Case C-287/10

Tankreederei I SA

v

Directeur de l’administration des contributions directes

(Reference for a preliminary ruling from the tribunal administratif (Luxembourg))

(Freedom to provide services – Free movement of capital – Tax credit for investments – Grant linked to the physical use of the investments on national territory – Use of inland navigation vessels used in other Member States)

Summary of the Judgment

Freedom to provide services – Restrictions – Tax legislation

(Art. 56 TFEU)

Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

Such a national provision – which applies a less favourable tax regime to investments used in the territory of other Member States, in which the undertaking concerned is not established, than to investments that are used in national territory – is likely, if not to discourage national undertakings from providing, in other Member States, services that require the use of capital goods situated in those other Member States, at least to make that provision of cross-border services less attractive or more difficult than the provision of services in national territory by means of capital goods situated in that territory.

Such national rules cannot be justified by the need to ensure the coherence of the national tax system since there is no direct link, as regards the tax system concerned, between, on the one hand, the grant to a resident undertaking providing services in other Member States of a tax credit for investments used for those purposes and, on the other hand, the financing of that tax advantage by means of the tax levied on the income made by the recipients of the services provided by means of those assets.

Such rules cannot, moreover, be justified by the need to prevent abuse since they affect every undertaking which uses capital goods in the territory of another Member State, and do so even where nothing points towards the existence of a wholly artificial arrangement which does not reflect economic reality and whose only purpose is to obtain a tax advantage.

Furthermore such a national provision which consistently refuses the benefit of a tax advantage when the investment is not used in national territory, notwithstanding the fact that the investment in question is unconnected with any social objective, cannot be justified by the discretion of Member States to choose the interests of the general public which they wish to promote by granting tax advantages.

(see paras 17, 23, 25, 28-30, 32, 34, operative part)

JUDGMENT OF THE COURT (Third Chamber)

22 December 2010 (*)

(Freedom to provide services – Free movement of capital – Tax credit for investments – Grant linked to the physical use of the investments on national territory – Use of inland navigation vessels used in other Member States)

In Case C?287/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the tribunal administratif (Luxembourg), made by decision of 8 June 2010, received at the Court on 10 June 2010, in the proceedings

Tankreederei I SA

v

Directeur de l’administration des contributions directes,

THE COURT (Third Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, D. Šváby, E. Juhász, G. Arestis and T. von Danwitz, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Tankreederei I SA, by F. Collot, avocat,

– the French Government, by G. de Bergues and B. Cabouat, acting as Agents,

– the European Commission, by R. Lyal and J.-P. Keppenne, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 TFEU and

63 TFEU.

2 The reference has been made in proceedings between Tankreederei I SA (‘Tankreederei’), a company governed by Luxembourg law, and the directeur de l’administration luxembourgeoise des contributions directes (the Director of the Luxembourg direct taxation authorities), following the refusal on the part of those authorities to grant that company tax credits for investments.

National law

3 The first paragraph of Article 152 bis of the Law of 4 December 1967 on income tax (*Mémorial* A 1967, p. 1228), as amended by the law of 19 December 1986 (*Mémorial* A 1986, p. 2330) (‘the LIT’), provides:

‘On application, taxpayers shall obtain the income tax credits referred to below on investments referred to in paragraphs 2 and 7 which they make in their undertakings as defined in Article 14. The investments must be made in an establishment situated in the Grand-Duchy and be intended to remain there permanently; they must also be physically used on Luxembourg territory’.

The facts which gave rise to the dispute in the main proceedings and the question referred for a preliminary ruling

4 Tankreederei, which has its principal office in Luxembourg, operates two inland navigation vessels from Luxembourg for the purpose of its business of providing sea vessels with hydrocarbons for their holds (‘bunkering’) in the ports of Antwerp (Belgium) and Amsterdam (Netherlands).

5 For the tax years 2000 to 2003, it claimed tax credits for investments under Article 152 bis of the LIT, which were refused, on 11 May 2005, by the administration des contributions directes du Grand-Duché de Luxembourg (Direct taxation authorities of the Grand-Duchy of Luxembourg) on the ground that the vessels concerned were used abroad.

6 On 28 June 2005, Tankreederei lodged a complaint with the Director of those authorities, which the Director rejected by decision of 29 January 2009 (‘the decision of 29 January 2009’).

7 On 23 April 2009, Tankreederei brought an action against the decision of 29 January 2009 before the national court. In support of that action, it argues that Article 152 bis of the LIT is incompatible with Article 56 TFEU. Stating, first, that it has no permanent establishment other than in Luxembourg and must therefore be regarded as an undertaking as defined in Article 14 of the LIT and, secondly, that its vessels are entered as assets on its balance sheet in that Member State and are used in connection with activities that are taxable exclusively in Luxembourg territory, Tankreederei submits that the decision of 29 January 2009 is tantamount to according it tax treatment less favourable than that of companies engaged in the same activities in the territory of that Member State. It submits that the treatment which is applied to it consequently constitutes an unjustified restriction on the freedom to provide services. It adds that, although its vessels are appropriate for the purpose of navigation on the Luxembourg Moselle, the maritime inland navigation department of the Ministry of Transport rejected its application for registration of those vessels in the Luxembourg port of Mertert, which compelled it to have them registered in the port of Antwerp.

8 On the basis of the finding that Tankreederei is established and liable to tax in Luxembourg and that the decision of 29 January 2009 was based on failure to comply with the condition, set out in Article 152 bis of the LIT, that the investment be physically used on Luxembourg territory, the tribunal administratif (Administrative Court) states that, contrary to the view taken before it by the

Luxembourg Government, European Union law precludes not only national legislation which constitutes discrimination on grounds of nationality, but is also capable of precluding national legislation that has the effect of deterring a national of one Member State from providing services or from investing in another Member State.

9 Faced with doubts on the compatibility of Article 152 bis of the LIT with European Union law, the tribunal administratif decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Do Articles [56 TFEU] and [63 TFEU] preclude the provisions of the first paragraph of Article 152 bis of the [LIT], insofar as, under those provisions, Luxembourg taxpayers are granted a tax credit for investments only if the investments are made in an establishment situated in the Grand-Duchy [of Luxembourg] and are intended to remain there on a permanent basis, and only if they are physically used on Luxembourg territory?’

The question referred for a preliminary ruling

10 By its question the national court asks, in essence, whether Articles 56 TFEU and 63 TFEU are to be interpreted as precluding a provision of a Member State which makes the grant of a tax credit for investments subject to the condition that the investments in question be made in an establishment situated in national territory, be intended to remain there on a permanent basis and that they be physically used in that territory.

11 It is apparent from the reference for a preliminary ruling and from the case-file sent to the Court that the national court’s question relates, more specifically, to the compliance with Articles 56 TFEU and 63 TFEU of the condition, as laid down in Article 152 bis of the LIT, which makes the grant of the tax advantage at issue in the main proceedings dependent on the physical use of the investments concerned in national territory.

12 In that regard, it must be pointed out, as did Tankreederei and the European Commission, that the services provided, in return for remuneration, by that company, which is exclusively established in Luxembourg, in connection with its refuelling business carried out in the ports of Antwerp and Amsterdam by the two vessels for which it sought a tax credit for investments, constitute services within the meaning of Article 57 TFEU.

13 It follows that the provisions of the FEU Treaty relating to freedom to provide services apply to a situation such as that in the main proceedings.

14 In that regard, whilst it is true that direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with EU law (see, inter alia, Case C?72/09 *Établissements Rimbaud* [2010] ECR I?0000, paragraph 23).

15 The Court has repeatedly held 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 (see, inter alia, Joined Cases C?155/08 and C?157/08 *X and Passenheim-van Schoot* [2009] ECR I?5093, paragraph 32). Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (see, inter alia, Case C?330/07 *Jobra* [2008] ECR I-9099, paragraph 19).

16 Furthermore, the freedom to provide services may be relied on by an undertaking against the Member State in which it is established where the services are provided to recipients established in another Member State and, more generally, whenever a provider of services offers

services in a Member State other than the one in which he is established (see, inter alia, Case C?208/05 *ITC* [2007] ECR I?181, paragraph 56).

17 In the present case, it must be held that a national provision such as that at issue in the main proceedings – which applies a less favourable tax regime to investments used in the territory of other Member States, in which the undertaking concerned is not established, than to investments that are used in national territory – is likely, if not to discourage national undertakings from providing, in other Member States, services that require the use of capital goods situated in those other Member States, at least to make that provision of cross-border services less attractive or more difficult than the provision of services in national territory by means of capital goods situated in that territory (see, to that effect, *Jobra*, paragraph 24).

18 It follows that such a national provision constitutes a restriction on freedom to provide services within the meaning of Article 56 TFEU.

19 That restriction may be accepted only if it is justified by overriding reasons in the public interest. Even if that were so, application of that restriction would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, to that effect, Case C?150/04 *Commission* v *Denmark* [2007] ECR I?1163, paragraph 46, and Case C-96/08 *CIBA* [2010] ECR I?0000, paragraph 45).

20 No possible justification has been put forward by the Luxembourg Government in the present case nor has any been mentioned by the national court.

21 In any event, in circumstances such as those of the main proceedings, the restriction referred to cannot be justified by the need, which the Court has held to be lawful, for the balanced allocation of the power to impose taxes between Member States (see, inter alia, Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraphs 45, 46 and 51).

22 It is sufficient, in that regard, to point out, as did Tankreederei and the Commission, that, according to the information provided by the national court, Tankreederei’s business activities relating to the refuelling services provided in the ports of Antwerp and Amsterdam by means of the vessels in respect of which the tax credit for investments is sought are exclusively taxable in Luxembourg. Consequently, the right of the Grand-Duchy of Luxembourg to exercise its taxing powers in relation to those activities would in no way be jeopardised if the condition referred to in paragraph 11 of this judgment did not exist (see, to that effect, *Jobra*, paragraphs 32 and 33).

23 The restriction in question cannot moreover be justified by the need to ensure the coherence of the national tax system, which was established by the Court as an overriding requirement relating to the public interest (See Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph 28, and Case C?300/90 *Commission* v *Belgium* [1992] ECR I?305, paragraph 21).

24 For such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (see, inter alia, Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 62 and the case-law cited).

25 As the Commission states, it is not apparent from the case-file submitted to the Court that there is a direct link, as regards the Luxembourg tax system, between, on the one hand, the grant to an undertaking providing services such as those at issue in the main proceedings of a tax credit for investments used for those purposes and, on the other hand, the financing of that tax advantage by means of the tax levied on the income made by the recipients of the services provided by means of those assets (see, to that effect, *Jobra*, paragraph 34 and the case-law cited).

26 It is therefore irrelevant, for the purposes of the grant of the tax credit at issue in the main proceedings, that the recipients of those services who are established in Luxembourg are subject to tax in that Member State and that those who are established in another Member State are not (see, to that effect, Case C?251/98 *Baars* [2000] ECR I?2787, paragraph 40).

27 The need to prevent the reduction of national tax revenues – a reduction which, in the main proceedings, the grant of the tax credit at issue to Tankreederei would result in – is not an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the FEU Treaty (see, to that effect, Case C?136/00 *Danner* [2002] ECR I?8147, paragraph 56, and Case C-318/07 *Persche* [2009] ECR I?359, paragraph 46).

28 As regards the need to prevent abuse, it is true that it is apparent from settled case-law that a restriction on the freedom to provide services can be justified where it specifically targets wholly artificial arrangements which do not reflect economic reality and whose only purpose is to obtain a tax advantage (see, inter alia, *Jobra*, paragraph 35 and the case-law cited).

29 However, the national provision at issue in the main proceedings affects every undertaking which uses capital goods in the territory of a Member State other than the Grand-Duchy of Luxembourg, and does so even where nothing, as in the main proceedings, points towards the existence of such an artificial arrangement (see, to that effect, *Jobra*, paragraphs 36 to 38).

30 Lastly, as regards the considerations voiced by the French Government on the discretion which Member States have to make the grant of a tax advantage which seeks to meet the specific needs of its entire or of part of its population subject to the requirement of a certain degree of connection between the recipient of the advantage and the society of the Member State concerned, it must be acknowledged that it is true that the choice of interests of the general public which a Member State wishes to promote by granting tax advantages is a matter for its own discretion (see, to that effect, Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 39).

31 Furthermore, as regards the need for a connection between the recipient of a benefit and the society of the Member State concerned, the Court has already held that, with regard to benefits that are not covered by European Union law, Member States enjoy a wide margin of appreciation in deciding which criteria are to be used when assessing the degree of connection to society (see, to that effect, Case C?103/08 *Gottwald* [2009] ECR I?9117, paragraphs 32 and 34).

32 However, in circumstances such as those of the case in the main proceedings, where a national provision consistently refuses the benefit of a tax advantage when the investment is not used in national territory, notwithstanding the fact that the investment in question is unconnected with any social objective, such a refusal cannot be justified by such considerations.

33 It is apparent from the foregoing analysis that a national provision such as that at issue in the main proceedings cannot be justified by overriding reasons of public interest.

34 Consequently, the answer to the question referred is that Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

35 In those circumstances, there is no need to examine whether the provisions of the FEU Treaty relating to the free movement of capital might also preclude such a national provision (see, to that effect, *Jobra*, paragraph 42).

Costs

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

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

Article 56 TFEU is to be interpreted as precluding a provision of a Member State pursuant to which the benefit of a tax credit for investments is denied to an undertaking which is established solely in that Member State on the sole ground that the capital goods, in respect of which that credit is claimed, are physically used in the territory of another Member State.

[Signatures]

* Language of the case: French.