Provisional text

JUDGMENT OF THE COURT (First Chamber)

22 November 2018(*)

(Reference for a preliminary ruling — Articles 56 and 63 TFEU — Freedom to provide services and free movement of capital — Credit institutions — Stability charge and the special contribution for that charge determined according to the unconsolidated balance sheet total of credit institutions established in Austria — Inclusion of cross-border banking transactions — Exclusion of subsidiaries' transactions in another Member State — Difference in treatment — Restriction — Justification)

In Case C?625/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), made by decision of 18 October 2017, received at the Court on 3 November 2017, in the proceedings

Vorarlberger Landes- und Hypothekenbank AG

v

Finanzamt Feldkirch,

THE COURT (First Chamber),

composed of 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,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Vorarlberger Landes- und Hypothekenbank AG, by C. Nauer, Rechtsanwalt,

– the Austrian Government, by G. Hesse, acting as Agent,

– the European Commission, by R. Lyal, N. Gossement and C. Tritz, acting as Agents,

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

gives the following

Judgment

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;

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, *MobistarandBelgacom 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 41 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 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:

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.

[Signatures]

* Language of the case: German.