension fund, the tax is recovered as a withholding tax and the entity paying the dividends is obliged to withhold the tax on income from capital, a withholding tax which, under Paragraph 43(1) No 1 and Paragraph 43a(1) No 1 of the EStG, amounts in principle to 25% of the gross dividends.

20. Under Paragraph 44a(9) of the EStG, two fifths of the tax on income from capital withheld and paid is reimbursed to companies which are partially taxable within the meaning of Paragraph 2(1) of the KStG, so that the effective tax burden in respect of the tax on income from capital is 15%. The taxation of dividends is also limited to 15% under many tax conventions. The reimbursement of the difference between the tax on income from capital withheld and the 15% tax rate is carried out retrospectively, on request, by the Bundeszentralamt für Steuern (Federal Central Tax Office, Germany), in accordance with the provisions of Paragraph 50d of the EStG.

21. For non-resident pension funds, the tax on income from capital of 15% is definitive pursuant to Paragraph 32(1) No 2 of the KStG, which reads as follows:

> 'Corporate income tax paid by withholding tax shall be discharged:
> …
> 2. where the beneficiary of the income is partially liable for tax and the income does not arise from an industrial, commercial, agricultural [or] forestry activity carried out on the national territory.'

22. The referring court also states that, pursuant to Article 32(1) No 2, a tax assessment procedure, entailing the possibility for non-resident pension funds to set the tax on income from capital off against the tax due, is precluded, and those funds are therefore likewise unable to deduct any professional expenditure from their taxable income.

*The Tax Agreement between Germany and Canada*

23. The Agreement between Canada and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income and certain other Taxes, the prevention of Fiscal Evasion and the Assistance in Tax Matters was concluded in Berlin on 19 April 2001 (BGBl. 2002 II, p. 670, 'the Tax Agreement between Germany and Canada'). Article 10(1) of that agreement provides that dividends may be taxed in the State of residence of the recipient thereof. However, Article 10(2)(b) of that agreement also allows the State in which the dividends originate to tax 15% of their gross amount.

24. Under Article 23(1)(a) of that agreement, Canada, as the State of residence, prevents the double taxation of dividends by means of deduction from Canadian tax.

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

25. The purpose of CPP is to provide pension benefits to former officials of the Province of British Columbia (Canada). To that end, it constitutes accounting provisions in its balance sheets, corresponding to its pension guarantee commitments (technical provisions). CPP is exempt from any taxation of profits in Canada.

26. During the period from 2007 to 2010, CPP indirectly held, by participating in pool investment portfolios, shares in German stock corporations; those shares did not exceed 1% of those companies' capital. The dividends received in respect of those shareholdings were subject to German tax on income from capital at a rate of 15%, as provided for in Article 10(2)(b) of the Tax Agreement between Germany and Canada.

27. On 23 December 2011, the defendant in the main proceedings applied to the Finanzamt München to exempt it from tax on income from capital and for reimbursement of the amount of EUR 156 280.10, plus interest, of the tax it had paid in this respect. Its application was rejected, as was the objection that it subsequently lodged. Consequently, CPP brought an action before the referring court.

28. The referring court states that, in support of its action, CPP claims that, as a non-resident pension fund, it has been subject to less favourable treatment than that to which resident pension funds are subject. CPP has argued that resident pension funds can receive dividends free of tax, as they are able, in the context of the tax assessment procedure, to set the tax on income from capital that has been withheld off against corporation tax or to obtain a refund of almost all of the former tax. Moreover, with regard to resident pension funds, CPP claims that allocations to provisions for pension commitments are taken into account as professional expenses, which makes it possible to reduce the amount of corporation tax when the latter is determined

under a tax assessment procedure. According to CPP, non-resident pension funds cannot effect such set-offs or obtain such refunds, since, for such pension funds, the corporation tax paid by way of withholding tax has a discharging effect, in accordance with Paragraph 32(1) No 2 of the KStG, and constitutes a definitive tax burden in relation to them.

29. For its part, the defendant in the main proceedings maintains, first of all, that, while German pension funds could set the tax on income from capital that has been paid off against the corporation tax due, this does not amount to a complete exemption, since the dividends received are subject to corporation tax, at a rate of 15% of taxable income. Next, that defendant maintains that it is not possible to take the view that a non-resident pension fund is treated less favourably than resident pension funds on the ground that the national legislation deprives non-resident funds of the possibility of deducting professional expenses, since, in the absence of any direct connection between such provisions for pension commitments and the activity generating the income in question, those funds are not in a situation comparable to resident pension funds. Moreover, any restriction is, in any event, justified on grounds of the effectiveness of fiscal supervision. Lastly, the defendant contends that a restriction is permissible under Article 64(1) TFEU, since the discharging effect provided for in Paragraph 32(1) No 2 of the KStG had already been established by Paragraph 50(2) of the KStG of 1977 and the income distributed involved a provision of financial services by the pension fund to its investors.

30. The referring court states that it is common ground between the parties to the main proceedings that, under German law, CPP can be treated like a pension fund. It wonders whether the national legislation establishes a difference in treatment between those funds, contrary to Articles 63 and 65 TFEU, since under national legislation partially taxable non-resident pension funds are not able to set the tax on income from capital off against the corporation tax payable by those funds or to obtain reimbursement of the tax on income from capital, whereas resident pension funds are able to do so and whereas, for the latter funds, the receipt of dividends does not lead to an increase in corporation tax due or only a comparatively small one, since they can deduct from the taxable profit allocations to provisions for pension commitments.

31. It is true that, as regards the possibility of deducting from the taxable profit allocations to provisions for pension commitments, there is no rule under German law similar to that at issue in the case which gave rise to the judgment of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688), a rule expressly providing that allocations to the mathematical provisions and similar technical provisions may be deducted from taxable income as deductible expenses. However, according to the German legislation, only the increase in the net assets of a company liable to tax is taxed over the course of a tax year. When dividends are paid to a pension fund, the assets of the pension fund increase only if, and to the extent that, the returns on non-accounting investments are not credited to the various pension fund agreements. Since the dividends distributed increase the mathematical provisions and/or other items on the liabilities side, the profits of the pension fund remain unchanged, with the result that there is no taxable increase in assets. Consequently, the provisions for pension commitments, which reduce the taxable profit, are the direct consequence of the receipt of the dividends, so that, according to the national court, resident and non-resident pension funds are in a comparable situation with regard to the taking into account of allocations to the mathematical and similar technical provisions as professional expenses.

32. The referring court wonders however whether Article 64(1) TFEU may be invoked in the present case.

33. In the first place, it states that the provisions of Paragraph 32(1) No 2 of the KStG providing for the discharge of the withholding tax, which has given rise to the difference in treatment between resident and non-resident pension funds, were identical to those of Paragraph 50(1) No 2 of the KStG of 1991 and therefore already existed on 31 December 1993. The fact that, on 31 December 1993, there was a right for fully taxable persons to set the tax on income from capital off against corporation tax and that the system was subsequently amended several times in no way changed the rules governing the tax treatment of dividends paid to partially taxable companies.

34. In the second place, according to the referring court, it is irrelevant that the current rate of the tax on income from capital of 25%, a rate which already existed on 31 December 1993 under the combined provisions of Paragraph 43(1) No 1 and Paragraph 43a(1) No 1 of the EStG, was reduced to 20% on 1 January 2001, and was then increased to 25% on 1 January 2009, since the principle of the rule governing the withholding of the tax on income from capital has not been amended and since, for partially taxable companies, the effective burden of the tax on income from capital amounts only to 15%.

35. In the third place, the referring court wonders whether a causal link, within the meaning of the judgment of 21 May 2015 in Case C-560/13 Wagner-Raith (EU:C:2015:347), exists between dividends from a shareholding in a German capital company held by a non-resident pension fund and the financial service that that pen-

sion fund provides to its insured persons. It states that some academics consider that capital inflows into the pension fund do not on their own have a sufficiently close connection with the provision of financial services provided by a non-resident pension fund for the benefit of insured persons. However, it points out that, because of the particularities of pension fund activity, returns on investments made by a pension fund increase, for the most part, in parallel with the pension fund's pension payment liabilities, so that the taxation of the dividends distributed has a direct impact on the claims of insured persons against the pension fund.

36. In those circumstances, the Finanzgericht München (Finance Court, Munich, Germany) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Does the freedom of movement of capital under Article 63(1) TFEU in conjunction with Article 65 TFEU preclude legislation of a Member State under which a non-resident institution operating an occupational pension scheme whose essential structure is similar to a German pension fund does not receive any relief from tax on income from capital in respect of dividends received, whereas such dividend distributions to domestic pension funds do not result in any increase in their corporation tax liability, or only a comparatively small one, because the latter are able to reduce their taxable profit in a tax assessment procedure by deducting the amounts reserved to meet their pension payment obligations and to neutralise the tax on income from capital through a set-off, and also receive a refund in the event that the amount of corporation tax payable is less than the amount set off?
> 2. If the answer to Question 1 is yes: is the restriction of the free movement of capital through Paragraph 32(1) No 2 of the [KStG] permissible with respect to third countries under Article 63 TFEU in conjunction with Article 64(1) TFEU because it relates to the provision of financial services?'

**The request to have the oral procedure reopened**

37. Following the delivery of the Advocate General's Opinion, the German Government, by a document lodged at the Court Registry on 2 July 2019, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court of Justice.

38. In support of its request, the German Government submits, in essence, that the Advocate General's Opinion is based on findings of fact relating to German law which are incorrect. The German Government states that dividends paid to resident pension funds are subject to corporation tax at a rate of 15% which is applied to gross dividends. The tax on income from capital, levied by a withholding tax of 25% of the gross dividend, is set off against the corporation tax thus established, so that the withholding tax is refunded at a rate of 10% of the gross dividend. In principle, the tax burden remains equal to 15% of the gross dividend. In addition, the German Government puts forward additional explanations relating to the observations that it made at the hearing. It confirms that it disputes the calculations that the Commission presented at that hearing.

39. In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 31 and the case-law cited).

40. It should also be noted in that respect that the Statute of the Court of Justice of the European Union and the Rules of Procedure make no provision for the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union to submit observations in response to the Advocate General's Opinion (judgment of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited). The fact that a party or such an interested person disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot therefore in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud – Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24, and of 29 November 2017, King, C-214/16, EU:C:2017:914, paragraph 27 and the case-law cited).

41. It follows that, since the German Government's request to have the oral part reopened is intended to enable it to respond to the findings made by the Advocate General in his Opinion, it cannot be granted.

42. However, pursuant to Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the oral part of the procedure to be reopened, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be

decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

43. It should be recalled in that context that, according to settled case-law of the Court, as regards the interpretation of provisions of national law, the Court is in principle required to base its consideration on the description given in the order for reference and does not have jurisdiction to interpret the internal law of a Member State (see, inter alia, judgments of 17 March 2011, *Naftiliaki Etaireia Thasou and Amaltheia I Naftiki Etaireia*, C-128/10 and C-129/10, EU:C:2011:163, paragraph 40, and of 16 February 2017, *Agro Foreign Trade & Agency*, C-507/15, EU:C:2017:129, paragraph 23).

44. However, the order for reference contains the necessary information relating to the provisions of German law and, in particular, to the tax rates applicable under those provisions, on which the Court is required to rely.

45. Consequently, the Court, after hearing the views of the Advocate General, considers that it has all the information necessary to enable it to answer the questions raised by the referring court and that the arguments enabling it to rule, in particular, on the question relating to the tax burden on dividends distributed to resident pension funds have been debated before it. In addition, at the hearing, the German Government was given the opportunity to respond to any argument put forward during that hearing and to provide any clarifications which it considered necessary in that regard.

46. In the light of the foregoing, there is no need to reopen the oral part of the procedure.

**Consideration of the questions referred**

*The first question*

47. By its first question, the referring court asks, in essence, whether Articles 63 and 65 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety against the corporation tax payable by that fund and give rise to a refund, when the tax withheld at source exceeds the corporation tax due, and (ii) do not result in any increase in the profit liable to corporation tax or only a comparatively small one, due to the possibility of deducting from that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund.

Whether there is a restriction within the meaning of Article 63 TFEU

48. It follows from the Court's settled case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see, inter alia, judgments of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 39, and of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 23 and the case-law cited).

49. Specifically, the less favourable treatment by a Member State of dividends paid to non-resident pension funds, compared to the treatment of dividends paid to resident pension funds, is liable to deter companies established in a Member State other than that Member State from pursuing investments in that same Member State and, consequently, amounts to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU (see, to that effect, judgments of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraph 33; of 22 November 2012, *Commission* v *Germany*, C-600/10, not published, EU:C:2012:737, paragraph 15, and of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 28).

50. The application to dividends paid to non-resident pension funds of a tax burden heavier than that borne by resident pension funds in respect of the same dividends constitutes such less favourable treatment (see, to that effect, judgment of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 48). The same applies to the total or substantial exemption of dividends paid to a resident pension fund, whereas dividends paid to a non-resident pension fund are subject to a definitive withholding tax (see, to that effect, judgment of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraphs 32 and 33).

51. Under the legislation at issue in the main proceedings, as it transpires from the order for reference, pension funds are subject, in relation to the dividends distributed to them, to two different sets of tax rules, the

application of which depends on whether they are resident in the territory of the Member State of the company distributing the dividends.

52. Both dividends distributed to resident pension funds and those distributed to non-resident pension funds are subject to a tax on income from capital that is withheld at source.

53. However, in addition, as regards non-resident pension funds, that tax is definitively levied at a rate, which, as is apparent from the documents before the Court, corresponds, in the main proceedings, to 15% of the gross dividends, as provided for in Article 10(2)(b) of the Tax Agreement between Germany and Canada.

54. By contrast, as regards resident pension funds, the tax on income from capital is withheld at source at the rate, according to the referring court, of 25% of gross dividends. It can be set off in its entirety against corporation tax, the rate of which, according to the referring court, is 15% of taxable income, and be refunded when the tax withheld at source exceeds the corporation tax for which the fund is liable.

55. Moreover, according to the information in the order for reference, the receipt of dividends results in a very small increase in the taxable profit of the resident fund for the calculation of corporation tax, and even, in certain cases, in no increase in that profit. As the referring court observes, the receipt of dividends has the effect of increasing the technical provisions in due proportion and the taxable profit of the resident pension fund increases only where the returns on non-accounting investments are not credited to the various agreements of that fund. As was stated in paragraph 11 of this judgment, returns on non-accounting investments must be credited to each agreement of the resident pension fund at a rate of at least 90%.

56. It follows that, as a result of that deduction of the provisions, corresponding to the dividends received, from the taxable amount for the calculation of corporation tax, dividends received by resident pension funds do not increase that taxable amount, or increase it only very slightly.

57. Consequently, even where the withholding tax initially levied on the dividends paid to resident pension funds in respect of tax on income from capital exceeds that levied on dividends paid to non-resident pension funds, the application of the mechanism, provided for by the German legislation in question in the main proceedings, for setting off the tax on income from capital against the corporation tax due by the resident pension fund, as well as the refund of that tax, in the event that the corporation tax due is less than the tax on income from capital withheld, in combination with the methods for calculating the taxable amount of the pension fund, results in dividends paid to resident pension funds being ultimately exempt, in whole or in part, from tax.

58. It follows that dividends paid to non-resident pension funds are the subject of less favourable treatment than that applied to dividends paid to resident pension funds, since the former are subject to definitive taxation of 15%, whereas the latter are exempt from tax in whole or in part.

59. Contrary to what the defendant in the main proceedings contends, such less favourable treatment is not the result either of the parallel exercise by the two States concerned of their respective powers of taxation or of the disparities between the legislation of the different States. The mere exercise by the Federal Republic of Germany of its powers of taxation results, irrespective of any application of the tax legislation of another State, (i) in the exemption in full or almost in full of dividends paid to resident pension funds and (ii) in the taxation of dividends paid to non-resident pension funds.

60. Consequently, a difference in the treatment, such as that resulting from the German legislation at issue in the main proceedings, between dividends paid to non-resident pension funds and those paid to resident pension funds, is liable to deter pension funds established in a State other than that Member State from investing in that same Member State and therefore constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU.

61. It is necessary, however, to examine whether that restriction might be justified in the light of the provisions of the FEU Treaty.

Whether there is justification

62. Under Article 65(1)(a) TFEU, Article 63 TFEU is without prejudice to the rights of Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

63. In so far as that provision is a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly. Accordingly, it cannot be interpreted as meaning that all tax legislation which

draws a distinction between taxpayers on the basis of their place of residence or the State in which they invest their capital is automatically compatible with the FEU Treaty. Indeed, the derogation in Article 65(1)(a) TFEU is itself limited by Article 65(3) TFEU, which provides that the national provisions referred to in paragraph 1 of that article 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63 [TFEU]' (judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraphs 55 and 56 and the case-law cited).

64. A distinction must, therefore, be made between the differences in treatment authorised by Article 65(1)(a) TFEU and discrimination prohibited by Article 65(3) TFEU. In that regard, according to the Court's case-law, for national tax legislation to be capable of being regarded as compatible with the provisions of the Treaty concerning the free movement of capital, the difference in treatment must concern situations that are not objectively comparable or must be justified by an overriding reason in the public interest (judgment of 10 May 2012, *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, paragraph 23 and the case-law cited).

65. It is clear from the Court's case-law that the comparability of a cross-border situation with an internal one must be examined having regard to the aim pursued by the national provisions at issue as well as their purpose and content (see, inter alia, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

66. Moreover, it is settled case-law of the Court that as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income not only of resident taxpayers but also of non-resident taxpayers from dividends which they receive from a resident company, the situation of those non-resident taxpayers becomes comparable to that of resident taxpayers (judgments of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 56, and of 17 September 2015, *Miljoen and Others*, C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 67 and the case-law cited).

67. The defendant in the main proceedings and the German Government argue however that resident pension funds and non-resident pension funds are not in objectively comparable situations in the light of the legislation at issue in the main proceedings.

68. In their contention, like the situation at issue in the case which gave rise to the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), the difference in treatment stems from the application of different taxation arrangements to residents and non-residents.

69. Moreover, they maintain that it is justified to treat resident and non-resident pension funds differently, since there is no direct connection between the receipt of dividends in Germany and the expenditure constituted by the allocations to the mathematical and other technical provisions, as required by the case-law of the Court on the comparability of the situation of residents and of non-residents in relation to expenses directly linked to an activity which has generated taxable income in a Member State (see, inter alia, judgments of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 40 and the case-law cited, and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 29).

70. As regards, in the first place, the argument that the difference in treatment stems from the application of different taxation arrangements to residents and non-residents, it should be noted that, although the Court held, in paragraph 41 of the judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762), that a difference in treatment consisting in the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable, it nevertheless made clear, in paragraphs 43, 44 and 49 of that judgment, that the income at issue in the case which gave rise to that judgment was, in any event, subject to tax irrespective of whether it was received by a resident or non-resident taxable person, and that, moreover, the difference in taxation arrangements did not necessarily procure an advantage for resident recipients.

71. However, as is apparent from paragraphs 57 and 58 of this judgment, the application of the German legislation at issue in the main proceedings results in dividends paid to resident pension funds being ultimately exempt in whole or in part from tax, while dividends paid to non-resident pension funds are subject to a definitive tax of 15%.

72. Accordingly, the national legislation at issue in the main proceedings does not simply provide for different procedures for charging tax depending on the place of residence of the recipient of nationally sourced dividends. It is also liable to result in dividends paid to resident pension funds being completely or almost completely exempt from tax and, therefore, to confer an advantage on those funds.

73. Consequently, the difference in treatment at issue in the main proceedings cannot be justified by the difference in the situation of resident and non-resident pension funds in the light of the application of the different taxation arrangements.

74. As regards, in the second place, the argument relating to the difference in the situation of resident and non-resident pension funds in terms of whether it is possible to take into account allocations to provisions for pension commitments as professional expenditure, it should be recalled that the Court has held that, in relation to expenditure, such as professional expenses directly linked to an activity that has generated taxable income in a Member State, residents and non-residents of that State are in a comparable situation (see, inter alia, judgments of 31 March 2011, *Schröder*, C-450/09, EU:C:2011:198, paragraph 40, of 8 November 2012, *Commission* v *Finland*, C-342/10, EU:C:2012:688, paragraph 37 and of 24 February 2015, *Grünewald*, C-559/13, EU:C:2015:109, paragraph 29).

75. However, the referring court states in its order for reference that the provisions of Paragraph 21a of the KStG concerning mathematical provisions and those of Paragraph 21(2) of the KStG concerning provisions for rebates are not provisions authorising the deduction of professional expenditure and that there is no rule in German law which expressly provides that allocations to mathematical and similar technical provisions may be deducted from taxable income as deductible expenses. As was recalled in paragraph 43 of this judgment, the Court is in principle required to base its consideration on the classifications resulting from the provisions of national law, as specified in the order for reference.

76. In that respect, the situation at issue in the main proceedings differs from that at issue in the case that gave rise to the judgment of 8 November 2012, *Commission* v *Finland* (C-342/10, EU:C:2012:688), in which the national legislature explicitly treated the amounts reserved/set aside with a view to meeting obligations in respect of pension liabilities as expenses incurred in order to acquire or maintain the income from economic activity.

77. Consequently, the case-law referred to in paragraph 74 of this judgment is irrelevant for the purposes of examining whether the situation of a non-resident pension fund and that of a resident pension fund are comparable, in the light of the national legislation at issue in the main proceedings. Thus, the fact that the German Government claims that allocations to the mathematical and other technical provisions do not constitute expenses incurred in order to generate income in respect of dividends cannot call into question that comparability of the situations.

78. In those circumstances, it should be noted that, according to the referring court, where the dividends distributed increase the mathematical provisions or other items on the liabilities side, the profits of the pension fund remain unchanged, with the result that there is no taxable increase in assets. It adds that the provisions for pension commitments, which reduce the taxable income, are the direct consequence of the receipt of dividends. Consequently, according to that court, resident and non-resident pension funds are in a comparable situation from the point of view of taking into account allocations to the mathematical provisions and similar technical provisions for the purpose of determining their taxable amount so far as concerns the dividends that they receive.

79. It is thus apparent from the information provided by the referring court that there is a causal link between the receipt of dividends, the increase in the mathematical provisions and other items on the liabilities side and the absence of any increase in the taxable amount of the resident fund, since dividends which are used for the purposes of technical provisions do not increase the taxable profit of the pension fund, which was confirmed by the German Government at the hearing. According to that government, profits obtained through the investment must in large part benefit members, in the sense that those profits cannot remain in the pension fund and that income is the condition for expenditure in respect of the provisions.

80. National legislation allowing complete or almost complete exemption from tax of dividends paid to resident pension funds thus facilitates the accumulation of the capital of such funds, while, as the German Government observed at the hearing, all pension funds are, in principle, required to invest insurance premiums on the capital market in order to generate income in the form of dividends that enable them to meet their future obligations under insurance contracts.

81. A non-resident pension fund, which allocates the dividends received to provisions for pensions that it will have to pay in the future, intentionally or pursuant to the law in force in its State of residence, is in that regard in a situation comparable to that of a resident pension fund.

82. It is for the referring court to verify whether that is the case in the situation in the main proceedings.

83. If the referring court finds that a non-resident pension fund is in a situation comparable to that of a resident pension fund in terms of allocating dividends to make provisions for pensions, it would still be necessary to examine whether the difference in treatment at issue in the main proceedings is capable – depending on the circumstances – of being justified by overriding reasons in the public interest (see, to that effect, inter alia, judgment of 24 November 2016, *SECIL*, C-464/14, EU:C:2016:896, paragraphs 54 and 56).

84. In that regard, first of all, since the German Government argued at the hearing that the legislation at issue in the main proceedings formed part of a balanced allocation between the Member State of the source of the dividends and the State of residence of the pension funds of the power to impose taxes, it must be recalled that the need to safeguard the balanced allocation between Member States and third countries of the power to impose taxes is a ground capable of justifying a restriction on the free movement of capital, in particular, where the national measures in question are designed to prevent conduct capable of jeopardising the right of a Member State to exercise its powers of taxation in relation to activities carried out in its territory (judgment of 26 February 2019, *X* (Controlled companies established in third countries), C-135/17, EU:C:2019:136, paragraph 72 and case-law cited).

85. However, where a Member State has chosen to exempt completely or almost completely dividends paid to resident pension funds, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States and third countries of the power to impose taxes in order to justify the taxation of dividends paid to non-resident pension funds (see, to that effect, judgments of 20 October 2011, Commission v Germany, C-284/09, EU:C:2011:670, paragraph 78, of 10 May 2012, Santander Asset Management SGIIC and Others, C-338/11 to C-347/11, EU:C:2012:286, paragraph 48, and of 21 June 2018, Fidelity Funds and Others, C-480/16, EU:C:2018:480, paragraph 71).

86. The need to safeguard a balanced allocation between the Member States and third countries of the power to impose taxes cannot therefore be relied on to justify the restriction on the free movement of capital at issue in the main proceedings.

87. Next, with regard to the need to safeguard the coherence of a tax system, mentioned by the referring court, which may also justify rules that are liable to restrict fundamental freedoms, provided that a direct link is established between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see, inter alia, judgment of 21 June 2018, *Fidelity Funds and Others*, C-480/16, EU:C:2018:480, paragraphs 79 and 80 and the case-law cited), it is sufficient to state that the German Government has not relied upon the existence of such a direct link, which is necessary in order that such justification can succeed.

88. Lastly, as regards the need to guarantee the effectiveness of fiscal supervision which constitutes an overriding reason in the public interest also capable of justifying a restriction on the free movement of capital (judgment of 26 February 2019, *X* (Controlled companies established in third countries), C-135/17, EU:C:2019:136, paragraph 74), which has also been raised by the referring court, it should be pointed out that there is nothing in the file before the Court to permit the inference that national legislation such as that at issue in the main proceedings is suitable for attaining that objective.

89. In the light of the foregoing, the answer to the first question is that Articles 63 and 65 TFEU must be interpreted as precluding national legislation under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety against the corporation tax payable by such a fund, and give rise to a refund when the tax withheld at source exceeds the corporation tax due by the fund, and (ii) do not result in any increase in the profit liable to corporation tax or only a comparatively small one, due to the possibility of deducting from that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund, when the non-resident pension fund allocates dividends received to make provisions for pensions which it will have to pay in the future, this being a matter for the referring court to ascertain.

*The second question*

90. By its second question, the referring court asks, in essence, whether Article 64(1) TFEU must be interpreted as meaning that national legislation, such as that at issue in the main proceedings, under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety against the corporation tax payable by that fund and give rise to a refund, when the tax withheld at source exceeds the corporation tax due by the fund, and (ii) do not result in any increase in the profit liable to corporation tax or only a comparatively small one, due to the possibility of deducting from

that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund, can be considered to be a restriction existing on 31 December 1993 for the purposes of applying that provision.

91. According to Article 64(1) TFEU, the provisions of Article 63 are without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EU law adopted in respect of the movement of capital to or from third countries involving direct investment – including in real estate – establishment, the provision of financial services or the admission of securities to capital markets.

92. As regards the temporal criterion laid down by Article 64(1) TFEU, it is apparent from the Court's settled case-law that while it is, in principle, for the national court to determine the content of the legislation which existed on a date laid down by an EU measure, it is for the Court of Justice to provide guidance on interpreting the concept of EU law which constitutes the basis of a derogation under EU law for national legislation 'existing' on a particular date (judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 47 and the case-law cited).

93. The words 'restrictions which exist on 31 December 1993' in Article 64(1) TFEU presuppose that the legal provisions relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from non-member States which existed as part of the national legal order on 31 December 1993 but had not been maintained (judgments of 5 May 2011, *Prunus and Polonium*, C-384/09, EU:C:2011:276, paragraph 34 and the case-law cited, and of 20 September 2018, *EV*, C-685/16, EU:C:2018:743, paragraph 74).

94. However, the Court has already held that any national measure adopted after that date is not, by that fact alone, automatically excluded from the derogation laid down in the EU measure in question. It is settled case-law of the Court that restrictions laid down in provisions adopted after that date which, in essence, are identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of rights and freedoms of movement in previous legislation can be treated as equivalent to such restrictions 'which exist'. By contrast, legislation based on an approach which differs from that of the previous law and establishes new procedures cannot be treated as legislation existing on that date (see, to that effect, judgments of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 48, of 20 September 2018, *EV*, C-685/16, EU:C:2018:743, paragraph 75, and of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraphs 37 and 39 and the case-law cited).

95. In that regard, the referring court states that the provision of Paragraph 32(1) No 2 of the KStG providing for the discharging nature of the withholding tax, which has given rise to the difference in treatment between resident and non-resident pension funds, already existed on 31 December 1993 in the form of the provision of Paragraph 50(1) No 2 of the KStG of 1991, the wording and functioning of which are identical.

96. However, CPP argues before the Court that pension funds were not covered by German law on 31 December 1993, since they were introduced into insurance law and into the KStG with effect only from 1 January 2002 and that, before that date, there was no specific tax legislation relating to pension funds either.

97. The Court has already held that, if, on 31 December 1993, dividends paid by a resident company to non-resident entities were subject either to the same treatment as that applied to those paid to resident entities, or to different treatment more favourable than that applied to those paid to resident entities, but that, after that date, an exemption was introduced for dividends paid to resident companies, the temporal criterion should be considered not to have been satisfied, since what constitutes a restriction on the free movement of capital, namely the tax exemption, was introduced subsequently, and is based on an approach which differs from that of the previous law, and establishes a new procedure (see, to that effect, judgment of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraphs 50 to 52).

98. It is therefore for the referring court to determine whether, because special legislation relating to pension funds was introduced after 31 December 1993, the situation of non-resident pension funds has become less advantageous than that of resident pension funds with regard to dividends paid to them by resident companies, so that what constitutes the restriction in question in the present case cannot be considered to have existed on that date. For the purposes of that assessment, the referring court will have to take into account that the conditions that national legislation must fulfil in order to be regarded as 'existing' on 31 December 1993, notwithstanding an amendment to national law after that date, must be interpreted strictly (judgments

of 20 September 2018, *EV*, C-685/16, EU:C:2018:743, paragraph 81, and of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 42).

99. If that was the case, the temporal criterion cannot be considered to be fulfilled.

100. As regards the substantive criterion, it should be recalled that Article 64(1) TFEU sets out an exhaustive list of capital movements to which Article 63(1) TFEU is liable not to apply and, as a derogation from the fundamental principle of the free movement of capital, it must be interpreted strictly (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 21).

101. The Court has already clarified in that respect that restrictions on the movement of capital to or from third countries involving portfolio investments are not included in the movements of capital involving 'direct investments', referred to in Article 64(1) TFEU (judgment of 26 February 2019, *X (Controlled companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 28).

102. In the present case, the referring court observes that CPP's shareholding in the capital of the companies distributing dividends never exceeded 1%, which corresponds to so-called 'portfolio investments', which refer to the acquisition of shares on the capital market solely with the intention of making a financial investment without any intention of influencing the management and control of the undertaking, so that it cannot be considered that a situation such as that at issue in the main proceedings concerns capital movements involving 'direct investments', within the meaning of Article 64(1) TFEU.

103. However, since a pension fund may provide financial services to its insured persons, it is still necessary to ascertain whether capital movements, such as those referred to in the legislation at issue in the main proceedings, involve the provision of financial services within the meaning of Article 64(1) TFEU.

104. In that regard, the Court has held that the decisive criterion for the application of Article 64(1) TFEU is concerned with the causal link between the capital movements and the provision of financial services and not with the personal scope of the contested national measure or its relationship with the provider, rather than the recipient, of such services. The scope of that provision is defined by reference to the categories of capital movements which are capable of being subject to restrictions (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 39).

105. In order to be capable of being covered by that derogation, the national measure must therefore relate to capital movements that have a sufficiently close link with the provision of financial services, namely a causal link between the movement of capital and the provision of financial services (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraphs 43 and 44).

106. National legislation which, in applying to capital movements to or from third countries, restricts the provision of financial services thus falls within Article 64(1) TFEU (judgment of 21 May 2015, *Wagner-Raith*, C-560/13, EU:C:2015:347, paragraph 45 and the case-law cited).

107. As regards the acquisition of units in investment funds situated in a British overseas territory and the receipt of the dividends deriving from them, the Court held, in paragraph 46 of the judgment of 21 May 2015, *Wagner-Raith* (C-560/13, EU:C:2015:347), that they involve the existence of financial services provided by those investment funds to the investor concerned. The Court specified that such an investment enables the investor concerned, as a result of those services, to benefit, in particular, from increased asset diversification and better spreading of risk.

108. As the Advocate General observed in point 100 of his Opinion, the acquisition of shareholdings by a pension fund and the dividends which it receives as a result serve the purpose, first and foremost, of preserving its assets and of guaranteeing the provisions constituted by the fund, through increased diversification and better spreading of risk, in order to ensure that it can meet its pension commitments to its insured persons. Those acquisitions of shareholdings and those dividends thus constitute, in the first place, a means by which a pension fund can honour its pension commitments and not a service that it provides to those insured persons.

109. In those circumstances, it must be concluded that there is not a sufficiently close link in the form of a causal link, within the meaning of the case-law referred to in paragraphs 104 to 106 of this judgment, between the movement of capital referred to in the legislation at issue in the main proceedings relating to the receipt of dividends by a pension fund, and a provision of financial services, within the meaning of Article 64(1) TFEU.

110. In the light of the foregoing considerations, the answer to the second question is that Article 64(1) TFEU must be interpreted as meaning that national legislation, under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety

against the corporation tax payable by that fund, and give rise to a refund when the tax withheld at source exceeds the corporation tax due by the fund, and (ii) do not result in any increase in the profit liable to the corporation tax payable or only a comparatively small one, due to the possibility of deducting from that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund, cannot be considered to be a restriction existing on 31 December 1993 for the purposes of applying that provision.

**Costs**

111. …

On those grounds,

the Court (Second Chamber)

hereby rules:

**1. Articles 63 and 65 TFEU must be interpreted as precluding national legislation under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety against the corporation tax payable by such a fund, and give rise to a refund when the tax withheld at source exceeds the corporation tax due, and (ii) do not result in any increase in the profit liable to corporation tax or only a comparatively small one, due to the possibility of deducting from that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund, when the non-resident pension fund allocates dividends received to make provisions for pensions which it will have to pay in the future, this being a matter for the referring court to ascertain.**

**2. Article 64(1) TFEU must be interpreted as meaning that national legislation, under which dividends distributed by a resident company to a resident pension fund (i) are subject to a withholding tax which can be set off in its entirety against the corporation tax payable by that fund, and give rise to a refund when the tax withheld at source exceeds the corporation tax due by the fund, and (ii) do not result in any increase in the profit liable to the corporation tax payable or only a comparatively small one, due to the possibility of deducting from that profit provisions for pension commitments, whereas dividends paid to a non-resident pension fund are subject to a withholding tax which constitutes a definitive tax for such a fund, cannot be considered to be a restriction existing on 31 December 1993 for the purposes of applying that provision.**

# EU Court of Justice, 30 January 2020*

# Case C-156/17

# *Köln-Aktienfonds Deka v Staatssecretaris van Financiën*

*Seventh Chamber:* *P. G. Xuereb (Rapporteur), President of the Chamber, T. von Danwitz and C. Vajda, Judges*

*Advocate General:* *G. Pitruzella*

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1. This request for a preliminary ruling concerns the interpretation of Article 63 TFEU.

2. The request has been made in proceedings between Köln-Aktienfonds Deka ('KA Deka') and the Staatssecretaris van Financiën (State Secretary for Finance, Netherlands) concerning the refund of dividend tax withheld from KA Deka in respect of share dividends from Netherlands companies received in the financial years 2002/2003 to 2007/2008.

## Legal context

### *European Union law*

3. The purpose of Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3) was, according to its fourth recital, to establish common basic rules for the authorisation, supervision, structure and activities of undertakings for collective investment in transferable securities (UCITS) situated in the Member States and the information they must publish. Directive 85/611 was amended on a number of occasions before being repealed, with effect from 1 July 2011, by Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 2009 L 302, p. 32), which recast the former directive.

### *Netherlands law*

4. The Netherlands regime relating to fiscal investment enterprises ('FIEs') is intended to enable natural persons and, in particular, small investors to make collective investments in certain types of assets. The aim of that regime is to bring the tax treatment applicable to private individuals who invest through an FIE in line with the tax treatment of private individuals who make investments on an individual basis.

5. For that purpose, FIEs are subject to a zero corporation tax rate. They also benefit from the refund of dividend tax withheld on dividends received in the Netherlands. Thus, Article 10(2) of the Wet op de dividendbelasting 1965 (Law on the Taxation of Dividends of 1965), in its version applicable to the dispute in the main proceedings, states:

* Language of the case: Dutch.

> 'A company classified as an investment enterprise for the purposes of corporation tax may request the inspector to adopt a decision, open to appeal, granting it a refund of the dividend tax withheld from it during a calendar year …'

6. FIEs are also entitled to a concession in respect of tax deducted at source on their investment products abroad.

7. When they distribute dividends, FIEs are required to withhold Netherlands tax on the recipient's dividends.

8. The FIE regime is mainly regulated by Article 28 of the Wet op de vennootschapsbelasting 1969 (Law on Corporation Tax of 1969), which lays down the conditions which must be met by an investment undertaking in order to qualify as an FIE.

9. One of those conditions is the obligation on the investment undertaking to distribute income to its shareholders or participants within a certain period of time. Thus, Article 28(2)(b) of the Law on Corporation Tax of 1969 provides that the part of the profit defined by an order of general application is to be paid to shareholders and holders of certificates of participation within 8 months of the end of the financial year and that the amount to be paid is to be divided equally between the shares and the certificates of participation.

10. In that regard, it is apparent from the file before the Court that, in accordance with the Besluit beleggingsinstellingen (Order on Collective Investment Enterprises) (Stb. 1970, No 190), as amended by the Order of 20 December 2007 (Stbl. 2007, No 573) ('the Order on Collective Investment Enterprises'), non-deductible amounts are taken into account to determine the investment undertaking's distributable proceeds. Furthermore, an FIE may establish a reinvestment reserve and a cash reserve to round off the sums it distributes. In addition, an FIE may establish a reinvestment reserve and a cash reserve to round off the sums it distributes.

11. The nature of the investment undertaking's shareholders is also one of the conditions in order to qualify as an FIE, as the FIE regime is only to be used by the investors for whom it is intended.

12. In the years 2002 to 2006, the conditions relating to the shareholders were regulated by Article 28(2)(c) to (g) of the Law on Corporation Tax of 1969. Those provisions distinguished between investment undertakings whose shares or participations were held by the general public and others subject to stricter conditions. The distinction between those undertakings was based on whether or not their shares or certificates of participation were officially listed on the Amsterdam Stock Exchange.

13. An investment undertaking whose shares or participations were listed on the Amsterdam Stock Exchange was, in essence, excluded from the FIE regime if 45% or more of its shares or participations were held by an entity subject to a profit tax, with the exception of an FIE whose shares or participations are listed on the Amsterdam Stock Exchange, or were held by an entity subject to a profit tax in respect of its shareholders or participants. Moreover, an investment undertaking in which at least 25% of the shares or participations were held by a natural person alone could not qualify for the FIE regime.

14. An investment undertaking whose shares or participations were not listed on the Amsterdam Stock Exchange was subject to stricter conditions and had to, in order to qualify for the FIE regime, essentially have at least 75% of its shares or participations held by natural persons, by entities not subject to profit tax, such as pension funds and charitable organisations, or by other FIEs. An investment undertaking could not benefit from the FIE regime if one or more natural persons held a participation of at least 5% of the shares or participations in that undertaking. If the investment fund held an authorisation under the Wet houdende bepalingen inzake het toezicht op beleggingsinstellingen (Law on the supervision of investment funds) of 27 June 1990 (Stb. 1990, No 380), that prohibition was replaced by the rule that no natural person is entitled to hold 25% or more of the shares in the undertaking.

15. Following legislative amendments, since 1 January 2007, in order to benefit from the FIE regime, the shares or participations of an investment undertaking must be admitted to trading on a market in financial instruments, such as that referred to in Article 1:1 of the Wet houdende regels met betrekking tot de financiële markten en het toezicht daarop (Law on financial markets and their supervision) of 28 September 2006 (Stb. 2006, No 475), or the fund or the fund manager must hold an authorisation under Article 2:65 of that law or be exempt from holding it under Article 2:66(3) of that law.

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

16. KA Deka is an investment fund constituted under German law (*Publikums-Sondervermögen*) established in Germany. It is a UCITS within the meaning of Directives 85/611 and 2009/65, open-ended, listed on the stock exchange, without legal personality and exempt from tax on profits in Germany. It makes investments on behalf of individuals. Its share price is listed on the German Stock Exchange, but the shares are traded via the '*global stream system*'.

17. During the financial years 2002/2003 to 2007/2008, KA Deka received dividends distributed by companies established in the Netherlands, in which it held shares. Those dividends were subject, in accordance with the Convention for the avoidance of double taxation in the area of income, capital, and various other taxes and for regulating other tax matters, concluded on 16 June 1959 between the Kingdom of the Netherlands and the Federal Republic of Germany (Trb. 1959, 85), as amended by the third additional protocol of 4 June 2004 (Trb. 2004, 185) ('the tax convention between the Kingdom of the Netherlands and the Federal Republic of Germany), to a tax of 15% which was withheld at source. KA Deka, unlike an investment fund established in the Netherlands meeting the conditions enabling it to qualify as an FIE, was not able to benefit from the repayment of that tax on the basis of Article 10(2) of the Law on the Taxation of Dividends of 1965.

18. KA Deka is not subject in the Netherlands to the obligation to withhold tax on dividends that it has itself distributed.

19. The referring court states that, according to German tax law rules, individuals who have invested in an investment fund are deemed to receive a theoretical minimum amount of dividends. Sums which are therefore taxed above the sum actually distributed are referred to as 'additional notional amounts' (*ausschüttungsgleiche Erträge*). In the years at issue in the main proceedings, German private individuals who invested in such funds received a tax exemption applicable to half of their taxable amount, which corresponded to the profits actually distributed plus any 'additional notional amounts'.

20. Until 2004, German legislation permitted those individuals to offset in full the dividend tax withheld in the Netherlands payable by the investment fund against the German tax levied on half of the taxable amount. Following a change to German legislation, that possibility of offsetting was limited from 2004 to 2008 to half the Netherlands tax withheld at source and the offsetting was no longer possible if the investment fund had chosen to deduct from the dividend the foreign tax levied at source.

21. KA Deka applied to the Netherlands tax authorities for a refund of the dividend tax deducted from its dividends distributed by Netherlands companies for the financial years 2002/2003 to 2007/2008.

22. After the inspecteur van de Belastingdienst (Inspector of Taxes) rejected those applications, KA Deka brought an action before the rechtbank Zeeland-West-Brabant (District Court of Zeeland-West-Brabant, Netherlands) for a ruling on the legality of the decision of the Inspector of Taxes. KA Deka argued before that court that its situation could be compared to that of an investment fund established in the Netherlands which has the status of an FIE, as referred to in Article 28 of the Law on Corporation Tax of 1969 and that it was therefore entitled to a refund of the dividend tax under Article 56 EC (now Article 63 TFEU).

23. The rechtbank Zeeland-West-Brabant (District Court of Zeeland-West-Brabant) was uncertain as to whether KA Deka was objectively comparable to an FIE, in the light of the criteria laid down by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) for the comparison of those funds, and on account of the large number of cases likely to raise questions similar to those at issue in the main proceedings, decided to refer five questions to that court for a preliminary decision.

24. The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) notes, as a preliminary point, that, in its legal form, KA Deka could be classified as an FIE and is, in that regard, objectively comparable to an FIE established in the Netherlands. That court states that, whereas an FIE established in the Netherlands would have been entitled to the refund of the dividend tax requested by KA Deka, the latter cannot derive any right to a refund of dividend tax either from Netherlands legislation or from the tax convention between the Kingdom of the Netherlands and the Federal Republic of Germany.

25. Taking the view that there are reasonable doubts as to the answers to the questions referred by the rechtbank Zeeland-West-Brabant (District Court of Zeeland-West-Brabant), the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does Article 56 EC (now Article 63 TFEU) mean that an investment fund established outside the Netherlands cannot be refused, on the ground that it is not subject to an obligation to withhold Netherlands dividend tax, a refund of Netherlands dividend tax which was withheld on dividends which that investment fund received from corporate bodies established in the Netherlands, when such a refund is granted to a fiscal investment enterprise established in the Netherlands, which, subject to the withholding of Netherlands dividend tax, distributes the proceeds of its investments to its shareholders or participants on an annual basis?

2. Does Article 56 EC (now Article 63 TFEU) mean that an investment fund established outside the Netherlands cannot be refused a refund of Netherlands dividend tax which was withheld on dividends which it received from corporate bodies established in the Netherlands on the ground that it has not proved satisfactorily that its shareholders or participants satisfy the conditions laid down in Netherlands legislation?

3. Does Article 56 EC (now Article 63 TFEU) mean that an investment fund established outside the Netherlands cannot be refused a refund of Netherlands dividend tax which was withheld on dividends which it received from corporate bodies established in the Netherlands, on the ground that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis at the latest in the eighth month following the end of the financial year, even if, in the country in which that investment fund is established, under the legislation there applicable, the proceeds of its investments, to the extent to which they are not distributed, (a) are deemed to have been distributed, and/or (b) are taken into account in the tax levied in that country on the shareholders or participants as though those profits had been distributed, whereas such a refund is granted to a fiscal investment enterprise established in the Netherlands, which, subject to the withholding of Netherlands dividend tax, distributes the proceeds of its investments in full to its shareholders or participants on an annual basis?’

**Procedure before the Court**

26. By decision of the President of the Court of Justice of 5 April 2017, the present case and Case C-157/17 were joined for the purposes of the written and oral part of the procedure, and the judgment.

27. Following the delivery of the judgment of 21 June 2018, *Fidelity Funds and Others* (C-480/16, EU:C:2018:480), the referring court informed the Court of Justice by letter of 3 December 2018 that it wished to withdraw the request for a preliminary ruling in Case C-157/17, and the first question in Case C-156/17, but that it wished to maintain the second and third questions referred in Case C-156/17.

28. By decision of the President of the Court of Justice of 4 December 2018, Case C-156/17 was disjoined from Case C-157/17 and the latter was removed from the register of the Court of Justice on 12 December 2018.

**The request to have the oral part of the procedure reopened**

29. Following the delivery of the Opinion of the Advocate General, KA Deka, by document lodged at the Court Registry on 18 September 2019, requested the Court to order the reopening of the oral part of the procedure, pursuant to Article 83 of the Rules of Procedure of the Court.

30. In support of its request, KA Deka submits that the Opinion of the Advocate General contains an inaccuracy regarding the interpretation of Article 7(e) of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ 1995 L 281, p. 31). KA Deka argues that, contrary to what the Advocate General states in points 79 to 81 of his Opinion, Article 7(e) of Directive 95/46 does not have horizontal direct effect authorising a non-public body to request or provide personal data to another non-public body. That inaccuracy has a decisive influence on the Court’s decision and thus justifies the reopening of the oral part of the procedure.

31. In that regard, it should be noted that, under the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice, require his involvement. The Court is not bound either by the Advocate General’s Opinion or by the reasoning on which it is based (judgment of 22 June 2017, *Federatie Nederlandse Vakvereniging and Others*, C-126/16, EU:C:2017:489, paragraph 31 and the case-law cited).

32. It should also be noted, in that context, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the parties in question or interested parties referred

to in Article 23 of the Statute of the Court of Justice of the European Union to submit observations in response to the Advocate General's Opinion (judgment of 25 October 2017, *Polbud - Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 23 and the case-law cited). As a consequence, the fact that a party or interested party disagrees with the Advocate General's Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgments of 25 October 2017, *Polbud - Wykonawstwo*, C-106/16, EU:C:2017:804, paragraph 24, and of 29 November 2017, *King*, C-214/16, EU:C:2017:914, paragraph 27 and the case-law cited).

33. It follows that, since the purpose of KA Deka's request for a reopening of the oral procedure is to enable it to respond to the Advocate General's findings in his Opinion relating to the interpretation of Directive 95/46, that request cannot be granted.

34. Under Article 83 of its Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the opening or reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.

35. However, in the present case, the Court, after hearing the Advocate General, considers that it has all the information necessary to answer the questions referred by the referring court.

36. In the light of the foregoing considerations, there is no need to order the reopening of the oral part of the procedure.

**Consideration of the questions referred**

*Preliminary observations*

37. It is important to note that, as is apparent from the order for reference, dividends paid by companies established in the Netherlands to recipients established in that Member State are subject to a dividend tax. Where, as in the case in the main proceedings, the recipient of the dividends is established in another Member State, in the present case Germany, those dividends may be taxed in the Netherlands at a rate of 15%, under the tax convention between the Kingdom of the Netherlands and the Federal Republic of Germany.

38. It is also apparent from the information in that decision that only investment funds which meet the conditions laid down in Article 28 of the Law on Corporation Tax of 1969 in order to qualify as FIEs may request and receive a refund of the dividend tax which they have paid.

39. Such a refund is not made to investment funds which do not demonstrate that they have met those conditions, including non-resident funds.

40. Consequently, whereas dividends received by funds which qualify as FIEs are not taxed in their hands, dividends received by other bodies, including investment funds established in other Member States, are taxed.

41. As a result, an investment fund which meets the conditions relating to FIEs benefits from, as regards dividends received, a tax treatment which is more favourable than that of investment funds which do not meet those conditions, including non-resident investment funds.

42. It is important to note**,** in that regard, that it is for each Member State to organise, in compliance with EU law, its system for taxing distributed profits and to define, in that context, the tax base and the tax rate which apply to the shareholder receiving them (see, inter alia, judgments of 20 May 2008, *Orange European Smallcap Fund*,
C-194/06, EU:C:2008:289, paragraph 30; of 20 October 2011, *Commission* v *Germany*, C-284/09, EU:C:2011:670, paragraph 45, and of 30 June 2016, *Riskin and Timmermans*, C-176/15, EU:C:2016:488, paragraph 29).

43. It follows that Member States are free to provide for, for the purposes of encouraging the use of collective investment undertakings, a specific tax regime applicable to those undertakings and to the dividends received by them, and to define the material and formal conditions which must be respected to benefit from such a regime (see, to that effect, judgments of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 47, and of 24 October 2018, *Sauvage and Lejeune*, C-602/17, EU:C:2018:856, paragraph 34).

44. Furthermore, it is inherent in the principle of the fiscal autonomy of Member States that they determine the evidence that must be provided to establish that the conditions in order to benefit from such a regime have been respected (see, to that effect, judgments of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 37; of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 47; and of 24 October 2018, *Sauvage and Lejeune*, C-602/17, EU:C:2018:856, paragraph 34).

45. Member States must nevertheless exercise their fiscal autonomy in accordance with the requirements of EU law, in particular those imposed by the Treaty provisions on the free movement of capital (judgment of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 38).

46. Consequently, the establishment of a regime specific to collective investment undertakings, in particular the nature of the conditions in order to benefit from it and the evidence to be provided for that purpose, must not constitute a restriction on the free movement of capital.

47. The second and third questions referred must be answered in the light of those considerations.

*The second question*

48. By its second question, the referring court asks, in essence, whether Article 63 TFEU must be interpreted as precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted, on the ground that it has not provided proof that its shareholders or participants meet the conditions laid down by that legislation, a refund of dividend tax withheld on dividends which it has received from corporate bodies established in that Member State.

49. In that regard, it follows from the Court's case-law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those which are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see judgments of 10 April 2014, *Emerging Markets Series of DFA Investment Trust Company*, C-190/12, EU:C:2014:249, paragraph 39, and of 22 November 2018, *Sofina and Others*, C-575/17, EU:C:2018:943, paragraph 23 and the case-law cited).

50. It is therefore necessary to verify, in the first place, whether the requirements laid down by a Member State relating to the shareholders or participants of an investment fund, which are a condition for that fund to be able to claim a refund of dividend tax which it has paid, are likely to discourage a non-resident investment fund from making investments in that Member State. In the second place, it will be necessary to consider whether the evidence which must be provided for that purpose by non-resident investment funds discourages them from making investments in that Member State.

51. As regards, in the first place, those conditions, it is apparent from the order for reference that, during the years 2002 to 2006, the conditions relating to the shareholders stipulated participation thresholds which were not to be exceeded by holders of shares or certificates of participation in a fund, in order for the latter to qualify as an FIE. Those thresholds differed depending on whether or not the fund's shares or certificates of participation were officially listed on the Amsterdam Stock Exchange.

52. Where the fund's shares or certificates of participation were officially listed on the Amsterdam Stock Exchange, funds in which 45% or more of the shares or participations were held by an entity subject to a profit tax or by an entity whose profit was subject to profit tax in respect of its shareholders or participants, as well as funds in which a natural person alone held a participation of 25% or more, could not be covered by the FIE regime. By contrast, where the fund's shares or certificates of participation were not officially listed on the Amsterdam Stock Exchange, at least 75% of the shares or certificates of participation had to be held by natural persons, by entities not subject to profit tax, such as pension funds and charitable organisations, or by other FIEs, without a natural person alone holding a participation of 5% or more, or, where an undertaking was authorised under the Law on the supervision of investment funds, 25% or more.

53. It is also apparent from the order for reference that, according to the national law applicable since 1 January 2007, in order to benefit from the FIE regime, the shares or participations of an investment undertaking must be admitted to trading on a market in financial instruments, as referred to in the Law on financial markets and their supervision, or the fund or its manager must be authorised or exempt from authorisation under that law. The referring court states that it is now irrelevant whether the shares or participations in an investment fund are listed on the Amsterdam Stock Exchange.

54. It should be noted that the national legislation at issue in the main proceedings, applicable during the period 2002-2006, as with the legislation applicable from 1 January 2007, did not distinguish between resident investment funds and non-resident investment funds, in that the conditions for the refund of dividend tax applied without distinction to those two types of fund.

55. However, national legislation which applies without distinction to resident and non-resident operators may constitute a restriction on the free movement of capital. It follows from the Court's case-law that even a differentiation based on objective criteria may de facto disadvantage cross-border situations (see, to that effect, judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraphs 37 to 39).

56. That is the case where national legislation which applies without distinction to resident and non-resident operators reserves a tax advantage in situations in which an operator complies with conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations, and non-resident operators which are comparable do not generally comply with those conditions or obligations (see, to that effect, judgments of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraphs 36 and 37, and of 8 June 2017, *Van der Weegen and Others*, C-580/15, EU:C:2017:429, paragraph 29).

57. In that respect, as regards the national legislation at issue in the main proceedings, applicable during the period 2002-2006, it is apparent from the information in the order for reference, as summarised in paragraph 52 of this judgment, that investment funds whose shares or participations were not listed on the Amsterdam Stock Exchange had to meet conditions which were stricter than those for investment funds whose shares or shareholdings had been listed on that stock exchange.

58. It is therefore for the referring court to ascertain whether the condition relating to shareholders which was based on the listing of the shares or participations of the investment fund on the Amsterdam Stock Exchange could, by its nature or de facto, be met only by resident investment funds, whereas non-resident investment funds, whose shares and participations were listed not on the Amsterdam Stock Exchange but on another stock exchange, did not generally meet that condition.

59. As regards the national legislation applicable from 1 January 2007, it is apparent from the information in the order for reference as summarised in paragraph 53 of this judgment that, in order to benefit from the FIE regime, the shares or holdings of an investment undertaking must be admitted to trading on a market in financial instruments, as referred to in the Law on financial markets and their supervision. Under that legislation, the regime also applies to a fund or its manager which is authorised or exempt from authorisation under that law.

60. In that regard, it is for the referring court to verify whether the conditions laid down by that legislation are not, by their nature or de facto, likely to be met only by resident investment funds and do not, de facto, exclude non-resident investment funds which meet similar conditions in their Member State of establishment from benefitting from that regime.

61. As regards, in the second place, the proof to be provided by non-resident investment funds in order to demonstrate that they meet the conditions allowing them to benefit from the FIE regime and, therefore, to obtain a refund of the dividend tax they have paid, it should be borne in mind that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether to grant that advantage (judgment of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 95 and the case-law cited). The content, the form and the degree of detail which the information submitted by the taxpayer must satisfy in order to benefit from a tax advantage are determined by the Member State conferring such an advantage in order to enable it to apply the tax properly (see, to that effect, judgment of 9 October 2014, *van Caster*, C-326/12, EU:C:2014:2269, paragraph 52).

62. However, in order not to make it impossible or excessively difficult for a non-resident taxpayer to obtain a tax advantage, it cannot be required to produce documents which comply in all respects with the form and degree of detail of the documentary evidence laid down in the national legislation of the Member State conferring that advantage if the documents provided by that taxpayer do enable that Member State to ascertain, clearly and precisely, that the conditions for obtaining the tax advantage in question have been met (see, to that effect, judgment of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 46). As the

Advocate General states in point 72 of his Opinion, non-resident taxpayers may not be subject to excessive administrative burdens that make it impossible for them to benefit from a tax advantage.

63. In the main proceedings, the referring court states that KA Deka is unable to meet the conditions relating to the shareholders because of the share trading system chosen, which does not enable it to know who its shareholders are.

64. The fact of not being able to provide proof that the conditions relating to the shareholders have been met does not appear to lie either in the intrinsic complexity of the necessary information, or in the means of proof required, or in the legal impossibility of collecting that data because of the application of the legislation on data protection, implementing Directive 95/46, but is as a result of the choice of model for the trading of the shares by the fund in question.

65. In those circumstances, the inadequate flow of information to the investor is not a problem for which the Member State concerned should have to answer (judgments of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, paragraph 98, and of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 48).

66. In so far as the evidential requirements at issue in the main proceedings also appear to be imposed on resident investment funds which have chosen a share trading system similar to that adopted by KA Deka in the main proceedings, which it is for the national court to verify, the refusal to grant a non-resident investment fund a refund of the dividend tax which it has paid, on the ground that that investment fund has failed to establish sufficiently that it has met those conditions, does not constitute unfavourable treatment of a non-resident investment fund.

67. Consequently, in the light of all of the foregoing, the answer to the second question is that Article 63 TFEU must be interpreted as not precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted, on the ground that it has not provided proof that its shareholders or participants meet the conditions laid down by that legislation, a refund of dividend tax withheld on dividends which it has received from corporate bodies established in that Member State, provided that those conditions do not de facto disadvantage non-resident investment funds and provided that the tax authorities require proof of compliance with those conditions to be provided also by resident investment funds, which it is for the referring court to verify.

*The third question*

68. By its third question, the national court asks, in essence, whether Article 63 TFEU must be interpreted as precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted a refund of the dividend tax which it has had to pay in that Member State, on the ground that it has not met the conditions for that refund, namely that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis within 8 months of the end of its financial year, even though in its Member State of establishment, under the legal provisions in force, the proceeds of its investments which have not been distributed are deemed to have been distributed or are taken into account in the tax which that Member State levies on shareholders or participants as though that profit had been distributed.

69. As is apparent from the order for reference, the condition for the refund of dividend tax relating to the redistribution of a fund's profits is worded in general terms and does not distinguish between resident and non-resident investment funds. Both resident and non-resident investment funds must meet that condition in order to receive the refund of dividend tax paid.

70. However, in view of the case-law referred to in paragraphs 55 and 56 of this judgment, it must be ascertained whether, while being applicable without distinction, such a condition is likely to place non-resident investment funds at a de facto disadvantage.

71. As noted in paragraph 43 of this judgment, in the absence of harmonisation at European Union level, each Member State is free to determine whether, in order to encourage the use of collective investment undertakings, to provide for a specific tax regime applicable to those undertakings and to the dividends received by them, and to define the material and formal conditions which must be complied with to benefit from such a regime. The conditions of such regimes are therefore necessarily specific to each Member State and differ between Member States.

72. Furthermore, the free movement of capital cannot be understood as meaning that a Member State is required to adjust its tax rules on the basis of those of another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules, given that the decisions made by a taxpayer as to investment in another Member State may be to the taxpayer's advantage or not, according to circumstances (judgment of 7 November 2013, *K*, C-322/11, EU:C:2013:716, paragraph 80 and the case-law cited).

73. However, making the possibility of obtaining a refund of withholding tax subject to strict compliance with the conditions laid down by national legislation, irrespective of the legal conditions to which non-resident investment funds are subject in their State of establishment, would amount to reserving the possibility of benefiting from an advantageous treatment of dividends only to resident investment funds. Subject to verification by the referring court, resident investment funds would generally be likely to meet all the conditions laid down by the legislation of their State of establishment, whereas non-resident investment funds would generally be likely to meet only the conditions laid down by their Member State of establishment.

74. In those circumstances, it cannot be excluded that a non-resident investment fund which, because of the regulatory framework in force in its State of establishment, does not meet all the conditions laid down by the Member State conferring the tax advantage in question, is nevertheless in a situation which is essentially comparable to that of a resident investment fund meeting such conditions.

75. Consequently, in order to ensure that the conditions laid down by the legislation of a Member State, while applying without distinction to resident and non-resident investment funds, do not de facto disadvantage non-resident investment funds, the latter must be able to prove that they are, in particular because of the regulatory framework in force in their State of establishment, in a situation that is comparable to that of resident investment funds meeting those conditions.

76. It follows from the Court's case-law that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue, as well as the purpose and content of the latter (see, inter alia, judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek*, C-252/14, EU:C:2016:402, paragraph 48 and the case-law cited).

77. In that regard, it is apparent from the file before the Court that the condition relating to the redistribution of profits is linked to the objective of the FIE regime, which is that the return on investments made by a private individual through an investment undertaking must be the same as the return on investments made individually through a direct investment. To that end, it also follows from the file that the national legislature considered it essential for investment undertakings to pass on the profits of investments as quickly as possible to the savers whose funds they have invested.

78. As regards the link between the obligation to redistribute profits and the taxation of investors, it also follows from the file before the Court that the obligation to redistribute profits triggered the application of profit tax. However, because of the introduction, in 2001, of taxation of the flat-rate annual return, calculated for individuals irrespective of the actual return which they earned on their shares and other investments, the applicant in the main proceedings, the interveners in the main proceedings and the European Commission question whether the redistribution of the profits of a fund is essential in order to achieve the objective of neutrality of taxation between direct investments and those made through an investment fund.

79. In the present case, it is for the referring court, which has sole jurisdiction to interpret national law, taking account of all the elements of the tax legislation at issue in the main proceedings and the national tax system as a whole, to determine the main objective underlying the condition for redistribution of profits.

80. Although it appears that the objective pursued is to ensure that the profits made by investors who have used the services of an investment fund reach those investors as soon as possible, a non-resident investment fund which does not distribute income from its investments, even though that income is deemed to have been distributed, is not in a situation that is objectively comparable to that of a resident investment fund which distributes its income in accordance with the conditions laid down by national law.

81. By contrast, if the objective pursued lies principally in the taxation of profits made by a shareholder in an investment fund, a resident investment fund which makes an actual distribution of its profits, and a non-resident investment fund whose profits are not distributed but are deemed to have been distributed and are taxed as such in respect of the shareholder in that fund, must be regarded as being in an objectively comparable situation. In both cases, the level of taxation is transferred from the investment fund to the shareholder.

82. In the latter situation, the refusal by a Member State to grant a non-resident investment fund, on the ground that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis within 8 months of the end of its financial year, a refund of the dividend tax that it has paid in that Member State, whereas in the Member State in which that fund is established, under the legal provisions in force, the proceeds of its investments which have not been distributed are deemed to have been distributed or are taken into account in the tax which that Member State levies on the shareholders or participants in that fund as though that profit had been distributed, would constitute a restriction on the free movement of capital.

83. Such a restriction is permissible if it is justified only by overriding reasons in the public interest, if it is appropriate for ensuring the attainment of the objective that it pursues and does not go beyond what is necessary to attain it (judgment of 24 November 2016, SECIL, C-464/14, EU:C:2016:896, paragraph 56).

84. However, it should be noted that, in the main proceedings, the Netherlands Government did not rely on such reasons as regards the condition relating to the redistribution of the profits of the investment fund concerned.

85. In those circumstances, the answer to the third question is that Article 63 TFEU must be interpreted as precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted a refund of dividend tax that it has had to pay in that Member State, on the ground that it has not met the legal conditions for that refund, namely that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis within 8 months of the end of its financial year, where, in its Member State of establishment, the proceeds of its investments which have not been distributed are deemed to have been distributed or are taken into account in the tax which that Member State levies on shareholders or participants as though that profit had been distributed and where, having regard to the objective underlying those conditions, such a fund is in a situation that is comparable to that of a resident fund which benefits from the refund of that tax, which it is for the referring court to verify.

**Costs**

86. …

On those grounds,

the Court (Seventh Chamber)

hereby rules:

**1. Article 63 TFEU must be interpreted as not precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted, on the ground that it has not provided proof that its shareholders or participants meet the conditions laid down by that legislation, a refund of dividend tax withheld on dividends that it has received from corporate bodies established in that Member State, provided that those conditions do not de facto disadvantage non-resident investment funds and provided that the tax authorities require proof of compliance with those conditions to be provided also by resident investment funds, which it is for the referring court to verify.**

**2. Article 63 TFEU must be interpreted as precluding legislation of a Member State which provides that a non-resident investment fund cannot be granted a refund of dividend tax which it has had to pay in that Member State, on the ground that it has not met the legal conditions for that refund, namely that it does not distribute the proceeds of its investments in full to its shareholders or participants on an annual basis within 8 months of the end of its financial year, where, in its Member State of establishment, the proceeds of its investments which have not been distributed are deemed to have been distributed or are taken into account in the tax which that Member State levies on shareholders or participants as though that profit had been distributed and where, having regard to the objective underlying those conditions, such a fund is in a situation that is comparable to that of a resident fund which benefits from the refund of that tax, which it is for the referring court to verify.**

# EU Court of Justice, 30 January 2020*

## Case C-725/18

## *Anton van Zantbeek VOF v Ministerraad*

*Seventh Chamber:* *T. von Danwitz (Rapporteur), acting as President of the Chamber, C. Vajda and A. Kumin, Judges*

*Advocate General:* *H. Saugmandsgaard Øe*

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1. This request for a preliminary ruling concerns the interpretation of Articles 56 and 63 TFEU and Articles 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

2. The request has been made in proceedings between Anton van Zantbeek VOF and Ministerraad (Council of Ministers, Belgium) concerning an action for annulment of provisions of national law extending the scope of a tax on stock exchange transactions.

### Belgian law

3. Articles 122 and 123 of the loi-programme du 25 décembre 2016 (Programme Law of 25 December 2016) (*Moniteur belge* of 29 December 2016, p. 90879) ('the Programme Law') amended the Code des droits et taxes divers (Code of miscellaneous taxes and duties), by inserting a second paragraph into Articles 120 and 126/2 of that code, respectively.

4. Article 120 of the Code of miscellaneous taxes and duties, as amended by the Programme Law ('the CDTD'), provides:

> 'The following transactions, concluded or executed in Belgium in respect of Belgian or foreign Government stocks shall be subject to the tax on stock exchange transactions:
> 1. any sale or purchase and, more generally, any disposal or acquisition for valuable consideration;
> …
> 3. any repurchase of its shares by an investment company if the transaction involves capitalisation shares;
> …
> The transactions referred to in paragraph 1 shall also be deemed to be concluded or executed in Belgium where the order relating to the transactions is given directly or indirectly to an intermediary established abroad:
> – by a natural person who has his habitual residence in Belgium;
> – or by a legal person on behalf of a registered office or an establishment of that legal person in Belgium.'

5. Article 125/1 of the CDTD provides:

> 'The tax shall be payable at the latest on the last working day:
> 1. of the second month following that in which the transaction was concluded or executed, where the issuer of an order is the person liable for payment of the tax;
> 2. of the month following the month in which the transaction was concluded or executed, in other cases.
> The tax shall be paid by payment or transfer to the bank account of the competent office.

* Language of the case: Dutch.

On the day of payment, the person liable for payment shall lodge at that office a statement setting out the basis of collection and all the information necessary for determining it.'

6. Under Article 126/2 of the CDTD:

'Professional intermediaries are personally liable for the duties on the transactions they carry out, either on behalf of third parties or for their own account.

However, where the professional intermediary is established abroad, the issuer of an order shall be liable for the tax and shall be subject to the obligations referred to in Article 125; unless he can establish that the tax has been paid.'

7. Article 126/3 of the CDTD reads as follows:

'Professional intermediaries not established in Belgium may, before executing or concluding stock exchange transactions in Belgium, have a liable representative established in Belgium approved by the Minister of Finance or his delegate. That person shall be jointly and severally liable to the Belgian State for the payment of the duties on transactions executed by the professional intermediary, either on behalf of a third party or for his own account, and to perform all the obligations imposed on the professional intermediary in accordance with this title.

In the case of the death of that representative, or of the withdrawal of his ministerial authorisation, or of any event leading to his incapacity, he shall be replaced immediately.

The King shall lay down the conditions and procedures for the approval of the liable representative.'

8. Article 127 of the CDTD provides as follows:

'At the latest on the working day following the day on which the transaction is executed, the intermediary is required to deliver to any issuer of an order an order statement [("bordereau")] indicating the names of the beneficiary and the intermediary, the specification of the transactions, the amount or value of the transactions and the amount of the tax due.'

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

9. By application of 20 June 2017, Anton van Zantbeek, a company established in Belgium, brought an action before the referring court, the Grondwettelijk Hof (Constitutional Court, Belgium), seeking annulment of Articles 122 and 123 of the Programme Law, which had introduced, respectively, a second paragraph in Articles 120 and 126/2 of the CDTD.

10. The referring court states that those provisions have widened the scope of the tax on stock exchange transactions ('taks op de beursverrichtingen'; 'TOB'), to which transactions entered into or executed in Belgium which relate to Belgian or foreign public funds are subject, in so far as the transaction is executed through a professional intermediary. That court states that, under those provisions, those transactions are no longer the only transactions subject to that tax, since the transactions 'deemed to be concluded or executed in Belgium' are also covered, with the result that that tax is also due if the purchase or sale order is issued to a non-resident professional intermediary by a resident issuer of an order, namely by 'a natural person who has his habitual residence in Belgium' or by a 'legal person on behalf of a registered office or an establishment of that legal person in Belgium'. The referring court adds that, in the latter case, the issuer of an order becomes liable for the TOB instead of the professional intermediary, since non-resident professional intermediaries cannot be required to comply with the Belgian tax provisions. That issuer of an order is required to declare and pay that tax within two months of the transaction in question, unless he can establish that it has already been paid, either through the intermediary or his liable representative.

11. In support of its action, Anton van Zantbeek claims that Articles 122 and 123 of the Programme Law, in that they establish a difference in treatment between Belgian issuers of an order, depending on whether they use a professional intermediary established in Belgium or elsewhere, are contrary, first, to the principle of equality guaranteed by Articles 10, 11 and 172 of the Belgian Constitution and, second, to those constitutional provisions, read in conjunction with Article 56 TFEU and Article 36 of the EEA Agreement, which establish the freedom to provide services, or with Article 63 TFEU and Article 40 of the EEA Agreement, relating to the free movement of capital.

12. In that regard, Anton van Zantbeek claims that if an issuer of an order residing in Belgium uses a professional intermediary who is not established in that Member State, that issuer of an order will be treated as a professional intermediary, in so far as he will, first, be subject to the declaration and payment obligations of the TOB and, second, will be subject to administrative sanctions almost identical to those imposed on Belgian

professional intermediaries. It would therefore be considerably more risky, costly and burdensome at an administrative level for such an issuer of an order who is resident in Belgium to use the services of a non-resident professional intermediary, which constitutes a restriction on the freedom to provide services and the free movement of capital, and cannot be justified by objectives in the public interest.

13. The Council of Ministers disputes that argument, stating that the tax scheme resulting from Articles 120 and 126/2 of the CDTD applies without distinction to all providers of stock exchange transactions, irrespective of their place of residence, but that only professional intermediaries established in Belgium are required to levy the TOB on the transactions executed. The situation of a resident issuer of an order using a resident professional intermediary is therefore not comparable to that of the same issuer of an order using a non-resident professional intermediary. In the alternative, the difference in treatment relied on is based on an objective criterion, pursues a legitimate aim and is not disproportionate.

14. The referring court points out that the Belgian legislature intended to extend the scope of the TOB in so far as, where an issuer of an order established in Belgium approached a non-resident professional intermediary, the transaction was generally executed in a foreign place, not rendering the tax chargeable. The legislature also found that there was unfair competition on the part of certain non-resident professional intermediaries in relation to Belgian professional intermediaries, who levy that tax. That court adds that Articles 120 and 126/2 of the CDTD could have the effect of restricting the freedom of Belgian residents to choose a professional intermediary to carry out their stock exchange transactions, having regard, in particular, to the liability which arises, for the issuer of an order, from the use of a non-resident professional intermediary in the event of non-payment or delay in making a declaration relating to the TOB or payment of that tax.

15. The referring court further states that, in order to facilitate the administration of proof of payment of that tax, enabling the issuer of an order to be exempted, non-resident professional intermediaries may have a liable representative approved, who will be responsible for fulfilling, on their behalf, the declaration and administrative obligations connected with that payment. The appointment of such a representative cannot, however, be imposed on those intermediaries. Furthermore, if the issuer of an order appointed a representative to fulfil its obligations under the TOB, the issuer of an order would remain liable to the Belgian State. The issuer of an order could establish that the tax was paid by producing an order statement ('bordereau') in accordance with Article 127 of the CDTD, indicating, inter alia, the value of the transaction forming the basis of that tax, and proof of payment to his intermediary, by means, for example, of a bank statement.

16. In those circumstances, the Grondwettelijk Hof (Constitutional Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Should Article 56 [TFEU] and Article 36 of the [EEA] Agreement be interpreted as precluding national legislation which introduces a tax on stock exchange transactions, as referred to in Articles 120 and 126/2 of the [CDTD], and which results in the Belgian issuer of an order becoming liable for that tax in the case where the professional intermediary is established outside Belgium?
> 2. Should Article 63 [TFEU] and Article 40 of the [EEA] Agreement be interpreted as precluding national legislation which introduces a tax on stock exchange transactions, as referred to in Articles 120 and 126/2 of the [CDTD], and which results in the Belgian issuer of an order becoming liable for that tax in the case where the professional intermediary is established outside Belgium?
> 3. If, on the basis of the reply to the first or second question referred for a preliminary ruling, the Grondwettelijk Hof (Constitutional Court) were to conclude that the contested articles infringe one or more of the obligations arising from the provisions cited in those questions, could it temporarily continue to enforce the effects of Articles 120 and 126/2 of the [CDTD] in order to prevent legal uncertainty and to enable the legislature to bring those provisions into conformity with those obligations?'

**Consideration of the questions referred**

*The first and second questions*

17. As a preliminary point, it should be noted that, according to the information set out in the request for a preliminary ruling, the national provisions contested in the main proceedings, namely the second paragraph of Article 120 and the second paragraph of Article 126/2 of the CDTD, have changed the scope of the TOB and the criteria for liability for that tax. Under those provisions, first, in addition to stock exchange transactions entered into or executed in Belgium, in so far as the transaction is executed through a professional intermediary, transactions which are 'deemed to be concluded or executed' in that Member State, that is to say, transactions whose order is given by a Belgian resident to a non-resident professional intermediary, are subject to that tax. Second, if the professional intermediary is established abroad, it is no longer the professional inter-

mediary who is liable for the TOB payable by his client who issues an order and the declaration obligations that are a corollary of this, but the issuer of an order himself.

18. It follows that, by its first and second questions, which it is appropriate to examine together, the referring court asks, in essence, whether Articles 56 and 63 TFEU and Articles 36 and 40 of the EEA Agreement are to be interpreted as precluding legislation of a Member State which establishes a tax on stock exchange transactions concluded or executed on the order of a resident of that Member State by a non-resident professional intermediary, with the result that an issuer of an order is liable for that tax and for the declaration obligations connected with that tax.

19. In order to answer those questions, it must in the first place be stated that such national legislation is liable to affect both the freedom to provide services and the free movement of capital.

20. In that regard, it is settled case-law of the Court that if a national measure concerns both the freedom to provide services and the free movement of capital, the Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, judgments of 3 October 2006, *Fidium Finanz*, C-452/04, EU:C:2006:631, paragraph 34; of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 39; and of 8 June 2017, *Van der Weegen and Others*, C-580/15, EU:C:2017:429, paragraph 25).

21. In the case in the main proceedings, it appears that the aspect of the freedom to provide services prevails over that of the free movement of capital. Although a tax such as the TOB is capable of affecting the free movement of capital in so far as it relates to stock exchange transactions, it is apparent from the information provided by the referring court that that tax applies only if a professional intermediary is involved in the transaction. In addition, the referring court is uncertain as to the restriction which may arise from the fact that the issuer of an order, if he uses a non-resident supplier of financial intermediation services, becomes liable to pay that tax, whereas that is not the case if that issuer of an order uses a resident supplier of services. Such an effect predominantly concerns the freedom to provide services, whereas its effect on the free movement of capital is merely an inevitable consequence of the possible restriction imposed on the provision of services.

22. It follows that the legislation at issue in the main proceedings must be examined solely in the light of Article 56 TFEU and Article 36 of the EEA Agreement.

23. In the second place, in accordance with the Court's case-law, Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided (judgments of 19 June 2014, *Strojírny Prostejov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 34, and of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 28). Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (see, to that effect, judgments of 19 June 2014, *Strojírny Prostejov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 35, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 46 and the case-law cited).

24. According to settled case-law of the Court, Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services (judgments of 31 January 1984, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 10; of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 23; and of 19 June 2014, *Strojírny Prostejov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 26).

25. In the present case, Anton van Zantbeek submits that the national legislation at issue in the main proceedings infringes the freedom to provide services in that it introduces an unjustified difference in treatment between issuers of an order who reside in Belgium according to whether they use a professional intermediary established in that Member State or abroad for the purposes of stock exchange transactions. The effect of that national legislation is, for a resident issuer of an order, to increase the risk, the cost and the burden of using a non-resident intermediary and, therefore, to make use of such a non-resident intermediary less attractive.

26. In that regard, it should be observed that resident issuers of an order who, as recipients of financial intermediation services, decide to use the services of a resident intermediary to carry out their stock exchange transactions are in a situation comparable to those who prefer to use the services of a non-resident intermediary.

27. Although, admittedly, the national legislation at issue in the main proceedings has the effect of making resident issuers of an order subject to identical taxation irrespective of where those intermediaries are estab-

lished, it also has the effect of imposing additional liability and obligations on such issuers of an order who decide to use a non-resident intermediary.

28. It is clear from the reference for a preliminary ruling that, in the latter case, resident issuers of an order become liable for the TOB and the declaration obligations relating to that tax under Article 126/2 of the CDTD, whereas, if they had used a resident intermediary, it is the latter who would have been required to fulfil those obligations and to levy that tax at source. Thus, resident issuers of an order using the services of a non-resident intermediary are required, in particular, to declare that tax themselves by means of an order statement containing the information referred to in Article 127 of the CDTD and to pay it within two months, on pain of fines, unless they provide proof that it has already been paid, by the intermediary or by the intermediary's liable representative in Belgium.

29. Such national legislation therefore establishes a difference in treatment between recipients of financial intermediation services resident in Belgium which is liable to dissuade them from using the services of non-resident service providers, while making it more difficult for the latter to offer their services in that Member State. Such national legislation therefore constitutes a restriction on the freedom to provide services.

30. In the third place, it should be recalled that, according to the Court's case-law, such a restriction may be justified by overriding reasons in the public interest. Nevertheless, that restriction is applied in such a way as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, judgments of 7 September 2006, *N*, C-470/04, EU:C:2006:525, paragraph 40; of 13 July 2016, *Brisal and KBC Finance Ireland*, C-18/15, EU:C:2016:549, paragraph 29; and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 52 and the case-law cited).

31. It is necessary to examine, first of all, whether the restriction on the freedom to provide services entailed by the national legislation at issue in the main proceedings reflects overriding reasons in the public interest.

32. In the present case, the Belgian Government states that that national legislation is intended to ensure the effective collection of tax and fiscal supervision and to combat tax evasion.

33. As the Court has already held, these are overriding reasons in the public interest that may justify a restriction on the exercise of the freedom to provide services, as well as the need to ensure the effectiveness of tax collection and fiscal supervision (see to that effect, inter alia, judgment of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraphs 53 and 57 and the case-law cited), the latter aimed at combating tax fraud and evasion (see, to that effect, judgments of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 44, and of 26 February 2019, *X (Intermediate Companies established in third countries)*, C-135/17, EU:C:2019:136, paragraph 74), and the fight against tax evasion (see, inter alia, judgment of 19 June 2014, *Strojírny Prostejov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 55 and the case-law cited).

34. According to the information contained in the reference for a preliminary ruling and confirmed by the Belgian Government, it is apparent from the preparatory document to Articles 122 and 123 of the Programme Law that those provisions are intended, inter alia, to prevent unfair competition between resident and non-resident professional intermediaries, in so far as the former are obliged to levy the TOB at source on behalf of their clients when executing stock exchange transactions, in accordance with the CDTD, while the latter are not obliged to do so on transactions executed for Belgian issuers of an order, and to ensure the effectiveness of tax collection and fiscal supervision.

35. Such reasons, which, in the present case, are closely linked, fall within the concept of 'overriding reasons in the public interest', within the meaning of the case-law of the Court referred to in paragraph 33 of the present judgment, so that they are capable of justifying a restriction on the freedom to provide services.

36. Next, with regard to whether that legislation is able to achieve the objectives pursued, it should be noted that making the issuer of an order using the services of a non-resident intermediary subject to the TOB is likely to ensure that the stock exchange transactions concerned will not escape taxation (see, by analogy, judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, point 39 and the case-law cited), by making fiscal supervision more effective and making it more difficult to circumvent that tax, the burden of which is borne by the issuer of an order.

37. It follows that such national legislation is appropriate for attaining the objectives it pursues.

38. As regards the question whether the national legislation at issue in the main proceedings does not go beyond what is necessary to achieve those objectives, it must be stated at the outset, as the European Commission has noted, that the information necessary for the establishment and supervision of a tax such as the TOB, which is levied on each stock exchange transaction, cannot be obtained by administrative cooperation

alone and by the automatic and compulsory exchange of information in the field of taxation provided for, in particular, by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1).

39. Furthermore, it is apparent from the request for a preliminary ruling that the national legislation at issue in the main proceedings, although having the effect of making the Belgian issuer of an order liable to the TOB if the professional intermediary is established abroad, nevertheless limits the burden resulting from that liability to what is necessary in order to attain the objectives pursued.

40. In particular, pursuant to Article 126/2 of the CDTD, the issuer of an order is exempt from payment of that tax and from the declaration obligations linked to that tax if he establishes that the tax has already been paid. For that purpose, it is apparent from the reference for a preliminary ruling that it is sufficient for the issuer of an order to produce the order statement referred to in Article 127 of the CDTD, indicating the name of the non-resident professional intermediary, the type and value of the transaction and the value of that tax, accompanied, for example, by a bank statement proving payment of that tax.

41. It appears, moreover, that a resident issuer of an order may agree with the non-resident professional intermediary engaged by him that the latter wishes to provide that resident issuer of an order with a bank statement in respect of the transactions showing payment of the TOB, as intermediaries established in Belgium are obliged to do. The referring court also notes that a non-resident professional intermediary is able to appoint a representative for the purposes of carrying out those formalities.

42. It is also apparent from the request for a preliminary ruling that, by the introduction of Article 126/3 of the CDTD, the Belgian legislature also sought to simplify the taking of evidence concerning payment of the TOB. That article allows, without obliging them to do so, non-resident intermediaries to have a representative established in Belgium approved for the purpose of fulfilling, on their behalf, the declaration obligations linked to the payment of that tax and who will be responsible for it. That option is such as to overcome the difficulty associated with the need to complete the order statement referred to in Article 127 of the CDTD in a language which is not that of the non-resident professional intermediary.

43. In those circumstances, such a choice of options, to the benefit of both resident issuers of an order and non-resident professional intermediaries, which allows them to adopt, from among those options, the solution which appears to them to be the least restrictive, limits the restriction on the freedom to provide services resulting from the national legislation at issue in the main proceedings to what is necessary in order to achieve the objectives which it pursues, so that that legislation, which thus offers those issuers of an order and the professional intermediaries options, both as regards the declaration obligations relating to the TOB and its payment, does not appear to go beyond what is necessary to achieve these objectives.

44. Finally, as far as Article 36 of the EEA Agreement is concerned, it must be noted that that provision is similar to that set out in Article 56 TFEU, with the result that the considerations relating to that latter article, set out in paragraphs 23 to 43 of the present judgment, also apply in respect of Article 36 of the EEA Agreement.

45. Consequently, the answer to the first and second questions is that Article 56 TFEU and Article 36 of the EEA Agreement must be interpreted as meaning that they do not preclude legislation of a Member State which introduces a tax on stock exchange transactions concluded or executed on the order of a resident of that Member State by a non-resident professional intermediary, resulting in a restriction on the freedom to provide services provided by such professional intermediaries, in so far as that legislation offers such an issuer of an order and such professional intermediaries options, both as regards the declaration obligations connected with that tax and its payment, which limit that restriction to that which is necessary to attain the legitimate objectives pursued by that legislation.

*The third question*

46. Given the answer to the first and second questions, there is no need to answer the third question.

**Costs**

47. ...

On those grounds,

the Court (Seventh Chamber)

hereby rules:

**Article 56 TFEU and Article 36 of the Agreement on the European Economic Area of 2 May 1992 must be interpreted as meaning that they do not preclude legislation of a Member State which introduces a tax on stock exchange transactions concluded or executed on the order of a resident of that Member State by a non-resident professional intermediary, resulting in a restriction on the freedom to provide services provided by such professional intermediaries, in so far as that legislation offers such an issuer of an order and such professional intermediaries options, both as regards the declaration obligations connected with that tax and its payment, which limit that restriction to that which is necessary to attain the legitimate objectives pursued by that legislation.**

# EU Court of Justice, 27 February 2020*

## Case C-405/18

## *AURES Holdings a.s. v Odvolací financní reditelství*

*Fourth Chamber:* *M. Vilaras, President of the Chamber, S. Rodin, D. Sváby, K. Jürimäe (Rapporteur) and N. Piçarra, Judges*
*Advocate General:* *J. Kokott*

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*Provisional text*

1. This request for a preliminary ruling concerns the interpretation of Articles 49, 52 and 54 TFEU.

2. The request has been made in proceedings between AURES Holdings a.s. and the Odvolací financní reditelství (Appellate Tax Directorate, Czech Republic) concerning the latter's refusal to allow that company to deduct a tax loss which it incurred in a Member State other than the Czech Republic.

### Legal context

3. Paragraph 34 of zákon c. 586/1992 Sb., o daních z príjmu (Law No 586/1992 on income tax), in the version applicable to the facts in the main proceedings ('Law on income tax'), under the heading 'Deductions from the tax base', provides, in paragraph 1:

> 'A tax loss incurred in and assessed for the previous tax year or part thereof may be deducted from the tax base in up to five accounting periods immediately following the period for which the tax loss is assessed. …'

4. Under Paragraph 38n(1) and (2) of that law, under the heading 'Tax losses':

> '1. If expenditure (costs) adjusted in accordance with Paragraph 23 is greater than income adjusted in accordance with the same paragraph, the resulting difference between the two is a tax loss.
> 2. A tax loss shall be administered in the same way as a tax obligation. However, a tax loss incurred and assessed in respect of an incorporated taxpayer wound up without purging its debts shall not be transferred to its successor in law unless Paragraph 23a(5)(b) or Paragraph 23c(8)(b) apply. The tax authorities shall assess the tax loss. A reduction in a tax loss shall be governed *mutatis mutandis* according to the same procedure as an increase in tax. An increase in a tax loss shall be governed *mutatis mutandis* according to the same procedure as a tax rebate. The amount of a tax loss shall be rounded up to the next point.'

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

5. AURES Holdings, formerly AAA Auto International a.s., is the successor in law of AAA Auto Group NV (together 'Aures'), a company incorporated under Netherlands law whose registered seat and place of effective management were in the Netherlands, by virtue of which it was a tax resident of the Netherlands.

6. In the 2007 tax year, Aures incurred a loss of EUR 2 792 187 in the Netherlands, which was determined by the Netherlands tax authorities in accordance with the tax legislation of that Member State.

7. On 1 January 2008, Aures set up a branch in the Czech Republic which, under Czech law, constitutes a permanent establishment of that company without legal personality and whose activity is taxable in that Member State.

* Language of the case: Czech.

8. On 1 January 2009, Aures transferred its place of effective management from the Netherlands to the Czech Republic and, more specifically, that branch's address. Following that transfer, Aures also transferred its tax residence from the Netherlands to the Czech Republic with effect from the same date. It now carries on all its activities through that branch.

9. However, Aures retained its registered seat and its entry in the commercial register in Amsterdam (Netherlands). Thus, it continues to be governed, as regards its internal relations, by Netherlands law.

10. In the light of that transfer of place of effective management and, consequently, of its tax residency, Aures applied to the Czech tax authorities for deduction of the loss which it had incurred in the Netherlands on the basis of the 2007 tax year from the corporation tax base for which it was liable on the basis of the 2012 tax year.

11. Following an investigatory review procedure, initiated on 19 March 2014, the Czech tax authorities considered that that loss could not be invoked as a deductible element of the tax base on the basis of Paragraph 38n of the Law on income tax. According to those authorities, Aures is, as a Czech tax resident, taxable on its worldwide income under Czech tax law. However, it can deduct from the tax base only a loss arising from an economic activity in the Czech Republic determined in accordance with the Law on income tax, since that law does not govern the deduction of a tax loss in the event of a change in tax residency and does not provide for the transfer of such a loss from any Member State other than the Czech Republic.

12. Accordingly, in a tax notice of 11 September 2014, the Czech tax authorities assessed the corporation tax payable by Aures for the 2012 tax year without deducting from that corporation tax base the loss incurred in the 2007 tax year.

13. Aures lodged an objection against that tax notice, which was rejected by the Appellate Tax Directorate, and then brought an action before the M?stský soud v Praze (City Court, Prague, Czech Republic), which was dismissed.

14. The Czech tax authorities, the Appellate Tax Directorate and the M?stský soud v Praze (City Court, Prague) considered, first, that neither the Law on income tax nor the Convention concluded on 22 November 1974 between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the avoidance of double taxation and the prevention of tax evasion with respect to taxes on income and capital, in the version in force on 31 May 2013, provided for the cross-border transfer of a tax loss upon the transfer of a company's place of effective management, save in specific circumstances which are not relevant in the present case. The general rules in Paragraphs 34 and 38n of that law do not allow for the deduction of a loss that has not been determined in accordance with Czech law.

15. Second, those authorities and that court took the view that, contrary to the arguments put forward by Aures, the impossibility of deducting the loss in question was not contrary to freedom of establishment. In their view, the judgments of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763), of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785); and of 21 February 2013, *A* (C-123/11, EU:C:2013:84), relied on by Aures, concerned situations which are objectively different from that at issue in the main proceedings. Citing the judgment of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278), the Appellate Tax Directorate took the view that, in the case in the main proceedings, there was a genuine danger that tax loss incurred on the basis of the 2007 tax year would be taken into account twice.

16. Aures brought an appeal on a point of law before the Nejvyšší správní soud (Supreme Administrative Court, Czech Republic) in respect of the judgment of the Mestský soud v Praze (City Court, Prague).

17. Aures claims in the appeal before that court that by the cross-border transfer of its place of effective management it exercised the freedom of establishment and that the impossibility for it to deduct the 2007 tax loss in the Czech Republic, which it can no longer claim in the Netherlands, amounts to an unjustified restriction on that freedom.

18. The referring court notes that the Law on income tax does not allow a company which, like Aures, has transferred its place of effective management to the Czech Republic from another Member State to claim a tax loss suffered in that Member State. The transfer of a tax loss is possible only in the context of cross-border transactions specifically covered by that law, which are not relevant to the case in the main proceedings.

19. In order to dispose of the case in the main proceedings, the referring court therefore considers that it is necessary to address the arguments relating to freedom of establishment.

20. In that regard, it is necessary to determine in the first place whether that freedom is applicable to the case of a cross-border transfer of a company's place of effective management.

21. If so, it is necessary to examine, in the second place, whether national legislation which does not allow a company to claim, in the host Member State, a loss incurred in the Member State of origin before the transfer of its place of effective management to the host Member State, is compatible with that freedom. While noting that the field of direct taxation is not, in principle, subject to harmonisation and that the Member States are sovereign in the matter, the referring court asks whether that freedom means that the transfer of tax residency from one Member State to another Member State must always be neutral from a tax point of view.

22. The Nejvyšší správní soud (Supreme Administrative Court) therefore decided to stay the

proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Can the concept of freedom of establishment within the meaning of Article 49 [TFEU] be held [prima facie] to cover a simple transfer of the place of a company's management from one Member State to another Member State?
> 2. If so, is it contrary to Articles 49, 52 and 54 [TFEU] for national law not to allow an entity from another Member State, when relocating its place of business or place of management to the Czech Republic, to claim a tax loss incurred in that other Member State?'

**Consideration of the questions referred**

*The first question*

23. By its first question, the referring court wishes to know, in essence, whether Article 49 TFEU must be interpreted as meaning that a company incorporated under the law of a Member State, which transfers its place of effective management to another Member State without that transfer affecting its status as a company incorporated under the law of the first Member State, may rely on that article for the purposes of contesting a refusal in the second Member State to defer losses prior to that transfer.

24. In that regard, it should be made clear that Article 49 TFEU, read in conjunction with Article 54 TFEU, extends the benefit of freedom of establishment to companies or firms formed in accordance with the legislation of a Member State and having their registered seat, their central administration or principal place of business within the European Union.

25. In particular, the Court has previously held that a company incorporated under the law of a Member State which transfers its place of effective management to another Member State, without that transfer affecting its status as a company of the former Member State, may rely on Article 49 TFEU for the purpose, inter alia, of challenging the tax consequences resulting from that transfer in the Member State of origin (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 33).

26. Similarly, such a company, in such circumstances, may therefore rely on Article 49 TFEU for the purposes of challenging its tax treatment in the Member State to which it has transferred its place of effective management. A cross-border transfer of that place of management therefore falls within the scope of that article.

27. Any other interpretation would fall foul of the very wording of the provisions of EU law on freedom of establishment, which are, inter alia, aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State (see, to that effect, judgments of 11 March 2004, *de Lasteyrie du Saillant*, C-9/02, EU:C:2004:138, paragraph 42, and of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 16).

28. In the light of the foregoing considerations, the answer to the first question is that Article 49 TFEU must be interpreted as meaning that a company incorporated under the law of a Member State, which transfers its place of effective management to another Member State without that transfer affecting its status as a company incorporated under the law of the first Member State, may rely on that article for the purposes of contesting a refusal in the second Member State to defer losses prior to that transfer.

*The second question*

29. By its second question, the referring court wishes to know, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State which excludes the possibility for a company, which has transferred its place of effective management and, as a result, its tax residency to that Member State, from

claiming a tax loss incurred, prior to that transfer, in another Member State, in which it has retained its registered seat.

30. Freedom of establishment, which Article 49 TFEU grants to EU nationals, includes, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered seat, central administration or principal place of business within the European Union, the right to exercise their activity in other Member States through a subsidiary, branch or agency.

31. As has been stated in paragraph 27 above, the provisions of EU law on freedom of establishment are, inter alia, aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State.

32. By contrast, the Treaty offers no guarantee to a company covered by Article 54 TFEU that transferring its place of effective management from one Member State to another Member State will be neutral as regards taxation. Given the relevant disparities in the tax legislation of the Member States, such a transfer may be to the company's advantage in terms of tax or not, according to circumstances. Freedom of establishment cannot therefore be understood as meaning that a Member State is required to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes any disparities arising from national tax rules (judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 62 and the case-law cited).

33. In the present case, it should be noted that the possibility available under the law of a Member State to a resident company to claim a loss incurred in that Member State during a given tax year, so that that loss may be deducted from the taxable profits made by such a company in subsequent tax years, constitutes a tax advantage.

34 To exclude a loss incurred by a company resident in one Member State but incorporated in another Member State under the latter's law during the tax year in which that company was resident in the Member State of incorporation from the benefit of that advantage, whereas that advantage is granted to a company resident in the Member State of residence which incurred a loss in the same tax year, constitutes a difference in tax treatment.

35. By reason of that difference in treatment, a company incorporated under the law of a Member State might be dissuaded from transferring its place of effective management to another Member State in order to pursue its economic activities there.

36. Such a difference in treatment resulting from a Member State's tax legislation to the detriment of companies exercising their freedom of movement can be permissible only if it relates to cases which are not objectively comparable or if it is justified by an overriding reason in the public interest (judgments of 17 July 2014, *Nordea Bank Danmark*, C-48/13, EU:C:2014:2087, paragraph 23, and of 17 December 2015, *Timac Agro Deutschland*, C-388/14, EU:C:2015:829, paragraph 26).

37. As regards the first case referred to in the previous paragraph, it should be noted that, according to the case-law of the Court, the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue (judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraph 32 and the case-law cited).

38. In the present case, it is clear from the file before the Court, subject to verification by the referring court, that, by providing that a company may not claim, in the Member State in which it is now resident, a loss incurred in a tax year in which it was a tax resident of another Member State, the Czech legislation is conducive, in essence, to preservation of the allocation of the power to impose taxes between the Member States and to prevent the risk of double deduction of losses.

39. As regards a measure pursuing such objectives, it must be held that a company resident in a Member State which has incurred a loss in that Member State and a company which has transferred its place of effective management and, consequently, its tax residency to that Member State having incurred a loss during a tax year during which it was a tax resident of another Member State, without any activity in the former Member State are not, in principle, in a comparable situation.

40. The situation of a company which effects such a transfer is subject successively to the tax jurisdiction of two Member States, namely, first, the Member State of origin, in respect of the tax year during which the loss is incurred, and, second, the host Member State, in respect of the tax year for which that company applies for that loss to be deducted.

41. It follows that, where the host Member State has no tax jurisdiction over the tax year during which the loss at issue arose, the situation of a company, which has transferred its tax residency to that Member State and subsequently claims a loss there previously incurred in another Member State, is not comparable to that of a company the turnover of which was subject to the tax powers of the previous Member State on the basis of the tax year during which that company incurred that loss (see, by analogy, judgment of 17 December 2015, *Timac Agro Deutschland*, C-388/14, EU:C:2015:829, paragraph 65).

42. Furthermore, the fact that a company which has transferred its tax residency from one Member State to another falls successively within the tax jurisdiction of two Member States is liable to give rise to a greater risk of that loss being taken into account twice, since such a company might claim the same loss in respect of the authorities of both Member States.

43. In their written observations submitted to the Court, the United Kingdom Government and the European Commission nevertheless observed, in essence, that, according to case-law resulting from the judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 38), the comparability of the situations depends on whether or not the loss at issue in the main proceedings is final.

44. In that regard, it should be noted that the Court held that, as regards losses attributable to a non-resident permanent establishment which has ceased activity and whose losses could not, and no longer can, be deducted from its taxable profits in the Member State in which it carried on its activity, the situation of a resident company possessing such an establishment is not different from that of a resident company possessing a resident permanent establishment, from the point of view of the objective of preventing double deduction of the losses, despite the fact that the situations of those two companies are not, in principle, comparable (see, to that effect, judgment of 12 June 2018, *Bevola and Jens W. Trock*, C-650/16, EU:C:2018:424, paragraphs 37 and 38).

45. However, such an approach cannot be accepted in the case of a company which, after transferring its place of effective management and, as a result, its tax residency from the Member State of its registered seat to another Member State, seeks to deduct in that other Member State a loss incurred in the former Member State in respect of a tax year during which that company fell exclusively within the tax jurisdiction of that Member State.

46. First, as the Advocate General noted in points 56 and 57 of her Opinion, the case-law referred to in paragraph 44 above arose in circumstances different from those at issue in the main proceedings.

47. Thus, that case-law concerns any taking into account, by a resident company, of a loss incurred by a non-resident permanent establishment of that company.

48. That case-law therefore refers to a situation characterised by the fact that, during the same tax year, the company which seeks to deduct a loss of its non-resident permanent establishment from its tax base and that permanent establishment are situated in two different Member States.

49. It is clear from the chronology of the relevant facts of the case in the main proceedings set out by the referring court that Aures incurred a loss in the Netherlands in 2007 in a tax year during which both its registered seat and its place of effective management were located in that Member State at a time when it had not yet created a permanent establishment in the Czech Republic.

50. Second, as the Advocate General noted in points 72 and 73 of her Opinion, extending the scope of the rule in the judgment of 12 June 2018, *Bevola and Jens W. Trock* (C-650/16, EU:C:2018:424, paragraph 38) to the case referred to in paragraph 45 above would also be incompatible with the Court's case-law on exit taxation.

51. In that regard, the Court held, in essence, that Article 49 TFEU does not preclude the possibility of the Member State of origin of a company incorporated under the law of that Member State having transferred its place of effective management to another Member State, from taxing unrealised capital gains relating to assets of that company (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 59 and 64).

52. Similarly, the Member State to which a company transfers its place of effective management cannot be required to take into account a loss incurred before that transfer which relates to tax years in respect of which that company did not fall within the tax jurisdiction of that Member State.

53. Accordingly, resident companies which suffered a loss in that Member State, on the one hand, and companies which transferred their tax residence to that Member State and had incurred a loss in another Member State in respect of a tax year during which they were tax residents in the latter Member State, on the other, are

not in a comparable situation in the light of the objectives of preserving the allocation of the power to impose taxes between the Member States and preventing the double deduction of losses.

54. In the light of the foregoing considerations, the answer to the second question is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State which excludes the possibility for a company, which has transferred its place of effective management and, as a result, its tax residency to that Member State, from claiming a tax loss incurred, prior to that transfer, in another Member State, in which it has retained its registered seat.

**Costs**

55. …

On those grounds,

the Court (Fourth Chamber)

hereby rules:

**1. Article 49 TFEU must be interpreted as meaning that a company incorporated under the law of a Member State, which transfers its place of effective management to another Member State without that transfer affecting its status as a company incorporated under the law of the first Member State, may rely on that article for the purposes of contesting a refusal in the second Member State to defer losses prior to that transfer.**

**2. Article 49 TFEU must be interpreted as not precluding legislation of a Member State which excludes the possibility for a company, which has transferred its place of effective management and, as a result, its tax residency to that Member State, from claiming a tax loss incurred, prior to that transfer, in another Member State, in which it has retained its registered seat.**

# EU Court of Justice, 3 March 2020*

## Case C-75/18

## *Vodafone Magyarország Mobil Távközlési Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

*Grand Chamber:* *K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur), A. Prechal and M. Vilaras, Presidents of Chambers, E. Juhász, M. Ilesic, J. Malenovský, P. G. Xuereb, N. Piçarra and L. S. Rossi, Judges*

*Advocate General:* *J. Kokott*

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*Provisional text*

1. This request for a preliminary ruling concerns the interpretation of Articles 49, 54, 107 and 108 TFEU and of Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1; 'the VAT Directive').

2. The request has been made in proceedings between Vodafone Magyarország Mobil Távközlési Zrt. ('Vodafone'), an undertaking active in the telecommunications sector, and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Resources Directorate of the National Tax and Customs Administration, Hungary; 'the Resources Directorate') concerning the payment of a tax on turnover in that sector ('the special tax').

### Legal context

*European Union law*

3. Article 401 of the VAT Directive provides:

> 'Without prejudice to other provisions of Community law, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.'

*Hungarian law*

4. The preamble of the egyes ágazatokat terhel? különadóról szóló 2010. évi XCIV. törvény (Law No XCIV of 2010 on the special tax on certain sectors; 'the law on the special tax on certain sectors') states:

> 'In the context of the correction of budgetary balance, the Parliament enacts this law on the establishment of a special tax imposed on taxpayers whose ability to contribute to the costs of public expenditure exceeds the general obligation to pay tax.'

* Language of the case: Hungarian.

5. Paragraph 1 of the law on the special tax on certain sectors provides:

'For the purposes of the present law, the following definitions shall apply:
…
2. telecommunications activities; the provision of electronic communication services within the meaning of Az elektronikus hírközlésr?l szóló 2003. évi C. törvény (Law No C of 2003 on electronic communications),
…
5. net turnover: in the case of a taxable person subject to the law on accounting, the net turnover from sales within the meaning of the law on accounting; in the case of a taxable person subject to the simplified corporation tax and not covered by the law on accounting, turnover exclusive of value added tax in accordance with the law on the tax regime; in the case of a taxable person subject to the law on personal income tax, income exclusive of value added tax in accordance with the law on personal income tax.'

6. Paragraph 2 of the law on the special tax on certain sectors provides:

'Tax shall be chargeable on:
…
b. telecommunications activities,
…'

7. Paragraph 3 of that law defines taxable persons as follows:

'1. Taxable persons are legal persons, other organisations within the meaning of the general tax code and self-employed persons who pursue an activity subject to tax within the meaning of Paragraph 2.
2. Non-resident organisations and individuals shall also be subject to the tax with respect to the activities subject to the tax referred to in Paragraph 2, where they pursue those activities in the internal market through subsidiaries.'

8. Paragraph 4(1) of that law states:

'the taxable amount is the net turnover of the taxable person resulting from the activities referred to in Paragraph 2.'

9. Paragraph 5 of that law provides:

'The applicable tax rate:
…
b. on the performance of an activity referred to in Paragraph 2(b) shall be set at 0% on the proportion of the taxable amount not exceeding 500 million [Hungarian forint (HUF)], 4.5% on the proportion of the taxable amount in excess of HUF 500 million but not exceeding HUF 5 billion, and 6.5% on the proportion of the taxable amount in excess of HUF 5 billion …
…'

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

10. Vodafone is a public limited company governed by Hungarian law, active in the telecommunications market, whose sole shareholder is Vodafone Europe BV, established in the Netherlands. That Hungarian subsidiary is part of Vodafone Group plc, whose registered office is in the United Kingdom. That subsidiary is, with a more than 20% market share, the third largest undertaking on the Hungarian telecommunications market.

11. Vodafone was the subject of a tax inspection carried out by the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatóság (National Tax and Customs Administration, Hungary; 'the first-tier tax authority') concerning all the taxes paid and budget subsidies received in the period from 1 April 2011 until 31 March 2015.

12. Following that inspection, the first-tier tax authority required Vodafone to pay a sum of HUF 8 371 000 (approximately EUR 25 155), by reason of a tax discrepancy, including HUF 7 417 000 (approximately EUR 22 293) in arrears, and a sum of HUF 3 708 000 (approximately EUR 11 145.39) as a tax penalty, together with late-payment interest and fines for default.

13. The Resources Directorate, before which a complaint was brought against the decision of the first-tier tax authority, varied that decision by reducing the amount of the tax penalty and late-payment interest.

14. Vodafone brought an action before the F?városi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) against the decision of the Resources Directorate. Vodafone submits that

the obligation to pay the special tax imposed on it has no legal basis, arguing that the legislation relating to that tax constitutes prohibited State aid and is contrary to Article 401 of the VAT Directive.

15. The referring court considers that the effect of that tax, which is based on turnover and is calculated in accordance with a scale that comprises progressive rates applicable to various tax bands, may be indirectly discriminatory vis-à-vis taxable persons owned by foreign natural persons or legal persons and, therefore, be contrary to Articles 49, 54, 107 and 108 TFEU particularly since, in practice, only the Hungarian subsidiaries of foreign parent companies pay the special tax at the rate laid down for the highest band of turnover.

16. Further, the referring court has doubts as to the compatibility of the special tax with Article 401 of the VAT Directive.

17. In those circumstances, the F?városi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

> '1. Must the provisions of Articles 49, 54, 107 and 108 TFEU be interpreted as precluding a national measure pursuant to which a Member State's legislation ([Law on the special tax on certain sectors]) has the effect that the actual tax burden falls on foreign-owned taxable persons? Is that effect indirectly discriminatory?
> 2. Do Articles 107 and 108 TFEU preclude a Member State's legislation imposing a tax liability on turnover calculated on the basis of a progressive tax rate? If the effect of that legislation is that the actual tax burden, for the highest tax band, falls mainly on foreign-owned taxable persons, is that legislation indirectly discriminatory? Does that measure amount to prohibited State aid?
> 3. Must Article 401 of the VAT Directive be interpreted as precluding legislation of a Member State that gives rise to discrimination between foreign-owned taxable persons and national taxable persons? Must the special tax be considered a tax on turnover? In other words, is this tax compatible or not with the VAT Directive?'

**Consideration of the questions referred**

*The admissibility of the second question*

18. The Hungarian Government and the Commission argue that those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other persons constitutes unlawful State aid in order to avoid payment of that tax, and consequently that the second question is inadmissible.

19. In that regard, it must at the outset be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 84).

20. The implementation of that system of control is a task for both the Commission and the national courts, their respective roles being complementary but separate (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

21. Whilst an assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28).

22. The involvement of national courts is the result of the fact that the prohibition on implementation of planned aid laid down in that provision has been held to have direct effect. The immediate enforceability of that prohibition extends to all aid which has been implemented without being notified (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88).

23. National courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision and possible interim measures (judgments of 21 November 2013,

*Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 30, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89).

24. The Court has, however, also held that if, having regard to the rules of EU law in relation to State aid, an exemption from a tax is unlawful, that is not capable of affecting the lawfulness of the actual charging of that tax, so that a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax (see, to that effect, judgments of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 44; of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 43; and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

25. The position is however different where the dispute in the main proceedings concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax as a matter of EU law (judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

26. Further, the Court has consistently held that taxes do not fall within the scope of the provisions of the FEU Treaty concerning State aid, unless they constitute the means of financing an aid measure, so that they form an integral part of that measure. Where the method of financing aid by means of a tax forms an integral part of the aid measure, the consequences of a failure by national authorities to comply with the last sentence of Article 108(3) TFEU must also apply to that aspect of the aid, so that the national authorities are required, in principle, to repay taxes levied in breach of EU law (judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 14 and the case-law cited).

27. In that regard, it must be recalled that, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of that aid (judgments of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 46, and of 7 September 2006, *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paragraph 44).

28. Accordingly, if a tax is not hypothecated to an aid measure, the possible unlawfulness of the aid measure contested under EU law is not capable of affecting the lawfulness of the tax itself, and consequently the undertakings who are liable to pay that tax cannot rely on the argument that the tax measure for which other persons qualify constitutes State aid in order to avoid payment of that tax or to obtain a repayment of tax paid (see, to that effect, judgments of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 51, and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

29. In this case, the dispute in the main proceedings concerns an application for exemption from the special tax submitted by Vodafone to the Hungarian tax authorities. As stated, in essence, by the Advocate General in point 138 of her Opinion, the tax burden borne by Vodafone is the result of a general tax the revenue from which is transferred to the State budget, that tax not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify.

30. It follows that, even if the de facto exemption from the special tax for which some taxable persons qualify may be classified as State aid, within the meaning of Article 107(1) TFEU, that tax is not hypothecated to the exemption measure at issue in the main proceedings.

31. It follows that any illegality under EU law of the de facto exemption from the special tax for which some taxable persons qualify is not capable of affecting the legality of that tax itself, so that Vodafone cannot rely, before the national courts, on the unlawfulness of that exemption in order to avoid payment of that tax or to obtain repayment of tax paid.

32. It follows from all the foregoing that the second question is inadmissible.

*The first question*

Admissibility

33. The Hungarian Government submits that an answer to the first question is not necessary in order to resolve the dispute in the main proceedings since the Court has already given a ruling, in its judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), on the compatibility of the law on the special tax on certain sectors with Articles 49 and 54 TFEU.

34. In that regard, it must be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appro-

priate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 21 and the case-law cited).

35. It follows that the fact that the Court, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), has already interpreted EU law with regard to the same national legislation as that at issue in the main proceedings cannot in itself lead to the inadmissibility of the questions referred in the present case.

36. Moreover, the referring court states that, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), the Court examined, in relation to the special tax on retail trade, the effect produced by the rule on the consolidation of turnover achieved by linked undertakings, for the purposes of the law on the special tax on certain sectors. That court adds that that tax is, in essence, equivalent to the special tax at issue in the present case. However, the referring court considers that it is necessary, in order to resolve the dispute in the main proceedings, to determine whether the progressive scale, using bands, of the special tax may constitute, in itself, irrespective of the application of that consolidation rule, indirect discrimination vis-à-vis taxable persons that are controlled by natural persons or legal persons of other Member States, who bear the actual tax burden, and, therefore, be contrary to Articles 49 and 54 TFEU.

37. In those circumstances, the first question is admissible in so far as it concerns the interpretation of Articles 49 and 54 TFEU. However, for the reasons stated in paragraphs 19 to 32 of the present judgment, the first question is inadmissible in so far as it relates to the interpretation of Articles 107 and 108 TFEU.

Substance

38. By its first question, the referring court seeks, in essence, to ascertain whether Articles 49 and 54 TFEU must be interpreted as precluding the legislation of a Member State in relation to a turnover tax where the consequence of the fact that that tax is steeply progressive is that undertakings controlled directly or indirectly by nationals of other Member States or by companies having their registered office in another Member State mainly bear the actual burden of that tax.

39. According to settled case-law, freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to nationals of other Member States and to companies referred to in Article 54 TFEU by prohibiting any discrimination based on the place in which companies have their seat (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 16 and the case-law cited).

40. In order to be effective, the scope of freedom of establishment must mean that a company may rely on a restriction on the freedom of establishment of another company which is linked to it in so far as that restriction affects its own taxation (see, to that effect, judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 23).

41. In this case, Vodafone has its registered office in Hungary but is 100% owned by Vodafone Europe, which has its registered office in the Netherlands. As observed by the Advocate General in point 43 of her Opinion, in so far as that parent company pursues its activity on the Hungarian market through a subsidiary, its freedom of establishment may be affected by any restriction which applies to the subsidiary. Accordingly, contrary to what is submitted by the Hungarian Government, a restriction on the freedom of establishment of that parent company may legitimately be relied on in the main proceedings.

42. Not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited (judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 30, and of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 17).

43. Moreover, a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 18).

44. In this case, the law on the special tax on certain sectors makes no distinction between undertakings according to where they have their registered office. All the undertakings operating in Hungary in the tele-

communications sector are subject to that tax, and the tax rates that are, respectively, applicable to the various bands of turnover defined by that law apply to all those undertakings. That law does not, therefore, establish any direct discrimination.

45. However, Vodafone and the Commission maintain that the fact that the special tax is progressive is, in itself, to the advantage of taxable persons owned by Hungarian natural persons or legal persons and to the disadvantage of taxable persons owned by natural persons or legal persons of other Member States, with the result that the special tax constitutes, taking into consideration its characteristics, indirect discrimination.

46. As was stated in paragraph 9 of the present judgment, the special tax, which is a progressive tax based on turnover, comprises a basic band of tax charged at 0% for the proportion of the taxable amount that does not exceed HUF 500 million (approximately EUR 1.5 million, currently), an intermediate band of tax charged at 4.5% for the proportion of the taxable amount between HUF 500 million and HUF 5 billion (approximately between EUR 1.5 million and EUR 15 million, currently), and a higher band of tax charged at 6.5% for the proportion of the taxable amount that exceeds HUF 5 billion (approximately EUR 15 million, currently).

47. It is clear from the Hungarian authorities' data in relation to the tax years at issue in this case, as disclosed by the Commission and Hungary, that, in the period at issue in the main proceedings, with respect to telecommunications, the taxable persons that fell only within the base band were all taxable persons owned by Hungarian natural persons or legal persons, that of those falling within the intermediate band one half were taxable persons owned by Hungarian natural persons or legal persons and one half were taxable persons owned by natural persons or legal persons of other Member States, and that those falling within the higher band were predominantly taxable persons owned by natural persons or legal persons of other Member States.

48. Further, it is clear from the observations of the Hungarian Government that, during that period, the greater part of the special tax was borne by taxable persons owned by natural persons or legal persons of other Member States. According to Vodafone and the Commission, the tax burden borne by the latter was thus proportionately greater than that borne by taxable persons owned by Hungarian natural persons or legal persons as a ratio of their taxable turnover, the latter being in fact exempted from the special tax or being subject to it only at a marginal rate and at an effective rate that were substantially lower than taxable persons with a higher turnover.

49. However, it must be recalled that the Member States are free, given the current state of harmonisation of EU tax law, to establish the system of taxation that they deem the most appropriate, and consequently the application of progressive taxation falls within the discretion of each Member State (see, to that effect, judgments of 22 June 1976, *Bobie Getränkevertrieb*, 127/75, EU:C:1976:95, paragraph 9, and of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraphs 51 and 53).

50. In that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay.

51. In this case, it is apparent from the material available to the Court, in particular from the passage in the preamble of the law on the special tax on certain sectors quoted in paragraph 4 of the present judgment, that, by means of the application of a progressive scale based on turnover, the aim of that law is to impose a tax on taxable persons who have an ability to pay 'that exceeds the general obligation to pay tax'.

52. The fact that the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be such as to merit, by itself, categorisation as discrimination. As stated by the Advocate General, in particular, in points 66, 69 and 82 of her Opinion, that situation is due to the fact that the Hungarian telecommunications market is dominated by such taxable persons, who achieve the highest turnover in that market. Accordingly, that situation is an indicator that is fortuitous, if not a matter of chance, and which may arise, even in a system of proportional taxation, whenever the market concerned is dominated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States.

53. It must be observed, moreover, that the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian natural persons or legal persons, since, as in any system of progressive taxation, any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band.

54. It follows from the foregoing that the progressive rates of the special tax do not, inherently, create any discrimination, based on where companies have their registered office, between taxable persons owned by Hun-

garian natural persons or legal persons and taxable persons owned by natural persons or legal persons of other Member States.

55. It must further be stated that the present case can be distinguished from the case which led to the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47). As is apparent from paragraphs 34 to 36 of that judgment, that case concerned the combined application of both very progressive rates of taxation of turnover and a rule for the consolidation of turnover of linked undertakings, the effect of which was that taxable persons belonging to a group of companies were taxed on the basis of 'fictitious' turnover. In that regard, the Court held, in essence, in paragraphs 39 to 41 of that judgment, that, if it were to be established that, in the store retail market in the Member State concerned, the taxable persons belonging to a group of companies and covered by the highest band of the special tax are, in the majority of cases, 'linked', within the meaning of the national legislation, to companies which have their registered offices in other Member States, 'the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover' is liable to disadvantage, in particular, taxable persons 'linked' to such companies and would, consequently, constitute indirect discrimination based on where companies have their registered office, within the meaning of Articles 49 and 54 TFEU.

56. In the light of all the foregoing, the answer to the first question is that Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned

*The third question*

57. By its third question, the referring court seeks to ascertain, in essence, whether Article 401 of the VAT Directive must be interpreted as precluding the introduction of the tax established by the law on the special tax on certain sectors.

58. In that regard, it must be recalled that, under Article 401 of the VAT Directive, the provisions of that directive do not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties or, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided that the collecting of those taxes, duties or charges does not give rise, in trade between Member States, to formalities connected with the crossing of frontiers.

59. In order to decide whether a tax, duty or charge can be characterised as a turnover tax, within the meaning of Article 401 of the VAT Directive, it is necessary, in particular, to determine whether it has the effect of jeopardising the functioning of the common system of value added tax (VAT) by being levied on the movement of goods and services and on commercial transactions in a way comparable to VAT (see, by analogy, judgment of 11 October 2007, *KÖGÁZ and Others*, C-283/06 and C-312/06, EU:C:2007:598, paragraph 34 and the case-law cited).

60. The Court has stated in this regard that taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT, even if they are not identical to it in every way (judgment of 3 October 2006, *Banca popolare di Cremona*, C-475/03, EU:C:2006:629, paragraph 26 and the case-law cited).

61. However, Article 401 of the VAT Directive does not preclude, no more than did Article 33 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), the maintenance or introduction of a tax which does not display one of the essential characteristics of VAT (see, by analogy, judgment of 7 August 2018, *Viking Motors and Others*, C-475/17, EU:C:2018:636, paragraph 38 and the case-law cited).

62. It is apparent from the case-law that there are four such characteristics: VAT applies generally to transactions relating to goods or services; it is proportional to the price charged by the taxable person in return for the goods and services which he has supplied; it is charged at each stage of the production and distribution process, including that of retail sale, irrespective of the number of transactions which have previously taken place; the amounts paid during the preceding stages of the process are deducted from the VAT payable by a taxable person, with the result that the tax applies, at any given stage, only to the value added at that stage and the final burden of the tax rests ultimately on the consumer (judgment of 3 October 2006, *Banca popolare di Cremona*, C-475/03, EU:C:2006:629, paragraph 28).

63. In this case, it is clear that the special tax does not display the third and fourth essential characteristics of VAT, namely the charging of the tax at each stage of the production and distribution process and the existence of a right to deduction of the tax paid during the preceding stages of the process.

64. Unlike VAT, this tax, which is based on the net turnover of the taxable person concerned, is not charged at each stage of that process, does not contain a mechanism comparable to that of the right to deduction of VAT, and is not based on the value added at the various stages of that process.

65. That circumstance is sufficient ground to conclude that the special tax does not display all the essential characteristics of VAT and is, consequently, not subject to the prohibition laid down in Article 401 of the VAT Directive (see, by analogy, judgment of 12 June 2018, *Viking Motors and Others*, C-475/17, EU:C:2018:636, paragraph 43).

66. Consequently, the answer to the third question is that Article 401 of the VAT Directive must be interpreted as not precluding the introduction of a tax which is based on the overall turnover of the taxable person and which is levied periodically, and not at each stage of the production and distribution process, there being no right to deduct tax paid at an earlier stage of that process.

**Costs**

67. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned.**

**2. Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding the introduction of a tax which is based on the overall turnover of the taxable person and which is levied periodically, and not at each stage of the production and distribution process, there being no right to deduct tax paid at an earlier stage of that process.**

# EU Court of Justice, 3 March 2020*

## Case C-323/18

## *Tesco-Global Áruházak Zrt. v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága*

| | |
|---|---|
| *Grand Chamber:* | *K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot (Rapporteur) and E. Regan, Presidents of Chambers, P. G. Xuereb, L. S. Rossi, I. Jarukaitis, E. Juhász, M. Ilesic, J. Malenovský, L. Bay Larsen, K. Jürimäe and N. Piçarra, Judges* |
| *Advocate General:* | *J. Kokott* |

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1. This request for a preliminary ruling concerns the interpretation of Articles 18, 26, 49, 54 to 56, 63, 65, 107, 108 and 110 TFEU and of the principles of the effectiveness and primacy of EU law, and of the principle of procedural equivalence.

2. The request has been made in proceedings between Tesco-Global Áruházak Zrt. ('Tesco') and the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Resources Directorate of the National Tax and Customs Administration, Hungary; 'the Resources Directorate') concerning payment of a turnover tax in the store retail trade sector ('the special tax').

### Hungarian law

3. The preamble of the egyes ágazatokat terhelö különadóról szóló 2010. évi XCIV. törvény (Law No XCIV of 2010 on the special tax on certain sectors; 'the law on the special tax on certain sectors') states:

> 'In the context of the correction of budgetary balance, the Parliament enacts this law on the establishment of a special tax imposed on taxpayers whose ability to contribute to the costs of public expenditure exceeds the general obligation to pay tax.'

4. Paragraph 1 of the law on the special tax on certain sectors provides:

> 'For the purposes of the present law, the following definitions shall apply:
> 1. store retail trade: in accordance with the uniform system for classification of economic activities, in force on 1 January 2009, the activities classified in sector 45.1, apart from wholesale trade in vehicles and trailers, in sectors 45.32, 45.40, apart from repairs of and wholesale trade in motorcycles, and in sectors 47.1 to 47.9,
> …
> 5. net turnover: in the case of a taxable person subject to the law on accounting, the net turnover from sales within the meaning of the law on accounting; in the case of a taxable person subject to the simplified corporation tax and not covered by the law on accounting, turnover exclusive of value added tax in accordance with the law on the tax regime; in the case of a taxable person subject to the law on personal income tax, income exclusive of value added tax in accordance with the law on personal income tax.'

* Language of the case: Hungarian.

5. Paragraph 2 of the law on the special tax on certain sectors provides:

   'Tax shall be chargeable on:
   a. store retail trade
   …'

6. Paragraph 3 of that law defines taxable persons as follows:

   '1. Taxable persons are legal persons, other organisations within the meaning of the general tax code and self-employed persons who pursue an activity subject to tax within the meaning of Paragraph 2.
   2. Non-resident organisations and individuals shall also be subject to the tax with respect to the activities subject to the tax referred to in Paragraph 2, where they pursue those activities in the internal market through subsidiaries.'

7. Paragraph 4(1) of that law states:

   'the taxable amount is the net turnover of the taxable person resulting from the activities referred to in Paragraph 2, …'

8. Paragraph 5 of that law provides:

   'The applicable tax rate:
   a. on activities referred to in Paragraph 2(a), shall be set at 0% on the proportion of the taxable amount not exceeding 500 million [Hungarian forint (HUF)]; 0.1% on the proportion of the taxable amount in excess of HUF 500 million but not exceeding HUF 30 billion; 0.4% on the proportion of the taxable amount in excess of HUF 30 billion but not exceeding HUF 100 billion, and 2.5% on the proportion of the taxable amount in excess of HUF 100 billion,
   …'

9. Paragraph 124/B of the adózás rendjér?l szóló 2003. évi XCII. törvény (Law No XCII of 2003 on General Taxation) provides:

   'The tax authority shall give a decision on a supplementary return within 15 days of the filing date of that return, without carrying out any inspection, where the taxpayer has filed such a supplementary return claiming only that the legal provision on which the tax liability is based is unconstitutional or contrary to a binding legal act of the European Union or that a municipal decree is contrary to any other legal provision, provided that the Alkotmánybíróság [Constitutional Court, Hungary] the Kúria [Supreme Court, Hungary] or the Court of Justice of the European Union had not yet given a ruling on that issue at the time of filing of the supplementary return or that return does not comply with the terms of the published ruling. The decision adopted in relation to the supplementary return may be the subject of an administrative appeal or legal proceedings in accordance with the general provisions of this Law.'

10. Paragraph 128(2) of that law provides:

   'No tax adjustment should be made where taxes or public subsidies are not required to be adjusted by means of a supplementary return.'

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

11. Tesco is a public limited company governed by Hungarian law which is engaged in store wholesale and retail trade. As a member of a group that has its registered office in the United Kingdom, it is the retail chain that achieved the highest turnover in the Hungarian market in the period between 1 March 2010 and 28 February 2013.

12. Tesco was the subject of a tax inspection carried out by the Nemzeti Adó- és Vámhivatal Kiemelt Adózók Adóigazgatósága (National Tax and Customs Administration, Large Taxpayers Directorate, Hungary; 'the first-tier tax authority') concerning all the taxes paid and budget subsidies received in that period.

13. Following that inspection, the first-tier tax authority imposed on Tesco an adjustment of, inter alia, the special tax amounting to HUF 1 396 684 000 (approximately EUR 4 198 852), and found that Tesco had had the benefit of a surplus of HUF 17 900 000 (approximately EUR 53 811) with respect to that same tax. In total, there was held to be a tax shortfall of HUF 4 634 131 000 (approximately EUR 13 931 233), which gave rise to a tax penalty of HUF 873 760 000 (approximately EUR 2 626 260) and a late-payment surcharge of HUF 956 812 000 (approximately EUR 2 875 889).

14. The Resources Directorate, before which an administrative appeal was brought against the decision of the first-tier tax authority, upheld that decision in relation to the special tax. However, that decision was varied with respect to the tax surplus of which Tesco was held to have had the benefit, which was set at HUF 249 254 000 (approximately EUR 749 144), and the adjustment imposed on Tesco, which was set at HUF 3 058 090 000 (approximately EUR 9 191 226), of which HUF 3 013 077 000 (approximately EUR 9 070 000) was held to be the tax shortfall. In addition to that tax liability, the Resources Directorate ordered Tesco to pay HUF 1 396 684 000 (approximately EUR 4 198 378) with respect to the special tax and to pay a tax penalty of HUF 468 497 000 (approximately EUR 1 408 284), and a late-payment surcharge of HUF 644 890 000 (approximately EUR 1 938 416).

15. Tesco brought an action before the F?városi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest, Hungary) contesting the decision of the Resources Directorate. Tesco submits that the obligation to pay the special tax imposed on it has no legal basis, arguing that the legislation relating to that tax adversely affects freedom of establishment, the freedom to provide services and the free movement of capital. Further, that legislation is contrary to the principle of equal treatment, constitutes prohibited State aid and is contrary to Article 401 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (OJ 2006 L 347, p. 1).

16. Tesco claims in particular that, because of the steeply progressive scale of the special tax and the structure of the Hungarian retail trade market, all the companies that fall within the lower bands are companies which are owned by Hungarian natural persons or legal persons, and which operate within franchise systems. Conversely, the companies that fall within the highest band are, with one exception, undertakings linked to companies that have their registered office in another Member State. Accordingly, the companies owned by foreign natural persons or legal persons bear a disproportionate share of the burden of that tax.

17. The referring court considers that the law on the special tax on certain sectors may be contrary to Articles 18, 26, 49, 54 to 56, 63, 65, 107, 108 and 110 TFEU since, in particular, the actual tax burden of that tax is borne primarily by taxable persons whose share capital is foreign-owned. The referring court states that the Court, in its judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), examined the rule of consolidation applied in that context and concluded that there was indirect discrimination.

18. Further, the referring court has doubts as to whether Law No XCII of 2003 on general taxation is compatible with the principle of procedural equivalence, and the principles of the primacy and effectiveness of EU law.

19. In those circumstances, the Fövárosi Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Budapest) decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

> ‘1. Is the fact that taxable persons under foreign ownership which operate a number of retail establishments through a single company and which are engaged in store retail trade in fact have to pay the special tax corresponding to the highest band of a steeply progressive tax rate, whereas taxable persons under domestic ownership operating as a franchise under a single banner – through stores which generally constitute independent companies – are in fact included in the exempt band or are subject to one of the lower tax rates following that band, with the result that the proportion of the tax paid by companies under foreign ownership of the total tax collected through the special tax is substantially higher than in the case of taxable persons under domestic ownership, compatible with the provisions of the FEU Treaty governing the principles of non-discrimination (Articles 18 and 26 TFEU), freedom of establishment (Article 49 TFEU), equal treatment (Article 54 TFEU), equal treatment as regards financial participation in the capital of companies or firms within the meaning of Article 54 TFEU (Article 55 TFEU), freedom to provide services (Article 56 TFEU), free movement of capital (Articles 63 and 65 TFEU) and equality of taxation of companies (Article 110 TFEU)?
>
> 2. Is the fact that taxable persons which operate a number of stores through a single company and which are engaged in store retail trade in fact have to pay the special tax corresponding to the highest band of a steeply progressive tax rate, whereas taxable persons under domestic ownership which are their direct competitors and which operate as a franchise under one and the same sign – through stores which generally constitute independent companies – are in fact included in the exempt band or are subject to one of the lower tax rates following that band, with the result that the proportion of the tax paid by companies under foreign ownership of the total tax collected through the special tax is substantially higher than in the case of taxable persons under domestic ownership, compatible with the provisions of the FEU Treaty governing the principle of the prohibition of State aid (Article 107(1) TFEU)?

3. Must Articles 107 TFEU and 108(3) TFEU be interpreted as meaning that their effects extend to a tax measure an intrinsic part of which is a tax exemption (constituting State aid) financed by means of the tax receipts generated by the tax measure, where the legislature has, before the introduction of the special tax on retail trade, predetermined (on the basis of the turnover of market operators) the amount of budgetary revenue, through the application of progressive tax rates based on turnover and not through the introduction of a generally applicable tax rate, so that the legislature has deliberately ensured that a category of market operators qualify for a tax exemption?

4. Is a practice of a Member State, whereby, during tax inspections commenced *ex officio* or subsequent court proceedings it is not possible – despite the principle of effectiveness and the obligation to disapply an incompatible provision of national law – to submit an application for a refund of tax set under a national tax provision which is contrary to EU law, on the ground that the tax authority or the court examines the issue of incompatibility with EU law only in special proceedings commenced on application by a party and only prior to the *ex officio* procedure, whereas, as far as tax which has been set in breach of national law is concerned, there is nothing to prevent an application for a refund from being submitted in proceedings before the tax authority or a court, compatible with the principle of procedural equivalence and the principles of the effectiveness and primacy of EU law?'

**The request to have the oral procedure reopened**

20. Following the delivery of the Opinion of the Advocate General, Tesco, by a document lodged at the Court's Registry on 2 September 2019, applied for the oral part of the procedure to be reopened, pursuant to Article 83 of the Rules of Procedure of the Court.

21. In support of its request, Tesco expressed its disagreement with that Opinion, more particularly with certain factual details relating to the procedure set out in the Opinion.

22. It must however be recalled that, first, the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court make no provision for the interested parties referred to in Article 23 of the Statute to submit observations in response to the Advocate General's Opinion (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 26).

23. Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General's involvement. The Court is not bound either by the Advocate General's submissions or by the reasoning which led to those submissions. Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions that he or she examines in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 27).

24. Nevertheless, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in accordance with Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the interested persons (judgment of 6 March 2018, *Achmea*, C-284/16, EU:C:2018:158, paragraph 28).

25. In this case, since Tesco confines itself to setting out its observations on the Opinion of the Advocate General and does not mention any new argument on the basis of which the present case should be decided, the Court considers, after hearing the Advocate General, that it has before it all the necessary material to give judgment and that that material has been debated between the interested persons.

26. Having regard to the foregoing, the request for the oral procedure to be reopened must be rejected.

**Admissibility of the request for a preliminary ruling**

27. The Hungarian Government submits that the referring court does not specify either the provisions of the law on the special tax on certain sectors which may be contrary to EU law or the reasons why it has doubts concerning the interpretation of the provisions of the Treaty and of the fundamental principles of EU law referred to in the order for reference.

28. However, it is clear that the information provided by the referring court makes it possible to determine the scope of the request for a preliminary ruling and the context, in particular the legal context, of its being made. Thus, the order for reference, which sets out the doubts of that court in relation to the compatibility with EU law of the law on the special tax on certain sectors, states sufficiently clearly the reasons which led

the referring court to take the view that an interpretation of EU law was necessary to enable it to give judgment on the dispute in the main proceedings.

29. The request for a preliminary ruling is therefore admissible.

**Consideration of the questions referred**

*The second and third questions*

30. The Hungarian Government and the European Commission argue that those liable to pay a tax cannot rely on the argument that the exemption enjoyed by other persons constitutes unlawful State aid in order to avoid payment of that tax, and consequently that the second and third questions are inadmissible.

31. In that regard, it must, at the outset, be recalled that Article 108(3) TFEU establishes a prior control of plans to grant new aid. The aim of that system of prior control is therefore that only compatible aid may be implemented. In order to achieve that aim, the implementation of planned aid is to be deferred until doubt as to its compatibility is resolved by the Commission's final decision (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraphs 25 and 26, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 84).

32. The implementation of that system of control is a task for both the Commission and the national courts, their respective roles being complementary but separate (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 27 and the case-law cited).

33. While an assessment of the compatibility of aid measures with the internal market falls within the exclusive competence of the Commission, subject to review by the Courts of the European Union, it is for the national courts to ensure the safeguarding, until the final decision of the Commission, of the rights of individuals faced with a possible breach by State authorities of the prohibition laid down by Article 108(3) TFEU (judgment of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 28).

34. The involvement of national courts is the result of the fact that the prohibition on implementation of planned aid laid down in that provision has been held to have direct effect. The immediate enforceability of that prohibition extends to all aid which has been implemented without being notified (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 29, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 88).

35. National courts must offer to individuals the certainty that all appropriate action will be taken, in accordance with their national law, to address the consequences of an infringement of the last sentence of Article 108(3) TFEU, as regards both the validity of measures giving effect to the aid and the recovery of financial support granted in disregard of that provision and any interim measures (judgments of 21 November 2013, *Deutsche Lufthansa*, C-284/12, EU:C:2013:755, paragraph 30, and of 5 March 2019, *Eesti Pagar*, C-349/17, EU:C:2019:172, paragraph 89).

36. The Court has, however, also held that if, having regard to the rules of EU law in relation to State aid, an exemption from a tax is unlawful, that is not capable of affecting the lawfulness of the actual charging of that tax, and consequently a person liable to pay that tax cannot rely on the argument that the exemption enjoyed by other persons constitutes State aid in order to avoid payment of that tax (see, to that effect, judgments of 27 October 2005, *Distribution Casino France and Others*, C-266/04 to C-270/04, C-276/04 and C-321/04 to C-325/04, EU:C:2005:657, paragraph 44; of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 43; and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

37. The position is however different where the dispute in the main proceedings concerns not an application to be exempted from the contested tax, but the legality of the rules relating to that tax as a matter of EU law (judgment of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

38. Further, the Court has consistently held that taxes do not fall within the scope of the provisions of the FEU Treaty concerning State aid unless they constitute the means of financing an aid measure, so that they form an integral part of that measure. Where the method of financing aid by means of a tax forms an integral part of the aid measure, the consequences of a failure by national authorities to comply with the last sentence of Article 108(3) TFEU must also apply to that aspect of the aid, so that the national authorities are required, in principle, to repay taxes levied in breach of EU law (judgment of 20 September 2018, *Carrefour Hypermarchés and Others*, C-510/16, EU:C:2018:751, paragraph 14 and the case-law cited).

39. In that regard, it must be recalled that, for a tax to be regarded as forming an integral part of an aid measure, it must be hypothecated to the aid measure under the relevant national rules, in the sense that the revenue from the tax is necessarily allocated for the financing of the aid and has a direct impact on the amount of that aid (judgments of 15 June 2006, *Air Liquide Industries Belgium*, C-393/04 and C-41/05, EU:C:2006:403, paragraph 46, and of 7 September 2006, *Laboratoires Boiron*, C-526/04, EU:C:2006:528, paragraph 44).

40. Accordingly, if a tax is not hypothecated to an aid measure, the possible unlawfulness of the contested aid measure under EU law is not capable of affecting the lawfulness of the tax itself, and consequently the undertakings who are liable to pay that tax cannot rely on the argument that the tax measure for which other persons qualify constitutes State aid in order to avoid payment of that tax or to obtain repayment of tax paid (see, to that effect, judgments of 5 October 2006, *Transalpine Ölleitung in Österreich*, C-368/04, EU:C:2006:644, paragraph 51, and of 26 April 2018, *ANGED*, C-233/16, EU:C:2018:280, paragraph 26).

41. In this case, the dispute in the main proceedings concerns an application for exemption from the special tax submitted by Tesco to the Hungarian tax authorities. As stated, in essence, by the Advocate General in point 132 of her Opinion, the tax burden borne by Tesco is the result of a general tax, the revenue from which is transferred to the State budget, that tax not being specifically allocated to the funding of a tax advantage for which a particular category of taxable persons qualify.

42. It follows that, even if the de facto exemption from the special tax for which some taxable persons qualify may be classified as State aid, within the meaning of Article 107(1) TFEU, that tax is not hypothecated to the exemption measure at issue in the main proceedings.

43. It follows that any illegality under EU law of the exemption from the special tax for which some taxable persons qualify is not capable of affecting the legality of that tax itself, and consequently Tesco cannot rely, before the national courts, on the unlawfulness of that de facto exemption in order to avoid payment of that tax or to obtain repayment of tax paid.

44. It follows from all the foregoing that the second and third questions are inadmissible.

*The first question*

Admissibility

45. The Hungarian Government submits that an answer to the first question is not necessary in order to resolve the dispute in the main proceedings since the Court has already given a ruling, in its judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), on the compatibility with EU law of the law on the special tax on certain sectors.

46. In that regard, it must be recalled that, even when there is case-law of the Court resolving the point of law at issue, national courts remain entirely at liberty to bring a matter before the Court if they consider it appropriate to do so, and the fact that the provisions whose interpretation is sought have already been interpreted by the Court does not deprive the Court of jurisdiction to give a further ruling (judgment of 6 November 2018, *Bauer and Willmeroth*, C-569/16 and C-570/16, EU:C:2018:871, paragraph 21 and the case-law cited).

47. It follows that the fact that the Court, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), has already interpreted EU law with regard to the same national legislation as that at issue in the main proceedings cannot in itself lead to the inadmissibility of the questions referred in the present case.

48. Moreover, the referring court states that, in the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), the Court examined, in relation to the special tax on retail trade, the effect produced by the rule on the consolidation of turnover achieved by linked undertakings, for the purposes of the law on the special tax on certain sectors. However, the referring court considers that it is necessary, in order to resolve the dispute in the main proceedings, to determine whether the progressive scale, using bands, of the special tax may constitute, in itself, irrespective of the application of that consolidation rule, indirect discrimination vis-à-vis taxable persons that are controlled by natural persons or legal persons of other Member States, who bear the actual tax burden, and, therefore, be contrary to Articles 49 and 54 TFEU.

49. In those circumstances, the first question is admissible.

Substance

50. Since the question referred for a preliminary ruling mentions a number of provisions of the Treaty, namely those relating to, respectively, freedom of establishment, the freedom to provide services and the free movement of capital, and the provisions of Articles 18, 26 and 110 TFEU, it is necessary, first, to clarify the scope of that question in accordance with the specific features of the dispute in the main proceedings.

51. In that regard, it is clear from settled case-law that the purpose of the legislation concerned must be taken into consideration (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 21 and the case-law cited).

52. National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 22).

53. The dispute in the main proceedings concerns the allegedly discriminatory tax rate borne under the special tax by taxable persons that are controlled by individual citizens or companies of other Member States.

54. In those circumstances, the request for a preliminary ruling concerns the interpretation of the provisions of the Treaty relating to freedom of establishment. It is, therefore, not necessary to interpret Articles 56, 63 and 65 TFEU relating to the freedom to provide services and the free movement of capital.

55. It should, next, be recalled that Article 18 TFEU is intended to apply independently only to situations governed by EU law for which the Treaty lays down no specific prohibition of discrimination. In the field of freedom of establishment, the principle of the prohibition of discrimination is given specific expression in Article 49 TFEU (judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 25 and the case-law cited).

56. Consequently, there is also no need to interpret Article 18 TFEU and Article 26 TFEU.

57. Last, as is stated in paragraph 27 of the judgment of 5 February 2014, *Hervis Sport- és Divatkereskedelmi* (C-385/12, EU:C:2014:47), since it does not appear that the special tax has a greater impact on products from other Member States than on national products, the interpretation of Article 110 TFEU is of no relevance in the context of the main proceedings.

58. It follows from the foregoing that the first question must be regarded as concerning whether Articles 49 and 54 TFEU must be interpreted as precluding the legislation of a Member State in relation to a turnover tax where the consequence of the fact that that tax is steeply progressive is that undertakings controlled directly or indirectly by nationals of other Member States or by companies having their registered office in another Member State mainly bear the actual burden of that tax.

59. According to settled case-law, freedom of establishment aims to guarantee the benefit of national treatment in the host Member State to nationals of other Member States and to companies referred to in Article 54 TFEU by prohibiting any discrimination based on the place in which companies have their seat (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 16 and the case-law cited).

60. In order to be effective, the scope of freedom of establishment must mean that a company may rely on a restriction on the freedom of establishment of another company which is linked to it in so far as that restriction affects its own taxation (see, to that effect, judgment of 1 April 2014, *Felixstowe Dock and Railway Company and Others*, C-80/12, EU:C:2014:200, paragraph 23).

61. In this case, Tesco has its registered office in Hungary but is part of a group of which the parent company has its registered office in the United Kingdom. As observed by the Advocate General in point 41 of her Opinion, in so far as that parent company pursues its activity on the Hungarian market through a subsidiary, its freedom of establishment may be affected by any restriction which applies to the subsidiary. Accordingly, contrary to what is submitted by the Hungarian Government, a restriction on the freedom of establishment of that parent company may legitimately be relied on in the main proceedings.

62. Not only overt discrimination based on the location of the seat of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result are, in that regard, prohibited (judgments of 5 February 2014, *Hervis Sport- és Divatkereskedelmi*, C-385/12, EU:C:2014:47, paragraph 30, and of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 17).

63. Moreover, a compulsory levy which provides for a criterion of differentiation that is apparently objective but that disadvantages in most cases, given its features, companies that have their seat in other Member States and which are in a situation comparable to that of companies whose seat is situated in the Member State of taxation, constitutes indirect discrimination based on the location of the seat of the companies, which is prohibited under Articles 49 and 54 TFEU (judgment of 26 April 2018, *ANGED*, C-236/16 and C-237/16, EU:C:2018:291, paragraph 18).

64. In this case, the law on the special tax on certain sectors makes no distinction between undertakings according to where they have their registered office. All the undertakings operating in Hungary in the store retail trade sector are subject to that tax and the tax rates that are, respectively, applicable to the various bands of turnover defined by that law apply to all those undertakings. That law does not, therefore, establish any direct discrimination.

65. However, Tesco and the Commission maintain that the fact that the special tax is steeply progressive is, in itself, to the advantage of taxable persons owned by Hungarian natural persons or legal persons and to the disadvantage of taxable persons owned by natural persons or legal persons of other Member States, with the result that the special tax constitutes, taking into consideration its characteristics, indirect discrimination.

66. As was stated in paragraph 8 of the present judgment, the special tax, which is a progressive tax based on turnover, comprises, with respect to store retail trade, a first band of tax charged at 0% for the proportion of the taxable amount that does not exceed HUF 500 million (approximately EUR 1.5 million, currently), a second band of tax charged at 0.1% for the proportion of the taxable amount between HUF 500 million and HUF 30 billion (approximately between EUR 1.5 million and EUR 90 million, currently), a third band of tax charged at 0.4% for the proportion of the taxable amount between HUF 30 billion and HUF 100 billion (approximately between EUR 90 million and EUR 300 million, currently) and a fourth band of tax charged at 2.5% for the proportion of the taxable amount that exceeds HUF 100 billion (approximately EUR 300 million, currently).

67. It is clear from the Hungarian authorities' data in relation to the tax years at issue in this case, as disclosed by the Commission and Hungary, that, in the period at issue in the main proceedings, with respect to store retail trade, the taxable persons that fell only within the base band were all taxable persons owned by Hungarian natural persons or legal persons, whereas those who fell within the third and fourth bands were predominantly taxable persons owned by natural persons or legal persons of other Member States.

68. Further, it is clear from the observations of the Hungarian Government that, during that period, the greater part of the special tax was borne by taxable persons owned by natural persons or legal persons of other Member States. According to Tesco and the Commission, the tax burden borne by the latter was thus proportionately greater than that borne by taxable persons owned by Hungarian natural persons or legal persons as a ratio of their taxable turnover, the latter being in fact exempted from the special tax or being subject to it only at a marginal rate and at an effective rate that were substantially lower than taxable persons with a higher turnover.

69. However, it must be recalled that the Member States are free, given the current state of harmonisation of EU tax law, to establish the system of taxation that they deem the most appropriate, and consequently the application of progressive taxation falls within the discretion of each Member State (see, to that effect, judgments of 22 June 1976, *Bobie Getränkevertrieb*, 127/75, EU:C:1976:95, paragraph 9, and of 6 December 2007, *Columbus Container Services*, C-298/05, EU:C:2007:754, paragraphs 51 and 53).

70. In that context, and contrary to what is maintained by the Commission, progressive taxation may be based on turnover, since, on the one hand, the amount of turnover constitutes a criterion of differentiation that is neutral and, on the other, turnover constitutes a relevant indicator of a taxable person's ability to pay.

71. In this case, it is apparent from the material available to the Court, in particular from the passage in the preamble of the law on the special tax on certain sectors quoted in paragraph 3 of the present judgment, that, by means of the application of a steeply progressive scale based on turnover, the aim of that law is to impose a tax on taxable persons who have an ability to pay 'that exceeds the general obligation to pay tax'.

72. The fact that the greater part of such a special tax is borne by taxable persons owned by natural persons or legal persons of other Member States cannot be such as to merit, by itself, categorisation as discrimination. As stated by the Advocate General, in particular, in points 62, 65 and 78 of her Opinion, that situation is due to the fact that the Hungarian store retail trade market is dominated by such taxable persons, who achieve the highest turnover in that market. Accordingly, that situation is an indicator that is fortuitous, if not a matter of chance, which may arise, even in a system of proportional taxation, whenever the market concerned is domi-

nated by undertakings of other Member States or of non-Member States or by national undertakings owned by natural persons or legal persons of other Member States or of non-Member States.

73. It must be observed, moreover, that the basic band of tax charged at 0% does not exclusively affect taxable persons owned by Hungarian natural persons or legal persons, since, as in any system of progressive taxation, any undertaking operating on the market concerned has the benefit of the reduction for the proportion of its turnover that does not exceed the maximum amount of that band.

74. It follows from the foregoing that the steeply progressive rates of the special tax do not, inherently, create any discrimination, based on where companies have their registered office, between taxable persons owned by Hungarian natural persons or legal persons and taxable persons owned by natural persons or legal persons of other Member States.

75. It must further be stated that the present case can be distinguished from the case which led to the judgment of 5 February 2014, Hervis Sport- és Divatkereskedelmi (C-385/12, EU:C:2014:47). As is apparent from paragraphs 34 to 36 of that judgment, that case concerned the combined application of both very progressive rates of taxation of turnover and a rule for the consolidation of turnover of linked undertakings, the effect of which was that taxable persons belonging to a group of companies were taxed on the basis of 'fictitious' turnover. In that regard, the Court held, in essence, in paragraphs 39 to 41 of that judgment, that, if it were to be established that, in the store retail market in the Member State concerned, the taxable persons belonging to a group of companies and covered by the highest band of the special tax are, in the majority of cases, 'linked', within the meaning of the national legislation, to companies which have their registered offices in other Member States, 'the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover' is liable to disadvantage, in particular, taxable persons 'linked' to such companies and would, consequently, constitute indirect discrimination based on where companies have their registered office, within the meaning of Articles 49 and 54 TFEU.

76. In the light of all the foregoing, the answer to the first question is that Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a steeply progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned.

*The fourth question*

77. In the light of all the foregoing, there is no need to answer the fourth question.

**Costs**

78. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**Articles 49 and 54 TFEU must be interpreted as not precluding the legislation of a Member State that establishes a steeply progressive tax on turnover, the actual burden of which is mainly borne by undertakings controlled directly or indirectly by nationals of other Member States or by companies that have their registered office in another Member State, due to the fact that those undertakings achieve the highest turnover in the market concerned.**

# EU Court of Justice, 3 March 2020*

## Case C-482/18

## *Google Ireland Limited v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága*

*Grand Chamber:* *K. Lenaerts, President, R. Silva de Lapuerta, Vice-President, J.-C. Bonichot, A. Arabadjiev, E. Regan, S. Rodin, L. S. Rossi (Rapporteur) and I. Jarukaitis, Presidents of Chambers, E. Juhász, C. Toader, D. Sváby, F. Biltgen and K. Jürimäe, Judges*

*Advocate General:* *J. Kokott*

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1. This request for a preliminary ruling concerns the interpretation of Articles 18 and 56 TFEU and of Articles 41 and 47 of the Charter of Fundamental Rights of the European Union ('the Charter').

2. The request has been made in proceedings between Google Ireland Limited, a company established in Ireland, and the Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vámigazgatósága (National Tax and Customs Authority, Hungary; 'the tax authority') concerning decisions by which that authority imposed a series of fines on that company for having infringed the obligation to submit a tax declaration of persons exercising an activity subject to the tax on advertisements laid down in Hungarian legislation.

### Legal context

*The Hungarian law on the taxation of advertisements*

3. Article 2(1)(e) of the reklámadóról szóló 2014. évi XXII. törvény (Law No XXII of 2014 on the taxation of advertisements), in the version in force on 1 January 2017 ('the Law on the taxation of advertisements'), provides that the publication of advertisements on the internet is to be subject to the tax on advertisements where the advertisements are mainly in Hungarian or mainly on internet pages that are in Hungarian.

4. Under Article 2(2)(b) of that law:

> 'the commissioning of the publication of an advertisement shall be subject to the tax unless … the customer who has commissioned the publication of the advertisement:
> (ba) has requested a taxpayer within the meaning of Article 3(1) to submit the tax declaration referred to in Article 3(3) and can provide reliable evidence that it has done so;
> (bb) has not received the declaration requested under subparagraph (ba) within 10 working days of receipt of the invoice or accounting document concerning publication of the advertisement; and
> (bc) has submitted a declaration to the tax authority regarding the situation referred to in subparagraph (ba), the person who has published the advertisement and the payment for publication'.

5. Under Article 3(1) of that law, any person who undertakes the publication of advertisements on the internet, where the advertisements are mainly in Hungarian or mainly on internet pages that are in Hungarian, is a 'taxpayer irrespective of its place of residence'.

* Language of the case: Hungarian.

6. Article 3(3) of the Law on the taxation of advertisements provides:

   ‘A taxpayer within the meaning of Article 3(1) must state in the invoice, accounting document or other document stating the payment for the publication of the advertisement (in particular, in the contract for publication of an advertisement) either that it is required to pay the tax and will comply with its obligations to submit a tax declaration and to pay the tax, or that in that tax year it is not required to pay the tax on publication of advertisements. …’

7. Article 7/B of that law reads as follows:

   ‘1. A taxpayer within the meaning of Article 3(1) who is not registered with the tax authority as a taxpayer for the purposes of some form of tax must register by submitting the relevant form supplied by the tax authority within 15 days of commencing an activity that is subject to the tax under Article 2(1). …
   2. Where a taxpayer fails to comply with the obligation to submit a tax declaration under Article 7/B(1) – in addition to ordering him to comply – the tax authority shall impose an initial fine of 10 000 000 forint [(HUF) (approximately EUR 31 000)] for failure to comply.
   3. If it is still found that there is non-compliance with the obligation, the tax authority shall impose a fine for failure to comply of three times the amount of the previous fine.
   4. The tax authority shall issue daily decisions confirming non-compliance with the obligation to register under Article 7/B(1). These decisions shall be final and enforceable from the moment when notice of them is served and may be contested by way of judicial review. In the judicial review procedure, only documentary evidence shall be admissible and the court must reach its decision without holding a hearing.
   5. If the taxpayer complies with the obligation to submit a tax declaration when first requested to do so by the tax authority, the fine provided for in paragraphs 2 and 3 may be reduced without limit.’

8. Article 7/D of that law states:

   ‘The total maximum amount of the fines for failure to comply which the tax authority may impose on the same taxpayer under Article 7/B is HUF 1 000 000 000 [(approximately EUR 3 100 000)].’

*The Hungarian Law on general tax procedures*

9. It is clear from Article 17(1)(b) of the adózás rendjér?l szóló 2003. évi XCII. törvény (Law No XCII of 2003 on general tax procedures; ‘the Law on general tax procedures’), that a resident taxpayer automatically satisfies the obligation to register with the tax authority when it submits an application for registration (a completed form) plus attachments, together with an application for a tax identification number, to the court with jurisdiction with respect to the registry.

10. A taxpayer who fails to comply with any disclosure obligation, whether the obligations to register or to report any changes, to disclose data, to open a bank account or to submit a tax declaration may, pursuant to Article 172 of that law, be fined either HUF 500 000 (approximately EUR 1 550) or HUF 1 000 000 (approximately EUR 3 100), depending on the circumstances. The tax authority is also required, when it imposes a fine on that basis, to order the taxpayer to comply with the obligation which it infringed by a prescribed deadline. If the taxpayer fails to meet the prescribed deadline, the amount of the fine is to be doubled. In the event of compliance with the obligation, the fine imposed may be reduced without limit.

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

11. By decision of 16 January 2017, the tax authority found, first, that Google Ireland was exercising an activity which fell within the scope of that law and, second, that it had not registered with the tax authority within 15 days of commencing its activity contrary to Article 7/B(1) of the Law on the taxation of advertisements. Consequently, the tax authority imposed a fine of HUF 10 000 000 (approximately EUR 31 000) on Google Ireland pursuant to Article 7/B(2) of that law.

12. By decisions adopted on the following four days, the tax authority imposed four new fines on Google Ireland, each of which, in accordance with Article 7/B(3) of the Law on the taxation of advertisements, was equal to three times the amount of the fine previously imposed. Following the decision of 20 January 2017, Google Ireland had been fined, in total, the statutory maximum amount of HUF 1 000 000 000 (approximately EUR 3 100 000) laid down in Article 7/D of that law.

13. Google Ireland brought an action for the annulment of those decisions before the referring court.

14. In support of its action, Google Ireland submits, first of all, that the imposition of fines on the ground of a failure to comply with the obligation to register laid down in Article 7/B of the Law on the taxation of adver-

tisements is contrary to Articles 18 and 56 TFEU. Furthermore, it submits that companies established in Hungary may satisfy the obligations laid down by that law more easily than those established outside Hungary. Lastly, it maintains that fines imposed on companies established outside Hungary on the ground that they fail to comply with their obligations to submit a tax declaration differ from those applicable to companies established in Hungary which fail to comply with a similar obligation, and are disproportionate to the seriousness of the infringement committed, thereby constituting a restriction on the freedom to provide services in the European Union.

15. According to Google Ireland, taxpayers established abroad are also in a less favourable situation than companies established in Hungary as regards the exercise of the right to an effective remedy. Although they have the right to judicial review of a decision imposing a fine on them, which is, pursuant to the provisions of Articles 7/B and 7/D of the Law on the taxation of advertisements, final and enforceable merely by notification thereof, the rules governing the exercise of that right, however, restrict its scope. In particular, in the judicial review procedure under Article 7/B(4) of the Law on the taxation of advertisements, the court with jurisdiction can admit only documentary evidence and gives judgment without holding a hearing, whereas the objection procedure applicable to domestic taxpayers under the Law on general tax procedures is not subject to such limitations, since such taxpayers would have, inter alia, the right to bring an administrative law action. The provisions of the Law on the taxation of advertisements do not therefore afford the person fined the right to an effective remedy or a fair trial, as provided for in Article 47 of the Charter.

16. In that context, the referring court asks whether Articles 7/B and 7/D of the Law on the taxation of advertisements are compatible with Article 56 TFEU and the principle of non-discrimination. According to that court, the obligation to submit a tax declaration and the fines for failure to comply with that obligation – fines forming part of a very repressive and punitive system of penalties – are highly detrimental to companies established outside of Hungary and are in fact likely to restrict the freedom to provide services in the European Union. It considers in particular, as far as concerns the fines for failure to comply with the obligation to submit a tax declaration which were imposed on those companies, that the principle of proportionality was probably not observed in the present case. In that regard, it points, first, to the fact that a series of fines may be imposed on those taxpayers in five days during which the tax authority can triple the amount of the previous fine every day. Those penalties apply even before taxpayers are able to have notice of the daily tripling of the amount of the previous fine and before they can remedy the infringement, thus making it impossible for them to prevent the final fine from reaching the ceiling of HUF 1 000 000 000 (EUR 3 100 000). In the referring court's view, that fact can also give rise to the question of the compatibility of that administrative procedure with Article 41 of the Charter. Second, the referring court notes that the amount of the fine imposed under Article 7/D of the Law on the taxation of advertisements is, in total, up to 2 000 times higher than that of the fine which may be imposed on a company established in Hungary which does not comply with the obligation to register for tax purposes laid down in Article 172 of the Law on general tax procedures.

17. Lastly, the referring court raises the question of compliance with Article 47 of the Charter in so far as, in the context of the judicial review procedure provided for in Article 7/B(4) of the Law on the taxation of advertisements, unlike the ordinary procedure for administrative law actions, only documentary evidence is admitted, since the court with jurisdiction cannot hold a hearing.

18. On the ground that the case-law of the Court does not provide an answer to those questions, the Fővárosi Közigazgatási és Munkaügyi Bíróság (Budapest Administrative and Labour Court, Hungary) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Should Articles 18 and 56 [TFEU] and the prohibition on discrimination be interpreted as precluding a Member State's tax legislation in which the penalty provisions require, for breach of the obligation to register for the purposes of an advertisement tax, the imposition of a fine for failure to comply, the total amount of which, for companies not established in Hungary, can be, in total, 2 000 times greater than the amount of the fine for companies established in Hungary?
> 2. Can the penalty described in the previous question, which involves a markedly large sum and is punitive in nature, be considered as capable of discouraging service providers who are not established in Hungary from providing services in that country?
> 3. Should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding legislation under which, for undertakings established in Hungary, the obligation to register is satisfied automatically, without making an explicit application, through the [mere] allocation of a Hungarian tax identification number as part of the process of registering with the Companies Registry, irrespective of whether or not the undertaking publishes advertisements, whereas for undertakings that are not established in Hungary but that publish advertisements in that country it is not satisfied automatically, and instead they have

specifically to comply with the obligation to register, and can be subject to a specific penalty if they fail to do so?

4. If the answer to the first question is in the affirmative, should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding a penalty such as the one at issue in the main proceedings, imposed for breach of the obligation to register for the purposes of an advertisement tax, in so far as the aforesaid legislation may be contrary to that article?

5. Should Article 56 TFEU and the prohibition on discrimination be interpreted as precluding a provision under which the decision to impose a fine on an undertaking established abroad is final and enforceable from the moment when notice of it is served, and the decision may be contested only through judicial proceedings in which the court may not hold a hearing and only documentary evidence is admissible, while fines imposed on undertakings established in Hungary may be contested in an administrative procedure and, moreover, the judicial proceedings are not restricted in any way?

[6.]Should Article 56 TFEU, read in the light of the right to good administration in Article 41(1) of the [Charter], be interpreted as meaning that that requirement is not satisfied where the fine for failure to comply is imposed in the form of a fine the amount of which is tripled each day in such a way that the service provider, given that it still unaware of the earlier decision, is therefore unable to remedy its omission before the imposition of the next fine?

[7.]Should Article 56 TFEU, read with the right to good administration in Article 41(1) of the Charter, the right to be heard in Article 41(2)(a) of the Charter, and the right to an effective remedy and to a fair trial in Article 47 of the Charter, be interpreted as meaning that those requirements are not satisfied where the decision cannot be contested in an administrative procedure and where, in the administrative court proceedings, only documentary evidence is admissible and the court cannot hold a hearing?'

**Consideration of the questions referred**

19. By its seven questions, the referring court raises, in essence, the following three categories of question.

20. First, by its third question, it asks whether Article 56 TFEU must be interpreted as precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

21. Second, by its first, second, fourth and sixth questions, the referring court wishes to know, in essence, whether Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with an obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, and those suppliers are not able to comply with such an obligation to submit a tax declaration before notification of the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register, contrary to the general provisions of national tax legislation, would be significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

22. Third, by its fifth and seventh questions, the referring court wishes to know, in essence, whether Article 56 TFEU, read in conjunction with Articles 41 and 47 of the Charter, must be interpreted as precluding legislation of a Member State which provides that decisions taken by a tax authority to fine a supplier of services established in another Member State, who has failed to comply with the obligation to submit a tax declaration under that legislation, are subject to judicial review in a written procedure where, contrary to the ordinary procedure of an administrative law action in tax matters, the national court with jurisdiction is not able to hold a hearing.

23. It is appropriate to consider those questions in that order.

*The third question*

24. As a preliminary matter, it should be noted that the referring court is not asking the Court whether the liability of suppliers of advertising services to a tax on online advertisements, such as that applicable in Hungary,

constitutes a restriction on the freedom to provide services under Article 56 TFEU, but only whether the obligation imposed in that Member State on those suppliers to submit a tax declaration for the purposes of their liability to that tax constitutes such a restriction.

25. In that regard, it must be borne in mind that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State (judgment of 18 June 2019, Austria v Germany, C-591/17, EU:C:2019:504, paragraph 135 and the case-law cited). Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided (see, inter alia, judgment of 22 November 2018, *Vorarlberger Landes- und Hypothekenbank*, C-625/17, EU:C:2018:939, paragraph 28 and the case-law cited).

26. National measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom. On the other hand, measures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and such provision within one Member State do not fall within the scope of the prohibition laid down in Article 56 TFEU (see, inter alia, judgment of 18 June 2019, *Austria* v *Germany*, C-591/17, EU:C:2019:504, paragraphs 136 and 137 and the case-law cited).

27. In the present case, it is important to note that, under Article 7/B(1) of the Law on the taxation of advertisements, a person liable to the tax on advertisements who is not registered with the tax authority as a taxpayer for the purposes of some form of tax must register with the tax authority by submitting the relevant form within 15 days of commencing the taxable activity.

28. It follows, first, that the obligation to submit a tax declaration, laid down in Article 7/B(1) of that law, does not impinge on the exercise of the activity of advertising online in Hungary and, second, that a supplier of advertising services who, before commencing its advertising activity which is taxable, has not registered for tax purposes in Hungary is subject to that obligation, whereas that obligation does not apply to a supplier of advertising services who is already registered for tax purposes in that Member State for the purposes of some form of tax, that being so irrespective of either supplier’s place of establishment.

29. The obligation to submit a tax declaration, which is an administrative formality, does not per se constitute an obstacle to the freedom to provide services.

30. It is in no way apparent that the obligation to submit a tax declaration, laid down in Article 7/B(1) of the Law on the taxation of advertisements, means that suppliers of advertising services who are not established in Hungary are subject to an additional administrative burden in relation to that borne by suppliers of advertising services established in Hungary.

31. It is true that the suppliers of advertising services established in Hungary are exempt from that obligation. As stated by the referring court, they are considered, under national tax law, to satisfy that obligation automatically.

32. However, the fact that those suppliers are exempt from the obligation to submit a tax declaration is not, in relation to suppliers of advertising services established in other Member States, a difference in treatment capable of constituting a restriction on the freedom to provide services.

33. First of all, it is common ground that those suppliers are also exempt from the obligation to submit a tax declaration under Article 7/B(1) of the Law on the taxation of advertisements if they have already submitted a tax declaration or registered with the tax authority for the purposes of some form of direct or indirect tax levied in Hungary.

34. Next, the exemption from the obligation to submit a tax declaration, whilst mainly benefiting suppliers of services established in Hungary, does not result in deterring the cross-border supply of advertising services, but in preventing suppliers already registered with the tax authority from being required to complete a meaningless administrative formality, since the purpose of the obligation to submit a tax declaration is precisely to enable that authority to identify those persons liable to the tax on advertisements. In particular, it is clear from the information before the Court that a supplier of services established in Hungary is required to submit an application for registration with the traders registry in order to be given a tax identification number.

35. Lastly, nothing brought to the Court's attention in the course of the present proceedings suggests that the steps to be taken to satisfy the obligation to submit a tax declaration at issue are more onerous than those

which must be taken both in order to register with the tax authority for the purposes of another tax and to register with the national traders registry.

36. In the light of the foregoing considerations, the answer to the third question referred is that Article 56 TFEU must be interpreted as not precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.

*The first, second, fourth and sixth questions*

37, It should be noted that, although systems of penalties in the field of taxation fall within the competencies of the Member States in the absence of harmonisation at EU level, such systems should not have the effect of jeopardising the freedoms provided for by the FEU Treaty (see, to that effect, judgment of 25 February 1988, *Drexl*, 299/86, EU:C:1988:103, paragraph 17).

38. Therefore, as the Advocate General observed, in essence, in point 63 of her Opinion, it is appropriate to consider whether the penalties connected with failure to submit the tax declaration laid down in Article 7/B(1) of the Law on the taxation of advertisements infringe the freedom to provide services under Article 56 TFEU.

39. It is clear from the information before the Court that, according to Article 7/B(2) and (3) of that law, any person liable to the tax on advertisements who is not yet registered with the tax authority as a taxpayer for the purposes of another tax and does not comply with the obligation to submit a tax declaration to which it is subject, risks being required to pay a series of fines, the first of which is set at HUF 10 000 000 (approximately EUR 31 000) and tripled every day if it is still found that that obligation has not been complied with, until several days later, pursuant to Article 7/D of that law, the total amount of the fines is capped at approximately HUF 1 000 000 000 (approximately EUR 3 100 000).

40. Strictly speaking, that system of penalties applies without distinction to all taxpayers who fail to comply with their obligation to submit a tax declaration pursuant to the Law on the taxation of advertisements, irrespective of the Member State in which they are established.

41. However, as the Advocate General noted, in essence, in point 77 of her Opinion, only taxpayers not resident in Hungary are, in reality, capable of being fined pursuant to Article 7/B(2) and (3) and Article 7/D of the Law on the taxation of advertisements, since, in the light of the scope *ratione personae* of Article 7/B(1) of that law, suppliers which the tax authority has registered as taxpayers for the purposes of any tax in Hungary are exempt from the obligation to submit a tax declaration.

42. Indeed, suppliers of advertising services established in Hungary may be fined for failure to comply with similar obligations to submit a tax declaration and to register required of them under the general provisions of the national tax legislation.

43. However, the system of penalties, laid down in Articles 7/B and 7/D of the Law on the taxation of advertisements, enables significantly higher fines to be issued than those resulting from the application of Article 172 of the Law on general tax procedures in the event of infringement, by a supplier of advertising services established in Hungary, of its obligation to register laid down in Article 17(1)(b) of that law. Furthermore, the amount of the fines imposed under that system is not increased for continued non-compliance with the corresponding obligation to register to such an extent, nor necessarily within such a short period of time, as that applied under the system of penalties laid down in the Law on the taxation of advertisements.

44. Having regard to the difference in treatment introduced between suppliers of advertising services according to whether or not they are already registered for tax purposes in Hungary, the system of penalties at issue in the main proceedings constitutes a restriction on the freedom to provide services, which is, in principle, prohibited by Article 56 TFEU.

45. Such a restriction may nevertheless be warranted if it is justified by overriding reasons of public interest and, provided that that is the case, its application is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, to that effect, judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 58, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 52).

46. In the present case, in order to justify that restriction, the Hungarian Government formally invokes the need to preserve the integrity of its tax regime, but essentially relies on grounds based on ensuring the effectiveness of fiscal supervision and the effective collection of tax.

47. In that regard, the Court has previously accepted that the need to ensure the effectiveness of fiscal supervision and the effective collection of tax may constitute overriding reasons in the public interest capable of justifying a restriction on the freedom to provide services. It has also held that the imposition of penalties, including criminal penalties, may be considered to be necessary in order to ensure compliance with national rules, subject, however, to the condition that the nature and amount of the penalty imposed is, in each individual case, proportionate to the gravity of the infringement which it is designed to penalise (see, to that effect, judgments of 26 May 2016, *NN (L) International*, C-48/15, EU:C:2016:356, paragraph 59, and of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 57).

48. In the first place, as regards the suitability of the system of penalties imposed by Articles 7/B and 7/D of the Law on the taxation of advertisements for securing the attainment of the objectives invoked by the Hungarian Government, it should be made clear that issuing fines of a sufficiently high amount to penalise failure to comply with the obligation to submit a tax declaration, laid down in Article 7/B(1) of that law, is capable of deterring the suppliers of advertising services subject to such an obligation from infringing it and thus preventing the Member State where the tax is levied from being deprived of the possibility of policing effectively the conditions for the application of, and exemption from, the tax in question.

49. In the second place, as to whether or not the national legislation at issue in the main proceedings goes beyond what is necessary in order to attain the objectives relied on by Hungary, as far as concerns the amount of the fines incurred in the event of failure to comply with the obligation to submit a tax declaration, it must be found that that legislation introduces a system of penalties under which a supplier who has not complied with that administrative formality may, within a few days, at intervals of only one day apart, be fined, from the second day, in amounts which are tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, thereby resulting in a total amount of HUF 1 000 000 000 (approximately EUR 3 100 000), without the competent authority giving the supplier the time necessary to comply with its obligations or the opportunity to submit its observations, or having itself examined the seriousness of the infringement. In those circumstances, such legislation is disproportionate.

50. First, there is no link between the exponential increase, within particularly short periods of time, in the total amount of the fines, which may amount to several million euros, and the seriousness of the failure to comply, within such a period, with the administrative formality constituted by the obligation to submit a tax declaration laid down in Article 7/B(1) of the Law on the taxation of advertisements. Thus, it is clear that the amount of the fines imposed is determined without taking account of turnover, which constitutes the basis of assessment for the tax which is supposed to be recovered. In those circumstances, it is quite possible that the total amount of the penalties imposed under Article 7/B(2) and (3) of the Law on the taxation of advertisements exceeds the taxpayer’s turnover.

51. Second, in so far as the legislation at issue provides for the automatic and daily adoption by the tax authority of decisions issuing fines such as those issued in the main proceedings, only a few days elapse between the adoption and notification of the initial decision to fine the taxpayer HUF 10 000 000 (approximately EUR 31 000), on the one hand, and the notification of the last decision to issue a fine, on the other, as a result of which the total amount of the fines may reach the statutory ceiling of HUF 1 000 000 000 (approximately EUR 3 100 000). Thus, even if that taxpayer acted with due diligence, it would, in any event, be in effect unable to comply with its obligation to submit a tax declaration in the Member State where the tax is levied prior to receiving the last decision in its Member State of establishment and could not therefore avoid significant increases in the amount of the previous fines. This also shows that the method of calculating fines laid down in the national legislation at issue in the main proceedings does not take account of the seriousness of the conduct of suppliers of advertising services who fail to comply with their obligation to submit a tax declaration.

52. Indeed, as the Hungarian Government claimed in its written observations, under Article 7/B(5) of the Law on the taxation of advertisements, the tax authority may reduce the amount of the fines provided for in Article 7/B(2) and (3) of that law ‘without limit’ if the taxpayer complies with its obligation to submit a tax declaration when requested to do so by that authority for the first time.

53. However, it is clear from the very wording of that provision, subject to verification by the referring court, that the tax authority has at its disposal a mere discretion in that regard. A fine is no less disproportionate merely because the authorities of a Member State may, at their sole discretion, reduce its amount.

54. In the light of the foregoing considerations, the answer to the first, second, fourth and sixth questions is that Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with the obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, without the competent authority giving those suppliers of services the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register contrary to the general provisions of national tax legislation is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.

*The fifth and seventh questions*

55. It is apparent from the answer given to the first, second, fourth and sixth questions that national legislation providing for a system of fines such as that applicable in the event of failure to comply with the obligation to submit a tax declaration at issue in the main proceedings is incompatible with Article 56 TFEU. Accordingly, it is not necessary to answer the fifth and seventh questions.

**Costs**

56. …

On those grounds,

the Court (Grand Chamber)

hereby rules:

**1. Article 56 TFEU must be interpreted as not precluding legislation of a Member State which imposes an obligation to submit a tax declaration on suppliers of advertising services established in another Member State for the purposes of their liability to a tax on advertising, whereas suppliers of such services established in the Member State where the tax is levied are exempt from that obligation on the ground that they are subject to obligations to submit a tax declaration or to register on the basis of liability to all other taxes applicable in that Member State.**

**2. Article 56 TFEU must be interpreted as precluding legislation of a Member State which fines suppliers of services established in another Member State for non-compliance with the obligation to submit a tax declaration for the purposes of their liability to a tax on advertising in a series of fines issued within several days, the amount of which, from the second day, is tripled in relation to the amount of the previous fine if it is still found that that obligation has not been complied with, leading to a total amount of several million euros, without the competent authority giving those suppliers of services the time necessary to comply with their obligations or the opportunity to submit their observations, or having itself examined the seriousness of the infringement, before adopting the final decision fixing the total amount of those fines, whereas the amount of the fine which suppliers of services established in the Member State where the tax is levied who fail to comply with a similar obligation to submit a tax declaration or to register contrary to the general provisions of national tax legislation is significantly less and is not increased, in the event of continued failure to comply with such an obligation, in the same proportions, nor necessarily within such a short period of time.**

# CE Cour de Justice, le 2 avril 2020*

## Affaire C-458/18

## *"GVC Services (Bulgaria)" EOOD contre Direktor na Direktsia "Obzhalvane i danachno-osiguritelna praktika"- Sofia*

*Cinquième chambre:* *E. Regan, président de chambre, I. Jarukaitis, E. Juhász, M. Ilesic (rapporteur) et C. Lycourgos, juges*

*Avocat Général:* *G. Hogan*

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1. La demande de décision préjudicielle porte sur l'interprétation de l'article 2, sous a), i) et iii), de la directive 2011/96/UE du Conseil, du 30 novembre 2011, concernant le régime fiscal commun applicable aux sociétés mères et filiales d'États membres différents (JO 2011, L 345, p. 8), et de son annexe I, partie A, sous ab), et partie B, dernier tiret.

2. Cette demande a été présentée dans le cadre d'un litige opposant « GVC Services (Bulgaria) » EOOD, établie en Bulgarie (ci-après « GVC »), au Direktor na Direktsia « Obzhalvane i danachno-osiguritelna praktika » – Sofia (directeur de la direction « Recours et pratique en matière de fiscalité et de sécurité sociale » de Sofia, Bulgarie) (ci-après le « directeur ») au sujet d'un avis de redressement fiscal constatant des dettes d'impôt sur les dividendes distribués et versés par GVC à sa société mère, PGB Limited – Gibraltar, établie à Gibraltar, pour la période allant du 13 juillet 2011 au 21 avril 2016.

### Le cadre juridique

*Le droit de l'Union*

Le statut de Gibraltar

3. À titre liminaire, il y a lieu de relever que, le litige pendant devant la juridiction de renvoi concernant des dettes d'impôt dues pour une période antérieure au 1er février 2020, il n'y a pas lieu de tenir compte, dans le cadre de la présente affaire, de l'accord sur le retrait du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord de l'Union européenne et de la Communauté européenne de l'énergie atomique (JO 2020, L 29, p. 7).

4. Gibraltar est un territoire européen dont un État membre, à savoir le Royaume-Uni de Grande-Bretagne et d'Irlande du Nord, assume les relations extérieures au sens de l'article 355, point 3, TFUE et auquel les dispositions des traités s'appliquent.

5. L'acte relatif aux conditions d'adhésion du Royaume de Danemark, de l'Irlande et du Royaume-Uni de Grande-Bretagne et d'Irlande du Nord et aux adaptations des traités (JO 1972, L 73, p. 14, ci-après l'« acte d'adhésion de 1972 ») prévoit toutefois que certaines parties du traité ne s'appliquent pas à Gibraltar.

6. L'article 28 de l'acte d'adhésion de 1972 dispose :

> « Les actes des institutions de [l'Union européenne] visant les produits de l'annexe [I] du traité [FUE] et les produits soumis à l'importation dans [l'Union] à une réglementation spécifique comme conséquence de la mise en œuvre de la politique agricole commune, ainsi que les actes en matière d'harmonisation des législations des États membres relatives aux taxes sur le chiffre d'affaires ne sont pas applicables à Gibraltar, à

* Lange de procédure: le bulgare.

moins que le [Conseil de l'Union européenne] statuant à l'unanimité sur proposition de la [Commission européenne] n'en dispose autrement. »

7. En vertu de l'article 29 de l'acte d'adhésion de 1972, combiné avec l'annexe I, partie I, point 4, de celui-ci, Gibraltar est exclu du territoire douanier de l'Union.

La directive 2011/96

8. Les considérants 3 à 6 et 8 de la directive 2011/96 énoncent :

« 3. L'objectif de la présente directive est d'exonérer de retenue à la source les dividendes et autres bénéfices distribués par des filiales à leur société mère, et d'éliminer la double imposition de ces revenus au niveau de la société mère.
4. Les regroupements de sociétés d'États membres différents peuvent être nécessaires pour créer dans l'Union des conditions analogues à celles d'un marché intérieur et pour assurer ainsi le bon fonctionnement d'un tel marché intérieur. Ces opérations ne devraient pas être entravées par des restrictions, des désavantages ou des distorsions découlant en particulier des dispositions fiscales des États membres. Il importe, par conséquent, de prévoir pour ces regroupements des règles fiscales neutres au regard de la concurrence afin de permettre aux entreprises de s'adapter aux exigences du marché intérieur, d'accroître leur productivité et de renforcer leur position concurrentielle sur le plan international.
5. Les regroupements en question peuvent aboutir à la création de groupes de sociétés mères et filiales.
6. Avant l'entrée en vigueur de la directive 90/435/CEE [du Conseil, du 23 juillet 1990, concernant le régime fiscal commun applicable aux sociétés mères et filiales d'États membres différents (JO 1990, L 225, p. 6)], les dispositions fiscales régissant les relations entre sociétés mères et filiales d'États membres différents variaient sensiblement d'un État membre à l'autre et étaient, en général, moins favorables que celles applicables aux relations entre sociétés mères et filiales d'un même État membre. La coopération entre sociétés d'États membres différents était, de ce fait, pénalisée par rapport à la coopération entre sociétés d'un même État membre. Il convenait d'éliminer cette pénalisation par l'instauration d'un régime commun et de faciliter ainsi les regroupements de sociétés à l'échelle de l'Union.
[...]
8. Il convient par ailleurs, pour assurer la neutralité fiscale, d'exempter de retenue à la source les bénéfices qu'une société filiale distribue à sa société mère. »

9. Aux termes de l'article 1er, paragraphe 1, de la directive 2011/96 :

« Chaque État membre applique la présente directive :
a. aux distributions de bénéfices reçus par des sociétés de cet État membre et provenant de leurs filiales d'autres États membres ;
b. aux distributions de bénéfices effectuées par des sociétés de cet État membre à des sociétés d'autres États membres dont elles sont les filiales ;
[...] »

10. L'article 2, sous a), de cette directive dispose :

« Aux fins de l'application de la présente directive, on entend par :
a. "société d'un État membre" : toute société :
i. qui revêt une des formes énumérées à l'annexe I, partie A ;
ii. qui, selon la législation fiscale d'un État membre, est considérée comme ayant dans cet État membre son domicile fiscal et qui, aux termes d'une convention en matière de double imposition conclue avec un État tiers, n'est pas considérée comme ayant son domicile fiscal hors de l'Union ;
iii. qui, en outre, est assujettie, sans possibilité d'option et sans en être exonérée, à l'un des impôts énumérés à l'annexe I, partie B, ou à tout autre impôt qui viendrait se substituer à l'un de ces impôts. »

11. L'article 5 de ladite directive prévoit que « [l]es bénéfices distribués par une filiale à sa société mère sont exonérés de retenue à la source ».

12. La partie A de l'annexe I de la directive 2011/96 établit la liste des sociétés visées à l'article 2, sous a), i), de cette directive et mentionne, au point ab), les « sociétés constituées conformément au droit du Royaume-Uni ».

13. Dans la partie B de cette annexe I figure la liste des impôts visés à l'article 2, sous a), iii), de ladite directive, comprenant, à son dernier tiret, la « corporation tax au Royaume-Uni ».

Le droit bulgare

14. Aux termes de l'article 194, paragraphes 1 et 3, du Zakon za korporativnoto podohodno oblagane (loi relative à l'impôt sur les sociétés) (DV nº 105, du 22 décembre 2006) :

> « 1.Sont assujettis à un impôt prélevé à la source les dividendes et les boni de liquidation distribués (versés) par des personnes morales résidentes :
> 1. à des personnes morales étrangères [...]
>
> [...]
> 3. Le paragraphe 1 n'est pas applicable lorsque les dividendes et les boni de liquidation sont distribués :
> [...]
> 3. [...] à une personne morale étrangère ayant son domicile fiscal dans un État membre de [l'Union] ou dans un autre État qui est partie à l'accord sur l'Espace économique européen[, du 2 mai 1992 (JO 1994, L 1, p. 3)], sauf lorsqu'il y a distribution cachée de bénéfices. »

**Le litige au principal et les questions préjudicielles**

15. GVC est une société unipersonnelle à responsabilité limitée de droit bulgare, fournissant des services de technologies de l'information. Jusqu'au 1er février 2016, son capital était intégralement détenu par PGB Limited – Gibraltar, société constituée à Gibraltar.

16. Durant la période allant du 13 juillet 2011 au 21 avril 2016, GVC a distribué à sa société mère, PGB Limited – Gibraltar, des dividendes et les lui a versés sans retenir ni acquitter d'impôt sur ceux-ci en Bulgarie, estimant que ladite société mère pouvait être considérée comme une personne morale étrangère ayant son domicile fiscal dans un État membre de l'Union, conformément à l'article 194, paragraphe 3, de la loi relative à l'impôt sur les sociétés.

17. Considérant, au contraire, que, en l'occurrence, la retenue à la source sur les dividendes distribués aurait dû être opérée, l'autorité fiscale bulgare compétente a émis, le 1er décembre 2017, un avis de redressement fiscal, visant au recouvrement d'un montant de 930 529,54 leva bulgares (BGN) (environ 476 000 euros), dont 669 690,32 BGN (environ 342 000 euros) au titre du principal et 260 839,22 BGN (environ 134 000 euros) au titre des intérêts de retard. GVC a contesté cet avis en introduisant un recours administratif devant le directeur, qui a confirmé ledit avis. GVC a saisi la juridiction de renvoi d'un recours en annulation de l'avis confirmé.

18. GVC soutient que le droit de l'Union est applicable à Gibraltar qui est un territoire européen dont un État membre assume les relations extérieures au sens de l'article 355, point 3, TFUE et que la distribution des dividendes ne relève pas des exclusions prévues aux articles 28 à 30 de l'acte d'adhésion de 1972. À cet égard, elle estime que sa société mère remplit les conditions de l'article 2 de la directive 2011/96, cette société pouvant être assimilée à une société constituée au Royaume-Uni et étant assujettie à Gibraltar à l'impôt sur les sociétés qui correspond, selon elle, à la « corporation tax au Royaume-Uni » visée à l'annexe I, partie B, dernier tiret, de cette directive.

19. En revanche, le directeur fait valoir que l'annexe I de la directive 2011/96 établit une liste explicite et exhaustive tant des sociétés (partie A) que des impôts (partie B) qui relèvent de son champ d'application. Il considère que cette directive définit exhaustivement son champ d'application et que celui-ci ne saurait donc être étendu aux sociétés constituées à Gibraltar et qui y sont assujetties à l'impôt sur les sociétés, dans la mesure où les règles fiscales ne sauraient être interprétées extensivement.

20. Éprouvant des doutes sur le point de savoir si GVC, en tant que filiale d'une société mère enregistrée à Gibraltar et qui y est assujettie à l'impôt sur les sociétés, relève du champ d'application de la directive 2011/96 et si, par conséquent, elle doit être exonérée de la retenue à la source en Bulgarie, l'Administrativen sad Sofia-grad (tribunal administratif de Sofia, Bulgarie) a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

> « 1.Les dispositions combinées de l'article 2, sous a), i), de la directive [2011/96] et de son annexe I, partie A, sous ab), doivent-elles être interprétées en ce sens que l'on entend également par "sociétés constituées conformément au droit du Royaume-Uni" les sociétés constituées à Gibraltar ?
> 2. Les dispositions combinées de l'article 2, sous a), iii), de la directive [2011/96] et de son annexe I, partie B, [dernier tiret,] doivent-elle être interprétées en ce sens que l'on entend également par "corporation tax au Royaume-Uni" l'impôt sur les sociétés dû à Gibraltar ? »

**Sur la recevabilité de la demande de décision préjudicielle**

21. Bien que ne soulevant pas formellement une exception d'irrecevabilité, le gouvernement du Royaume-Uni indique, dans ses observations écrites, qu'il n'apparaît pas nécessaire de répondre aux questions préjudicielles pour pouvoir résoudre le litige au principal.

22. Au regard du statut de Gibraltar en droit de l'Union, tel qu'il a été confirmé par la Cour, PGB Limited – Gibraltar, en tant que société établie à Gibraltar, remplirait déjà la condition prévue à l'article 194, paragraphe 3, de la loi relative à l'impôt sur les sociétés, à savoir celle d'être une personne morale étrangère ayant son domicile fiscal dans un État membre de l'Union. Par conséquent, selon ce gouvernement, l'interprétation de la directive 2011/96 ne s'imposerait pas.

23. À cet égard, il convient de rappeler que, selon une jurisprudence constante, les questions relatives à l'interprétation du droit de l'Union posées par le juge national dans le cadre réglementaire et factuel qu'il définit sous sa responsabilité, et dont il n'appartient pas à la Cour de vérifier l'exactitude, bénéficient d'une présomption de pertinence. Le refus de la Cour de statuer sur une demande formée par une juridiction nationale n'est possible que s'il apparaît de manière manifeste que l'interprétation sollicitée du droit de l'Union n'a aucun rapport avec la réalité ou l'objet du litige au principal, lorsque le problème est de nature hypothétique ou encore lorsque la Cour ne dispose pas des éléments de fait et de droit nécessaires pour répondre de façon utile aux questions qui lui sont posées (arrêt du 30 janvier 2020, I.G.I., C‑394/18, EU:C:2020:56, point 56 et jurisprudence citée).

24. En l'occurrence, ainsi que le relève expressément le gouvernement du Royaume-Uni lui-même, les dispositions du droit national en cause au principal constituent précisément des mesures de transposition de la directive 2011/96.

25. Par ailleurs, ainsi qu'il ressort de la décision de renvoi, en vue de résoudre le litige au principal, la juridiction de renvoi doit établir si PGB Limited – Gibraltar, en tant que société constituée à Gibraltar, relève du champ d'application de la directive 2011/96, pour justifier l'exonération de GVC, en tant que sa filiale, de l'impôt retenu à la source en Bulgarie, conformément à l'article 5 de cette directive.

26. Dans ces conditions, il ne saurait aucunement être considéré que l'interprétation de la directive 2011/96 sollicitée par la juridiction de renvoi en l'occurrence soit sans rapport avec la réalité ou l'objet du litige au principal ou soulève un problème de nature hypothétique, cette interprétation étant nécessaire aux fins de la résolution de ce litige.

27. Par conséquent, la demande de décision préjudicielle est recevable.

**Sur les questions préjudicielles**

28. Par ses questions, qu'il convient d'examiner ensemble, la juridiction de renvoi demande, en substance, si l'article 2, sous a), i) et iii), de la directive 2011/96, lu en combinaison avec l'annexe I, partie A, sous ab), et partie B, dernier tiret, de cette directive, doit être interprété en ce sens que les notions de « sociétés constituées conformément au droit du Royaume-Uni » et de « corporation tax au Royaume-Uni », figurant à ces dispositions, visent les sociétés constituées à Gibraltar et qui y sont assujetties à l'impôt sur les sociétés.

29. À titre liminaire, il convient de faire observer que la période concernée dans le litige au principal est couverte tant par la directive 90/435, telle que modifié par la directive 2006/98/CE du Conseil, du 20 novembre 2006 (JO 2006, L 363, p. 129) (ci-après la « directive 90/435 »), que par la directive 2011/96, laquelle a abrogé et remplacé cette première directive. Les dispositions pertinentes étant toutefois demeurées inchangées, il suffit, en l'espèce, de répondre aux questions posées au regard des seules dispositions pertinentes de la directive 2011/96.

30. Dans la mesure où, au cours de la période pertinente pour le litige au principal, Gibraltar constituait un territoire européen dont un État membre, à savoir le Royaume-Uni, assume les relations extérieures, le droit de l'Union s'appliquait, en principe, sur ce territoire en vertu de l'article 355, point 3, TFUE, sous réserve des exclusions expressément prévues par l'acte d'adhésion de 1972 (arrêt du 23 septembre 2003, Commission/Royaume-Uni, C‑30/01, EU:C:2003:489, point 47 ; ordonnance du 12 octobre 2017, Fisher, C‑192/16, EU:C:2017:762, point 29, et arrêt du 23 janvier 2018, Buhagiar e.a., C‑267/16, EU:C:2018:26, point 31 ainsi que jurisprudence citée).

31. S'agissant de la directive 2011/96, il y a lieu de relever qu'elle a été adoptée sur la base de l'article 115 TFUE, qui permet au Conseil d'arrêter des directives pour le rapprochement des dispositions législatives, réglementaires et administratives des États membres ayant une incidence directe sur l'établissement ou le fonc-

tionnement du marché intérieur. Conformément à ses considérants 3 à 6, l'objectif de cette directive est d'exonérer de retenue à la source les dividendes et autres bénéfices distribués par des filiales à leur société mère et d'éliminer la double imposition de ces revenus au niveau de la société mère, afin de faciliter les regroupements de sociétés à l'échelle de l'Union (voir en ce sens, s'agissant de la directive 90/435, arrêt du 19 décembre 2019, Brussels Securities, C-389/18, EU:C:2019:1132, points 35 et 36 ainsi que jurisprudence citée).

32. Ainsi que M. l'avocat général l'a relevé au point 30 de ses conclusions, il est constant que la directive 2011/96 ne relève d'aucune des exclusions prévues aux articles 28 et 29 de l'acte d'adhésion de 1972.

33. Cela étant, pour savoir si les sociétés mères constituées à Gibraltar et qui y sont assujetties à l'impôt sur les sociétés peuvent prétendre à l'exonération de retenue à la source des bénéfices distribués par leurs filiales établies dans les États membres, prévue à l'article 5 de la directive 2011/96, il y a lieu de tenir compte des dispositions de cette directive qui circonscrivent son champ d'application matériel, à savoir des conditions cumulatives prévues à l'article 2, sous a), de la directive 2011/96, lu en combinaison avec son annexe I, partie A, sous ab), et partie B, dernier tiret.

34. À cet égard, il importe de rappeler, en premier lieu, que, comme cela a déjà été constaté au point 29 du présent arrêt, ces dispositions revêtant une portée en substance identique à celles de la directive 90/435, la jurisprudence de la Cour relative à la seconde de ces directives est également applicable à la première de ces directives (ordonnance du 14 juin 2018, GS, C-440/17, non publiée, EU:C:2018:437, point 30). Or, la Cour a jugé que la directive 90/435 n'a pas pour objectif d'instaurer un régime commun pour toutes les sociétés des États membres, ni pour tous les types de participations (arrêts du 22 décembre 2008, Les Vergers du Vieux Tauves, C-48/07, EU:C:2008:758, point 49, et du 1er octobre 2009, Gaz de France – Berliner Investissement, C-247/08, EU:C:2009:600, point 36).

35. Il en découle, ainsi que M. l'avocat général l'a relevé au point 36 de ses conclusions, que, pour des raisons de sécurité juridique, toute possibilité d'étendre le champ d'application de la directive 2011/96 par analogie à d'autres sociétés que celles énumérées à l'annexe I, partie A, de cette directive est exclue, le champ d'application matériel de ladite directive étant défini au moyen d'une liste exhaustive de sociétés.

36. Il convient de souligner, en second lieu, qu'il ressort du libellé de l'article 2, sous a), de la directive 2011/96, lu en combinaison avec son annexe I, partie A, sous ab), et partie B, dernier tiret, que, s'agissant du Royaume-Uni, la directive 2011/96 s'applique seulement aux « sociétés constituées conformément au droit du Royaume-Uni » et assujetties à la « corporation tax au Royaume-Uni ».

37. Ces dispositions contiennent un renvoi exprès au droit du Royaume-Uni. Elles doivent donc être interprétées conformément au droit national désigné comme applicable (voir, en ce sens, arrêt du 22 novembre 2012, Bank Handlowy et Adamiak, C-116/11, EU:C:2012:739, point 50).

38. Or, il y a lieu de relever que, dans ses observations écrites, le gouvernement du Royaume-Uni a précisé que, en vertu du droit interne de cet État membre, les sociétés constituées conformément à son droit national ne peuvent inclure que des sociétés qui sont considérées comme étant constituées au Royaume-Uni, celles-ci n'incluant pas, en tout état de cause, les sociétés constituées à Gibraltar, ce qui n'a pas été formellement contesté par les autres parties à la procédure devant la Cour.

39. Ce gouvernement a par ailleurs précisé, sans qu'une telle précision soit davantage remise en cause, que, selon le droit interne du Royaume-Uni, l'impôt prélevé à Gibraltar ne constitue pas une « corporation tax au Royaume-Uni ».

40. Il s'ensuit, au regard du dossier soumis à la Cour, que les sociétés constituées à Gibraltar ne remplissent pas la condition d'applicabilité prévue à l'article 2, sous a), i), de la directive 2011/96, lu en combinaison avec l'annexe I, partie A, sous ab), de cette directive et que le régime des impôts institué par Gibraltar ne remplit pas la condition d'applicabilité prévue à l'article 2, sous a), iii), de ladite directive, lu en combinaison avec son annexe I, partie B, dernier tiret.

41. Les considérations précédentes sont sans préjudice de l'obligation de respecter, à la date des faits du litige au principal, les articles 49 et 63 TFUE et de vérifier, éventuellement, si l'imposition des bénéfices distribués par une filiale bulgare à sa société mère établie à Gibraltar constitue, au regard du droit d'établissement ou de la libre circulation des capitaux dont jouissent les sociétés constituées à Gibraltar (ordonnance du 12 octobre 2017, Fisher, C-192/16, EU:C:2017:762, points 26 et 27), une restriction et, dans l'affirmative, si une telle restriction est justifiée.

42. Eu égard à tout ce qui précède, il convient de répondre aux questions posées que l'article 2, sous a), i) et iii), de la directive 2011/96, lu en combinaison avec l'annexe I, partie A, sous ab), et partie B, dernier tiret, de cette directive, doit être interprété en ce sens que les notions de « sociétés constituées conformément au droit du Royaume-Uni » et de « corporation tax au Royaume-Uni », figurant à ces dispositions, ne visent pas les sociétés constituées à Gibraltar et qui y sont assujetties à l'impôt sur les sociétés.

**Sur les dépens**

43. …

Par ces motifs,

la Cour (cinquième chambre)

dit pour droit :

**L'article 2, sous a), i) et iii), de la directive 2011/96/UE du Conseil, du 30 novembre 2011, concernant le régime fiscal commun applicable aux sociétés mères et filiales d'États membres différents, lu en combinaison avec l'annexe I, partie A, sous ab), et partie B, dernier tiret, de cette directive, doit être interprété en ce sens que les notions de « sociétés constituées conformément au droit du Royaume-Uni » et de « corporation tax au Royaume-Uni », figurant à ces dispositions, ne visent pas les sociétés constituées à Gibraltar et qui y sont assujetties à l'impôt sur les sociétés.**

# EU Court of Justice, 30 April 2020*, as rectified by order of 8 June 2020

## Joined Cases C-168/19 and C-169/19

## *HB (C-168/19), IC (C-169/19) v Istituto nazionale della previdenza sociale (INPS)*

*Eighth Chamber:* *L. S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and N. Wahl, Judges*

*Advocate General:* *G. Hogan*

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1. These requests for a preliminary ruling concern the interpretation of Articles 18 TFEU and 21 TFEU.

2. The requests have been made in two sets of proceedings brought by HB and IC respectively against the Istituto nazionale della previdenza sociale (INPS) (National Social Security Institute, Italy) concerning the latter's refusal to pay the amount of their respective retirement pensions without levying Italian taxes.

### Legal context

3. Article 18 of the convenzione tra la Repubblica italiana e la Repubblica portoghese per evitare le doppie imposizioni e prevenire l'evasione fiscal in materia di imposte sul reddito (Convention between the Italian Republic and the Portuguese Republic for the avoidance of double taxation and the prevention of tax evasion with regard to income tax), signed in Rome on 14 May 1980, ratified by the Italian Republic by legge n. 562 (Law No 562) of 10 July 1982 (ordinary supplement to GURI No 224 of 16 August 1982) ('the Italian-Portuguese Convention'), stipulates:

> 'Subject to the provisions of Article 19(2), pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.'

4. Article 19(2) of the Italian-Portuguese Convention provides:

> 'a. The pensions paid by a Contracting State, by one of the political or administrative subdivisions of that State or by one of its local authorities, whether directly or from funds set up by them, to a natural person in respect of services provided to that State or local authority, shall be taxable in that State only.
> b. However, such pensions shall be taxable only in the other Contracting State if the individual is a resident and a national of that State.'

### The disputes in the main proceedings and the question referred for a preliminary ruling

5. HB and IC, of Italian nationality, are former employees of the Italian public sector. They are each in receipt of a retirement pension paid by the INPS. After transferring their residence to Portugal, they requested the INPS, in 2015, that they receive, pursuant to Article 18 and Article 19(2) of the Italian-Portuguese Convention, the gross amount of their monthly retirement pension, without deduction of tax at source by the Italian Republic. The INPS rejected those requests, taking the view that, pursuant to Article 19 of the Italian-Portuguese Convention, unlike Italian pensioners in the private sector, retired employees in the Italian public sector must be taxed in Italy, and only in that Contracting State. HB and IC each brought actions against those decisions before the referring court, the Corte dei conti – Sezione Giurisdizionale per la Regione Puglia (Court of Auditors – Judicial Chamber for the Region of Puglia, Italy).

6. The referring court considers that the Italian-Portuguese Convention clearly introduces inequality of treatment between Italian pensioners in the private sector and Italian pensioners in the public sector resident in Portugal, in so far as the former indirectly enjoy more advantageous tax treatment than the latter, which

* Language of the case: Italian.

constitutes, according to that court, an obstacle to the freedom of movement guaranteed to every citizen of the European Union under Article 21 TFEU.

7. The referring court also points out that the difference in the tax treatment of the retirement pensions of Italian nationals who transfer their residence to Portugal, depending on whether they are former public sector employees or former private sector employees, amounts to discrimination on grounds of nationality, which is prohibited by Article 18 TFEU, since, in order to be taxed in Portugal, former private sector employees are merely required to be resident there, whereas former public sector employees must have acquired Portuguese nationality.

8. In those circumstances, the Corte dei Conti –Sezione Giurisdizionale per la Regione Puglia (Court of Auditors – Judicial Chamber for the Region of Puglia) decided to stay the proceedings and to refer the following question, worded identically in both joined cases, to the Court for a preliminary ruling:

> 'Must Articles 18 TFEU and 21 TFEU be interpreted as precluding legislation of a Member State which provides for the taxation, in that Member State, of the income of a person resident in another Member State who receives all of his or her income from the first Member State but who does not hold the nationality of the second Member State, without the benefit of the tax advantages provided by that second Member State?'

**Consideration of the question referred**

9. By its question, the referring court asks whether Articles 18 TFEU and 21 TFEU are to be interpreted as precluding legislation of a Member State which provides that the income of a person resident in another Member State, who receives all of his or her income from the first Member State but who does not hold the nationality of the second Member State, is taxed only in the first Member State, that person being thereby excluded from the benefit of the tax advantages offered by the second Member State.

10. A preliminary point to make is that, according to the Court's settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 27).

11. In that regard, it should be noted, in the first place, that, although the referring court does not specify whether the applicants in the main proceedings transferred their residence to Portugal after having ceased all occupational activity or not, it considers that their situation is governed by Article 21 TFEU on the freedom of movement of citizens of the Union. On the basis of that provision of the TFEU, the referring court appears to indicate to the Court that the transfer of residence took place after the applicants in the main proceedings had ceased all occupational activity. It is therefore only in the light of that fact that the Court will examine the question referred.

12. In the second place, contrary to what the Belgian and Swedish Governments submit in their written observations, Article 18 TFEU, which enshrines the principle of non-discrimination on grounds of nationality, is applicable to a situation such as that at issue in the main proceedings.

13. It is settled case-law of the Court of Justice that any citizen of the Union may rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in a situation where he or she has exercised the fundamental freedom of movement and residence within the territory of the Member States conferred by Article 21 TFEU (see, to that effect, judgments of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraphs 27 and 44 and the case-law cited, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 29).

14. In the third and last place, it should be noted that it is apparent from the documents before the Court that Article 18 and Article 19(2) of the Italian-Portuguese Convention, which are drafted in the same terms as the corresponding provisions of the Model Tax Convention on Income and on Capital drawn up by the Organisation for Economic Cooperation and Development (OECD), in its 2014 version, are intended to allocate powers of taxation between the Italian Republic and the Portuguese Republic in respect of pensions and include, in that regard, different connecting factors according to whether the taxpayers were employed in the private or public sector. The latter category of taxpayers is, in principle, taxed in the State responsible for payment of the retirement pension, unless they have the nationality of the other Contracting State in which they reside.

15. It is apparent from those preliminary considerations that, by its question, the referring court asks, in essence, whether Articles 18 TFEU and 21 TFEU preclude a tax scheme resulting from a double taxation convention concluded between two Member States under which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the beneficiaries of those pensions were in employment in the private sector or in the public sector and, in the latter case, depending on whether or not they are nationals of the Member State of residence.

16. In this regard, it should be recalled that, hearing requests for a preliminary ruling on the question of whether the conventions on double taxation concluded between the EU Member States must be compatible with the principle of equal treatment and, in general, with the freedoms of movement guaranteed by primary EU law, the Court has already held that the Member States are free to determine the connecting factors for the allocation of fiscal sovereignty in bilateral conventions for the avoidance of double taxation (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 37 and the case-law cited).

17. Furthermore, it must be stated that the objective of a bilateral convention for the avoidance of double taxation, such as the Italian-Portuguese Agreement, is to prevent the same income from being taxed in each of the two parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other contracting State (see, by analogy, judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 44 and the case-law cited).

18. To that end, it is not unreasonable for Member States to use the criteria followed in international tax practice and, in particular, as the Italian Republic and the Portuguese Republic have done in the present case, as is apparent from paragraph 14 of the present judgment, the Model Tax Convention on Income and on Capital drawn up by the OECD, Article 19(2) of which, in the 2014 version, provides for connecting factors such as the paying State and nationality (see, to that effect, judgments of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 31, and of 24 October 2018, *Sauvage and Lejeune*, C-602/17, EU:C:2018:856, paragraph 23).

19. Consequently, where, in a convention on double taxation concluded between the Member States, the criterion of nationality appears in a provision which is intended to allocate fiscal sovereignty, there is no justification for considering such differentiation on the basis of nationality as constituting prohibited discrimination (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 38 and the case-law cited).

20. Similarly, the designation of the State responsible for payment of the retirement pension ('the paying State') as being competent to tax pensions received from the public sector cannot, in itself, have negative repercussions for the taxpayers concerned, in so far as the favourable or unfavourable nature of the tax treatment of those taxpayers does not derive strictly speaking from the choice of connecting factor, but from the level of taxation of the competent State, in the absence of harmonisation, at EU level, of the scales of direct taxes (see, to that effect, judgment of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 34).

21. It follows from an application to the circumstances of the main proceedings of the principles identified in the case-law of the Court, referred to in paragraphs 16 to 20 of the present judgment, that the difference in treatment which the applicants in the main proceedings claim to have suffered arises from the allocation of the power to impose taxes between the parties to the Italian-Portuguese Convention and from the disparities existing between the respective tax systems of those contracting parties. The choice of various connecting factors, made by those parties for the purpose of allocating powers of taxation between them, such as, in the present case, the State responsible for paying the retirement pension and nationality, must not be regarded, as such, as constituting discrimination prohibited by Articles 18 TFEU and 21 TFEU (see, by analogy, judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 45).

22. In the light of all the foregoing considerations, the answer to the question referred is that Articles 18 TFEU and 21 TFEU do not preclude a tax scheme resulting from a double taxation convention concluded between two Member States, pursuant to which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the recipients of those pensions were in employment in the private sector or in the public sector and, in the latter case, depending on whether or not they are nationals of the Member State of residence.

**Costs**

23. ...

On those grounds,

the Court (Eighth Chamber)

hereby rules:

**Articles 18 TFEU and 21 TFEU do not preclude a tax regime resulting from a convention for the avoidance of double taxation concluded between two Member States, pursuant to which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the recipients of those pensions were in employment in the private sector or the public sector and, in the latter case, according to whether or not they are nationals of the Member State of residence.**

# CE Cour de Justice, le 30 avril 2020*

## Affaire C-565/18

## *Société Générale SA contre Agenzia delle Entrate - Direzione Regionale Lombardia Ufficio Contenzioso*

*Deuxième chambre: A. Arabadjiev, président de chambre, P. G. Xuereb et T. von Danwitz (rapporteur), juges*

*Advocate General: G. Hogan*

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1. La demande de décision préjudicielle porte sur l'interprétation des articles 18, 56 et 63 TFUE.

2. Cette demande a été présentée dans le cadre d'un litige opposant Société Générale SA (ci-après « Société Générale ») à l'Agenzia delle Entrate – Direzione Regionale Lombardia Ufficio Contenzioso (administration fiscale – direction régionale de la Lombardie, service du contentieux, Italie, ci-après l'« administration fiscale »), au sujet d'une demande de remboursement d'une taxe sur les transactions financières ayant pour objet des instruments financiers dérivés acquittée par Société Générale.

**Le droit italien**

3. L'article 1er de la legge n. 228 – Disposizioni per la formazione del bilancio annuale e pluriennale dello Stato (Legge di stabilità 2013) [loi nº 228, relative aux dispositions pour la formation du budget annuel et pluriannuel de l'État (loi de stabilité 2013)], du 24 décembre 2012 (supplément ordinaire à la GURI nº 302, du 29 décembre 2012, nº 212, p. 1, ci-après la « loi nº 228/2012 »), dispose, à ses paragraphes 491, 492 et 494 :

> « 491. Le transfert de la propriété d'actions et d'autres instruments financiers participatifs [...], émis par des sociétés résidentes sur le territoire de l'État, ainsi que des titres représentatifs desdits instruments, indépendamment de l'État de résidence de l'entité émettrice, est soumis à une taxe sur les transactions financières au taux de 0,2 pour cent de la valeur de la transaction. Le transfert de la propriété d'actions découlant de la conversion d'obligations est également soumis à la taxe ci-dessus. [...] La taxe est due indépendamment du lieu de conclusion de la transaction et de l'État de résidence des parties contractantes. [...]
> 492. Les opérations portant sur des instruments financiers dérivés [...], ayant principalement comme instrument sous-jacent un ou plusieurs des instruments financiers prévus au paragraphe 491, ou dont la valeur dépend essentiellement de l'un ou de plusieurs des instruments financiers prévus au même paragraphe, et les opérations sur les valeurs mobilières [...], permettant d'acheter ou de vendre principalement un ou plusieurs instruments financiers visés au paragraphe 491 ou comportant un paiement comptant déterminé principalement par rapport à un ou plusieurs instruments financiers visés au paragraphe précédent, y compris les warrants, les warrants couverts et les certificats, sont soumises, au moment de la conclusion, à une taxe fixe, déterminée en fonction du type d'instrument et de la valeur du contrat, conformément au tableau 3 annexé à la présente loi. La taxe est due indépendamment du lieu de conclusion de la transaction et de l'État de résidence des parties contractantes. Dans le cas où les opérations visées à la première phrase prévoient également, comme mode de règlement, le transfert des actions ou des autres instruments financiers participatifs, le transfert du droit de propriété desdits instruments financiers, qui se produit au moment du règlement, est soumis à l'impôt selon les modalités et dans la mesure prévue au paragraphe 491. [...]
> [...]
> 494. La taxe prévue au paragraphe 491 est due par le bénéficiaire du transfert ; celle prévue au paragraphe 492 est due dans la mesure établie par chacune des contreparties des opérations. La taxe prévue aux paragraphes 491 et 492 ne s'applique pas aux entités qui s'interposent dans les mêmes opérations.

* Langue de procédure: l'italien.

Dans le cas d'un transfert de propriété d'actions et d'instruments financiers prévu au paragraphe 491, ainsi que pour les opérations sur les instruments financiers prévues au paragraphe 492, la taxe est payée par les banques, les sociétés de fiducie et les entreprises d'investissement habilitées à fournir au public, à titre professionnel, les services et activités d'investissement [...] ainsi que par les autres entités intervenant dans l'exécution des opérations susmentionnées, y compris les intermédiaires non-résidents. Lorsque plusieurs entités parmi celles indiquées à la troisième phrase, interviennent dans l'exécution de l'opération, la taxe est payée par celle d'entre elles qui reçoit l'ordre d'exécution directement de l'acquéreur ou de la contrepartie finale. Dans les autres cas, la taxe est acquittée par le contribuable. Les intermédiaires et autres entités non-résidents intervenant dans l'opération peuvent désigner un représentant fiscal [...] qui répond, dans les mêmes termes et avec les mêmes responsabilités que l'entité non résidente, des obligations liées aux opérations visées aux paragraphes précédents. [...] »

4. Le tableau 3, visé à l'article 1er, paragraphe 492, de la loi nº 228/2012, figurant en annexe de celle-ci et intitulé « Tableau : taxe sur les transactions financières par instrument financier (valeur libellée en euros pour chaque contrepartie) », se présente comme suit :

| | Valeur nationale du contrat (en milliers d'EUR) | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| Instrument financier | 0-2.5 | 2.5-5 | 5-10 | 10-50 | 50-100 | 100-500 | 500-1 000 | Plus de 1 000 |
| Contrats à terme standardisés (futures), certificats, warrants couverts et contrats d'option sur les rendements, mesures ou indices relatifs aux actions | 0.01875 | 0.0375 | 0.075 | 0.375 | 0.75 | 3.75 | 7.5 | 5 |
| Contrats à terme standardisés (futures), warrants, certificats, warrants couverts et contrats d'option sur actions | 0.125 | 0.25 | 0.5 | 2.5 | 5 | 25 | 50 | 100 |
| Contrats d'échange (swaps) sur les actions et rendement, indices ou mesures correspondants<br>Contrats à terme liés à des actions et rendement, indices ou mesures correspondants<br>Contrats financiers avec paiement d'un différentiel lié aux actions et aux rendements, indices ou mesures correspondants<br>Tout autre titre comportant un règlement en espèces déterminé par référence aux actions et aux rendements, indices ou mesures correspondants<br>Combinaisons des contrats ou des titres précités | 0.25 | 0.5 | 1 | 5 | 10 | 50 | 100 | 200 |

**Le litige au principal et la question préjudicielle**

5. Le 28 mars 2014, Société Générale, établie en France, a présenté, par l'intermédiaire de sa succursale italienne, une déclaration à l'administration fiscale au titre de la taxe sur les transactions financières instaurée par la loi nº 228/2012. Sur la base de cette déclaration, relative aux opérations effectuées au cours de l'année

d'imposition 2013 par la société mère française, ayant pour objet des instruments financiers dérivés visés à l'article 1er, paragraphe 492, de cette loi, le montant de cette taxe s'élevait à la somme de 55 207 euros.

6. Le 1er août 2014, Société Générale a demandé à l'administration fiscale le remboursement des sommes acquittées au titre de cette taxe, en faisant valoir que la loi no 228/2012, en ce qu'elle prévoit l'imposition des transactions financières portant sur des instruments financiers dérivés lorsque le titre sous-jacent à de tels instruments a été émis par une entité établie en Italie, est contraire à la Constitution italienne, notamment aux principes d'égalité formelle et de capacité contributive, prévus respectivement aux articles 3 et 53 de celle-ci, ainsi qu'au droit international coutumier, applicable dans l'ordre juridique italien en vertu de l'article 10 de cette constitution, et au droit de l'Union, en particulier aux articles 18, 56 et 63 TFUE.

7. Le 28 janvier 2015, à défaut de réponse de l'administration fiscale, Société Générale a saisi la Commissione tributaria provinciale di Milano (commission fiscale provinciale de Milan, Italie) d'un recours contre cette décision de refus tacite, fondé sur les mêmes moyens. Par jugement du 18 mai 2016, cette juridiction a rejeté ce recours, en considérant que la loi no 228/2012 n'était ni inconstitutionnelle ni contraire au droit de l'Union. S'agissant de la constitutionnalité de l'article 1er, paragraphe 492, de cette loi, ladite juridiction a estimé qu'il existait un lien effectif et objectif, à caractère économique, entre le fait générateur de la taxe instituée par cette disposition, à savoir la négociation aboutissant à la conclusion d'un instrument financier dérivé, exprimant une capacité contributive, et l'État italien, ainsi qu'un lien indissoluble entre la valeur d'un tel instrument et celle du titre qui lui est sous-jacent. Par ailleurs, la taxation des seules transactions concernant les titres sous-jacents pourrait entraîner des comportements d'évitement de la taxe et le principe international de territorialité et de souveraineté fiscale ne serait pas méconnu. Quant à une éventuelle incompatibilité de ladite loi avec le droit de l'Union, cette même juridiction a considéré que tel n'était pas le cas, compte tenu de l'absence de régimes d'imposition différenciés entre les assujettis italiens et ceux établis dans d'autres États membres.

8. Société Générale a interjeté appel de ce jugement devant la juridiction de renvoi, la Commissione tributaria regionale per la Lombardia (commission fiscale régionale pour la Lombardie, Italie), en demandant le remboursement de la taxe acquittée sur la base de la même argumentation que celle qu'elle avait développée devant la juridiction de première instance et, subsidiairement, le renvoi de l'affaire devant la Corte costituzionale (Cour constitutionnelle, Italie), ainsi que, à titre préjudiciel, devant la Cour.

9. La juridiction de renvoi expose que la taxe sur les transactions financières instituée par la loi no 228/2012, à son article 1er, paragraphes 491 à 500, a pour objectif d'assurer une contribution aux dépenses publiques, dans le cadre de leurs marchés respectifs, des entités qui effectuent des opérations sur des instruments financiers ayant un lien avec le territoire italien.

10. Cette juridiction fait état d'une symétrie entre les paragraphes 491 et 492 de l'article 1er de cette loi, visant, pour le premier, les actions et les instruments financiers participatifs émis par des sociétés établies en Italie ainsi que les titres représentatifs de ces instruments et, pour le second, les instruments financiers dérivés ayant pour titres sous-jacents un ou plusieurs des actions et instruments visés au paragraphe 491 de cet article, ou dont la valeur est rattachée à ces actions et instruments, ces deux paragraphes prévoyant que ladite taxe est due, bien que selon des modalités de calcul différentes, indépendamment du lieu de la conclusion de la transaction et de l'État de résidence des parties contractantes.

11. La juridiction de renvoi relève également que tout opérateur financier qui effectue des transactions ayant pour objet de tels instruments financiers dérivés profite de la valeur du titre sous-jacent, dont l'existence dépend de celle de l'ordre juridique italien, au sein duquel est réglementée l'émission de ce titre. Partant, le législateur italien considérerait à raison qu'il existe un lien économique indissociable entre ces instruments et l'ordre juridique de cet État membre. Cette juridiction ajoute qu'elle ne partage pas la thèse de Société Générale selon laquelle il n'existe pas de lien territorial entre la taxe prévue par l'article 1er, paragraphe 492, de la loi no 228/2012 et ledit ordre juridique.

12. La juridiction de renvoi se demande toutefois si la loi no 228/2012 est conforme aux principes du droit de l'Union en ce qu'elle soumet à une taxe ainsi qu'à des obligations administratives et déclaratives des opérations effectuées entre des entités non-résidentes, par l'intermédiation d'entités également non-résidentes, portant sur des instruments financiers dérivés dont les titres sous-jacents ont été émis par une société résidente, étant donné que les opérations portant sur ces titres sous-jacents seraient soumises à une taxe similaire.

13. En particulier, la juridiction de renvoi se demande si la taxe prévue à l'article 1er, paragraphes 491 et 492, de la loi no 228/2012 n'est pas susceptible de créer, ainsi que le soutient Société Générale, des discriminations

entre assujettis résidents et non-résidents ainsi que des entraves à la libre prestation des services et à la libre circulation des capitaux.

14. Dans ces conditions, la Commissione tributaria regionale per la Lombardia (commission fiscale régionale pour la Lombardie) a décidé de surseoir à statuer et de poser à la Cour la question préjudicielle suivante :

> « Les articles 18, 56 et 63 TFUE s'opposent-ils à une réglementation nationale qui soumet les transactions financières, indépendamment de l'État de résidence des opérateurs financiers et de l'intermédiaire, à une taxe, pesant sur les parties à la transaction, qui est égale à un montant fixe croissant par tranches de valeur des transactions et variable en fonction du type d'instrument objet de la transaction et en fonction de la valeur du contrat, et qui est due parce que les opérations taxées portent sur la négociation d'un contrat dérivé dont le titre sous-jacent est émis par une société résidente dans l'État membre instituant la taxe elle-même ? »

**Sur la question préjudicielle**

15. Par sa question, la juridiction de renvoi demande, en substance, si les articles 18, 56 et 63 TFUE doivent être interprétés en ce sens qu'ils s'opposent à une réglementation d'un État membre qui soumet à une taxe ainsi qu'à des obligations administratives et déclaratives les transactions financières portant sur des instruments financiers dérivés, pesant sur les parties à l'opération, indépendamment du lieu où la transaction est conclue ou de l'État de résidence de ces parties et de l'éventuel intermédiaire intervenant dans l'exécution de celle-ci, dès lors que ces instruments ont pour titre sous-jacent un titre émis par une société établie dans cet État membre.

16. À titre liminaire, il convient de rappeler que l'article 18 TFUE n'a vocation à s'appliquer de façon autonome que dans des situations régies par le droit de l'Union pour lesquelles le traité ne prévoit pas de règles spécifiques de non-discrimination. Or, le traité prévoit une telle règle spécifique notamment à l'article 56 TFUE dans le domaine de la libre prestation des services (voir, en ce sens, arrêt du 19 juin 2014, Strojírny Prost?jov et ACO Industries Tábor, C-53/13 et C-80/13, EU:C:2014:2011, point 32 et jurisprudence citée) et à l'article 63 TFUE dans le domaine relevant de la liberté de circulation des capitaux (voir, en ce sens, ordonnance du 6 septembre 2018, Patrício Teixeira, C-184/18, non publiée, EU:C:2018:694, points 15 et 16 ainsi que jurisprudence citée).

17. Cela étant précisé, s'agissant, tout d'abord, de la liberté applicable aux circonstances du litige au principal, la juridiction de renvoi se réfère aux libertés de prestation des services et de circulation des capitaux.

18. À cet égard, il y a lieu de constater qu'une réglementation d'un État membre imposant les opérations portant sur des instruments financiers dérivés, telle que l'article 1er, paragraphe 492, de la loi no 228/2012, relève du champ d'application de la liberté de circulation des capitaux, dès lors que sont taxées des transactions financières qui opèrent des mouvements de capitaux. Or, une telle réglementation est également susceptible d'affecter la libre prestation des services, en ce que celle-ci peut avoir des effets sur les services financiers ayant pour objet des titres émis par des sociétés établies dans ledit État membre, proposés dans un autre État membre.

19. Selon une jurisprudence constante de la Cour, lorsqu'une mesure nationale se rapporte à la fois à la libre prestation des services et à la libre circulation des capitaux, la Cour examine la mesure en cause, en principe, au regard de l'une seulement de ces deux libertés s'il s'avère que, dans les circonstances de l'affaire au principal, l'une d'elles est tout à fait secondaire par rapport à l'autre et peut lui être rattachée [voir, en ce sens, arrêts du 3 octobre 2006, Fidium Finanz, C-452/04, EU:C:2006:631, point 34 ; du 26 mai 2016, NN (L) International, C-48/15, EU:C:2016:356, point 39, et du 8 juin 2017, Van der Weegen e.a., C-580/15, EU:C:2017:429, point 25].

20. Dans les circonstances de l'affaire au principal, il apparaît que la libre prestation de services est secondaire par rapport à la libre circulation des capitaux. En effet, les conditions légales de la taxe en cause, laquelle vise les transactions financières, s'appliquent indépendamment du point de savoir si une telle transaction implique ou non des prestations de services. En outre, la juridiction de renvoi s'interroge sur les éventuels effets restrictifs pouvant résulter de l'instauration même d'une telle taxe, sans fournir de précisions sur les modalités de celle-ci qui seraient susceptibles d'affecter spécifiquement de telles prestations. Enfin, selon les indications figurant dans la demande de décision préjudicielle, Société Générale a acquitté ladite taxe en tant qu'opérateur financier participant aux opérations en cause au principal, sans que soient fournis davantage d'éléments sur ces opérations et sur son intervention. En particulier, cette demande n'indique pas à quel titre et en vue de quelles finalités lesdites opérations ont été négociées.

21. Il s'ensuit qu'il convient d'examiner la question posée au regard de la libre circulation des capitaux.

22. Ensuite, conformément à la jurisprudence de la Cour, les mesures interdites par l'article 63, paragraphe 1, TFUE, en tant que restrictions aux mouvements de capitaux, comprennent celles qui sont de nature à dissuader les non-résidents de faire des investissements dans un État membre ou à dissuader les résidents dudit État membre d'en faire dans d'autres États (arrêts du 10 février 2011, Haribo Lakritzen Hans Riegel et Österreichische Salinen, C-436/08 et C-437/08, EU:C:2011:61, point 50, et du 18 janvier 2018, Jahin, C-45/17, EU:C:2018:18, point 25 ainsi que jurisprudence citée).

23. À cet égard, le droit que les États membres tirent de l'article 65, paragraphe 1, sous a), TFUE d'appliquer les dispositions pertinentes de leur législation fiscale qui établissent une distinction entre les contribuables qui ne se trouvent pas dans la même situation en ce qui concerne leur résidence ou le lieu où leurs capitaux sont investis constitue une dérogation au principe fondamental de la libre circulation des capitaux. Cette dérogation est elle-même limitée par les dispositions de l'article 65, paragraphe 3, TFUE, selon lesquelles les dispositions nationales visées au paragraphe 1 de cet article « ne doivent constituer ni un moyen de discrimination arbitraire ni une restriction déguisée à la libre circulation des capitaux et des paiements telle que définie à l'article 63 [TFUE] » (voir, en ce sens, arrêt du 22 novembre 2018, Sofina e.a., C-575/17, EU:C:2018:943, point 45 ainsi que jurisprudence citée).

24. La Cour a également jugé qu'il y a lieu, dès lors, de distinguer les différences de traitement permises au titre de l'article 65, paragraphe 1, sous a), TFUE des discriminations interdites par l'article 65, paragraphe 3, TFUE. Or, pour qu'une législation fiscale nationale puisse être considérée comme compatible avec les dispositions du traité relatives à la libre circulation des capitaux, il faut que la différence de traitement qui en résulte concerne des situations qui ne sont pas objectivement comparables ou soit justifiée par une raison impérieuse d'intérêt général (arrêt du 22 novembre 2018, Sofina e.a., C-575/17, EU:C:2018:943, point 46 et jurisprudence citée).

25. En outre, il est de jurisprudence constante qu'une discrimination peut également résulter de l'application de la même règle à des situations différentes (arrêt du 6 décembre 2007, Columbus Container Services, C-298/05, EU:C:2007:754, point 41 et jurisprudence citée).

26. Enfin, il convient de rappeler que, aux fins d'établir l'existence d'une discrimination, la comparabilité d'une situation transfrontalière avec une situation interne à l'État membre doit être examinée en tenant compte de l'objectif poursuivi par les dispositions nationales en cause [arrêt du 26 février 2019, X (Sociétés intermédiaires établies dans des pays tiers), C-135/17, EU:C:2019:136, point 64 et jurisprudence citée].

27. En l'occurrence, Société Générale soutient que la taxe prévue à l'article 1er, paragraphe 492, de la loi nº 228/2012 introduit des discriminations entre résidents et non-résidents ainsi que des restrictions à la liberté de circulation des capitaux.

28. Cette société fait valoir que cette disposition traite de façon identique la situation des redevables de cette taxe résidents et non-résidents, pourtant différente, et rend, pour les seconds, l'investissement dans les instruments financiers dérivés ayant pour titre sous-jacent un titre émis par une société établie en Italie moins avantageux que l'investissement dans ceux dont le titre sous-jacent émane d'un autre État. Il en résulterait une entrave à l'accès au marché de ces instruments financiers dérivés, d'autant que la mise en œuvre de ladite taxe serait accompagnée d'obligations administratives et déclaratives qui s'ajouteraient à celles prévues dans les États de résidence des opérateurs financiers et de l'intermédiaire éventuel.

29. À cet égard, il convient de relever qu'il ressort des indications figurant dans la demande de décision préjudicielle que la taxe prévue à l'article 1er, paragraphe 492, de la loi nº 228/2012 vise les transactions financières portant sur les instruments financiers dérivés ayant un lien avec l'État italien. Cette taxe est due indépendamment du lieu où la transaction est conclue ou de l'État de résidence des parties à cette transaction et de celui de l'intermédiaire éventuel, de sorte que les entités résidentes et non-résidentes sont soumises à un régime d'imposition identique.

30. En particulier, cette taxe s'applique de la même manière aux opérateurs financiers résidents et non-résidents ainsi qu'aux opérations conclues dans l'État d'imposition ou dans un autre État. En effet, ladite taxe varie en fonction non pas du lieu de conclusion des opérations ou de l'État de résidence des parties ou de celui de l'intermédiaire éventuel, mais du montant de ces opérations et du type d'instrument en cause. Il apparaît ainsi que les opérations intervenant dans le cadre national sont, sur le plan fiscal, traitées de la même manière que des opérations similaires présentant un caractère transfrontalier et que l'existence d'une différence de traitement entre les situations respectives des entités résidentes et non-résidentes ne peut être constatée.

31. S'agissant de la comparabilité des situations, la juridiction de renvoi indique que la réglementation nationale en cause au principal poursuit l'objectif d'assurer une contribution aux dépenses publiques des entités

qui effectuent des transactions financières portant sur les instruments financiers visés. Or, au regard de cet objectif, contrairement à ce que soutient Société Générale, les entités résidentes et non-résidentes participant aux opérations portant sur les instruments financiers dérivés ayant pour titre sous-jacent un titre émis en Italie, assujetties à la taxe par ladite réglementation nationale, se trouvent dans une situation comparable.

32. En revanche, ainsi que l'a relevé M. l'avocat général au point 52 de ses conclusions, au vu dudit objectif, les instruments financiers dérivés dont les titres sous-jacents sont régis par le droit italien et qui sont soumis à cette taxe ne sont pas comparables à ceux dont les titres sous-jacents ne sont pas régis par ce droit et auxquels ladite taxe ne s'applique pas.

33. Il ressort de ce qui précède que la taxe prévue à l'article 1er, paragraphe 492, de la loi nº 228/2012 n'apparaît pas renfermer de discrimination interdite par l'article 65, paragraphe 3, TFUE.

34. Pour autant que Société Générale fait valoir qu'il résulte de la différence de traitement opérée par la réglementation italienne entre les instruments financiers dérivés dont les titres sous-jacents sont régis par le droit italien et ceux dont les titres sous-jacents ne sont pas régis par ce droit que l'investissement dans les premiers est rendu moins avantageux, il importe de rappeler que la Cour a jugé à maintes reprises que, d'une part, en l'absence d'une harmonisation au niveau de l'Union européenne, les désavantages pouvant découler des compétences fiscales des différents États membres, pour autant qu'un tel exercice n'est pas discriminatoire, ne constituent pas des restrictions aux libertés de circulation et, d'autre part, que les États membres n'ont pas l'obligation d'adapter leur propre système fiscal aux différents systèmes de taxation des autres États membres [arrêt du 26 mai 2016, NN (L) International, C-48/15, EU:C:2016:356, point 47 et jurisprudence citée].

35. Notamment, la libre circulation ne saurait être comprise en ce sens qu'un État membre est obligé d'aménager ses règles fiscales en fonction de celles des autres États membres afin de garantir, dans toutes les situations, une imposition qui efface toute disparité découlant des réglementations fiscales nationales, étant donné que les décisions prises par un contribuable quant à l'investissement dans un autre État membre peuvent, selon les cas, être plus ou moins avantageuses ou désavantageuses pour un tel contribuable (arrêt du 30 janvier 2020, Köln-Aktienfonds Deka, C-156/17, EU:C:2020:51, point 72).

36. Dans ces conditions, comme le font valoir le gouvernement italien et la Commission européenne dans leurs observations écrites, la taxe prévue à l'article 1er, paragraphe 492, de la loi nº 228/2012 ne peut être considérée comme une restriction à la liberté de circulation des capitaux.

37. Quant à l'existence d'obligations déclaratives et administratives liées au paiement de cette taxe, il y a lieu de constater que, dans la demande de décision préjudicielle, la juridiction de renvoi n'a pas développé cet aspect et, notamment, n'a pas explicité de quelles obligations il s'agissait ni fait état des dispositions applicables en la matière. En tout état de cause, ainsi que l'a relevé M. l'avocat général au point 53 de ses conclusions, il ne ressort de cette demande aucun élément laissant supposer que les obligations incombant aux entités non-résidentes seraient différentes de celles imposées aux entités résidentes, ni que ces obligations dépasseraient ce qui est nécessaire pour le recouvrement de la taxe prévue à l'article 1er, paragraphe 492, de la loi nº 228/2012.

38. S'agissant de cette dernière hypothèse, la Cour a, en effet, jugé que la nécessité de garantir un recouvrement efficace de l'impôt constitue un objectif légitime pouvant justifier une restriction aux libertés fondamentales. Ainsi, un État membre est-il autorisé à appliquer des mesures qui permettent la vérification, de façon claire et précise, du montant de l'impôt dû, sous réserve, toutefois, que ces mesures soient propres à garantir la réalisation de l'objectif poursuivi et qu'elles n'aillent pas au-delà de ce qui est nécessaire pour l'atteindre (voir, en ce sens, arrêts du 15 mai 1997, Futura Participations et Singer, C-250/95, EU:C:1997:239, point 31, et du 22 novembre 2018, Sofina e.a., C-575/17, EU:C:2018:943, point 67). Il appartient à la juridiction de renvoi d'effectuer, à cet effet, les vérifications nécessaires.

39. Eu égard à l'ensemble des considérations qui précèdent, il convient de répondre à la question posée que l'article 63 TFUE doit être interprété en ce sens qu'il ne s'oppose pas à une réglementation d'un État membre qui soumet à une taxe les transactions financières portant sur des instruments financiers dérivés, pesant sur les parties à l'opération, indépendamment du lieu où la transaction est conclue ou de l'État de résidence de ces parties et de l'éventuel intermédiaire intervenant dans l'exécution de celle-ci, dès lors que ces instruments ont pour titre sous-jacent un titre émis par une société établie dans cet État membre. Les obligations administratives et déclaratives accompagnant cette taxe incombant aux entités non-résidentes ne doivent toutefois pas aller au-delà de ce qui est nécessaire pour le recouvrement de ladite taxe.

**Sur les dépens**

40. …

Par ces motifs,

la Cour (deuxième chambre)

dit pour droit :

**L'article 63 TFUE doit être interprété en ce sens qu'il ne s'oppose pas à une réglementation d'un État membre qui soumet à une taxe les transactions financières portant sur des instruments financiers dérivés, pesant sur les parties à l'opération, indépendamment du lieu où la transaction est conclue ou de l'État de résidence de ces parties et de l'éventuel intermédiaire intervenant dans l'exécution de celle-ci, dès lors que ces instruments ont pour titre sous-jacent un titre émis par une société établie dans cet État membre. Les obligations administratives et déclaratives accompagnant cette taxe incombant aux entités non-résidentes ne doivent toutefois pas aller au-delà de ce qui est nécessaire pour le recouvrement de ladite taxe.**

# CE Cour de Justice, le 6 octobre 2020*

## Affaires jointes C-245/19 et C-246/19

## *État luxembourgeois contre B (C-245/19), et État luxembourgeois contre B, C, D, F. C., en présence de: A (C-246/19)*

*Grande chambre:* *K. Lenaerts, président, R. Silva de Lapuerta, vice-présidente, J.-C. Bonichot, A. Arabadjiev, E. Regan et S. Rodin, présidents de chambre, M. Ilesic, J. Malenovský (rapporteur), D. Sváby, F. Biltgen, K. Jürimäe, C. Lycourgos, A. Kumin, N. Jääskinen et N. Wahl, juges*

*Avocat Général:* *J. Kokott*

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1. Les demandes de décision préjudicielle portent sur l'interprétation, d'une part, des articles 7, 8 et 47 ainsi que de l'article 52, paragraphe 1, de la charte des droits fondamentaux de l'Union européenne (ci-après la « Charte ») et, d'autre part, de l'article 1er, paragraphe 1, et de l'article 5 de la directive 2011/16/UE du Conseil, du 15 février 2011, relative à la coopération administrative dans le domaine fiscal et abrogeant la directive 77/799/CEE (JO 2011, L 64, p. 1, et rectificatif JO 2013, L 162, p. 15), telle que modifiée par la directive 2014/107/UE du Conseil, du 9 décembre 2014 (JO 2014, L 359, p. 1) (ci-après la « directive 2011/16 »).

2. Ces demandes ont été introduites dans le cadre de deux litiges opposant l'État luxembourgeois, respectivement, à la société B, pour le premier, et aux sociétés B, C et D ainsi qu'à F. C., pour le second, au sujet de deux décisions du directeur de l'administration des contributions directes (Luxembourg) faisant injonction, respectivement, à la société B et à la banque A de lui communiquer certaines informations, à la suite de demandes d'échange d'informations entre États membres en matière fiscale.

* Langue de procédure: le français.

**Le cadre juridique**

*Le droit de l'Union*

La directive 2011/16

3. Les considérants 1, 2, 9 et 27 de la directive 2011/16 indiquent :

> « 1. À l'ère de la mondialisation, il est plus que jamais nécessaire pour les États membres de se prêter mutuellement assistance dans le domaine fiscal. La mobilité des contribuables, le nombre d'opérations transfrontalières et l'internationalisation des instruments financiers connaissent une évolution considérable, ce qui fait qu'il est difficile pour les États membres d'établir correctement le montant des impôts et taxes à percevoir. Cette difficulté croissante a des répercussions sur le fonctionnement des systèmes fiscaux et entraîne un phénomène de double imposition, lequel incite à la fraude et à l'évasion fiscales [...]
> 2. C'est pourquoi un État membre ne peut gérer son système fiscal interne sans disposer d'informations provenant d'autres États membres, notamment pour ce qui est de la fiscalité directe. Afin de surmonter les effets négatifs de ce phénomène, il est indispensable de mettre au point un nouveau mécanisme de coopération administrative entre les administrations fiscales des États membres. Il est nécessaire de disposer d'instruments propres à instaurer la confiance entre les États membres par l'établissement de règles, d'obligations et de droits identiques dans toute l'Union européenne.
> [...]
> 9. Il importe que les États membres échangent des informations concernant des cas particuliers lorsqu'un autre État membre le demande et fassent effectuer les recherches nécessaires pour obtenir ces informations. La norme dite de la "pertinence vraisemblable" vise à permettre l'échange d'informations en matière fiscale dans la mesure la plus large possible et, en même temps, à préciser que les États membres ne sont pas libres d'effectuer des "recherches tous azimuts" ou de demander des informations dont il est peu probable qu'elles concernent la situation fiscale d'un contribuable donné. [...]
> [...]
> 27. Tous les échanges d'informations visés dans la présente directive sont soumis aux dispositions d'application de la directive 95/46/CE du Parlement européen et du Conseil du 24 octobre 1995 relative à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données [(JO 1995, L 281, p. 31)] [...]. Toutefois, il convient d'envisager des limitations de certains droits et obligations prévus par la directive [95/46], afin de sauvegarder les intérêts visés à l'article 13, paragraphe 1, [sous] e), de ladite directive. Ces limitations sont nécessaires et proportionnées compte tenu des pertes de recettes potentielles pour les États membres et de l'importance capitale des informations visées par la présente directive pour l'efficacité de la lutte contre la fraude. »

4. L'article 1er de la directive 2011/16, intitulé « Objet », énonce, à son paragraphe 1 :

> « La présente directive établit les règles et procédures selon lesquelles les États membres coopèrent entre eux aux fins d'échanger les informations vraisemblablement pertinentes pour l'administration et l'application de la législation interne des États membres relative aux taxes et impôts visés à l'article 2. »

5. L'article 5 de cette directive, intitulé « Procédure régissant l'échange d'informations sur demande », est libellé comme suit :

> « À la demande de l'autorité requérante, l'autorité requise communique à l'autorité requérante les informations visées à l'article 1er, paragraphe 1, dont elle dispose ou qu'elle obtient à la suite d'enquêtes administratives. »

6. L'article 7 de ladite directive prévoit que les communications visées à l'article 5 de celle-ci doivent être effectuées le plus rapidement possible et, sauf cas particuliers, dans des délais de deux mois ou de six mois selon que l'autorité requise est déjà ou n'est pas déjà en possession des informations demandées.

7. L'article 25 de la directive 2011/16, intitulé « Protection des données », dispose, à son paragraphe 1 :

> « Tous les échanges d'informations effectués en vertu de la présente directive sont soumis aux dispositions d'application de la directive [95/46]. Toutefois, aux fins de la bonne application de la présente directive, les États membres limitent la portée des obligations et des droits prévus à l'article 10, à l'article 11, paragraphe 1, et aux articles 12 et 21 de la directive [95/46] dans la mesure où cela est nécessaire afin de sauvegarder les intérêts visés à l'article 13, paragraphe 1, [sous] e), de ladite directive. »

La directive 95/46

8. L'article 10, l'article 11, paragraphe 1, et les articles 12 et 21 de la directive 95/46 prévoient, le premier, les modalités d'information des personnes physiques qui sont concernées par un traitement de données à caractère personnel dans le cas où ces données sont collectées auprès d'elles, le deuxième, les modalités d'information de ces personnes physiques dans le cas où lesdites données n'ont pas été collectées auprès de celles-ci, le troisième, le droit d'accès desdites personnes physiques aux données en cause et, le quatrième, la publicité des traitements de données à caractère personnel.

9. L'article 13, paragraphe 1, sous e), de cette directive prévoit que les États membres peuvent prendre des mesures législatives visant à limiter la portée des obligations et des droits prévus, notamment, à l'article 10, à l'article 11, paragraphe 1, et aux articles 12 et 21 de ladite directive lorsqu'une telle limitation constitue une mesure nécessaire pour sauvegarder un intérêt économique ou financier important d'un État membre ou de l'Union, y compris dans les domaines monétaire, budgétaire et fiscal.

10. L'article 22 de la même directive énonce :

> « Sans préjudice du recours administratif qui peut être organisé [...] antérieurement à la saisine de l'autorité judiciaire, les États membres prévoient que toute personne dispose d'un recours juridictionnel en cas de violation des droits qui lui sont garantis par les dispositions nationales applicables au traitement en question. »

Le règlement (UE) 2016/679

11. La directive 95/46 a été abrogée, avec effet au 25 mai 2018, par le règlement (UE) 2016/679 du Parlement européen et du Conseil, du 27 avril 2016, relatif à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et à la libre circulation de ces données, et abrogeant la directive 95/46 (règlement général sur la protection des données) (JO 2016, L 119, p. 1, et rectificatif JO 2018, L 127, p. 2), dont l'article 1er, intitulé « Objet et objectifs », précise notamment qu'il établit des règles relatives à la protection des personnes physiques à l'égard du traitement des données à caractère personnel et qu'il protège les libertés et les droits fondamentaux des personnes physiques, en particulier leur droit à la protection des données à caractère personnel. Par ailleurs, l'article 94, paragraphe 2, de ce règlement précise que les références à la directive 95/46 s'entendent désormais comme étant faites audit règlement.

12. Les articles 13, 14 et 15 du règlement 2016/679 reprennent respectivement, en les modifiant, les dispositions qui figuraient antérieurement à l'article 10, à l'article 11, paragraphe 1, et à l'article 12 de la directive 95/46.

13. L'article 23, paragraphe 1, sous e), dudit règlement, qui reprend, en la modifiant, la disposition figurant antérieurement à l'article 13, paragraphe 1, sous e), de cette directive, énonce que le droit de l'Union et le droit des États membres peuvent, par la voie de mesures législatives, limiter la portée des obligations et des droits prévus, notamment, aux articles 13 à 15 du même règlement lorsqu'une telle limitation respecte l'essence des libertés et des droits fondamentaux et qu'elle constitue une mesure nécessaire et proportionnée dans une société démocratique pour garantir certains objectifs importants d'intérêt public général, et notamment un intérêt économique ou financier important de l'Union ou d'un État membre, y compris dans les domaines monétaire, budgétaire et fiscal, de la santé publique et de la sécurité sociale.

14. L'article 79, paragraphe 1, du règlement 2016/679, qui reprend, en le modifiant, l'article 22 de la directive 95/46, prévoit que, sans préjudice de tout recours administratif ou extrajudiciaire qui lui est ouvert, chaque personne physique concernée par un traitement de données à caractère personnel a droit à un recours juridictionnel effectif si elle considère que les droits que lui confère ce règlement ont été violés du fait d'un traitement de ces données effectué en violation dudit règlement.

*Le droit luxembourgeois*

La loi du 29 mars 2013

15. L'article 6 de la loi du 29 mars 2013 portant transposition de la directive 2011/16 et portant 1) modification de la loi générale des impôts, 2) abrogation de la loi modifiée du 15 mars 1979 concernant l'assistance administrative internationale en matière d'impôts directs (*Mémorial* A 2013, p. 756), dispose :

> « À la demande de l'autorité requérante, l'autorité requise luxembourgeoise lui communique les informations vraisemblablement pertinentes pour l'administration et l'application de la législation interne de

l'État membre requérant relative aux taxes et impôts [...], dont elle dispose ou qu'elle obtient à la suite d'enquêtes administratives. »

La loi du 25 novembre 2014

16. La loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande en matière fiscale et modifiant la loi du 31 mars 2010 portant approbation des conventions fiscales et prévoyant la procédure y applicable en matière d'échange de renseignements sur demande (*Mémorial* A 2014, p. 4170, ci-après la « loi du 25 novembre 2014 ») est applicable, notamment, aux demandes d'échange d'informations visées à l'article 6 de la loi du 29 mars 2013, citée au point précédent du présent arrêt.

17. Aux termes de l'article 2 de la loi du 25 novembre 2014 :

> « 1. Les administrations fiscales sont autorisées à requérir les renseignements de toute nature qui sont demandés pour l'application de l'échange de renseignements tel que prévu par les [c]onventions et lois auprès du détenteur de ces renseignements.
> 2. Le détenteur des renseignements est obligé de fournir les renseignements demandés, en totalité, de manière précise, sans altération, endéans le délai d'un mois à partir de la notification de la décision portant injonction de fournir les renseignements demandés. Cette obligation comprend la transmission des pièces sans altération sur lesquelles les renseignements sont fondés.
> [...] »

18. L'article 3 de cette loi, dans sa version applicable aux litiges au principal, prévoyait :

> « 1. L'administration fiscale compétente vérifie la régularité formelle de la demande d'échange de renseignements. La demande d'échange de renseignements est régulière en la forme si elle contient l'indication de la base juridique et de l'autorité compétente dont émane la demande ainsi que les autres indications prévues par les [c]onventions et lois.
> [...]
> 3. Si l'administration fiscale compétente ne détient pas les renseignements demandés, le directeur de l'administration fiscale compétente ou son délégué notifie par lettre recommandée adressée au détenteur des renseignements sa décision portant injonction de fournir les renseignements demandés. La notification de la décision au détenteur des renseignements demandés vaut notification à toute autre personne y visée.
> [...] »

19. L'article 5, paragraphe 1, de ladite loi énonce :

> « Si les renseignements demandés ne sont pas fournis endéans le délai d'un mois à partir de la notification de la décision portant injonction de fournir les renseignements demandés, une amende administrative fiscale d'un maximum de 250 000 euros peut être infligée au détenteur des renseignements. Le montant en est fixé par le directeur de l'administration fiscale compétente ou son délégué. »

20. L'article 6 de la même loi, dans sa version applicable aux litiges au principal, était libellé de la façon suivante :

> « 1. Aucun recours ne peut être introduit contre la demande d'échange de renseignements et la décision d'injonction visées à l'article 3, paragraphes 1er et 3.
> 2. Contre les décisions visées à l'article 5, un recours en réformation est ouvert devant le tribunal administratif au détenteur des renseignements. [...] Le recours a un effet suspensif. [...]
> [...] »

La loi du 1er mars 2019

21. La loi du 1er mars 2019 portant modification de la loi du 25 novembre 2014 prévoyant la procédure applicable à l'échange de renseignements sur demande en matière fiscale (*Mémorial* A 2019, p. 112, ci-après la « loi du 1er mars 2019 ») est entrée en vigueur le 9 mars 2019.

22. L'article 3, paragraphe 1, de la loi du 25 novembre 2014, telle que modifiée par la loi du 1er mars 2019, dispose :

> « L'administration fiscale compétente vérifie la régularité formelle de la demande d'échange de renseignements. La demande d'échange de renseignements est régulière en la forme si elle contient l'indication de la base juridique et de l'autorité compétente dont émane la demande ainsi que les autres indications pré-

vues par les [c]onventions et lois. L'administration fiscale compétente s'assure que les renseignements demandés ne sont pas dépourvus de toute pertinence vraisemblable eu égard à l'identité de la personne visée par la demande d'échange de renseignements et à celle du détenteur des renseignements ainsi qu'aux besoins de la procédure fiscale en cause. »

23. L'article 6, paragraphe 1, de la loi du 25 novembre 2014, telle que modifiée par la loi du 1er mars 2019, énonce :

« Contre la décision d'injonction visée à l'article 3, paragraphe 3, un recours en annulation est ouvert devant le tribunal administratif au détenteur des renseignements. [...] »

**Les litiges au principal et les questions préjudicielles**

24. Les litiges au principal ont chacun pour origine une demande d'échange d'informations adressée par l'administration fiscale du Royaume d'Espagne à celle du Grand-Duché de Luxembourg, en vue d'obtenir des informations relatives à F. C., une personne physique ayant sa résidence en Espagne, où celle-ci est visée, en tant que contribuable, par une enquête ayant pour objet de déterminer sa situation au regard de la législation fiscale nationale.

*Affaire C-245/19*

25. Le 18 octobre 2016, l'administration fiscale espagnole a adressé à l'administration fiscale luxembourgeoise une première demande d'échange d'informations au sujet de F. C.

26. Le 16 juin 2017, le directeur de l'administration des contributions directes a donné suite à cette demande en adressant à la société B une décision lui faisant injonction de communiquer des informations relatives à la période allant du 1er janvier 2011 au 31 décembre 2014 et portant sur les éléments suivants :

– les contrats conclus par la société B avec les sociétés E et F au sujet des droits de F. C. ;

– tout autre contrat conclu, soit au cours de la période en cause, soit antérieurement ou postérieurement à cette période mais prenant effet au cours de celle-ci et relatif à F. C. ;

– toutes les factures émises ou reçues en rapport avec ces contrats ainsi que leur mode de recouvrement et leur paiement, et

– le détail des comptes bancaires et des établissements financiers dans lesquels est déposée la trésorerie comptabilisée au bilan.

27. Cette décision précisait, par ailleurs, qu'elle ne pouvait pas faire l'objet d'un recours, conformément à l'article 6 de la loi du 25 novembre 2014.

28. Par requête déposée au greffe du tribunal administratif (Luxembourg) le 17 juillet 2017, la société B a introduit un recours visant à obtenir, à titre principal, la réformation de ladite décision et, à titre subsidiaire, l'annulation de celle-ci.

29. Par jugement du 26 juin 2018, le tribunal administratif s'est déclaré compétent pour connaître de ce recours en ce que celui-ci tendait à l'annulation de la décision du 16 juin 2017 et a partiellement annulé cette dernière. S'agissant de sa compétence, il a considéré que l'article 6, paragraphe 1, de la loi du 25 novembre 2014 n'était pas conforme à l'article 47 de la Charte en ce qu'il excluait l'existence d'un recours direct contre une décision portant injonction de communiquer des informations à l'administration fiscale, de telle sorte que cette disposition devait être laissée inappliquée. Quant au fond, il a estimé que certaines des informations demandées par le directeur de l'administration des contributions directes n'étaient pas vraisemblablement pertinentes aux fins de l'enquête menée par l'administration fiscale espagnole, en conséquence de quoi la décision du 16 juin 2017 devait être annulée en tant qu'elle faisait injonction à la société B de communiquer ces informations.

30. Par requête déposée au greffe de la Cour administrative (Luxembourg) le 24 juillet 2018, l'État luxembourgeois a fait appel de ce jugement.

31. Dans le cadre de cet appel, il fait valoir que l'article 6, paragraphe 1, de la loi du 25 novembre 2014 ne méconnaît pas l'article 47 de la Charte dès lors qu'il ne s'oppose pas à ce que la personne qui est destinataire d'une décision portant injonction de communiquer des informations à l'administration fiscale et qui détient les informations sollicitées puisse, dans l'hypothèse où elle ne s'est pas conformée à cette décision et où une sanction lui a été infligée pour ce motif, contester à titre incident ladite décision dans le cadre du recours en réformation qu'elle peut former contre une telle sanction, en vertu de l'article 6, paragraphe 2, de cette loi. En conséquence, ce serait à tort que le tribunal administratif a écarté l'article 6, paragraphe 1, de ladite loi et s'est

déclaré compétent pour connaître du recours en annulation qui lui avait été soumis. En outre, cette juridiction aurait considéré à tort que certaines des informations visées par la décision du 16 juin 2017 n'étaient pas vraisemblablement pertinentes au sens de la directive 2011/16.

32. Dans sa décision de renvoi, la Cour administrative se demande, en premier lieu, si les articles 7, 8, 47 et 52 de la Charte imposent de reconnaître, à la personne qui est destinataire d'une décision lui faisant injonction de communiquer des informations dont elle est détentrice à l'administration fiscale, le droit de former un recours direct contre cette décision, en complément de la possibilité, pour une telle personne, de contester à titre incident ladite décision, dans le cas où elle ne respecte pas celle-ci et où une sanction lui est ultérieurement infligée pour ce motif, en vertu de la loi du 25 novembre 2014, telle qu'interprétée à la lumière de l'arrêt du 16 mai 2017, Berlioz Investment Fund (C-682/15, EU:C:2017:373).

33. En second lieu, la juridiction de renvoi se demande, en cas de réponse affirmative à cette première interrogation, quelle est la portée du contrôle que le juge peut être invité à effectuer, dans le cadre d'un tel recours direct, sur le caractère vraisemblablement pertinent des informations en cause, à la lumière des articles 1er et 5 de la directive 2011/16.

34. Dans ces conditions, la Cour administrative a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

> « 1. Est-ce que les articles 7 [et] 8 et [l'article] 52, paragraphe 1, de la Charte [...], lus éventuellement ensemble avec l'article 47 [de celle-ci], doivent être interprétés en ce sens qu'ils s'opposent à une législation [...] d'un État membre qui, dans le cadre du régime de procédure en matière d'échange de renseignements sur demande mis en place notamment en vue de la mise en œuvre de la directive 2011/16 [...], exclut tout recours, notamment judiciaire, de la part du tiers détenteur des renseignements, contre une décision à travers laquelle l'autorité compétente de cet État membre l'oblige à lui fournir des informations en vue de donner suite à une demande d'échange de renseignements émanant d'un autre État membre ?
> 2. En cas de réponse affirmative à la première question, est-ce que l'article 1er, paragraphe 1, et l'article 5 de la directive 2011/16 doivent être interprétés, le cas échéant en tenant compte du caractère évolutif de l'interprétation de l'article 26 du modèle de convention fiscale de l'[Organisation de coopération et de développement économiques (OCDE) concernant le revenu et la fortune], en ce sens qu'une demande d'échange, ensemble [avec] une décision d'injonction de l'autorité compétente de l'État membre requis y donnant suite, satisfont au critère de l'absence d'un défaut manifeste de pertinence vraisemblable dès lors que l'État membre requérant indique l'identité du contribuable concerné, la période concernée par l'enquête dans l'État membre requérant et l'identité du détenteur des renseignements visés, tout en sollicitant des renseignements concernant des contrats et les facturations et paiements afférents non précisés mais qui sont délimités par les critères tenant, premièrement, au fait qu'ils auraient été conclus par le détenteur de renseignements identifié, deuxièmement, à leur applicabilité durant les années d'imposition concernées par l'enquête des autorités de l'État requérant et, troisièmement, à leur lien avec le contribuable concerné identifié ? »

*Affaire C-246/19*

35. Le 16 mars 2017, l'administration fiscale espagnole a adressé à l'administration fiscale luxembourgeoise une seconde demande d'échange d'informations concernant F. C.

36. Le 29 mai 2017, le directeur de l'administration des contributions directes a donné suite à cette demande en adressant à la banque A une décision par laquelle il lui faisait injonction de communiquer des informations relatives à la période allant du 1er janvier 2011 au 31 décembre 2014 et portant sur les documents et éléments suivants :

– le(s) nom(s) du (des) titulaire(s) actuel(s) d'un compte bancaire déterminé ;
– le(s) nom(s) de la (des) personne(s) autorisée(s) à effectuer des opérations sur ce compte ;
– le(s) nom(s) de la (des) personne(s) ayant ouvert ledit compte ;
– les relevés du même compte pendant la période en cause ;
– le(s) bénéficiaire(s) effectif(s) du compte en question ;
– le point de savoir si un autre compte bancaire a été ouvert après le 31 décembre 2014 auprès de la banque A et si les fonds versés sur celui-ci proviennent d'un compte précédemment ouvert auprès de cette banque ;
– les relevés de tout actif financier détenu par F. C. dans la société B, dans la société D ou dans toute autre société contrôlée par F. C. pendant la période en cause, et
– les relevés des actifs financiers où F. C. apparaît comme bénéficiaire effectif pendant cette période.

37. Cette décision précisait, par ailleurs, qu'elle ne pouvait pas faire l'objet d'un recours, conformément à l'article 6, paragraphe 1, de la loi du 25 novembre 2014.

38. Par requête déposée au greffe du tribunal administratif le 17 juillet 2017, les sociétés B, C et D ainsi que F. C. ont introduit un recours visant à obtenir, à titre principal, la réformation de ladite décision et, à titre subsidiaire, l'annulation de celle-ci.

39. Par jugement du 26 juin 2018, le tribunal administratif s'est déclaré compétent pour connaître de ce recours en ce que celui-ci tendait à l'annulation de la décision du 29 mai 2017 et a partiellement annulé cette dernière, en se fondant sur des motifs analogues à ceux qui sont résumés au point 29 du présent arrêt.

40. Par requête déposée au greffe de la Cour administrative le 24 juillet 2018, l'État luxembourgeois a fait appel de ce jugement.

41. Dans sa décision de renvoi, la Cour administrative exprime des interrogations analogues à celles résumées aux points 32 et 33 du présent arrêt, tout en mettant en exergue le fait que l'affaire C-246/19 a pour origine des recours introduits non pas par une personne destinataire d'une décision lui faisant injonction de communiquer des informations dont elle est détentrice à l'administration fiscale d'un État membre, comme c'est le cas de l'affaire C-245/19, mais par des personnes ayant d'autres qualités, à savoir, d'une part, celle de contribuable visé par une enquête ouverte par l'administration fiscale d'un autre État membre et, d'autre part, celle de tierces personnes entretenant des relations juridiques, bancaires, financières ou, plus largement, économiques avec ce contribuable.

42. Dans ces conditions, la Cour administrative a décidé de surseoir à statuer et de poser à la Cour les questions préjudicielles suivantes :

> « 1. Est-ce que les articles 7 [et] 8 et [l'article] 52, paragraphe 1, de la Charte, lus éventuellement ensemble avec l'article 47 [de celle-ci], doivent être interprétés en ce sens qu'ils s'opposent à une législation [...] d'un État membre qui, dans le cadre du régime de procédure en matière d'échange de renseignements sur demande mis en place notamment en vue de la mise en œuvre de la directive 2011/16 [...], exclut tout recours, notamment judiciaire, de la part du contribuable visé par [une] enquête dans [un autre État membre] et d'une tierce personne concernée, contre une décision à travers laquelle l'autorité compétente [du premier] État membre oblige un détenteur de renseignements à lui fournir des informations en vue de donner suite à une demande d'échange de renseignements émanant [de cet] autre État membre ?
> 2. En cas de réponse affirmative à la première question, est-ce que l'article 1er, paragraphe 1, et l'article 5 de la directive 2011/16 doivent être interprétés, le cas échéant en tenant compte du caractère évolutif de l'interprétation de l'article 26 du modèle de convention fiscale de l'OCDE [concernant le revenu et la fortune], en ce sens qu'une demande d'échange, ensemble [avec] une décision d'injonction de l'autorité compétente de l'État membre requis y donnant suite, satisfont au critère de l'absence d'un défaut manifeste de pertinence vraisemblable dès lors que l'État membre requérant indique l'identité du contribuable concerné, la période concernée par l'enquête dans l'État membre requérant et l'identité du détenteur des renseignements visés, tout en sollicitant des renseignements concernant des comptes bancaires et des actifs financiers non précisés mais qui sont délimités par les critères tenant, premièrement, au fait qu'ils seraient détenus par un détenteur de renseignements identifié, deuxièmement, aux années d'imposition concernées par l'enquête des autorités de l'État requérant et, troisièmement, à leur lien avec le contribuable concerné identifié ? »

43. Par décision du président de la Cour du 3 mai 2019, les affaires C-245/19 et C-246/19 ont été jointes aux fins de la procédure écrite et orale ainsi que de l'arrêt.

**Sur les questions préjudicielles**

*Sur les premières questions dans les affaires C-245/19 et C-246/19*

Observations liminaires

44. Par ses premières questions dans les affaires C-245/19 et C-246/19, la juridiction de renvoi demande, en substance, si l'article 47 de la Charte, lu conjointement avec les articles 7 et 8 ainsi qu'avec l'article 52, paragraphe 1, de celle-ci, doit être interprété en ce sens qu'il s'oppose à ce que la législation d'un État membre mettant en œuvre la procédure d'échange d'informations sur demande instituée par la directive 2011/16 exclue qu'une décision par laquelle l'autorité compétente de cet État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, puisse faire l'objet de recours formés, première-

ment, par une telle personne, deuxièmement, par le contribuable qui est visé, dans cet autre État membre, par l'enquête à l'origine de ladite demande et, troisièmement, par des tierces personnes concernées par les informations en cause.

45. Ainsi qu'il résulte de l'article 51, paragraphe 1, de la Charte, les dispositions de celle-ci s'adressent aux États membres uniquement lorsque ceux-ci mettent en œuvre le droit de l'Union.

46. Constitue une telle mise en œuvre du droit de l'Union, emportant l'applicabilité de la Charte, l'adoption, par un État membre, d'une législation précisant les modalités de la procédure d'échange d'informations sur demande instituée par la directive 2011/16 (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 34 à 37), notamment en prévoyant la possibilité, pour l'autorité compétente, de prendre une décision obligeant une personne détentrice d'informations à lui fournir ces dernières.

47. L'article 47 de la Charte énonce, à son premier alinéa, que toute personne dont les droits et les libertés garantis par le droit de l'Union ont été violés a droit à un recours effectif, dans les conditions prévues à cet article. À ce droit correspond l'obligation faite aux États membres, à l'article 19, paragraphe 1, second alinéa, TUE, d'établir les voies de recours nécessaires pour assurer une protection juridictionnelle effective dans les domaines couverts par le droit de l'Union.

48. Les articles 7 et 8 de la Charte consacrent, le premier, le droit au respect de la vie privée et, le second, le droit à la protection des données à caractère personnel.

49. Aucun de ces trois droits fondamentaux ne constitue une prérogative absolue, chacun d'entre eux devant, en effet, être pris en considération par rapport à sa fonction dans la société (voir, s'agissant du droit à un recours effectif, arrêt du 18 mars 2010, Alassini e.a., C-317/08 à C-320/08, EU:C:2010:146, point 63 ainsi que jurisprudence citée, et, en ce qui concerne les droits au respect de la vie privée et à la protection des données à caractère personnel, arrêt du 16 juillet 2020, Facebook Ireland et Schrems, C-311/18, EU:C:2020:559, point 172 ainsi que jurisprudence citée).

50. Ainsi, dans l'hypothèse où plusieurs droits garantis par la Charte sont en présence dans un cas d'espèce donné et susceptibles d'entrer en conflit l'un avec l'autre, la nécessaire conciliation qui doit s'opérer entre ces droits, aux fins d'assurer un juste équilibre entre la protection attachée à chacun d'entre eux, peut conduire à leur apporter une limitation (voir, en ce sens, arrêts du 29 janvier 2008, Promusicae, C-275/06, EU:C:2008:54, points 63 à 65, et du 27 mars 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, point 46).

51. Par ailleurs, l'article 52, paragraphe 1, de la Charte prévoit que des limitations peuvent être apportées à l'exercice des droits et des libertés garantis par celle-ci à condition, premièrement, que ces limitations soient prévues par la loi, deuxièmement, qu'elles respectent le contenu essentiel des droits et des libertés en cause, et, troisièmement, que, dans le respect du principe de proportionnalité, elles soient nécessaires et répondent effectivement à des objectifs d'intérêt général reconnus par l'Union ou au besoin de protection des droits et des libertés d'autrui.

52. En l'occurrence, toutefois, les trois droits fondamentaux en présence ne sont pas susceptibles d'entrer en conflit l'un avec l'autre, mais ont vocation à s'appliquer de façon complémentaire. En effet, le caractère effectif de la protection que l'article 47 de la Charte est censé accorder au titulaire du droit garanti par celui-ci ne peut se manifester et s'apprécier que par rapport à des droits matériels, tels que ceux visés aux articles 7 et 8 de la Charte.

53. Plus précisément, il découle des premières questions dans les affaires C-245/19 et C-246/19, lues à la lumière de la motivation qui les sous-tend, que la juridiction de renvoi demande si l'article 47 de la Charte doit être interprété en ce sens qu'une législation nationale peut priver une personne détentrice d'informations, un contribuable visé par une enquête fiscale et des tierces personnes concernées par ces informations de la possibilité de former un recours direct contre une décision d'injonction de communication desdites informations à l'administration fiscale, décision dont cette juridiction considère qu'elle est de nature à porter atteinte aux droits garantis à ces différentes personnes par les articles 7 et 8 de la Charte.

Sur le droit à un recours effectif garanti par l'article 47 de la Charte

54. Ainsi qu'il résulte de la jurisprudence constante de la Cour, le droit à un recours effectif est invocable sur la seule base de l'article 47 de la Charte, sans que le contenu de celui-ci doive être précisé par d'autres dispositions du droit de l'Union ou par des dispositions du droit interne des États membres (arrêts du 17 avril 2018, Egenberger, C-414/16, EU:C:2018:257, point 78, et du 29 juillet 2019, Torubarov, C-556/17, EU:C:2019:626, point 56).

55. Cela étant, la reconnaissance de ce droit, dans un cas d'espèce donné, suppose, ainsi qu'il ressort de l'article 47, premier alinéa, de la Charte, que la personne qui l'invoque se prévale de droits ou de libertés garantis par le droit de l'Union.

– Sur le droit à un recours effectif de la personne détentrice d'informations à laquelle l'autorité compétente décide d'enjoindre leur communication

56. Ainsi qu'il résulte des énonciations de la juridiction de renvoi résumées au point 26 du présent arrêt et des dispositions nationales reprises aux points 17 à 19 de cet arrêt, la personne détentrice d'informations en cause au principal est une personne morale à laquelle l'autorité nationale compétente a adressé une décision d'injonction de communication de ces informations, dont le non-respect est susceptible d'entraîner l'infliction d'une sanction.

57. S'agissant, en premier lieu, de la question de savoir si une telle personne doit se voir reconnaître le bénéfice du droit à un recours effectif garanti par l'article 47 de la Charte en présence d'une telle décision, il convient, d'emblée, de relever qu'il résulte de la jurisprudence constante de la Cour que constitue un principe général du droit de l'Union la protection des personnes, tant physiques que morales, contre des interventions de la puissance publique dans leur sphère d'activité privée, qui seraient arbitraires ou disproportionnées (arrêts du 21 septembre 1989, Hoechst/Commission, 46/87 et 227/88, EU:C:1989:337, point 19, ainsi que du 13 septembre 2018, UBS Europe e.a., C-358/16, EU:C:2018:715, point 56).

58. Or, cette protection peut être invoquée par une personne morale, en tant que droit garanti par le droit de l'Union, au sens de l'article 47, premier alinéa, de la Charte, en vue de contester en justice un acte lui faisant grief, tel qu'une injonction de communication d'informations ou une sanction infligée pour cause de non-respect de cette injonction (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 51 et 52).

59. Il s'ensuit qu'une personne morale à laquelle l'autorité nationale compétente a adressé une décision d'injonction de communication d'informations telle que celles en cause au principal doit se voir reconnaître le bénéfice du droit à un recours effectif garanti par l'article 47 de la Charte en présence d'une telle décision.

60. En ce qui concerne, en second lieu, la question de savoir si l'exercice de ce droit peut être limité par une législation nationale, il découle de la jurisprudence de la Cour qu'une limitation peut être apportée à l'exercice du droit à un recours effectif devant un tribunal consacré à l'article 47 de la Charte, par le législateur de l'Union ou, en l'absence de réglementation de l'Union en la matière, par les États membres, si les conditions prévues à l'article 52, paragraphe 1, de la Charte sont respectées (voir, en ce sens, arrêt du 15 septembre 2016, Star Storage e.a., C-439/14 et C-488/14, EU:C:2016:688, points 46 et 49).

61. En l'occurrence, il ne résulte d'aucune disposition de la directive 2011/16, dont la législation en cause au principal assure la mise en œuvre, que le législateur de l'Union ait entendu limiter l'exercice du droit à un recours effectif, en présence d'une décision d'injonction de communication d'informations telle que celles en cause au principal.

62. Par ailleurs, la directive 2011/16 renvoie, à son article 25, paragraphe 1, à la réglementation de l'Union relative au traitement des données à caractère personnel, en prévoyant que tous les échanges d'informations effectués en vertu de cette directive sont soumis aux dispositions de la directive 95/46, qui a, comme cela a été rappelé au point 11 du présent arrêt, été abrogée et remplacée avec effet au 25 mai 2018, soit postérieurement à l'adoption des décisions en cause au principal, par le règlement 2016/679, dont l'objectif consiste notamment à assurer et à préciser le droit à la protection des données à caractère personnel garanti par l'article 8 de la Charte.

63. Or, l'article 22 de la directive 95/46, dont l'article 79 du règlement 2016/679 reprend la substance, souligne que toute personne doit disposer d'un recours juridictionnel en présence d'une violation des droits qui lui sont garantis par les dispositions applicables au traitement de telles données.

64. Il s'ensuit que le législateur de l'Union n'a pas limité lui-même l'exercice du droit à un recours effectif consacré à l'article 47 de la Charte et qu'il est loisible aux États membres de limiter cet exercice, à condition de respecter les exigences prévues à l'article 52, paragraphe 1, de la Charte.

65. Ainsi qu'il a été rappelé au point 51 du présent arrêt, cette disposition exige, notamment, que toute limitation apportée à l'exercice des droits et des libertés garantis par la Charte respecte le contenu essentiel de ces derniers.

66. À cet égard, il découle de la jurisprudence de la Cour que le contenu essentiel du droit à un recours effectif consacré à l'article 47 de la Charte inclut, entre autres éléments, celui consistant, pour la personne titulaire de ce droit, à pouvoir accéder à un tribunal compétent pour assurer le respect des droits que le droit de l'Union lui garantit et, à cette fin, pour examiner toutes les questions de droit et de fait pertinentes pour résoudre le litige dont il se trouve saisi (voir, en ce sens, arrêts du 6 novembre 2012, Otis e.a., C-199/11, EU:C:2012:684, point 49, ainsi que du 12 décembre 2019, Aktiva Finants, C-433/18, EU:C:2019:1074, point 36). En outre, pour accéder à un tel tribunal, cette personne ne saurait se voir contrainte d'enfreindre une règle ou une obligation juridique et de s'exposer à la sanction attachée à cette infraction (voir, en ce sens, arrêts du 1er avril 2004, Commission/Jégo-Quéré, C-263/02 P, EU:C:2004:210, point 35 ; du 13 mars 2007, Unibet, C-432/05, EU:C:2007:163, point 64, ainsi que du 3 octobre 2013, Inuit Tapiriit Kanatami e.a./Parlement et Conseil, C-583/11 P, EU:C:2013:625, point 104).

67. Or, en l'occurrence, il ressort des énonciations de la juridiction de renvoi résumées au point 32 du présent arrêt que, eu égard à la législation en cause au principal, ce n'est que si la personne destinataire d'une décision d'injonction de communication d'informations telle que celles en cause au principal ne respecte pas cette décision, d'une part, et si elle se voit ultérieurement infliger une sanction pour ce motif, d'autre part, qu'elle dispose d'une possibilité de contester à titre incident ladite décision, dans le cadre du recours qui lui est ouvert contre une telle sanction.

68. Il s'ensuit que, en présence d'une décision d'injonction de communication d'informations qui serait arbitraire ou disproportionnée, une telle personne ne peut pas accéder à un tribunal, à moins d'enfreindre cette décision en refusant d'obtempérer à l'injonction qu'elle comporte et de s'exposer, ainsi, à la sanction attachée au non-respect de celle-ci. Partant, cette personne ne peut pas être regardée comme jouissant d'une protection juridictionnelle effective.

69. Dans ces conditions, il doit être considéré qu'une législation nationale telle que celle en cause au principal, qui exclut la possibilité, pour une personne détentrice d'informations à laquelle l'autorité nationale compétente adresse une décision d'injonction de communication de ces informations, de former un recours direct contre cette décision, ne respecte pas le contenu essentiel du droit à un recours effectif garanti par l'article 47 de la Charte et, par conséquent, que l'article 52, paragraphe 1, de celle-ci s'oppose à une telle législation.

– Sur le droit à un recours effectif du contribuable visé par l'enquête à l'origine de la décision d'injonction de communication d'informations

70. Ainsi qu'il découle des énonciations de la juridiction de renvoi résumées au point 24 du présent arrêt, le contribuable en cause au principal est une personne physique qui a sa résidence dans un État membre autre que celui dont relève l'autorité ayant adopté les décisions d'injonction de communication d'informations en cause au principal et qui est visée, dans cet État membre, par une enquête tendant à déterminer sa situation au regard de la législation fiscale dudit État membre.

71. Par ailleurs, le libellé des décisions d'injonction de communication d'informations en cause au principal, repris aux points 26 et 36 du présent arrêt, fait apparaître que les informations dont ces décisions enjoignent la communication à l'autorité qui les a adoptées portent sur des comptes bancaires et sur des actifs financiers dont cette personne serait titulaire ou bénéficiaire ainsi que sur diverses opérations juridiques, bancaires, financières ou, plus largement, économiques susceptibles d'avoir été réalisées par ladite personne ou par des tierces personnes agissant pour son compte ou dans son intérêt.

72. S'agissant, en premier lieu, de la question de savoir si une telle personne doit se voir reconnaître le bénéfice du droit à un recours effectif consacré à l'article 47 de la Charte, en présence de telles décisions, il convient de relever que cette personne est à l'évidence titulaire, d'une part, du droit au respect de la vie privée garanti par l'article 7 de la Charte et, d'autre part, du droit à la protection des données à caractère personnel garanti par l'article 8, paragraphe 1, de celle-ci, qui est étroitement lié, s'agissant des personnes physiques, au droit au respect de la vie privée de ces dernières [arrêts du 9 novembre 2010, Volker und Markus Schecke et Eifert, C-92/09 et C-93/09, EU:C:2010:662, point 47, ainsi que du 18 juin 2020, Commission/Hongrie (Transparence associative), C-78/18, EU:C:2020:476, points 123 et 126].

73. En outre, il découle de la jurisprudence constante de la Cour que la communication d'informations relatives à une personne physique identifiée ou identifiable à un tiers, y compris une autorité publique, ainsi que la mesure qui impose ou permet cette communication, sont, sans préjudice de leur éventuelle justification, constitutives d'ingérences dans le droit de cette personne au respect de sa vie privée ainsi que dans son droit à la protection des données à caractère personnel la concernant, indépendamment du point de savoir si ces informations présentent un caractère sensible ou non et quelle que soit leur utilisation ultérieure, sauf si ladite

communication intervient dans le respect des dispositions du droit de l'Union et, le cas échéant, des dispositions du droit interne prévues à cet effet [voir, en ce sens, arrêts du 18 juin 2020, Commission/Hongrie (Transparence associative), C-78/18, EU:C:2020:476, points 124 et 126, ainsi que du 16 juillet 2020, Facebook Ireland et Schrems, C-311/18, EU:C:2020:559, point 171 et jurisprudence citée].

74. Ainsi, la communication à l'autorité nationale compétente d'informations relatives à une personne physique identifiée ou identifiable, telles que les informations mentionnées au point 71 du présent arrêt, et la mesure qui, à l'instar des décisions visées au même point, impose cette communication, sont susceptibles de violer le droit au respect de la vie privée de la personne en cause ainsi que son droit à la protection des données à caractère personnel la concernant.

75. Partant, un contribuable tel que celui visé au point 70 du présent arrêt doit se voir reconnaître le bénéfice du droit à un recours effectif garanti par l'article 47 de la Charte en présence d'une décision d'injonction de communication d'informations telle que celles en cause au principal.

76. En ce qui concerne, en second lieu, la question de savoir si l'exercice de ce droit peut être limité, en vertu de l'article 52, paragraphe 1, de la Charte, en excluant qu'une telle personne puisse former un recours direct contre cette décision, il convient de rappeler qu'une telle limitation doit, premièrement, être prévue par la loi, ce qui implique notamment, ainsi qu'il résulte d'une jurisprudence constante de la Cour, que sa base légale en définisse la portée de manière claire et précise (arrêts du 17 décembre 2015, WebMindLicenses, C-419/14, EU:C:2015:832, point 81, et du 8 septembre 2020, Recorded Artists Actors Performers, C-265/19, EU:C:2020:677, point 86).

77. En l'occurrence, le libellé de la législation nationale en cause au principal fait apparaître que cette exigence est respectée.

78. Deuxièmement, le contenu essentiel du droit à un recours effectif doit être respecté, cette exigence devant être appréciée, notamment, au regard des éléments énoncés au point 66 du présent arrêt.

79. À cet égard, il découle de la jurisprudence de la Cour que ladite exigence n'implique pas, en tant que telle, que le titulaire de ce droit dispose d'une voie de recours directe ayant pour objet, à titre principal, de mettre en cause une mesure donnée, pour autant qu'il existe par ailleurs, devant les différentes juridictions nationales compétentes, une ou plusieurs voies de recours lui permettant d'obtenir, à titre incident, un contrôle juridictionnel de cette mesure assurant le respect des droits et des libertés que le droit de l'Union lui garantit, sans devoir s'exposer à cette fin au risque de se voir infliger une sanction en cas de non-respect de la mesure en cause (voir, en ce sens, arrêts du 13 mars 2007, Unibet, C-432/05, EU:C:2007:163, points 47, 49, 53 à 55, 61 et 64, ainsi que du 21 novembre 2019, Deutsche Lufthansa, C-379/18, EU:C:2019:1000, point 61).

80. En l'occurrence, il doit être relevé, à ce titre, que la situation du contribuable visé par une enquête est différente de celle de la personne détentrice d'informations concernant celui-ci. En effet, ainsi qu'énoncé au point 68 du présent arrêt, cette dernière personne se trouverait, en l'absence de possibilité de former un recours direct contre une décision qui lui est adressée et qui lui impose une obligation juridique de communiquer les informations en cause, privée de toute protection juridictionnelle effective. En revanche, le contribuable visé n'est pas destinataire d'une telle décision et n'est soumis à aucune obligation juridique par cette dernière, ni, partant, au risque de se voir infliger une sanction en cas de non-respect de celle-ci. Par conséquent, un tel contribuable n'est pas contraint de se placer dans l'illégalité pour pouvoir exercer son droit à un recours effectif, de sorte que la jurisprudence citée à la seconde phrase du point 66 du présent arrêt ne lui est pas applicable.

81. Par ailleurs, une décision d'injonction de communication d'informations telle que celles en cause au principal intervient dans le cadre de la phase préliminaire de l'enquête visant le contribuable en cause, au cours de laquelle sont recueillies des informations relatives à la situation fiscale de ce contribuable et qui ne revêt pas un caractère contradictoire. En effet, seule la phase ultérieure de ladite enquête, qui s'ouvre par l'envoi d'une proposition de rectification ou de redressement au contribuable visé, d'une part, revêt un caractère contradictoire impliquant de permettre à ce contribuable d'exercer son droit d'être entendu (voir, en ce sens, arrêt du 22 octobre 2013, Sabou, C-276/12, EU:C:2013:678, points 40 et 44) et, d'autre part, est susceptible de déboucher sur une décision de rectification ou de redressement adressée audit contribuable.

82. Or, cette dernière décision constitue un acte à l'égard duquel le contribuable visé doit disposer d'un droit de recours effectif supposant que le tribunal saisi du litige soit compétent pour examiner toutes les questions de droit et de fait pertinentes pour résoudre ce litige, comme évoqué au point 66 du présent arrêt, et, en particulier, pour vérifier que les preuves sur lesquelles se fonde cet acte n'ont pas été obtenues ou utilisées en vio-

lation des droits et des libertés garantis à l'intéressé par le droit de l'Union (voir, par analogie, arrêt du 17 décembre 2015, WebMindLicenses, C-419/14, EU:C:2015:832, points 87 à 89).

83. Partant, lorsqu'une décision d'injonction de communication d'informations telle que celles en cause au principal conduit l'autorité nationale ayant demandé ces informations à adopter une décision de rectification ou de redressement qui se fonde, en tant que preuves, sur lesdites informations, le contribuable visé par l'enquête a la possibilité de contester, à titre incident, la première de ces décisions ainsi que les conditions d'obtention et l'utilisation des preuves recueillies grâce à celle-ci, dans le cadre du recours qu'il peut former contre la seconde desdites décisions.

84. Par conséquent, une législation nationale telle que celle en cause au principal doit être considérée comme ne portant pas atteinte au contenu essentiel du droit à un recours effectif garanti au contribuable visé. De surcroît, elle ne restreint pas l'accès de ce contribuable aux voies de recours prévues conformément à l'article 79, paragraphe 1, du règlement 2016/679, qui reprend, en le modifiant, l'article 22 de la directive 95/46, si ledit contribuable considère que les droits que lui confère ce règlement ont été violés du fait d'un traitement de données à caractère personnel le concernant.

85. Troisièmement, comme énoncé au point 51 du présent arrêt, une telle législation nationale doit, dans le respect du principe de proportionnalité, être nécessaire et répondre effectivement à un objectif d'intérêt général reconnu par l'Union. Il y a donc lieu de vérifier successivement si elle répond à un objectif d'intérêt général reconnu par l'Union et, dans l'affirmative, si elle respecte le principe de proportionnalité (voir, en ce sens, arrêts du 5 juillet 2017, Fries, C-190/16, EU:C:2017:513, point 39, ainsi que du 12 juillet 2018, Spika e.a., C-540/16, EU:C:2018:565, point 40).

86. À cet égard, la juridiction de renvoi souligne que la législation en cause au principal met en œuvre la directive 2011/16, dont le considérant 27 envisage que des limitations nécessaires et proportionnées soient apportées à la protection des personnes physiques à l'égard du traitement des données à caractère personnel les concernant, telle qu'assurée par la directive 95/46, et dont les considérants 1 et 2 énoncent qu'elle a pour objectif de contribuer à la lutte contre la fraude et l'évasion fiscales internationales, en renforçant la coopération entre les autorités nationales compétentes en ce domaine.

87. Or, cet objectif constitue un objectif d'intérêt général reconnu par l'Union, au sens de l'article 52, paragraphe 1, de la Charte [voir, en ce sens, arrêts du 22 octobre 2013, Sabou, C-276/12, EU:C:2013:678, point 32 ; du 17 décembre 2015, WebMindLicenses, C-419/14, EU:C:2015:832, point 76, ainsi que du 26 février 2019, X (Sociétés intermédiaires établies dans des pays tiers), C-135/17, EU:C:2019:136, points 74 et 75], susceptible de permettre qu'une limitation soit apportée à l'exercice des droits garantis par les articles 7, 8 et 47 de celle-ci, pris individuellement ou conjointement.

88. Il s'ensuit que l'objectif poursuivi par la législation nationale en cause au principal constitue un objectif d'intérêt général reconnu par l'Union.

89. Cet objectif de lutte contre la fraude et l'évasion fiscales internationales se traduit notamment, aux articles 5 à 7 de la directive 2011/16, par la mise en place d'une procédure d'échange d'informations sur demande permettant aux autorités nationales compétentes de coopérer efficacement et rapidement entre elles, en vue de recueillir des informations dans le cadre d'enquêtes visant tel ou tel contribuable donné (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 46, 47 et 77).

90. Or, l'intérêt attaché à l'efficacité et à la rapidité de cette coopération, qui concrétise l'objectif de lutte contre la fraude et l'évasion fiscales internationales sous-tendant la directive 2011/16, impose notamment de respecter l'ensemble des délais prévus à l'article 7 de cette directive.

91. Eu égard à cette situation, il y a lieu de considérer qu'une législation nationale excluant qu'un recours direct puisse être formé, contre une décision d'injonction de communication d'informations telle que celles en cause au principal, par le contribuable visé par l'enquête à l'origine de la demande d'échange d'informations ayant conduit l'autorité nationale compétente à adopter cette décision, est propre à réaliser l'objectif de lutte contre la fraude et l'évasion fiscales internationales poursuivi par la directive 2011/16 et nécessaire à la réalisation de cet objectif.

92. En outre, elle n'apparaît pas disproportionnée dès lors, d'une part, qu'une telle décision ne soumet le contribuable visé à aucune obligation juridique ni à aucun risque de sanction, et, d'autre part, que ce contribuable a la possibilité de contester cette décision à titre incident, dans le cadre d'un recours contre une décision ultérieure de rectification ou de redressement.

93. Dans ces conditions, il y a lieu de considérer que l'article 47 de la Charte, lu conjointement avec les articles 7 et 8 ainsi qu'avec l'article 52, paragraphe 1, de celle-ci, ne s'oppose pas à ce qu'une législation nationale telle que celle en cause au principal exclue qu'une décision par laquelle l'autorité compétente d'un État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, puisse faire l'objet d'un recours direct formé par le contribuable qui est visé, dans cet autre État membre, par l'enquête à l'origine de cette demande.

– Sur le droit à un recours effectif des tierces personnes concernées

94. Ainsi qu'il découle des points 26, 36 et 71 du présent arrêt, les tierces personnes concernées auxquelles se réfère la juridiction de renvoi sont des personnes morales avec lesquelles le contribuable visé par l'enquête à l'origine des décisions d'injonction de communication d'informations en cause au principal entretient ou est susceptible d'entretenir des relations juridiques, bancaires, financières ou, plus largement, économiques.

95. Il convient, en premier lieu, de déterminer si de telles tierces personnes doivent, dans une situation telle que celle en cause au principal, se voir reconnaître le bénéfice du droit à un recours effectif consacré à l'article 47 de la Charte.

96. À cet égard, il doit être observé que, à l'instar d'une personne morale détentrice d'informations à laquelle l'autorité nationale compétente adresse une décision d'injonction de communication de ces informations, ces tierces personnes peuvent se prévaloir de la protection dont toute personne physique ou morale jouit, en vertu du principe général du droit de l'Union évoqué au point 57 du présent arrêt, contre des interventions arbitraires ou disproportionnées de la puissance publique dans leur sphère d'activité privée, même si la communication à une autorité publique d'informations juridiques, bancaires, financières ou, plus largement, économiques les concernant ne peut en aucun cas être considérée comme touchant au cœur de cette activité [voir, en ce sens, Cour EDH, 16 juin 2015 (déc.), Othymia Investments BV c. Pays-Bas, CE:ECHR:2015:0616DEC007529210, § 37 ; 7 juillet 2015, M. N.et autres c. San Marino, CE:ECHR:2015:0707JUD002800512, § 51 et 54, ainsi que 22 décembre 2015, G.S. B. c. Suisse, CE:ECHR:2015:1222JUD002860111, § 51 et 93].

97. Dès lors, de telles tierces personnes doivent se voir reconnaître le bénéfice du droit à un recours effectif en présence d'une décision d'injonction de communication d'informations qui pourrait violer leur droit à cette protection.

98. En ce qui concerne, en second lieu, la question de savoir si l'exercice du droit à un recours effectif garanti aux tierces personnes concernées par les informations en cause peut être limité de telle sorte que celles-ci ne puissent pas former un recours direct en présence d'une telle décision, il doit être souligné, premièrement, que la législation nationale en cause au principal définit, de manière claire et précise, la limitation qu'elle apporte à l'exercice de ce droit.

99. S'agissant, deuxièmement, de l'exigence tenant au respect du contenu essentiel du droit à un recours effectif, il importe de relever que les tierces personnes concernées par les informations en cause ne sont, à la différence de la personne détentrice de ces informations à laquelle l'autorité compétente d'un État membre a adressé une décision d'injonction de communication de celles-ci, soumises ni à une obligation juridique de communiquer lesdites informations ni, partant, au risque de se voir infliger une sanction en cas de non-respect d'une telle obligation juridique. Partant, la jurisprudence citée à la seconde phrase du point 66 du présent arrêt ne leur est pas applicable.

100. Par ailleurs, il est vrai que la communication d'informations concernant lesdites tierces personnes à une autorité publique, par la personne destinataire d'une décision enjoignant leur communication à cette autorité publique, est susceptible de porter atteinte au droit de ces tierces personnes d'être protégées contre des interventions arbitraires ou disproportionnées des autorités publiques dans leur sphère d'activité privée et, ce faisant, de leur causer un préjudice.

101. Toutefois, il ressort de la jurisprudence de la Cour que la possibilité, pour un justiciable donné, d'agir en justice aux fins de faire constater la violation des droits qui lui sont garantis par le droit de l'Union et d'obtenir la réparation du préjudice que lui a causé cette violation assure une protection juridictionnelle effective à ce justiciable, dès lors que le tribunal saisi du litige dispose de la possibilité de contrôler l'acte ou la mesure qui est à l'origine de ladite violation et dudit préjudice (voir, en ce sens, arrêt du 13 mars 2007, Unibet, C-432/05, EU:C:2007:163, point 58).

102. Il s'ensuit, en l'occurrence, que le respect du contenu essentiel du droit à un recours effectif n'exige pas que des justiciables tels que les tierces personnes qui sont concernées par les informations en cause, sans toutefois être soumises à une obligation juridique de communiquer ces informations ni, partant, à un risque de se voir infliger une sanction en cas de non-respect d'une telle obligation juridique, aient, par ailleurs, la possibilité de former un recours direct contre la décision d'injonction de communication desdites informations.

103. Troisièmement, il doit être rappelé que la législation nationale en cause au principal poursuit un objectif d'intérêt général reconnu par l'Union, comme énoncé aux points 86 à 88 du présent arrêt.

104. Quant à l'exigence tenant au caractère nécessaire et proportionné de cette législation au regard d'un tel objectif, elle est à considérer, comme cela découle des points 90 à 92 du présent arrêt, comme étant satisfaite compte tenu, d'une part, des délais qui doivent être respectés pour assurer l'efficacité et la rapidité de la procédure d'échange d'informations concrétisant l'objectif de lutte contre la fraude et l'évasion fiscales internationales qui sous-tend la directive 2011/16, et, d'autre part, de la possibilité, pour les personnes concernées, d'agir en justice aux fins de voir constater une violation des droits qui leur sont garantis par le droit de l'Union et réparer le préjudice causé par celle-ci.

105. Au vu de l'ensemble des considérations qui précèdent, il convient de répondre aux premières questions dans les affaires C-245/19 et C-246/19 que l'article 47 de la Charte, lu conjointement avec les articles 7 et 8 ainsi qu'avec l'article 52, paragraphe 1, de celle-ci, doit être interprété en ce sens :

– qu'il s'oppose à ce que la législation d'un État membre mettant en œuvre la procédure d'échange d'informations sur demande instituée par la directive 2011/16 exclue qu'une décision par laquelle l'autorité compétente de cet État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, puisse faire l'objet d'un recours formé par une telle personne, et

– qu'il ne s'oppose pas à ce qu'une telle législation exclue qu'une telle décision puisse faire l'objet de recours formés par le contribuable qui est visé, dans cet autre État membre, par l'enquête à l'origine de ladite demande, ainsi que par des tierces personnes concernées par les informations en cause.

*Sur la seconde question dans l'affaire C-245/19*

106. Eu égard aux réponses apportées aux premières questions dans les affaires C-245/19 et C-246/19 et à la circonstance que les secondes questions dans ces affaires n'ont été posées qu'en cas de réponse affirmative à celles-ci, il y a lieu de répondre uniquement à la seconde question dans l'affaire C-245/19.

107. Par cette question, la juridiction de renvoi demande, en substance, si l'article 1er, paragraphe 1, et l'article 5 de la directive 2011/16 doivent être interprétés en ce sens qu'une décision par laquelle l'autorité compétente d'un État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, est à considérer, prise ensemble avec cette demande, comme portant sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable dès lors qu'elle indique l'identité de la personne détentrice des informations en cause, celle du contribuable qui est visé par l'enquête à l'origine de la demande d'échange d'informations et la période couverte par cette dernière, et qu'elle porte sur des contrats, des facturations et des paiements qui, tout en n'étant pas identifiés de façon précise, sont délimités au moyen de critères tenant, premièrement, au fait qu'ils ont été respectivement conclus ou effectués par la personne détentrice, deuxièmement, à la circonstance qu'ils sont intervenus pendant la période couverte par cette enquête et, troisièmement, à leur lien avec le contribuable visé.

108. L'article 1er, paragraphe 1, de la directive 2011/16 prévoit que les États membres coopèrent entre eux aux fins d'échanger les informations vraisemblablement pertinentes pour l'administration et l'application de leur législation interne en matière fiscale.

109. Pour sa part, l'article 5 de cette directive énonce que, à la demande de l'autorité nationale qui entend se voir communiquer de telles informations, dénommée « autorité requérante », l'autorité à laquelle cette demande est adressée, dénommée « autorité requise », les lui communique, le cas échéant après les avoir obtenues à la suite d'une enquête.

110. L'expression « vraisemblablement pertinentes » figurant à l'article 1er, paragraphe 1, de la directive 2011/16 vise, ainsi que la Cour l'a déjà relevé, à permettre à l'autorité requérante de demander et d'obtenir toutes les informations dont elle peut raisonnablement considérer qu'elles se révéleront pertinentes aux fins de son enquête, sans toutefois l'autoriser à dépasser de manière manifeste le cadre de celle-ci ni imposer une

charge excessive à l'autorité requise (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 63 et 66 à 68).

111. En outre, cette expression doit être interprétée à la lumière du principe général du droit de l'Union tenant à la protection des personnes physiques ou morales contre des interventions arbitraires ou disproportionnées de la puissance publique dans leur sphère d'activité privée, visé au point 57 du présent arrêt.

112. À cet égard, il y a lieu d'observer que, si l'autorité requérante, qui est maîtresse de l'enquête à l'origine de la demande d'échange d'informations, dispose d'une marge d'appréciation pour évaluer, selon les circonstances de l'affaire, la pertinence vraisemblable des informations demandées, elle ne saurait pour autant demander à l'autorité requise des informations ne présentant aucune pertinence pour cette enquête (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 70 et 71).

113. Ainsi, une décision d'injonction de communication d'informations par laquelle l'autorité requise donnerait suite à une demande d'échange d'informations de l'autorité requérante visant à faire effectuer une recherche d'informations « tous azimuts », telle que visée au considérant 9 de la directive 2011/16, s'apparenterait à une intervention arbitraire ou disproportionnée de la puissance publique.

114. Il en découle que des informations qui seraient demandées aux fins d'une telle recherche « tous azimuts » ne sauraient, en tout état de cause, être considérées comme étant « vraisemblablement pertinentes » au sens de l'article 1er, paragraphe 1, de la directive 2011/16.

115. À cet égard, l'autorité requise doit contrôler que la motivation de la demande d'échange d'informations qui lui a été adressée par l'autorité requérante est suffisante pour établir que les informations en cause n'apparaissent pas dépourvues de toute pertinence vraisemblable eu égard à l'identité du contribuable visé par l'enquête à l'origine de cette demande, aux besoins d'une telle enquête et, dans l'hypothèse où il est nécessaire d'obtenir les informations en cause auprès d'une personne détenant celles-ci, à l'identité de cette dernière (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, points 76, 78, 80 et 82).

116. Par ailleurs, dans l'hypothèse où cette personne a formé un recours contre la décision d'injonction de communication d'informations qui lui a été adressée, la juridiction compétente doit contrôler que la motivation de cette décision et de la demande sur laquelle celle-ci se fonde est suffisante pour établir que les informations en cause n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable eu égard à l'identité du contribuable visé, à celle de la personne détenant ces informations et aux besoins de l'enquête en cause (voir, en ce sens, arrêt du 16 mai 2017, Berlioz Investment Fund, C-682/15, EU:C:2017:373, point 86).

117. C'est donc au regard de ces éléments qu'il convient de déterminer si une décision d'injonction de communication d'informations telle que celle à l'origine du litige au principal dans l'affaire C-245/19, prise ensemble avec la demande d'échange d'informations sur laquelle elle se fonde, porte sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable.

118. À ce sujet, il convient de relever qu'une telle décision, prise ensemble avec une telle demande, porte, à l'évidence, sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable en ce qu'elle indique l'identité du contribuable visé par l'enquête à l'origine de cette demande, la période couverte par cette enquête ainsi que l'identité de la personne qui est détentrice d'informations concernant des contrats, des facturations et des paiements conclus ou effectués pendant cette période et liés au contribuable en cause.

119. Les doutes de la juridiction de renvoi proviennent, toutefois, du fait que cette décision, prise ensemble avec cette demande, porte sur des contrats, des facturations et des paiements qui ne sont pas identifiés de façon précise.

120. Il doit être observé, d'une part, que ladite décision, prise ensemble avec ladite demande, porte, sans conteste, sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable en ce qu'elle vise des contrats, des facturations et des paiements qui ont été conclus ou effectués, pendant la période couverte par l'enquête, par la personne détentrice d'informations à leur sujet et qui présentent un lien avec le contribuable visé par cette enquête.

121. D'autre part, il convient de rappeler que tant ladite décision que ladite demande sont intervenues, ainsi qu'il résulte du point 81 du présent arrêt, au cours de la phase préliminaire de ladite enquête, dont l'objet est de recueillir des informations dont l'autorité requérante n'a, par hypothèse, pas une connaissance précise et complète.

122. Dans ces circonstances, il apparaît vraisemblable que certaines des informations qui sont visées par la décision d'injonction de communication d'informations à l'origine du litige au principal dans l'affaire C-245/19, prise ensemble avec la demande d'échange d'informations sur laquelle elle se fonde, s'avèrent en définitive, au terme de l'enquête menée par l'autorité requérante, non pertinentes à la lumière des résultats de cette enquête.

123. Toutefois, compte tenu des appréciations figurant aux points 118 et 120 du présent arrêt, cette situation ne saurait impliquer que les informations en cause puissent être considérées, aux fins du contrôle visé aux points 115 et 116 de cet arrêt, comme apparaissant, de manière manifeste, dépourvues de toute pertinence vraisemblable et, dès lors, comme ne répondant pas aux exigences découlant de l'article 1er, paragraphe 1, et de l'article 5 de la directive 2011/16.

124. Eu égard à l'ensemble des considérations qui précèdent, il convient de répondre à la seconde question dans l'affaire C-245/19 que l'article 1er, paragraphe 1, et l'article 5 de la directive 2011/16 doivent être interprétés en ce sens qu'une décision par laquelle l'autorité compétente d'un État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, est à considérer, prise ensemble avec cette demande, comme portant sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable dès lors qu'elle indique l'identité de la personne détentrice des informations en cause, celle du contribuable qui est visé par l'enquête à l'origine de la demande d'échange d'informations et la période couverte par cette dernière, et qu'elle porte sur des contrats, des facturations et des paiements qui, tout en n'étant pas identifiés de façon précise, sont délimités au moyen de critères tenant, premièrement, au fait qu'ils ont été respectivement conclus ou effectués par la personne détentrice, deuxièmement, à la circonstance qu'ils sont intervenus pendant la période couverte par cette enquête et, troisièmement, à leur lien avec le contribuable visé.

**Sur les dépens**

125. ...

Par ces motifs,

la Cour (grande chambre)

dit pour droit :

**1. L'article 47 de la charte des droits fondamentaux de l'Union européenne, lu conjointement avec les articles 7 et 8 ainsi qu'avec l'article 52, paragraphe 1, de celle-ci, doit être interprété en ce sens :**

**– qu'il s'oppose à ce que la législation d'un État membre mettant en œuvre la procédure d'échange d'informations sur demande instituée par la directive 2011/16/UE du Conseil, du 15 février 2011, relative à la coopération administrative dans le domaine fiscal et abrogeant la directive 77/799/CEE, telle que modifiée par la directive 2014/107/UE du Conseil, du 9 décembre 2014, exclue qu'une décision par laquelle l'autorité compétente de cet État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, puisse faire l'objet d'un recours formé par une telle personne, et**

**– qu'il ne s'oppose pas à ce qu'une telle législation exclue qu'une telle décision puisse faire l'objet de recours formés par le contribuable qui est visé, dans cet autre État membre, par l'enquête à l'origine de ladite demande, ainsi que par des tierces personnes concernées par les informations en cause.**

**2. L'article 1er, paragraphe 1, et l'article 5 de la directive 2011/16, telle que modifiée par la directive 2014/107, doivent être interprétés en ce sens qu'une décision par laquelle l'autorité compétente d'un État membre oblige une personne détentrice d'informations à lui fournir ces informations, en vue de donner suite à une demande d'échange d'informations émanant de l'autorité compétente d'un autre État membre, est à considérer, prise ensemble avec cette demande, comme portant sur des informations qui n'apparaissent pas, de manière manifeste, dépourvues de toute pertinence vraisemblable dès lors qu'elle indique l'identité de la personne détentrice des informations en cause, celle du contribuable qui est visé par l'enquête à l'origine de la demande d'échange d'informations et la période couverte par cette dernière, et qu'elle porte sur des contrats, des facturations et des paiements qui, tout en n'étant pas identifiés de façon précise, sont délimités au moyen de critères tenant, premièrement, au fait qu'ils ont été respectivement conclus ou effectués par la personne détentrice, deuxièmement, à la circonstance qu'ils sont intervenus pendant la période couverte par cette enquête et, troisièmement, à leur lien avec le contribuable visé.**

# EU Cour de Justice, le 8 octobre 2020*

## Affaire C-558/19

## *Impresa Pizzarotti & C SPA Italia Sucursala Cluj contre Agentia Nationala de Administrare Fiscala – Directia Generala de Administrare a Marilor Contribuabili*

**Table of contents**



1. La demande de décision préjudicielle porte sur l'interprétation des articles 49 et 63 TFUE.

2. Cette demande a été présentée dans le cadre d'un litige opposant Impresa Pizzarotti & C SPA Italia Sucursala Cluj (ci-après « Impresa Pizzarotti ») à l'Agentia Nationala de Administrare Fiscala – Directia Generala de Administrare a Marilor Contribuabili (agence nationale d'administration fiscale – direction générale pour l'administration des grands contribuables, Roumanie, ci-après l'« autorité fiscale »), au sujet de l'annulation d'un acte administratif fiscal émis par cette autorité ainsi que de l'avis d'imposition établi sur la base dudit acte.

### Le droit roumain

3. L'article 7 de la Legea nr. 571 privind Codul fiscal (loi nº 571, portant code des impôts), du 22 décembre 2003 (*Monitorul Oficial al României,* partie I, nº 927 du 23 décembre 2003), dans sa version applicable au litige au principal (ci-après le « code des impôts »), dispose :

> « Aux fins du présent code, à l'exception du titre VI, on entend par :
> [...]
> 20. "personne" : toute personne physique ou morale ;
> 21. "personne liée" : une personne est liée à une autre si leur relation correspond à au moins l'un des cas de figure suivants :
> [...]
> c. une personne morale est liée à une autre si, au moins :
> i. la première personne morale détient directement ou indirectement, y compris les participations des personnes liées, au moins 25 % de la valeur ou du nombre des titres de participation ou des droits de vote de l'autre personne morale ou si elle contrôle cette dernière ;
> ii. la seconde personne morale détient, directement ou indirectement, y compris les participations des personnes liées, au moins 25 % de la valeur ou du nombre des titres de participation ou des droits de vote de la première personne morale ;
> iii. une personne morale tierce détient, directement ou indirectement, y compris les participations des personnes liées, au moins 25 % de la valeur ou du nombre des titres de participation ou des droits de vote tant de la première personne morale que de la seconde.
> [...]
> 32. transfert : toute vente, cession ou aliénation du droit de propriété, l'échange d'un droit de propriété contre des services ou un autre droit de propriété ainsi que le transfert de la masse patrimoniale fiduciaire dans le cadre de l'opération de fiducie conformément au code civil. »

4. L'article 11, paragraphe 2, de ce code prévoit :

> « Dans le cadre d'une transaction entre des personnes roumaines et des personnes non-résidentes liées ainsi qu'entre personnes roumaines liées, les autorités fiscales peuvent ajuster les revenus ou les dépenses de chacune de ces personnes, autant que nécessaire, pour refléter le prix du marché des biens ou des services fournis dans le cadre de la transaction. Pour établir le prix de marché des transactions entre personnes liées, la méthode la plus adéquate parmi les suivantes est suivie : [...] »

* Langue de procédure: le roumain.

5. L'article 29, paragraphe 3, dudit code est ainsi libellé :

« Le bénéfice imposable de l'établissement stable est déterminé en considérant ce dernier comme une personne distincte et conformément aux règles relatives aux prix de transfert appliquées pour déterminer le prix de marché d'un transfert effectué entre la personne morale étrangère et son établissement stable. Lorsque l'établissement stable ne possède pas de facture pour les dépenses qui lui sont affectées par son établissement principal, les autres pièces justificatives doivent comprendre des preuves de la prise en charge effective des coûts et de l'affectation raisonnable de ces coûts à l'établissement stable conformément aux règles relatives aux prix de transfert. »

**Le litige au principal et la question préjudicielle**

6. Impresa Pizzarotti est la succursale roumaine de SC Impresa Pizzarotti & C SPA Italia (ci-après « Pizzarotti Italia »), établie en Italie.

7. Entre le 29 juillet 2016 et le 11 septembre 2017, l'unité de contrôle de l'autorité fiscale a effectué des vérifications auprès d'Impresa Pizzarotti, en sa qualité d'assujettie à l'impôt sur les sociétés, au cours desquelles il a été constaté que cette succursale avait conclu, en qualité de prêteur, deux contrats de prêt avec sa société mère, Pizzarotti Italia : un contrat daté du 6 février 2012, portant sur un montant de 11 400 000 euros, et un contrat daté du 9 mars 2012, portant sur un montant de 2 300 000 euros.

8. Il ressort de la décision de renvoi que ces sommes avaient été empruntées pour une période initiale d'un an, prorogeable par avenant, que les contrats de prêt ne contenaient aucune clause relative à la perception d'intérêts par Impresa Pizzarotti et que, si à la date du 1er janvier 2013 l'encours s'élevait à 11 250 000 euros, à celle du 9 avril 2014 les deux prêts avaient été intégralement remboursés.

9. Ainsi, compte tenu de l'article 11, paragraphe 2, du code des impôts, qui prévoit que les transactions effectuées entre des personnes roumaines et des personnes non-résidentes liées sont soumises aux règles en matière de prix de transfert, et de l'article 29, paragraphe 3, de ce code, selon lequel la notion de « personnes roumaines » couvre une succursale qui est l'établissement stable d'une personne non-résidente, l'autorité fiscale a estimé qu'Impresa Pizzarotti, société requérante au principal, devait être considérée comme une personne liée à Pizzarotti Italia et que le taux d'intérêt desdits prêts aurait dû être fixé au prix du marché, conformément aux règles en matière de prix de transfert, comme s'ils avaient été réalisés dans des conditions de concurrence normales.

10. Par conséquent, l'autorité fiscale a, le 20 septembre 2017, sur la base du rapport de contrôle fiscal datant du même jour, établi un avis d'imposition mettant à charge d'Impresa Pizzarotti un accroissement d'impôt d'un montant de 297 141,92 lei roumains (RON) (environ 72 400 euros) et une majoration de la base imposable à hauteur de 1 857 137 RON (environ 452 595 euros).

11. Par décision du 23 novembre 2017, l'autorité fiscale a rejeté comme non fondée la réclamation d'Impresa Pizzarotti contre cet avis d'imposition.

12. Cette dernière a alors saisi la juridiction de renvoi, le Tribunalul Cluj (tribunal de grande instance de Cluj, Roumanie), d'une demande d'annulation de la décision du 23 novembre 2017 ainsi que de l'avis d'imposition du 20 septembre 2017.

13. Dans le cadre du litige au principal, Impresa Pizzarotti fait valoir, en substance, que les dispositions nationales invoquées par l'autorité fiscale enfreignent les articles 49 et 63 TFUE, dans la mesure où elles prévoient que les transferts de fonds entre une succursale établie dans un État membre et sa société mère établie dans un autre État membre représentent des opérations susceptibles d'être soumises aux règles en matière de prix de transfert, alors que ces règles ne sont pas applicables si la succursale et sa société mère sont établies dans le même État membre.

14. C'est dans ces conditions que le Tribunalul Cluj (tribunal de grande instance de Cluj) a décidé de sursoir à statuer et de poser à la Cour la question préjudicielle suivante :

« Les articles 49 et 63 du [TFUE] s'opposent-ils à une réglementation nationale telle que [l'article 11, paragraphe 2, et l'article 29, paragraphe 3, du code des impôts], qui permet de requalifier un transfert bancaire de fonds d'une succursale résidant dans un État membre à sa société mère résidant dans un autre État membre d'"opération génératrice de revenus", de telle sorte que l'application des règles en matière de prix de transfert devient obligatoire, alors que, si la même opération avait été effectuée entre une succursale et une société mère résidant toutes deux dans le même État membre, elle n'aurait pas pu être requalifiée ainsi et lesdites règles n'auraient pas trouvé à s'appliquer ? »

**Sur la question préjudicielle**

15. Par sa question, la juridiction de renvoi demande, en substance, si les articles 49 et 63 TFUE doivent être interprétés en ce sens qu'ils s'opposent à une réglementation d'un État membre en vertu de laquelle un transfert de fonds opéré par une succursale résidente, en faveur de sa société mère établie dans un autre État membre, peut être qualifié d'« opération génératrice de revenus », de telle sorte que l'application des règles en matière de prix de transfert devient obligatoire, alors que, si la même opération avait été effectuée entre une succursale et une société mère établies toutes deux dans le même État membre, elle n'aurait pas été qualifiée ainsi et lesdites règles n'auraient pas trouvé à s'appliquer.

16. À cet égard, il ressort du dossier soumis à la Cour que le code des impôts prévoit des règles de rectification de la base imposable, relatives aux « prix de transfert », destinées à éviter que des sociétés résidentes ne fournissent des produits ou des services à des sociétés non-résidentes à un prix sous-évalué ou gratuitement, réduisant ainsi leur revenu imposable en Roumanie.

17. La juridiction de renvoi se référant, dans la question posée, à la fois à la liberté d'établissement et à la libre circulation des capitaux, consacrées, respectivement, aux articles 49 et 63 TFUE, il convient de rappeler, à titre liminaire, que la création et la détention totale par une personne physique ou morale établie dans un État membre d'un établissement stable, tel qu'une succursale, situé dans un autre État membre, relèvent du champ d'application matériel de l'article 49 TFUE (voir, en ce sens, arrêt du 15 mai 2008, Lidl Belgium, C-414/06, EU:C:2008:278, point 15, et du 15 septembre 2011, Dickinger et Ömer, C-347/09, EU:C:2011:582, point 35).

18. En l'occurrence, le litige au principal concerne l'impact de la réglementation nationale sur le traitement fiscal d'un transfert de fonds entre une succursale établie en Roumanie et sa société mère établie dans un autre État membre.

19. À supposer que le régime fiscal en cause au principal comporte des effets restrictifs sur la libre circulation des capitaux, de tels effets seraient la conséquence inéluctable d'une éventuelle entrave à la liberté d'établissement et ils ne justifient pas un examen dudit régime fiscal au regard de l'article 63 TFUE (voir, par analogie, arrêt du 15 mai 2008, Lidl Belgium, C-414/06, EU:C:2008:278, point 16 et jurisprudence citée).

20. Dans ces conditions, la réglementation nationale en cause au principal doit être examinée uniquement au regard des dispositions relatives à la liberté d'établissement du traité FUE.

21. Ainsi, il convient de rappeler que la liberté d'établissement, que l'article 49 TFUE reconnaît aux ressortissants de l'Union européenne, comprend, conformément à l'article 54 TFUE, pour les sociétés constituées en conformité avec la législation d'un État membre et ayant leur siège statutaire, leur administration centrale ou leur principal établissement au sein de l'Union, le droit d'exercer leur activité dans un autre État membre par l'intermédiaire d'une filiale, d'une succursale ou d'une agence (arrêts du 14 décembre 2006, Denkavit Internationaal et Denkavit France, C-170/05, EU:C:2006:783, point 20, ainsi que du 21 décembre 2016, Masco Denmark et Damixa, C-593/14, EU:C:2016:984, point 23 et jurisprudence citée).

22. La suppression des restrictions à la liberté d'établissement s'étend aux restrictions à la création d'agences, de succursales ou de filiales par les ressortissants d'un État membre établis sur le territoire d'un autre État membre (arrêt du 14 décembre 2006, Denkavit Internationaal et Denkavit France, C-170/05, EU:C:2006:783, point 21).

23. Pour les sociétés, il importe également de relever que leur siège, au sens de l'article 54 TFUE, sert à déterminer, à l'instar de la nationalité des personnes physiques, leur rattachement à l'ordre juridique d'un État membre. Admettre que l'État membre d'établissement de la succursale résidente puisse librement appliquer un traitement différent à ladite succursale en raison du seul fait que le siège de sa société mère est situé dans un autre État membre viderait l'article 49 TFUE de son contenu. La liberté d'établissement vise ainsi à garantir le bénéfice du traitement national dans l'État membre d'accueil de la succursale, en interdisant toute discrimination, même minime, fondée sur le lieu du siège des sociétés (voir, en ce sens, arrêt du 14 décembre 2006, Denkavit Internationaal et Denkavit France, C-170/05, EU:C:2006:783, point 22 ainsi que jurisprudence citée).

24. Dans ce cadre, il convient également de rappeler que la Cour a déjà jugé que constitue une restriction à la liberté d'établissement une réglementation nationale selon laquelle des avantages anormaux ou bénévoles accordés par une société résidente à une société entretenant un lien d'interdépendance avec celle-ci ne sont ajoutés aux bénéfices propres de la première société que si la société bénéficiaire est établie dans un autre État membre (voir, en ce sens, arrêt du 21 janvier 2010, SGI, C-311/08, EU:C:2010:26, points 42 à 45).

25. En l'occurrence, ainsi que la juridiction de renvoi l'a indiqué, le code des impôts ne traite les succursales comme des personnes distinctes que lorsqu'elles sont un établissement stable d'une personne morale non-

résidente de telle sorte que les revenus d'une succursale ne sont rectifiés, conformément aux règles du prix de transfert, que si la société mère est établie dans un autre État membre. Si, en revanche, la succursale et la société mère sont établies en Roumanie, il n'est procédé à aucune rectification des revenus.

26. Il en résulte qu'une succursale d'une société non-résidente telle que Impresa Pizzarotti bénéficie d'un traitement moins favorable que celui dont bénéficierait la succursale d'une société résidente réalisant des transactions similaires avec sa société mère.

27. Dans ces conditions, il y a lieu de constater qu'une telle différence de traitement fiscal des succursales, en fonction du lieu du siège de leurs sociétés mères, avec lesquelles ont été conclues des transactions caractérisées par des conditions qui seraient inhabituelles entre tiers, est susceptible de constituer une restriction à la liberté d'établissement, au sens de l'article 49 TFUE. En effet, la société mère pourrait être amenée à renoncer à l'acquisition, à la création ou au maintien d'une succursale dans un État membre autre que l'État membre de sa propre résidence, en raison de la charge fiscale frappant, dans une situation transfrontalière, l'octroi de conditions qui seraient inhabituelles entre tiers (voir, en ce sens, arrêt du 31 mai 2018, Hornbach-Baumarkt, C-382/16, EU:C:2018:366, point 35).

28. En vertu d'une jurisprudence constante de la Cour, une mesure fiscale qui est susceptible d'entraver la liberté d'établissement consacrée à l'article 49 TFUE ne saurait être admise que si elle concerne des situations qui ne sont pas objectivement comparables ou si elle peut être justifiée par des raisons impérieuses d'intérêt général reconnues par le droit de l'Union. Encore faut-il, dans cette hypothèse, qu'elle soit propre à garantir la réalisation de l'objectif en cause et qu'elle n'aille pas au-delà de ce qui est nécessaire pour atteindre cet objectif (arrêt du 31 mai 2018, Hornbach-Baumarkt, C-382/16, EU:C:2018:366, point 36).

29. Il ressort du dossier soumis à la Cour que les règles en matière de prix de transfert prévues par le code des impôts ont pour objet d'éviter que la base imposable dans l'État de résidence de l'établissement stable d'une société non-résidente soit minorée en raison d'opérations effectuées par cet établissement stable avec sa société mère qui ne seraient pas conformes aux conditions de marché.

30. À cet égard, la Cour a jugé que la nécessité de sauvegarder une répartition équilibrée du pouvoir d'imposition entre les États membres peut être de nature à justifier une différence de traitement lorsque le régime examiné vise à prévenir des comportements de nature à compromettre le droit d'un État membre d'exercer sa compétence fiscale en relation avec les activités réalisées sur son territoire (arrêt du 31 mai 2018, Hornbach-Baumarkt, C-382/16, EU:C:2018:366 point 43).

31. En l'occurrence, toutes les parties ayant soumis des observations à la Cour, hormis Impresa Pizzarotti, considérèrent que la restriction à la liberté d'établissement induite par la législation roumaine en cause au principal est justifiée par la nécessité de garantir une répartition équilibrée du pouvoir d'imposition entre les États membres, ce qui constitue, ainsi qu'il ressort du point précédent, une raison impérieuse d'intérêt général.

32. Or, force est de constater que permettre aux succursales des sociétés non-résidentes de transférer leurs bénéfices sous la forme d'avantages anormaux ou bénévoles vers leurs sociétés mères risquerait de compromettre une répartition équilibrée du pouvoir d'imposition entre les États membres. Cela serait susceptible de compromettre le système même de la répartition du pouvoir d'imposition entre les États membres, puisque l'État membre de la succursale accordant des avantages anormaux ou bénévoles serait contraint de renoncer à son droit d'imposer, en tant qu'État de résidence de cet établissement stable, les revenus de celle-ci, au profit, éventuellement, de l'État membre du siège de la société mère bénéficiaire (voir, en ce sens, arrêt du 21 janvier 2010, SGI, C-311/08, EU:C:2010:26, point 63).

33. En prévoyant l'imposition de l'établissement stable à raison du montant supposé de la rémunération de l'avantage consenti à la société mère sans contrepartie, afin de prendre en considération le montant que cet établissement stable aurait dû déclarer au titre de ses bénéfices si la transaction avait été conclue conformément aux conditions du marché, la réglementation en cause au principal permet donc à la Roumanie d'exercer sa compétence fiscale en relation avec les activités réalisées sur son territoire.

34. Partant, il y a lieu de considérer qu'une réglementation nationale telle que celle en cause au principal, qui vise à empêcher que des bénéfices générés dans l'État membre concerné soient transférés en dehors du ressort fiscal de ce dernier par le biais de transactions qui ne seraient pas conformes aux conditions du marché, sans avoir été imposés, est propre à garantir la préservation de la répartition de la compétence fiscale entre les États membres.

35. Dans ces conditions, en troisième lieu, il convient de vérifier si une réglementation telle que celle en cause au principal ne va pas au-delà de ce qui est nécessaire pour atteindre l'objectif poursuivi.

36. À cet égard, il y a lieu de relever qu'une législation nationale qui se fonde sur un examen d'éléments objectifs et vérifiables pour déterminer si une transaction présente le caractère d'une construction artificielle à des fins fiscales doit être considérée comme n'allant pas au-delà de ce qui est nécessaire pour atteindre les objectifs relatifs à la nécessité de sauvegarder la répartition équilibrée du pouvoir d'imposition entre les États membres et à celle de prévenir l'évasion fiscale, lorsque, en premier lieu, dans chaque cas où existe le soupçon qu'une transaction dépasse ce dont les sociétés concernées auraient convenu dans des circonstances de pleine concurrence, le contribuable est mis en mesure, sans être soumis à des contraintes administratives excessives, de produire des éléments concernant les éventuelles raisons commerciales pour lesquelles cette transaction a été conclue. En second lieu, lorsque la vérification de tels éléments aboutit à la conclusion que la transaction en cause dépasse ce dont les sociétés concernées auraient convenu dans des circonstances de pleine concurrence, la mesure fiscale correctrice doit se limiter à la fraction qui dépasse ce dont il aurait été convenu en l'absence d'une situation d'interdépendance entre celles-ci (arrêt du 21 janvier 2010, SGI, C-311/08, EU:C:2010:26, points 71 et 72).

37. En l'occurrence, il semble ressortir du dossier soumis à la Cour que, conformément aux dispositions nationales applicables au litige au principal, l'ajustement du revenu imposé par l'article 29, paragraphe 3, du code des impôts ne concerne que la différence entre le prix du marché de la transaction en cause, qui aurait prévalu dans des conditions de pleine concurrence, et celui concrètement appliqué par les parties. De même, le contribuable aurait toujours la possibilité d'établir qu'il existait des raisons objectives à ce que la transaction soit conclue à un prix ne reflétant pas le prix de marché.

38. Ainsi, sous réserve de vérification par la juridiction de renvoi, il apparaît que la réglementation roumaine en cause au principal ne va pas au-delà de ce qui est nécessaire pour la réalisation de l'objectif légitime qui sous-tend celle-ci.

39. Eu égard à l'ensemble des considérations qui précèdent, il y a lieu de répondre à la question posée que l'article 49 TFUE doit être interprété en ce sens qu'il ne s'oppose pas, en principe, à une réglementation d'un État membre en vertu de laquelle un transfert de fonds opéré par une succursale résidente, en faveur de sa société mère établie dans un autre État membre peut être requalifié d'« opération génératrice de revenus », de telle sorte que l'application des règles en matière de prix de transfert devient obligatoire, alors que, si la même opération avait été effectuée entre une succursale et une société mère établies toutes deux dans le même État membre, elle n'aurait pas été qualifiée ainsi et lesdites règles n'auraient pas trouvé à s'appliquer.

**Sur les dépens**

40. ...

Par ces motifs,

la Cour (sixième chambre)

dit pour droit :

**L'article 49 TFUE doit être interprété en ce sens qu'il ne s'oppose pas, en principe, à une réglementation d'un État membre en vertu de laquelle un transfert de fonds opéré par une succursale résidente, en faveur de sa société mère établie dans un autre État membre peut être requalifié d'« opération génératrice de revenus », de telle sorte que l'application des règles en matière de prix de transfert devient obligatoire, alors que, si la même opération avait été effectuée entre une succursale et une société mère établies toutes deux dans le même État membre, elle n'aurait pas été qualifiée ainsi et lesdites règles n'auraient pas trouvé à s'appliquer.**