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Provisional text

JUDGMENT OF THE COURT (Sixth Chamber)

12 December 2024 (*)

(Reference for a preliminary ruling – Direct taxation – Article 49 TFEU – Freedom of establishment – Tax on company profits – National legislation establishing a fairness tax – National decision annulling that legislation – Maintenance of effects – Tax not payable by a non-resident company with a permanent establishment in the Member State – Tax payable by a subsidiary of a non-resident company – Choice of legal form – Comparability of situations)

In Case C-436/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the hof van beroep te Gent (Court of Appeal, Ghent, Belgium), made by decision of 13 June 2023, received at the Court on 13 July 2023, in the proceedings

Belgische Staat / Federale Overheidsdienst Financiën

v

Volvo Group Belgium NV,

THE COURT (Sixth Chamber),

composed of T. von Danwitz, Vice-President of the Court, acting as President of the Sixth Chamber, A. Kumin and I. Ziemele (Rapporteur), Judges,

Advocate General: N. Emiliou,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

Volvo Group Belgium NV, by T. Lauwers, advocaat,

the Belgian Government, by S. Baeyens, A. De Brouwer and C. Pochet, acting as Agents, and by T. Bricout and C. Decordier, advocaten,

the European Commission, by A. Ferrand and W. Roels, acting as Agents,

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

gives the following

Judgment

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

The request has been made in proceedings between Belgische Staat / Federale Overheidsdienst Financiën (Belgian State/Federal Public Finance Service) and Volvo Group Belgium NV, a subsidiary of a non-resident company, established in Belgium, concerning the consequences for Volvo Group Belgium of national legislation which imposes a fairness tax on the resident subsidiaries of non-resident companies.

Legal context

European Union law

Article 49 TFEU provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

Belgian law

The Wetboek van de inkomstenbelastingen 1992 (Income Tax Code 1992) was amended by the Wet houdende diverse bepalingen (Law containing various provisions) of 30 July 2013 (*Belgisch Staatsblad*, 1 August 2013). Chapter 15 of that law contains a section 2, subsection 1 of which is headed 'Fairness Tax'. That subsection consists of Articles 43 to 51 of that law, which amend Articles 198, 207, 218, 219*ter*, 233, 246, 275 and 463*bis* of the aforementioned code.

Under Article 198(1) of the Income Tax Code 1992, as amended by the Law containing various provisions of 30 July 2013:

'Business expenses shall not include:

1. Corporate tax, including the separate charges due under Articles 219*bis* and 219*ter*, sums paid towards corporate tax, and advance tax paid by the debtor of income to discharge the beneficiary in breach of Article 261, but excluding the separate charge due under Article 219'.

The second paragraph of Article 207 of that code provides:

'None of those deductions or offsetting of loss in respect of the taxable period may be performed on the portion of the profits which results from abnormal or gratuitous benefits as referred to in Article 79; on received financial benefits or benefits of any nature as referred to in Article 53(24); on the taxable amount for the special separate charge levied on expenditure or advantages of any kind not justified in accordance with Article 219; on the portion of the profits allocated to the expenditure referred to in Article 198(1)(9) and (12); on the portion of the profits resulting from breach of the fourth subparagraph of Article 194*quater*(2) and from the application of Article 194*quater*(4); on the capital gains referred to in Article 217(3); or on the dividends referred to in Article 219*ter*.'

Article 219*ter* of that code provides:

'1. For the taxable period during which dividends are distributed within the meaning of subparagraphs (1) to (2*bis*) of the first paragraph of Article 18, a separate charge shall be introduced and calculated in accordance with the following paragraphs.

That separate charge shall be independent of and, where appropriate, complementary to other taxes which are due under other provisions of this code or, where appropriate, in the context of the implementation of specific legal provisions.

2. The taxable amount for that separate charge shall consist of the positive difference between, on the one hand, the gross dividends that were distributed for the taxable period and, on the other, the final taxable profits that are actually subject to the rate of corporate tax referred to in Articles 215 and 216.

3. The taxable amount so established shall be reduced by the portion of the distributed dividends that originates from reserves that were taxed at an earlier date but not later than the 2014 tax year. For the application of that reduction, the taking into account of reserves already taxed shall be applied with priority to the last reserves introduced.

For the 2014 tax year, dividends distributed during that same tax year may never be regarded as originating from reserves taxed for that same tax year.

4. The balance obtained shall then be limited according to a fraction which expresses the ratio between:

on the one hand, in the numerator, the deduction of losses carried forward actually made for the taxable period and the risk capital deduction actually made for the same taxable period, and

on the other, in the denominator, the taxable profits for the taxable period, without taking into account exemptions in respect of depreciation, provisions and capital gains.

5. The taxable amount determined in accordance with the preceding paragraphs shall not be limited or reduced in any other way.

6. The separate charge shall be equal to 5% of the amount so calculated.

7. Companies which, on the basis of Article 15 of the Company Code, are regarded as small companies for the tax year related to the taxable period during which the dividends are distributed shall not be subject to that charge.'

The third paragraph of Article 233 of that code states:

'In addition, a separate charge shall be established in accordance with the rules laid down in Article 219*ter*. For the application of that measure, in the case of Belgian establishments, the term "distributed dividends" shall mean the portion of the gross dividends distributed by the company that corresponds to the positive share of the Belgian establishment's accounting profits in the company's total accounting profits.'

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

In 2015 and 2016, Volvo Group Belgium was subject to corporate tax charges, of EUR 1 056 466.18 for the tax year 2015, of which EUR 1 052 467.14 related to the fairness tax, and of EUR 773 573.17 for the tax year 2016, of which EUR 769 881.87 related to the fairness tax.

In 2016, that company raised objections to the decisions establishing those charges, claiming that the fairness tax contravened the rules of EU law, the agreements intended to eliminate double taxation and the Belgian Constitution. In that regard, it noted that an action for annulment was at that time pending before the Grondwettelijk Hof (Constitutional Court, Belgium), which had referred questions to the Court of Justice for a preliminary ruling concerning the fairness tax and its compatibility with the freedom of establishment enshrined in Article 49 TFEU.

By a judgment of 1 March 2018 of the Grondwettelijk Hof (Constitutional Court), the provisions relating to the fairness tax, namely, Articles 43 to 49 and the first and second paragraphs of Article 51 of the Law containing various provisions of 30 July 2013, were annulled. As a result of that judgment, the objections raised by Volvo Group Belgium were dismissed as unfounded by decisions of 9 December 2019, in view of the fact that that court had maintained the effects of the annulled provisions for the 2014 to 2018 tax years.

On 12 February 2020, Volvo Group Belgium brought proceedings before the rechtbank van eerste aanleg Oost-Vlaanderen, afdeling Gent (East Flanders Court of First Instance, Ghent Division, Belgium), which, by a judgment of 4 February 2022, annulled the decisions setting the corporate tax charges for the 2015 and 2016 tax years in so far as they imposed a fairness tax on Volvo Group Belgium.

That is the judgment against which the Belgian State/Federal Public Finance Service lodged an appeal before the hof van beroep te Gent (Court of Appeal, Ghent, Belgium), which is the referring court.

The referring court wishes to ascertain whether the decision of the Grondwettelijk Hof (Constitutional Court) to maintain the effects of the provisions annulled by it (of the Law containing various provisions of 30 July 2013) infringes the freedom of establishment enshrined in Article 49 TFEU to the extent that that decision applies only to the subsidiaries of non-resident companies, whereas non-resident companies with a permanent establishment in Belgium are not affected by the maintenance of those effects and, consequently, are not subject to the fairness tax.

In those circumstances, the hof van beroep te Gent (Court of Appeal, Ghent) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 49 [TFEU] be interpreted as precluding a national scheme, such as that being challenged before the Court [of Appeal] (specifically that which was annulled by the Constitutional Court but whose effects were maintained, albeit with an infringement of the freedom of establishment as a result of which the maintained national scheme must be disapplied in respect of the profits distributed by companies established in another Member State with a Belgian permanent establishment), and whereby

a tax is payable on the distribution of profits which were not included in the final taxable result of a resident company, in respect of which a company established in another Member State has such an influence on the resident company’s management that it can determine its activities;

whereas that tax is not payable on the profits concerned if that company, established in another Member State, carries on its activities in Belgium through a permanent establishment [or] branch?’

Consideration of the question referred

By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding the legislation of a Member State under which a resident subsidiary of a non-resident company is subject to a ‘fairness tax’ on the distribution of profits which, as a result of the use of certain tax advantages provided for by the national tax system, are not included in the final taxable profits of that subsidiary, whereas a non-resident company pursuing an economic activity in that Member State through a permanent establishment or a branch is not subject to that tax.

As a preliminary point, it should be noted that the Belgian Government states in its written observations that, contrary to what the referring court seems to be asserting, maintenance of the effects of the fairness tax as ordered by the Grondwettelijk Hof (Constitutional Court) can apply not only to the subsidiaries of non-resident companies but also to their permanent establishments. In its view, that court maintained the fairness tax for the 2014 to 2018 tax years with general effect, the sole exception being the situation in which a foreign subsidiary distributes profits to a Belgian parent company that falls within the scope of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8).

In that regard, it is for the referring court to determine the scope of the decision of the Grondwettelijk Hof (Constitutional Court) to maintain the effects of the fairness tax. However, it is not for the Court, in the context of the judicial cooperation established in Article 267 TFEU, to call back into question or to verify the accuracy of the interpretation of national law made by the national court, as such interpretation falls within the exclusive jurisdiction of that court. In addition, when hearing a reference for a preliminary ruling from a national court, the Court of Justice must base its reasoning on the interpretation of national law as described to it by that court (see, to that effect, judgment of 27 October 2022, *Instituto do Cinema e do Audiovisual*, C-411/21, EU:C:2022:836, paragraph 16 and the case-law cited).

Accordingly, in the context of examination of the question referred and in accordance with the interpretation provided by the referring court, the starting point must be that maintenance of the effects of the fairness tax applies not to the permanent establishments of non-resident companies but only to their subsidiaries, such as Volvo Group Belgium.

Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 39 and the case-law cited).

A company’s registered office within the meaning of Article 54 TFEU serves as that company’s connecting factor with the legal system of a particular State, as nationality does in the case of natural persons. Accordingly, the application of national tax legislation such as that at issue in the main proceedings to a resident company, including a resident subsidiary of a non-resident company, on the one hand, and to a branch or permanent establishment of a non-resident company, on the other, involves the tax treatment of a resident company and of a non-resident company respectively (see, to that effect, judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 36 and the case-law cited).

As is clear from the second sentence of the first paragraph of Article 49 TFEU, traders are expressly left free to choose the appropriate legal form in which to pursue their activities in another Member State. That freedom of choice must not be limited by discriminatory tax provisions (judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 38 and the case-law cited).

The freedom to choose the appropriate legal form in which to pursue activities in another Member State therefore serves, inter alia, to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities under the same conditions as those which apply to subsidiaries (judgments of 23 February 2006, *CLT-UFA*, C-253/03, EU:C:2006:129, paragraph 15; of 6 September 2012, *Philips Electronics UK*, C-18/11, EU:C:2012:532, paragraph 14 and the case-law cited; and of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 39).

According to settled case-law, all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions on the freedom guaranteed in Article 49 TFEU (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 54 and the case-law cited).

In relation to tax provisions in particular, it follows from the case-law of the Court that it is for each Member State to organise, in compliance with EU law, its system for taxing profits, in so far as those profits come within the tax jurisdiction of the Member State concerned. It follows that the host Member State is free to determine the chargeable event of the tax, the taxable amount and the tax rates which apply to the various forms of establishments of the companies operating in that Member State, on condition that non-resident companies are not treated in a manner that is discriminatory in comparison with comparable national establishments (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 41 and the case-law cited).

In the present case, subject to verification by the referring court, the decision to maintain the effects of the fairness tax affects non-resident companies where they pursue their economic activities in Belgium through a subsidiary rather than through a permanent establishment or a branch. It appears therefore that maintenance of the effects of the fairness tax does not enable the subsidiaries of non-resident companies to pursue their activities under the same conditions as those which apply to permanent establishments of such companies and that therefore, in the light of the national legislation, the former are placed at a disadvantage in comparison with the latter.

In those circumstances, a decision to maintain the effects of a measure is likely to make it less attractive for companies that have their registered office in another Member State to pursue their activities in Belgium through a subsidiary (see, to that effect, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraphs 55 and 56).

A difference in treatment capable of limiting the freedom to choose the appropriate legal form in which to pursue an activity in another Member State, within the meaning of the case-law referred to in paragraph 22 of the present judgment, is liable to constitute a restriction on the freedom of establishment guaranteed by Articles 49 and 54 TFEU (see, to that effect, judgment of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 47).

In order for that difference in treatment to be compatible with the TFEU provisions on the freedom of establishment, according to settled case-law it must either relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgments of 2 September 2015, *Groupe Steria*, C-386/14, EU:C:2015:524, paragraph 21 and the case-law cited, and of 21 December 2023, *Cofidis*, C-340/22, EU:C:2023:1019, paragraph 48).

As regards the objective comparability of situations, it is clear from the Court's case-law that this involves comparing a cross-border situation with an internal situation. In order to distinguish a cross-border situation from an internal situation, it is necessary to have regard to where the companies in question have their registered office, which, as observed in paragraph 21 of the present judgment, serves as a company's connecting factor with the legal system of a particular State. It follows that the application of national tax legislation such as that at issue in the main proceedings to a resident subsidiary of a non-resident company, on the one hand, and to a resident permanent establishment of such a company, on the other, involves the tax treatment of a resident company and of a non-resident company respectively (see, to that effect, judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraphs 35 and 36 and the case-law cited).

That objective comparison is made having regard to the aim pursued by the national tax legislation at issue (see, to that effect, judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 51 and the case-law cited).

In that regard, the Court noted the following in relation to the comparability of situations and the aim pursued by the Belgian legislation on the fairness tax, as it was in force at the time. With regard to tax legislation of the host Member State aimed at preventing the profits generated in that State, as a result of the use of certain tax advantages provided for by the national tax system, from being distributed without having been taxed in the hands of the taxpayer, the situation of a non-resident taxpayer conducting an economic activity in that Member State through a permanent establishment is comparable to that of a resident taxpayer. In both cases, that tax legislation seeks to permit that State to exercise its power of taxation in respect of profits coming within its tax jurisdiction (judgment of 17 May 2017, *X*, C-68/15, EU:C:2017:379, paragraph 52 and the case-law cited).

In the case in the main proceedings, the permanent establishments and branches of non-resident companies are not subject to the fairness tax.

It follows that, in the context of the decision to maintain the effects of the fairness tax, as interpreted by the referring court, the Kingdom of Belgium no longer exercises its power of taxation in respect of the profits of the permanent establishments or branches of non-resident companies. Those non-resident companies are therefore not in a situation comparable to that of resident companies such as the subsidiary of a non-resident company.

Consequently, in a situation such as that at issue in the main proceedings, no restriction on the freedom of establishment guaranteed by Article 49 TFEU can be established.

In the light of the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding the legislation of a Member State under which a resident subsidiary of a non-resident company is subject to a 'fairness tax' on the distribution of profits which, as a result of the use of certain tax advantages provided for by the national tax system, are not included in the final taxable profits of that subsidiary, whereas a non-resident company pursuing an economic activity in that Member State through a permanent establishment or a branch is not subject to that tax.

Costs

Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Sixth Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding the legislation of a Member State under which a resident subsidiary of a non-resident company is subject to a 'fairness tax' on the distribution of profits which, as a result of the use of certain tax advantages provided for by the national tax system, are not included in the final taxable profits of that subsidiary, whereas a non-resident company pursuing an economic activity in that Member State through a permanent establishment or a branch is not subject to that tax.

[Signatures]

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* Language of the case: Dutch.