Downloaded via the EU tax law app / web

Provisional text

JUDGMENT OF THE COURT (First Chamber)

22 February 2018 (*)

(Reference for a preliminary ruling — Articles 49 and 54 TFEU — Freedom of establishment — Tax legislation — Corporation tax — Advantages linked to the formation of a single tax entity– Exclusion of cross-border groups)

In Joined Cases C?398/16 and C?399/16,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decisions of 8 July 2016, received at the Court on 18 July 2016, in the proceedings

X BV (C?398/16),

X NV (C?399/16)

v

Staatssecretaris van Financiën,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund, J.?C. Bonichot (Rapporteur), A. Arabadjiev and S. Rodin, Judges,

Advocate General: M. Campos Sánchez-Bordona,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– X BV and X NV, by M. Sanders, advocaat,

– the Netherlands Government, by M.K. Bulterman, M.H.S. Gijzen and C.S. Schillemans, acting as Agents,

– the European Commission, by W. Roels and N. Gossement, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 October 2017,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 49 and 54 TFEU.

2 The requests have been made in two sets of proceedings between, on the one hand, X BV and X NV respectively and, on the other, the Staatssecretaris van Financiën (State Secretary for Finance, the Netherlands, 'the tax authorities') concerning the possibility of deducting for tax purposes, in the case of X BV, interest paid on a loan and, in the case of X NV, a currency loss.

Netherlands law

3 Article 10a of the Wet op de vennootschapsbelasting 1969 (Law on corporation tax, 1969; 'the Law on corporation tax') is worded as follows:

'...

2. When profits are being determined ..., interest — including costs and currency exchange results — may not be deducted if it relates to loans which in law or in fact are directly or indirectly payable to a related entity or related natural person, in so far as the loan relates to one of the following legal transactions:

a. ...

b. an acquisition — including the paying up — of shares, redeemed shares, participation certificates, membership rights or debts which function, in fact, for the debtor as own funds within the meaning of Article 10(1)(d), in a related entity, except in so far as a change is made to the ultimate ownership or the ultimate control of that entity;

3. Paragraph 2 shall not apply if the taxpayer can demonstrate that:

a. there are predominantly sound business reasons for the loan and for the associated legal transaction; or

b. ultimately, a profit tax or income tax which, in accordance with the Netherlands criteria, is reasonable is levied on the interest of the person to whom interest is payable, in law or fact, directly or indirectly, and that there is no offsetting of losses or charges of another kind for the years preceding that in which the loan is taken out with the result that, ultimately, no tax is payable on the interest according to the criteria of reasonableness referred to, except where it is plausible that the loan was taken out with a view to offsetting losses or charges of another kind which arose during the year itself or will arise in the short term.'

4 Article 13(1) of the Law on corporation tax provides:

'For the purposes of determining the profit, no account shall be taken of the advantages derived from a holding or the costs incurred in respect of the acquisition or disposal of that holding (holding exemption).'

5 Article 13d of that law is worded as follows:

'1. The holding exemption shall not apply to the losses related to a holding which are brought about by the dissolution of the entity in which the taxable person has a holding (liquidation loss).

2. The liquidation loss corresponds to the amount of the taxable person's holding which exceeds the overall liquidation surplus. ...'

6 Article 15 of that law is worded as follows:

'1. Where a taxable person (the parent company) holds, legally and economically, at least 95% of the shares in the nominal paid-up capital of another taxable person (the subsidiary) and where both taxable persons so request, tax shall be levied on them as if they were a single taxable person, with the activities and assets of the subsidiary forming part of the activities and assets of the parent company. The tax shall be levied on the parent company. In that case, the taxable persons are together regarded as a single tax entity. More than one subsidiary may form part of a single tax entity.

2. A holding, as referred to in paragraph 1, also means an indirect holding of shares, provided that those shares are directly held by one or more taxable persons belonging to the single tax entity.

3. Paragraph 1 shall apply only if:

...

c. both taxable persons are established in the Netherlands …'

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

Case C?398/16

7 The company X BV incorporated under Netherlands law is part of a Swedish group, which also includes an Italian company. In order to purchase shares in the latter, which were held by third parties, X BV set up another Italian company, to which it contributed capital in the amount of EUR 237 312 000. That contribution was financed by means of a loan to X BV from a Swedish company in the same group. Under that loan, in 2004 X BV owed the lending company the sum of EUR 6 503 261 in respect of interest. That interest was deducted by X BV in its corporation tax return for 2004. Nonetheless, the tax authorities considered that Article 10a(2)(b) of the Law on corporation tax precluded that deduction, and they issued a notice of assessment to X BV which the latter seeks to have annulled in the Netherlands courts.

8 In the action which it brought contesting that notice of assessment, X BV argued that it could have deducted that loan interest from its profits if it had been able to form a single tax entity with its Italian subsidiary. Since Netherlands law reserves that right to resident companies, X BV claims that its freedom of establishment has been limited contrary to Articles 49 and 54 TFEU.

9 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which is seised of the case on an appeal on a point of law, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must … Articles 49 and 54 TFEU … be interpreted as precluding national legislation pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan associated with a capital contribution made to a subsidiary established in another Member State, whereas that deduction could have been availed of if that subsidiary had been included with that parent company in a single tax entity — with characteristics such as those of a Netherlands single tax entity — in view of the fact that, in that case, by reason of consolidation, there would be no obvious association with such a capital contribution?’

Case C?399/16

10 X NV, a company incorporated under Netherlands law, has an indirect subsidiary established in the United Kingdom. In its corporation tax returns for 2008 and 2009, X NV sought to deduct as an expense the loss on its shareholdings resulting from fluctuations in the exchange rate. Pursuant to Article 13(1) of the Law on corporation tax, according to which neither gains made nor losses incurred by reason of shareholdings are taken into account for the purposes of determining the profit, the tax authorities refused to allow that deduction.

11 X NV contested its notice of assessment for the years 2008 and 2009, arguing that it would have been able to deduct from its profits the currency loss incurred if it had been able to form a single tax entity with its subsidiary. Since Netherlands law reserves that right to deduct to resident companies only, X NV claims that its freedom of establishment has been limited contrary to Articles 49 and 54 TFEU.

12 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands), which is seised of the case on an appeal on a point of law, decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must … Articles 49 and 54 TFEU … be interpreted as precluding national legislation pursuant to which a parent company established in a Member State cannot take into account a currency loss in connection with the amount which it has invested in a subsidiary established in another Member State, whereas it would be able to do so if that subsidiary were to be included in a single tax entity — with characteristics such as those of the Netherlands single tax entity — with that parent company established in the first-mentioned Member State, as a result of consolidation within the single tax entity?

(2) If the answer to Question 1 is in the affirmative: can or must the point of departure for determining the currency loss to be taken into account be that (one or more of) the direct and indirect subsidiaries indirectly held by the parent company concerned, through the subsidiary [referred to in Question 1], and established in the European Union, should also be included in the single tax entity?

(3) If the answer to Question 1 is in the affirmative: should account be taken only of currency losses that would have been reflected on the parent company’s inclusion in the single tax entity in the years to which the dispute relates, or should the currency exchange results that would have been reflected in earlier years also be taken into account?’

13 By decision of the President of the Court of 9 August 2016, Cases C?398/16 and C?399/16 were joined for the purposes of the written and oral procedure and the judgment.

The application to have the oral part of the procedure reopened

14 Following the delivery of the Advocate General’s Opinion on 25 October 2017, X NV, by a

document lodged at the Court Registry on 16 November 2017, applied for the oral part of the procedure in Case C?399/16 to be reopened. In support of that application, that company argues, in essence, that the Opinion is based on a misinterpretation of the Netherlands tax rules at issue.

15 By a document lodged at the Court Registry on 2 January 2018, X BV also applied for the oral part of the procedure in Case C?398/16 to be reopened.

16 It should be observed that the Court may at any moment, after hearing the Advocate General, order the reopening of the oral part of the procedure under Article 83 of its Rules of Procedure if, inter alia, 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 parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgment of 29 April 2015, *Nordzucker*, C?148/14, EU:C:2015:287, paragraph 24).

17 In the present case, the Court considers, after hearing the Advocate General, that it has sufficient information to be able to adjudicate and that Cases C-398/16 and C?399/16 do not need to be decided on the basis of arguments that have not been debated. The Court holds, therefore, that there is no need to reopen the oral part of the procedure.

Consideration of the questions referred

Preliminary observations

18 Article 49 TFEU requires the elimination of restrictions on freedom of establishment of nationals of a Member State in the territory of another Member State. That freedom includes, for companies established in accordance with the legislation of a Member State and having their registered office, central administration or principal place of business within the European Union — which Article 54 TFEU treats in the same way as natural persons who are nationals of Member States, for the purposes of exercising freedom of establishment — the right to exercise their activity in other Member States through a subsidiary, branch or agency (see, to that effect, judgments of 21 May 2015, *Verder LabTec*, C?657/13, EU:C:2015:331, paragraph 32, and of 2 September 2015, *Groupe Steria*, C?386/14, EU:C:2015:524, paragraph 14).

19 Although, according to their wording, the provisions on freedom of establishment are aimed at ensuring the benefit of national treatment in the host Member 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 in accordance with its legislation.

20 However, a difference in treatment stemming from a Member State’s legislation to the detriment of companies exercising their freedom of establishment does not constitute an obstacle to that freedom if it relates to situations which are not objectively comparable or is justified by an overriding reason in the public interest and proportionate to that objective (see, to that effect, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C?446/04, EU:C:2006:774, paragraph 167, and 25 February 2010, *X Holding*, C?337/08, EU:C:2010:89, paragraph 20).

21 The Court has had occasion, in the judgment of 25 February 2010, *X Holding* (C?337/08, EU:C:2010:89), to rule on the compatibility with EU law of a Member State’s tax legislation, such as the Netherlands tax legislation, which reserves to resident parent companies and their resident subsidiaries the possibility of being subject to a tax integration scheme, that is to say to have tax levied on them as if they were a single tax entity. Such a scheme constitutes an advantage for the companies concerned in so far as it 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 that tax entity to remain neutral for tax purposes.

22 In paragraph 19 of that judgment, the Court held that the exclusion of such an advantage for a parent company which owns a subsidiary established in another Member State is liable to render less attractive the exercise by that parent company of its freedom of establishment by deterring it from setting up subsidiaries in other Member States.

23 The Court nonetheless decided, in paragraph 43 of that judgment, that that difference in treatment was justified in view of the need to safeguard the allocation of the power to impose taxes between the Member States and that the restriction on the freedom of establishment stemming therefrom was proportionate to that objective.

24 It cannot, however, be inferred from the judgment of 25 February 2010, *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. As regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must, therefore, be made 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 (see, to that effect, judgment of 2 September 2015, *Groupe Steria*, C?386/14, EU:C:2015:524, paragraphs 27 and 28).

25 In both disputes in the main proceedings, the applicant companies, which have non-resident subsidiaries, submit that they are because of that fact deprived of tax advantages, other than the transfer of losses within the tax-integrated group, which Netherlands law unjustifiably reserves to single tax entities. The referring court asks the Court of Justice, in essence, whether Article 49 TFEU must be interpreted as precluding those differences in treatment.

The question in Case C?398/16

26 By its question, the referring court asks, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan taken out with a related company in order to finance a capital contribution to a subsidiary established in another Member State, whereas if the subsidiary were established in the same Member State, the parent company could avail itself of that deduction by forming a tax-integrated entity with it.

The difference in treatment

27 Under Article 10a(2)(b) of the Law on corporation tax, interest in respect of loans taken out with a related entity is not deductible from taxable profit if that loan relates to a capital contribution, in particular in the form of the purchase of shares in a related entity. Under Article 10a(3)(a) of the Law on corporation tax, the situation is different, however, if the taxable person can demonstrate that there are predominantly sound business reasons for the debt and for the associated legal transaction.

28 Article 15 of that law allows, moreover, a group of resident companies to form a single tax entity. As is apparent from paragraph 21 above, companies which opt for that scheme are taxed jointly at the level of the parent company. Within the single tax entity, mutual equity links, such as a capital contribution from a parent company to its subsidiary, become non-existent for the purposes of taxation, as a result of consolidation.

29 Since, according to the referring court, a capital contribution is not apparent in a single tax

entity, Article 10a(2)(b) of the Law on corporation tax does not apply to a company which borrows from a related entity in order to make a capital contribution by purchasing shares in its subsidiary with which it forms a single tax entity. In that situation, the company is, therefore, able to deduct from its taxable profits the interest in respect of its loan without having to fulfil the conditions listed in Article 10(3) of that law.

30 Given that, pursuant to Article 15(3) of the Law on corporation tax, a single tax entity may be formed only between taxable persons established in the Netherlands, there is a difference in treatment between, on the one hand, a Netherlands parent company financing its subsidiary, which is also a Netherlands company, by a loan taken out with a related company, in respect of which the deduction of interest on that loan may not be limited by the application of Article 10a of that law and, on the other hand, a Netherlands parent company financing its foreign subsidiary in the same manner, but in respect of which the deduction of the interest may be refused on the basis of the same provisions.

31 In the present case, X BV financed the purchase of shares in its Italian subsidiary through a loan granted to it by a Swedish company belonging to the same group. Pursuant to Article 10a(2)(b) of the Law on corporation tax, the tax authorities refused to allow X BV to deduct the interest in respect of that loan, owing to its failure to demonstrate that there were sound business reasons for its recourse to the loan. X BV submits that it would have been treated more favourably if its subsidiary had been a resident company, since it could have formed a single tax entity with it and accordingly deducted its loan interest from its profits without any restriction.

32 That difference in treatment is liable to make the exercise by a parent company of its freedom of establishment through the creation of subsidiaries in other Member States less attractive. In order for that difference to be compatible with the provisions of the Treaty, it must, as is apparent from paragraph 20 above, relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest.

Whether the situations are comparable

33 Whether the cross-border and national situations are comparable must be examined having regard to the purpose and content of the national provisions in question (see, to that effect, judgment of 18 December 2014, *X*, C?87/13, EU:C:2014:2459, paragraph 27).

34 In the present case, the difference in treatment at issue stems from the combination of Article 10a(2)(b) and Article 15 of the Law on corporation tax. However, the purpose of those provisions is different. Whereas Article 10a(2)(b) of that law seeks to prevent the Netherlands tax base being eroded by contrived intra-group financial arrangements, Article 15 of the law allows the profits and losses of the companies constituting the single tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes. According to the referring court, one of the consequences of the single tax entity scheme is that the association between the loan and the capital contribution which determines whether Article 10a(2)(b) of the Law on corporation tax applies disappears because of consolidation.

35 However, Article 10a(2)(b) of the Law on corporation tax does not itself draw any distinction according to whether or not a group is cross-border. Consequently, whether the situations are comparable must be examined only in the light of the purpose of Article 15 of that law, having regard to the consequence of consolidation set out by the referring court.

36 The Court has already held, in paragraph 24 of the judgment of 25 February 2010, *X Holding* (C?337/08, EU:C:2010:89), with regard to the Netherlands tax scheme of the single tax entity, that

the situation of a resident parent company wishing to form a single tax entity with a resident subsidiary and the situation of a resident parent company wishing to form a single tax entity with a non-resident subsidiary are objectively comparable with regard to the objective of that tax scheme.

37 It follows from this that the cross-border and national situations are comparable in the light of the combination of the national provisions at issue in the main proceedings and that there is, therefore, a difference in treatment. That difference may, however, be justified by overriding reasons in the public interest.

Justification

38 In that regard, the Netherlands Government and the referring court put forward several arguments in order to justify the difference in treatment described in paragraph 30 above.

39 First, the Court must assess whether such a difference in treatment may be justified by the need to safeguard the allocation of the power to impose taxes between the Member States. The Court has held, in the judgment of 25 February 2010, *X Holding* (C?337/08, EU:C:2010:89), as is apparent from paragraph 23 of the present judgment, that consolidation at the parent-company level for the profits and losses of the companies constituting a single tax entity represents an advantage which may justifiably be reserved to resident companies in view of the need to safeguard the allocation of the power to impose taxes between the Member States.

40 However, the advantage which X BV claims in the present case may not be confused with the advantage provided by consolidation within a single tax entity. The main proceedings concern the possibility of deducting interest charges, not the general offsetting of costs and gains specific to a single tax entity. Far from reserving that possibility of deducting interest to single tax entities, Netherlands law affords that possibility to any company and restricts it only in the particular case and conditions laid down in Article 10a(2)(b) of the Law on corporation tax. In avoiding that restriction, a parent company which together with its subsidiary forms a single tax entity does not, therefore, obtain an advantage specifically linked to the tax scheme of the single tax entity.

41 That is true all the more so since the application of Article 10a(2)(b) of the Law on corporation tax seems not to depend on the place of taxation of the income comprising the interest paid and, therefore, on ascertaining which State benefits from that taxation, a factor which the Netherlands Government has not indeed addressed.

42 Consequently, the difference in treatment at issue cannot be justified by the need to safeguard the allocation of the power to impose taxes between the Member States.

43 Secondly, the referring court asks whether justification could be derived from the need to ensure the coherence of the Netherlands tax system. The Court accepts that such a justification constitutes an overriding reason in the public interest, provided that a direct link is 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 of 2 September 2015, *Groupe Steria*, C?386/14, EU:C:2015:524, paragraph 31 and the case-law cited).

44 However, the Netherlands Government does not claim that such a link exists. It simply argues, in general terms, that the single tax entity scheme constitutes a coherent package of advantages and disadvantages. In any event, the Netherlands Government does not mention any specific evidence from which it may be concluded that the coherence of the single tax entity scheme would be jeopardised if the deduction of interest in respect of a loan intended to finance the purchase of shares in a non-resident subsidiary were permitted.

45 Consequently, the difference in treatment referred to in paragraph 30 above is not justified by the need to ensure the coherence of the Netherlands tax system.

46 Thirdly, that difference in treatment is justified, according to the Netherlands Government, by the objective of the fight against tax evasion and fraud and aims to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality with a view to evading the tax normally due on the profits generated by activities carried out on national territory.

47 It is apparent from the case-law of the Court, in particular from paragraph 26 of the judgment of 16 July 1998, *ICI* (C?264/96, EU:C:1998:370) and from paragraph 51 of the judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C?196/04, EU:C:2006:544), that such an objective may constitute an overriding reason in the public interest in the field of taxation.

48 That is unquestionably the aim pursued by Article 10a(2)(b) of the Law on corporation tax. As the referring court sets out, it is a question of preventing own funds of a group from being artificially presented as funds borrowed by a Netherlands entity of that group and the interest in respect of that loan from being deducted from the taxable profits in the Netherlands. The purpose of the prohibition of the deduction of interest in respect of intra-group loans is expressly confirmed by the rule that loan interest may be deducted, pursuant to Article 10a(3)(a), if the intra-group transaction is economically justified.

49 However, in order for a restriction on the freedom of establishment to be justified on the ground of prevention of abusive practices, the specific objective of that restriction must also be to prevent that abuse (see, to that effect, judgment of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas*, C?196/04, EU:C:2006:544, paragraph 55). However, the Netherlands Government does not even attempt to show that the difference in treatment referred to in paragraph 30 above is based on such an intention. Nor could that be the case, since the difference in treatment does not stem from Article 10a(2)(b) of the Law on corporation tax alone, but from that provision in conjunction with Article 15 of that law, relating to the single tax entity, which has a different purpose, as is apparent from paragraph 34 above.

50 In addition, as the Advocate General observed in point 82 of his Opinion, that difference in treatment is not objectively justifiable by the prevention of abusive practices. When a parent company finances the purchase of shares in a subsidiary by a loan taken out with another related company, the risk that that loan does not reflect a genuine economic transaction and is intended simply to create a deductible charge artificially is no less if the parent company and the subsidiary are both resident in the same Member State and together form a single tax entity than if the subsidiary is established in another Member State and is not, therefore, permitted to form a single tax entity with the parent company.

51 It follows from all the foregoing that the answer to the question referred in Case C?398/16 is that Articles 49 and 54 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan taken out with a related company in

order to finance a capital contribution to a subsidiary established in another Member State, whereas if the subsidiary were established in the same Member State, the parent company could avail itself of that deduction by forming a tax-integrated entity with it.

The questions in Case C?399/16

The first question

52 By its first question, the referring court asks, in essence, whether Articles 49 and 54 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct from its profits capital losses derived from fluctuations in the exchange rate, in connection with the value of its shares in a subsidiary established in another Member State, where the same legislation does not provide, symmetrically, for tax to be levied on capital gains derived from those fluctuations.

53 Under Article 13(1) of the Law on corporation tax, for the purposes of determining the profit, no account is to be taken of the advantages derived from a holding or the costs incurred in respect of the acquisition or disposal of that holding.

54 One of the consequences of that rule — 'the holding exemption' — is that both the increases and decreases in value of a holding stemming from changes in the exchange rate of a foreign currency in which the value of that holding is expressed are not taken into account for the purposes of determining profit.

55 That is why X NV cannot deduct from its taxable profits the currency loss which it has sustained on the amount of its investment, as a shareholder, in its subsidiary established in the United Kingdom. By contrast, it would be able to deduct that loss, according to the explanations provided by the referring court, through the effect of consolidation, in the context of a single tax entity, if its subsidiary had been established in the Netherlands. X NV submits that, consequently, it suffers discrimination which constitutes a barrier to freedom of establishment.

56 Such situations are not, however, objectively comparable. A Netherlands company may not sustain currency losses on its shareholding in a resident subsidiary, except in the very special case where that shareholding is denominated in a currency other than that in which the company's profits are expressed.

57 Even in that case, it is questionable whether a difference in treatment exists. Within a single tax entity, as is apparent from paragraph 21 above, mutual equity links are neutral for tax purposes. Consequently, the depreciation of a parent company's shareholding in its resident subsidiary with which it forms a single tax entity may not be deducted from the entity's profits, whether that depreciation is due to a change in the foreign currency rate or another cause.

58 Lastly and in any event, the Court has held that it cannot be inferred from the provisions of the FEU Treaty concerning freedom of establishment that a Member State would be required to exercise, asymmetrically, its taxation powers so as to permit the deduction of losses from operations whose results, if they were positive, would not in any event be taxed (judgment of 19 June 2015, *X*, C?686/13, EU:C:2015:375, paragraphs 40 and 41).

59 The disadvantage for a Netherlands company of not being able to deduct the currency loss it sustains, as the case may be, on its holding in a non-resident subsidiary is inseparable from the symmetrical advantage linked to the absence of taxation of currency gains. As the referring court states, 'the holding exemption' is a priori neither advantageous nor disadvantageous. It cannot,

therefore, give rise to a difference in treatment unfavourable to Netherlands companies having a subsidiary in another Member State nor, therefore, constitute a restriction on freedom of establishment.

60 Consequently, the answer to the first question in Case C?399/16 is that Articles 49 and 54 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct from its profits capital losses derived from fluctuations in the exchange rate, in connection with the value of its shares in a subsidiary established in another Member State, where the same legislation does not provide, symmetrically, for tax to be levied on capital gains derived from those fluctuations.

The second and third questions

61 In view of the answer given to the first question, there is no need to answer the second and third questions in Case C?399/16.

Costs

62 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 (First Chamber) hereby rules:

1. **Articles 49 and 54 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct interest in respect of a loan taken out with a related company in order to finance a capital contribution to a subsidiary established in another Member State, whereas if the subsidiary were established in the same Member State, the parent company could avail itself of that deduction by forming a tax-integrated entity with it.**

2. **Articles 49 and 54 TFEU must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, pursuant to which a parent company established in a Member State is not allowed to deduct from its profits capital losses derived from fluctuations in the exchange rate, in connection with the value of its shares in a subsidiary established in another Member State, where the same legislation does not provide, symmetrically, for tax to be levied on capital gains derived from those fluctuations.**

[Signatures]

* Language of the case: Dutch.