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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

20 October 2022 (*)

(Reference for a preliminary ruling – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 90/435/EEC – Article 4(1) – Exemption in favour of a parent company of the dividends paid by its subsidiary – Carrying over definitively taxed income surpluses to subsequent tax years – Absorption of a company with definitively taxed income surpluses by another company – National legislation limiting the transfer of those surpluses to the absorbing company)

In Case C?295/21,

REQUEST for a preliminary ruling under Article 267 TFEU from the cour d'appel de Bruxelles (Court of Appeal, Brussels; Belgium), made by decision of 29 April 2021, received at the Court on 10 May 2021, in the proceedings

Allianz Benelux SA

v

État belge, SPF Finances,

THE COURT (Eighth Chamber),

composed of M. Safjan, President of the Chamber, N. Jääskinen, and M. Gavalec (Rapporteur), Judges,

Advocate General: A. Rantos,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 3 February 2022,

after considering the observations submitted on behalf of:

– Allianz Benelux SA, by V.-A. De Brauwere, avocate,

– the Belgian Government, by S. Baeyens, J.-C. Halleux and C. Pochet, acting as Agents, and by D. Delvaux, acting as an expert

– the European Commission, by W. Roels and V. Uher, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 28 April 2022,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 4(1) of Council

Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), read in conjunction with the Third Council Directive 78/855/EEC of 9 October 1978 based on Article 54(3)(g) of the Treaty concerning mergers of public limited liability companies (OJ 1978 L 295, p. 36) and with the Sixth Council Directive 82/891/EEC of 17 December 1982 based on Article 54(3)(g) of the Treaty, concerning the division of public limited liability companies (OJ 1982 L 378, p. 47).

2 The request has been made in proceedings between Allianz Benelux SA and État belge – SPF Finances (Belgian State – Public Federal Finance Authority) concerning the determination of that company's taxable profits for the purposes of corporation tax in respect of the tax years 2004 to 2007.

Legal context

European Union law

Directive 90/435

3 The third and fourth recitals of Directive 90/435 state:

'Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;

Whereas where a parent company by virtue of its association with its subsidiary receives distributed profits, the State of the parent company must:

– either refrain from taxing such profits,

– or tax such profits while authorizing the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits'.

4 The first and second indents of Article 1(1) of that directive are worded as follows:

'Each Member State shall apply this Directive:

– to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.'

5 Under Article 4(1) and (2) of that directive:

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

– refrain from taxing such profits, or

– tax such profits while authorising the parent company to deduct from the amount of tax due

that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.

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.'

6 Directive 90/435 was amended, inter alia, by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41). According to Article 4(1) of Directive 90/435, as amended by Directive 2003/123:

'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, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.'

7 Directive 90/435 was repealed by 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), which entered into force on 18 January 2012. Nevertheless, given the date of the facts in the main proceedings, Directive 90/435 applies *ratione temporis*.

Directive 78/855

8 Article 19(1) of Directive 78/855 provides:

'A merger shall have the following consequences *ipso jure* and simultaneously:

(a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

…'

Belgian law

9 Article 202(1) of the Code des impôts sur les revenus 1992 (Income Tax Code 1992), in the version applicable to the facts in the main proceedings ('the CIR 1992'), provides:

'The following shall also be deducted from the profits for the tax period, in so far as they are included in it:

1° dividends, with the exception of income which is received on the transfer to a company of its

own listed or unlisted shares or during the complete or partial distribution of the assets of a company;

…'

10 The first paragraph of Article 204 of the CIR 1992 states the following:

'The income deductible under paragraph 1(1), (3) and (4) of Article 202 shall be deemed to be found in the profits for the tax period up to 95[%] of the amount collected or received, which may be increased by real or notional tax on immoveable property or, with regard to the income mentioned in paragraph 1(4) and (5) of Article 202, decreased by the interest credited to the seller in cases where the securities were acquired during the tax period.'

11 Article 205(2) of the CIR 1992 is worded as follows:

'The deduction provided for under Article 202 shall be limited to the amount of profit remaining in the relevant tax period after the application of Article 199, less: …'

12 Article 206 of the CIR 1992 states:

'§ 1. Earlier business losses shall be offset in turn against business income for each of the following taxable periods.

§ 2. …

In the case of a merger carried out pursuant to Article 211(1), the business losses made by an absorbed company before that merger are to remain deductible in the hands of the absorbing company in proportion to the share represented by the net tax assets before the merger of the absorbed parts of the absorbed company in the pre-merger total of the net tax assets of the absorbing company and of the net tax value of the absorbed parts. In the case of a division carried out pursuant to Article 211(1), the rule outlined above is to apply to that part of the business losses that is determined in proportion to the net value of the assets absorbed in the total net tax assets of the absorbed company.'

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

13 On 16 November 1995, AGF l'Escaut SA absorbed two insurance companies. On 15 September 1999, AGF l'Escaut itself, together with five other insurance companies, were absorbed by Assubel-Vie SA.

14 The companies absorbed by AGF l'Escaut and Assubel-Vie, joined under the company name Allianz Benelux, had definitively taxed income ('DTI') surpluses, which could be carried forward to subsequent tax years. Allianz Benelux then carried forward in full those DTI surpluses to the financial years 2004 to 2007. That full deferral was refused by the Belgian tax authorities.

15 Following an objection lodged by Allianz Benelux against that refusal, the competent regional director of the Belgian tax authorities, by decision of 19 December 2012, took the view that, in the absence of any statutory provision providing for the transfer of the DTI surpluses from an absorbed company to the absorbing company, the carry-forward of the DTI surpluses of the absorbed companies requested in the present case by Allianz Benelux had no legal basis. However, it allowed part of those surpluses to be carried forward only in respect of the proportion provided for in Article 206(2) of the CIR 1992 concerning recoverable losses.

16 Allianz Benelux brought an action against that decision before the tribunal de première

instance francophone de Bruxelles (Brussels Court of First Instance (French-speaking)) (Belgium). By judgment of 20 May 2016, that court dismissed the application to carry forward the DTI surpluses in full.

17 Allianz Benelux brought an appeal against that judgment before the referring court. That company claims that the fact that the absorbing company cannot carry forward in full the DTI capable of being carried forward, and which was available to the absorbed company, leads, in the first place, to the taxation of that income, in the second place, to an infringement of Article 4(1) of Directive 90/435 and, in the third place, to an infringement of the principle of fiscal neutrality.

18 In those circumstances, the cour d'appel de Bruxelles (Court of Appeal, Brussels, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 4(1) of [Directive 90/435], whether or not read in conjunction with the provisions of [Directives 78/855] and [82/891] on company law, to be interpreted as precluding national legislation which provides that the distributed benefits covered by the Directive are included in the basis of assessment of the company receiving the dividends before 95% of their total is deducted from that basis and, as the case may be, carried forward to subsequent tax years but which, in the absence of a specific provision stating, in the case of an operation involving the reorganisation of companies, that the deductions thus carried forward in the hand[s] of the transferring company are transferred in full to the receiving company, has the effect that the profits covered are indirectly taxed at the time of that operation on account of the application of a provision which limits the transfer of those deductions in proportion to the share represented by the net tax assets before the operation involving the absorbed parts of the transferring company in the total, once again before the operation, of the net tax assets of the absorbing company and of the net tax value of the absorbed parts?'

Consideration of the question referred

Admissibility

19 First of all, it should be noted that although, in the question referred for a preliminary ruling, the national court refers not only to Article 4(1) of Directive 90/435 but also to Directives 78/855 and 82/891, it does not mention any particular provision of the latter two directives, nor does it set out the reasons why they are relevant to the main proceedings.

20 In the first place, as regards Directive 82/891, that directive, in accordance with Article 1 thereof, governs only the divisions of public limited companies by acquisition and/or by the formation of new companies, so that it does not apply to the case in the main proceedings, which concerns a merger, distinct from such divisions.

21 In the second place, Directive 78/855 does not apply to the main proceedings either, since it relates only to the aspects of private law specific to mergers, without containing any tax-related provisions. In that regard, the tax aspects of mergers within the European Union were governed, at the material time, by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

22 In the third place, as regards Directive 90/435, it must be borne in mind, first, that, as is apparent in particular from the third and fourth recitals in its preamble, that directive aims to avoid, in economic terms, the double taxation of profits distributed by a subsidiary established in one Member State to its parent company established in another Member State in order to facilitate the

grouping together of companies at EU level. To that end, in order to attain the objective of fiscal neutrality, Article 4(1) of that directive makes provision for a rule which aims to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C?389/18, EU:C:2019:1132, paragraphs 35 and 36 and the case-law cited). No provision of that directive expressly provides for its application in the context of mergers between companies such as that at issue in the main proceedings.

23 Second, Article 1 of Directive 90/435 applies to distributions of profits received by companies of one Member State from their subsidiaries with a seat in other Member States. Furthermore, in accordance with the Court's case-law, the first indent of Article 4(1) of that directive does not govern the situation in which the seat of the company distributing the dividends is in the same Member State as that of the company receiving them (order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraph 57).

24 In the present case, the request for a preliminary ruling does not contain any information concerning the source of the dividends received by the absorbed companies, so that it does not appear possible to determine whether the transactions at issue in the main proceedings are governed by Directive 90/435 or whether, on the contrary, they are a purely internal situation involving only Belgian companies.

25 However, first, in accordance with established case-law, preliminary questions relating to the interpretation of EU law are presumed to be relevant (see, to that effect, judgment of 7 September 2022, *Cilevi?s and Others* (C?391/20, EU:C:2022:638, paragraph 42 and the case-law cited). Second, the Court has already held that Belgian domestic law refers, as regards the DTI system, to Directive 90/435 and has therefore accepted the admissibility of requests for a preliminary ruling by virtue of that reference, ruling that, since the scope of the reference made by national law to EU law is a question governed exclusively by national law, it is for the national court alone to assess the precise scope of that reference to EU law, the jurisdiction of the Court being confined to the examination of the provisions of EU law (see, to that effect, judgment of 18 October 2012, *Punch Graphix Prepress Belgium*, C?371/11, EU:C:2012:647, paragraphs 26 and 27 and the case-law cited).

26 In the present case, as the Advocate General observed in point 33 of his Opinion, it is apparent from the request for a preliminary ruling that the Belgian tax authorities expressly based the decision at issue in the main proceedings on the Court's case-law in relation to DTI.

27 In the light of the foregoing, it must be held that the question referred for a preliminary ruling is admissible and that it must be examined solely in the light of Directive 90/435.

Substance

28 By its single question referred for a preliminary ruling, the referring court asks, in essence, whether Article 4(1) of Directive 90/435 must be interpreted as precluding legislation of a Member State which provides that dividends received by a company are to be included in its basis of assessment before up to 95% of the total amount is deducted from it and which makes it possible, where appropriate, to carry that deduction forward to subsequent tax years, but which, nonetheless, where that company is absorbed in the context of a merger, limits the transfer of the carry-forward of that deduction to the absorbing company in proportion to the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company.

29 As a preliminary point, it should be recalled that Article 4(1) of Directive 90/435, as amended by Directive 2003/123, provides that, 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 are, except when the subsidiary is liquidated, to either (i) refrain from taxing such profits, or (ii) 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, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3 of that first directive, up to the limit of the amount of the corresponding tax due.

30 Directive 90/435 therefore expressly leaves it open to Member States to choose between the exemption system and the imputation system, set out in the first and second indents respectively of Article 4(1) of that directive (judgment of 19 December 2019, *Brussels Securities*, C?389/18, EU:C:2019:1132, paragraph 31 and the case-law cited).

31 According to the information contained in the request for a preliminary ruling, the Kingdom of Belgium has opted for the exemption system set out in the first indent of Article 4(1) of Directive 90/435. Therefore, the question referred must be answered by reference to that provision alone.

32 In that regard, the Court has held, first, that the obligation of the Member State which has chosen the system provided for in the first indent of Article 4(1) of Directive 90/435 to refrain from taxing the profits which the parent company receives by virtue of its association with its subsidiary is not subordinated to any condition and is expressly subject only to Article 4(2) and (3), and Article 1(2) of that directive, and, second, that that prohibition under the first indent of Article 4(1) also applies to national legislation which, although it does not tax the dividends received by the parent company in themselves, may have the effect that the parent company is subject indirectly to taxation on those dividends (judgment of 19 December 2019, *Brussels Securities*, C?389/18, EU:C:2019:1132, paragraphs 33 and 37 and the case-law cited).

33 As regards the Belgian DTI tax system, it is apparent from the documents before the Court that that system originally provided that dividends received by the parent company were added to its tax base and that an amount corresponding to 95% of those dividends was deducted from that base, but only to the extent that the parent company continued to have taxable profits, there being no possibility of carrying forward to subsequent tax years the part of the DTI which was not deducted (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C?389/18, EU:C:2019:1132, paragraph 39).

34 However, following the judgment of 12 February 2009, *Cobelfret* (C?138/07, EU:C:2009:82), the DTI system was amended to the effect that, in accordance with Article 205(3) of the CIR 1992, that part of the DTI which cannot be deducted during the tax year concerned due to insufficient profits may now be carried forward to subsequent tax years and that that carry-forward is not limited in time. It is therefore apparent that the reduction in losses which may be carried forward, due to the inclusion of dividends in the parent company's tax base, is now offset by an unlimited ability to carry forward DTI in the same amount (see, to that effect, judgment of 19 December 2019, *Brussels Securities*, C?389/18, EU:C:2019:1132, paragraph 40).

35 In the present case, the main proceedings do not concern a situation in which the dividends paid by a subsidiary to its parent company have been taxed in the hands of the parent company, but a situation in which, by analogy with the national legislation on the transfer of the losses of an absorbed company to the absorbing company in the event of a merger, the Belgian tax authorities allowed only part of the transfer of the DTI surpluses held by the absorbed company to the

absorbing company, that is to say within the limit of the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company.

36 In the first place, it should be noted that Article 4(1) of Directive 90/435 does not provide for the possibility of unconditionally carrying forward surpluses which constitute definitively taxed income, such as those covered by the Belgian DTI tax system, from an absorbed company to the absorbing company. That provision merely requires Member States, as has been pointed out in paragraphs 29 and 30 above, to choose between the exemption system and the imputation system in order to avoid economic double taxation of dividends paid by a subsidiary to its parent company, without prescribing the way in which the Member States which have chosen the exemption system must implement it.

37 Accordingly, Member States are free to determine, in the light of the requirements of their domestic legal systems, the detailed arrangements for ensuring that the result prescribed by the first indent of Article 4(1) of Directive 90/435 is attained (order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraph 50).

38 In the second place, neither Directive 90/434 nor any other provision of EU law provide for the right to carry forward surpluses unconditionally, such as those referred to in paragraph 36 above from the absorbed company to the absorbing company in the context of mergers, as claimed by Allianz Benelux.

39 In the third place, it is necessary to examine whether a system for DTI such as that at issue in the main proceedings leads to direct or indirect taxation of dividends received, which is incompatible with the first indent of Article 4(1) of Directive 90/435.

40 First, as regards the possible direct taxation of dividends, it is apparent from the documents before the Court that the DTI system at issue in the main proceedings ensures that the dividends received from the absorbed company are not taxed in the hands of the absorbing company. That system provides that, initially, dividends received by the parent company are to be included in its basis of assessment and, subsequently, an amount corresponding to 95% of those dividends is deducted from that basis in so far as taxable profits remain in the hands of the parent company after deduction of the other exempt profits. Accordingly, that scheme does not entail direct taxation of the dividends exempted under the first indent of Article 4(1) of Directive 90/435, which, moreover, none of the parties who submitted observations has maintained.

41 Second, as regards the possible indirect taxation of dividends, which, as has been pointed out in paragraph 32 above, is precluded by the first indent of Article 4(1) of Directive 90/435, it is necessary to determine whether the obligation laid down in that provision precludes the tax effects of a limitation on the transfer of surpluses being carried forward under a DTI system during a merger by absorption produced on the basis of assessment of the company receiving the dividends.

42 In that regard, it should be borne in mind that, in the judgment of 19 December 2019, *Brussels Securities* (C?389/18, EU:C:2019:1132), which concerned the order in which deductible income was deducted from taxable profits under Belgian tax law, in particular DTI surpluses as compared with other income for which the carry-forward of the tax deduction was limited in time, the Court carried out a comparison of the situation at issue in that case, in which the parent company, at the time of the tax deduction, had to comply with the order of priority for deducting DTI surpluses as against another tax deduction, with the situation that would have prevailed if the Kingdom of Belgium had applied an exemption system which outright excluded dividends from the basis of assessment.

43 As both the Belgian Government and the Commission suggest, such reasoning, which was based on the comparison of two situations, may also be applied by analogy in the main proceedings, even though that reasoning was applied by the Court in the context of the relationship between a parent company and its subsidiary.

44 A comparison must therefore be made of a situation such as that at issue in the main proceedings, in which, at the time of a merger by absorption, the same limitation on a pro rata basis was applied to the carry-forward of both the losses and the DTI surpluses of the absorbed company, with the situation where the Member State concerned introduced a simple exemption system providing for the exclusion of dividends from the basis of assessment and where a pro rata limitation is applied only to the carry-forward of losses and not to the carry-forward of DTI surpluses.

45 As the Advocate General observed in point 57 of his Opinion, it is apparent from that comparison that the situation in which the limitation on a pro rata is applied both to the carry-forward of DTI surpluses and to the carry-forward of losses in the event of a merger does not appear to result in heavier taxation than the situation in which the dividends are excluded from the basis of assessment of the recipient company. Tax neutrality in both situations appears to be respected.

46 Moreover, as the Commission observes, if the DTI surpluses were transferred in full to the absorbing company, where a limitation on a pro rata basis such as the one in the main proceedings is applied to the transfer of losses, that company would be in a more favourable situation than if the Kingdom of Belgium had provided for a simple exemption.

47 Furthermore, in cases involving the national legislation at issue in the main proceedings, the Court has recalled that the Member States are free to determine the manner in which the result prescribed by Article 4(1) of Directive 90/435 is achieved (see, to that effect, judgment of 12 February 2009, *Cobelfret*, C?138/07, EU:C:2009:82, paragraph 61, and order of 4 June 2009, *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraphs 50 and 53 and the case-law cited).

48 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that Article 4(1) of Directive 90/435 must be interpreted as not precluding legislation of a Member State which provides that dividends received by a company are to be included in its basis of assessment before up to 95% of the total amount is deducted from it and which makes it possible, where appropriate, to carry that deduction forward to subsequent tax years, but which, nonetheless, where that company is absorbed in the context of a merger, limits the transfer of the carry-forward of that deduction to the absorbing company in proportion to the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company.

Costs

49 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 (Eighth Chamber) hereby rules:

Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

must be interpreted asnot precluding legislation of a Member State which provides that dividends received by a company are to be included in its basis of assessment before up to 95% of the total amount is deducted from it and which makes it possible, where appropriate, to carry that deduction forward to subsequent tax years, but which, nonetheless, where that company is absorbed in the context of a merger, limits the transfer of the carry-forward of that deduction to the absorbing company in proportion to the share represented by the net tax assets of the absorbed company in the total of the net tax assets of the absorbing company and the absorbed company.

[Signatures]

* Language of the case: French.