JUDGMENT OF THE COURT (Second Chamber)

2 September 2015 (*)

(Reference for a preliminary ruling — Tax legislation — Freedom of establishment — Directive 90/435/EEC — Article 4(2) — Cross-border distributions of dividends — Corporation tax — Group taxation (French intégration fiscale) — Tax exemption for dividends paid by subsidiaries belonging to the tax-integrated group — Residence qualification — Dividends paid by non-resident subsidiaries — Non-deductible costs and expenses relating to the holding)

In Case C?386/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour administrative d'appel de Versailles (France), made by decision of 29 July 2014, received at the Court on 13 August 2014, in the proceedings

Groupe Steria SCA

v

Ministère des Finances et des Comptes publics,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, K. Lenaerts (Rapporteur), Vice-President of the Court, J.-C. Bonichot, A. Arabadjiev and C. Lycourgos, Judges,

Advocate General: J. Kokott,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 13 May 2015,

after considering the observations submitted on behalf of:

– Groupe Steria SCA, by R. Schneider, avocat,

– the French Government, by J.-S. Pilczer and D. Colas, acting as Agents,

– the German Government, by T. Henze, J. Möller and K. Petersen, acting as Agents,

– the Netherlands Government, by M. de Ree and M. Bulterman, acting as Agents,

– the United Kingdom Government, by J. Kraehling, acting as Agent, and by S. Ford, Barrister,

– the European Commission, by J.-F. Brakeland and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2015,

gives the following

Judgment

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

2 The request has been made in proceedings between Groupe Steria SCA and the ministère des Finances et des Comptes publics (Ministry of Finance and Public Accounts) concerning the latter's refusal to repay to Groupe Steria a proportion of the corporation tax and additional related amounts paid in respect of the tax years 2005 to 2008. The tax reclaimed is that levied on the proportion of costs and expenses added back to its profits and incurred in respect of dividends received from its subsidiaries which are established in Member States other than France.

Legal context

EU law

3 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), which was in force at the material time as regards the dispute in the main proceedings, provided, in Article 4:

'1. Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the State of the parent company and the State of its permanent establishment shall, except when the subsidiary is liquidated, either:

– refrain from taxing such profits, or

– tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, … up to the limit of the amount of the corresponding tax due.

...

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.'

4 Directive 90/435 was repealed by Article 9 of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8).

French law

5 Under Article 145(1) of the French General Tax Code (code général des impôts; 'the CGI'), the tax regime for parent companies is applicable, inter alia, to companies subject to corporation tax at the normal rate which have holdings representing at least 5% of the capital of the issuing company.

6 As regards revenues from holdings, Article 216 of the CGI states:

'I. Net revenues from holdings giving entitlement to application of the tax regime for parent companies and referred to in Article 145 which are received by a parent company in the course of a financial year may be deducted from the net total profits of that company, after deduction of a proportion of costs and expenses.

The proportion of costs and expenses referred to in the first subparagraph is fixed in every case at 5% of the gross revenue from the holdings, including tax credits. That proportion may not exceed, however, for each tax period, the total amount of the costs and expenses of any nature incurred by the holding company during that period.'

7 As regards the tax integration scheme, Article 223 A of the CGI states:

'A company can render itself the sole party liable for corporation tax due on the overall profits of the group formed by the company itself and the companies of which it is the holder, continuously throughout the financial year, directly or indirectly through companies in the group, of at least 95% of the capital ...

...

Only those companies which have given their consent and whose results are subject to corporation tax under the conditions of the general law may be members of the group ...'

8 Article 223 B of the CGI provides:

'The overall profit is to be determined by the parent company through the algebraic sum of the results of each of the companies in the group, determined under the conditions of the general law ...

As regards the determination of the profits for financial years beginning on or before 1 January 1993, or ending after 31 December 1998, the overall profit shall be reduced by the proportion of costs and expenses which a group company has included in its results by virtue of its holding in another group company ...

...'

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

9 The appellant in the main proceedings is the parent company of a tax-integrated group as provided for in Article 223 A of the CGI. Steria, a company which is a member of that group, has holdings of more than 95% in subsidiaries established in France and in other Member States. In accordance with Article 216 of the CGI, the dividends received by Steria from subsidiaries established in other Member States were deducted from its net total profits, except for a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received ('the proportion of costs and expenses') and representing the costs and expenses borne by the parent company, relating to its holding in the subsidiary that distributed the dividends.

10 Having on that basis paid the corporation tax and additional amounts of its own accord, the appellant in the main proceedings requested repayment, for the tax years 2005 to 2008, of the proportion of those taxes corresponding to the proportion of costs and expenses. Its request was based on the incompatibility of the relevant national rules with Article 43 EC (now Article 49 TFEU). It raised the unequal treatment of dividends received by a parent company of a tax-

integrated group, depending on whether the dividends come from companies which are themselves members of that integrated group, which means that they are established in France, or from subsidiaries established in other Member States. In the first situation only, the dividends are fully exempt from corporation tax on account of the neutralisation, under Article 223 B of the CGI, of the add-back to the parent company's profits of the proportion of costs and expenses.

11 Since the tax authorities did not grant the request made by the appellant in the main proceedings, the latter brought an action before the tribunal administratif de Montreuil (Administrative Court, Montreuil). Following the dismissal of that action by judgment of 4 October 2012, the appellant in the main proceedings lodged an appeal against that judgment before the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles).

12 The referring court recalls that, in its judgment in *X Holding* (C?337/08, EU:C:2010:89), the Court of Justice held that Articles 49 TFEU and 54 TFEU do not preclude legislation of a Member State which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that Member State. However, according to the referring court, that judgment did not examine whether all the advantages reserved to companies that are members of a tax-integrated group are consistent with EU law.

13 In those circumstances, the cour administrative d'appel de Versailles decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Must Article 43 EC (now Article 49 TFEU) on freedom of establishment be interpreted as precluding the rules governing the French tax integration regime from granting a tax-integrated parent company neutralisation as regards the add-back of the proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies only, when such a right is refused to it under those rules as regards the dividends distributed to it from its subsidiaries established in another Member State, which, had they been resident, would have been eligible in practice, if they so elected?'

Consideration of the question referred

14 Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Therefore, even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are directed to ensuring that foreign nationals and companies 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 (judgment in *X*, C?686/13, EU:C:2015:375, paragraph 27 and the case-law cited).

15 It is apparent from the Court's case-law that freedom of establishment is hindered if, under a Member State's legislation, a resident company having a subsidiary or a permanent establishment in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment or a subsidiary in the first Member State (see judgment in *Nordea Bank Danmark*, C?48/13, EU:C:2014:2087, paragraph 19 and the case-law cited).

16 Under the rules at issue in the main proceedings, dividends received by a resident parent company which are issued by a subsidiary, whether resident or not, are deducted from the net profits of the parent company, excluding the proportion of costs and expenses. The costs and expenses relating to the holdings from which the tax-exempt dividends are issued are considered

non-deductible from the profits of the parent company.

17 However, that add-back of the proportion of costs and expenses to the profits of the parent company is neutralised in the case of a parent company which is part of a tax-integrated group as provided for in Article 223 A of the CGI only in respect of dividends distributed by subsidiaries belonging to that group.

18 It thus follows from rules of a Member State such as those at issue in the main proceedings that dividends received by a resident parent company that is part of a tax-integrated group and which have been distributed by subsidiaries belonging to the same tax group are deducted in full from the net profits of that parent company and are therefore fully exempt from corporation tax in that Member State, whereas dividends which that parent company receives from subsidiaries not belonging to that tax group are only partly exempt from corporation tax, owing to the add-back of the proportion of costs and expenses to that parent company’s profits.

19 Since, under such rules, only resident companies can be part of a tax-integrated group, the tax advantage at issue in the main proceedings is reserved to dividends of national origin.

20 To exclude from the benefit of such an advantage a parent company which owns a subsidiary established in another Member State is liable to make it less attractive for that parent company to exercise its freedom of establishment, as it would be deterred from setting up subsidiaries in other Member States.

21 In order for that difference in treatment to be compatible with the provisions of the Treaty on the freedom of establishment, it must relate to situations which are not objectively comparable or be justified by an overriding reason in the general interest (see judgment in *X Holding*, C?337/08, EU:C:2010:89, paragraph 20).

22 The fact that the dividends received by a parent company which enjoy full tax exemption come from subsidiaries that are part of the tax-integrated group to which the parent company concerned also belongs does not amount to an objective difference in the situation of parent companies that would justify the difference in treatment identified (see, to that effect, judgments in *Papillon*, C?418/07, EU:C:2008:659, paragraphs 23 to 30; *X Holding*, C?337/08, EU:C:2010:89, paragraphs 21 to 24; and *SCA Group Holding and Others*, C?39/13 to C?41/13, EU:C:2014:1758, paragraphs 29 to 31). With regard to legislation such as that at issue in the main proceedings, which, through the neutralisation of the add-back of the proportion of costs and expenses to the parent company’s profits, provides for dividends received to be fully exempt from tax, the situation of companies belonging to a tax-integrated group is comparable to that of companies not belonging to such a group in so far as, in each case, the parent company bears the costs and expenses related to its shareholding in the subsidiary, and, moreover, the profits made by the subsidiary and from which the dividends distributed are derived are, in principle, liable to be subject to economic double taxation or to a series of charges to tax (see, to that effect, judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C?436/08 and C?437/08, EU:C:2011:61, paragraph 113, and *Santander Asset Management SGIIC and Others*, C?338/11 to C?347/11, EU:C:2012:286, paragraph 42).

23 It is also necessary to examine whether a difference in treatment such as that at issue in the main proceedings is justified by an overriding reason in the general interest.

24 The French, Netherlands and United Kingdom Governments submit that the neutralisation of the add-back of the proportion of costs and expenses is indissociable from the tax integration scheme, which is justified by the need to safeguard the allocation of the power to impose taxes between the Member States.

25 It should be borne in mind in that regard that, in its judgment in *X Holding* (C?337/08, EU:C:2010:89, paragraphs 18 and 43), the Court, having recalled that a tax integration scheme allows, in particular, for the profits and losses of the companies constituting the tax entity to be consolidated at the level of the parent company and for the transactions carried out within the group to remain neutral for tax purposes, held that the Treaty provisions on the freedom of establishment do not preclude legislation of a Member State which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that Member State.

26 According to the Court, the exclusion of non-resident companies from such a scheme is justified in view of the need to safeguard the balanced allocation of the power to impose taxes between the Member States. Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account (judgment in *X Holding*, C?337/08, EU:C:2010:89, paragraphs 31 to 33).

27 It cannot, however, be inferred from the judgment in *X Holding* (C?337/08, EU:C:2010:89) that any difference in treatment between companies belonging to a tax-integrated group, on the one hand, and companies not belonging to such a group, on the other, is compatible with Article 49 TFEU. In that judgment, the Court merely examined the residence condition as a condition of access to a tax integration scheme, and held that that condition was justified, taking into account the fact that such a scheme allows losses to be transferred within the tax-integrated group.

28 As regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must therefore be made, as the Advocate General noted in point 34 of her Opinion, as to whether a Member State may reserve those advantages to companies belonging to a tax-integrated group and consequently exclude them in cross-border situations.

29 A difference in treatment such as that at issue in the main proceedings cannot be justified by the need to safeguard the balanced allocation of the power to impose taxes between the Member States. The difference in treatment concerns only incoming dividends, received by resident parent companies, so that what is concerned is the fiscal sovereignty of one and the same Member State (see, to that effect, judgment in *Papillon*, C?418/07, EU:C:2008:659, paragraphs 39 and 40).

30 The French, German and United Kingdom Governments also invoked the need to safeguard the cohesion of the tax system at issue in the main proceedings.

31 For an argument based on such justification to succeed, a direct link has to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (judgment in *Bouanich*, C?375/12, EU:C:2014:138, paragraph 69 and the case-law cited).

32 In that regard, the French Government maintained that the tax advantage at issue in the

main proceedings meets the objective of treating the group comprising the parent company and its subsidiaries in the same way as a single undertaking with a number of establishments.

33 Admittedly, such treatment means that the shareholdings held by the parent company at the head of a tax-integrated group in its subsidiaries are disregarded, which means that various transactions within the group are considered non-existent in fiscal terms. The Court accepted in its judgment in *Papillon* (C?418/07, EU:C:2008:659, paragraph 50) that a direct link may exist under the tax integration regime between a tax advantage given to the companies belonging to a tax-integrated group and a tax disadvantage resulting from such neutralisation of intragroup transactions. In the case giving rise to that judgment, the immediate taking into account by the parent company of the losses incurred by its subsidiary was offset by the fact that, in the context of a tax-integrated group, the existence of the first company’s holding in the second was disregarded, making it impossible for the parent company to make a provision for the depreciation of its holding in the subsidiary incurring the losses (see judgments in *Papillon*, C?418/07, EU:C:2008:659, paragraph 48, and *SCA Group Holding and Others*, C?39/13 to C?41/13, EU:C:2014:1758, paragraphs 34 and 35).

34 However, unlike the situation in *Papillon* (C?418/07, EU:C:2008:659), it has not been possible to identify any direct link, within the meaning of the case-law cited in paragraph 31 of the present judgment, between the tax advantage at issue in the main proceedings and a tax disadvantage resulting from the neutralisation of intragroup transactions.

35 Even if, as the French Government submits, the neutralisation of the add-back of the proportion of costs and expenses results from the fact that the group comprising the parent company and its subsidiaries is treated in the same way as a single undertaking with a number of establishments, that neutralisation does not entail any tax disadvantage for the parent company at the head of the tax-integrated group; on the contrary, as is apparent from paragraphs 17 to 19 of the present judgment, it confers on it the tax advantage at issue in the main proceedings.

36 Accordingly, the argument relating to the need to safeguard the cohesion of the tax system at issue in the main proceedings cannot be accepted.

37 Lastly, the French and German Governments also submit that the tax advantage at issue in the main proceedings is consistent with Article 4(2) of Directive 90/435, according to which the Member States are to retain the option of providing that any charges relating to a parent company’s holding in its subsidiary may not be deducted from the parent company’s taxable profits. They submit that Article 216 of the CGI implements that option.

38 That argument cannot be accepted either.

39 It is evident from settled case-law that the decision which Article 4(2) of Directive 90/435 leaves in the hands of the Member States may be exercised only in compliance with the fundamental provisions of the Treaty, in this instance Article 49 TFEU (see judgments in *Bosal*, C?168/01, EU:C:2003:479, paragraph 26; *Keller Holding*, C?471/04, EU:C:2006:143, paragraph 45; and *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 46).

40 It follows from all the foregoing considerations that the answer to the question raised is that Article 49 TFEU must be interpreted as precluding rules of a Member State that govern a tax integration regime under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when such neutralisation is refused to it under those rules as regards the dividends distributed to it from subsidiaries located in another Member State, which, had they been resident, would have been eligible in practice, if they

so elected.

Costs

41 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 (Second Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding rules of a Member State that govern a tax integration regime under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when such neutralisation is refused to it under those rules as regards the dividends distributed to it from subsidiaries located in another Member State, which, had they been resident, would have been eligible in practice, if they so elected.

[Signatures]

* Language of the case: French.