Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

27 February 2014*

(Reference for a preliminary ruling — Company law — Recommendation 2003/361/EC — Definition of micro, small and medium-sized enterprises — Types of enterprises taken into consideration in calculating staff numbers and financial amounts — Linked enterprises — Notion of 'group of natural persons acting jointly')

In Case C-110/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Germany), made by decision of 20 December 2012, received at the Court on 7 March 2013, in the proceedings

HaTeFo GmbH

v

Finanzamt Haldensleben,

THE COURT (Seventh Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the Italian Government, by G. Palmieri, acting as Agent, assisted by M. Santoro, avvocato dello Stato,

— the European Commission, by R. Sauer and T. Maxian Rusche, acting as Agents,

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

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of the fourth subparagraph of Article 3(3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (OJ 2003 L 124, p. 36, 'the SME Recommendation').

2 The request has been made in the course of proceedings between HaTeFo GmbH ('HaTeFo') and Finanzamt Haldensleben concerning the calculation of the amount of an investment subsidy.

Legal context

European Union law

3 Recital 9 of the preamble to the SME Recommendation states:

'To gain a better understanding of the real economic position of [micro, small and medium enterprises (SMEs)] and to remove from that category groups of enterprises whose economic power may exceed that of genuine SMEs, a distinction should be made between various types of enterprises, depending on whether they are autonomous, whether they have holdings which do not entail a controlling position (partner enterprises), or whether they are linked to other enterprises …'

4 Recital 11 of that recommendation is worded as follows:

'To simplify matters, in particular for Member States and enterprises, use should be made when defining linked enterprises of the conditions laid down in Article 1 of [the Seventh] Council Directive 83/349/EEC of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts [(OJ 1983 L 193, p. 1)], as last amended by Directive 2001/65/EC of the European Parliament and of the Council [of 27 September 2001 (OJ 2001 L 283, p. 28)] …'

5 Recital 12 of that recommendation states:

'Account should also be taken, in suitable cases, of relations between enterprises which pass through natural persons, with a view to ensuring that only those enterprises which really need the advantages accruing to SMEs from the different rules or measures in their favour actually benefit from them. In order to limit the examination of these situations to the strict minimum, the account taken of such relationships has been restricted to the relevant market or to adjacent markets – reference being had, where necessary, to the Commission's definition of "relevant markets" in the Commission notice on the definition of relevant market for the purposes of Community competition law [(OJ 1997 C 372, p. 5)].'

6 Article 3 of the SME Recommendation provides:

'This Recommendation replaces Commission Recommendation 96/280/EC of 3 April 1996 concerning the definition of small and medium-sized enterprises [OJ 1996 L 107, p. 4] with effect from 1 January 2005.'

7 Article 1 of the Annex to the SME Recommendation is worded as follows:

'An enterprise is considered to be any entity engaged in an economic activity, irrespective of its legal form …'

8 Article 3 of the Annex to the SME Recommendation relates to the types of enterprises taken into consideration when calculating staff numbers and financial amounts, making it possible to characterise the various categories of enterprises defined in Article 2 of that recommendation.

9 Article 3(1) of that Annex is drafted as follows:

'An "autonomous enterprise" is any enterprise which is not classified as a partner enterprise within the meaning of paragraph 2 or as a linked enterprise within the meaning of paragraph 3.'

10 Article 3(3) of that Annex is worded as follows:

'"Linked enterprises" are enterprises which have any of the following relationships with each other:

(a) an enterprise has a majority of the shareholders' or members' voting rights in another enterprise;

(b) an enterprise has the right to appoint or remove a majority of the members of the administrative, management or supervisory body of another enterprise;

(c) an enterprise has the right to exercise a dominant influence over another enterprise pursuant to a contract entered into with that enterprise or to a provision in its memorandum or articles of association;

(d) an enterprise, which is a shareholder in or member of another enterprise, controls alone, pursuant to an agreement with other shareholders in or members of that enterprise, a majority of shareholders' or members' voting rights in that enterprise.

There is a presumption that no dominant influence exists if the investors listed in the second subparagraph of paragraph 2 are not involving themselves directly or indirectly in the management of the enterprise in question, without prejudice to their rights as stakeholders.

Enterprises having any of the relationships described in the first subparagraph through one or more other enterprises, or any one of the investors mentioned in paragraph 2, are also considered to be linked.

Enterprises which have one or other of such relationships through a natural person or group of natural persons acting jointly are also considered linked enterprises if they engage in their activity or in part of their activity in the same relevant market or in adjacent markets.

An "adjacent market" is considered to be the market for a product or service situated directly upstream or downstream of the relevant market.'

German law

11 Article 1(1) of the Law on investment allowances for 2005 (Investitionszulagengesetz 2005) of 17 March 2004 (*Bundesgesetzblatt* 2004, I, p. 438) provides that taxpayers who make certain types of investments in the five new Länder and in Berlin (Germany) are eligible for a subsidy.

12 The law provides that, under certain conditions, that subsidy will be increased when the investments are made by an SME within the meaning of the SME Recommendation.

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

13 HaTeFo, established in 1999, produces plastic foils, sheets, tubes and mouldings. The share capital in that company is owned by three individuals, A, B (his spouse) and C, who hold respectively 24.8%, 62.8% and 12.4% of the shares. A and C are managing directors of that company. In addition, A and his mother D have equal shares in X, a company of which A and C are also the managing directors.

14 According to the order for reference, X acted as guarantor for HaTeFo during its launch, and also concluded a 'Geschäftsbesorgungsvertrag' ('business management contract') with HaTeFo, pursuant to which all of HaTeFo's orders were to be taken by X, which would be the only company with a presence on the market. That business management contract also stipulates that a representative of X was to take charge of HaTeFo's technical management. Furthermore, HaTeFo transferred its research and development activities and its computer management to X, and it uses one of X's bank accounts for the purposes of its activities.

15 Considered in isolation, HaTeFo could be qualified as an SME. However, in view of both the number of X's employees and its annual turnover, that would not hold true if HaTeFo were to be regarded as linked to X.

16 Taking the view that, as a result of its links with X, HaTeFo was not an SME, the Finanzamt Haldensleben did not grant it the increased subsidy for 2006, but granted instead the basic subsidy provided for under the Law of 17 March 2004 on investment allowances for 2005.

17 The Finanzamt Haldensleben stated, in particular, that account should not be taken of just the formal criteria set out in the SME Recommendation, but that it was necessary to carry out an economic examination in order to determine whether enterprises, although formally independent, should nevertheless be regarded as a single economic entity. In its opinion, the two enterprises concerned constitute such an entity, having regard to the existence of the business management contract, the division between them of production and sales and the fact that they are owned and controlled by just four individuals, three of whom are closely related.

18 At first instance, the Finanzgericht (Finance Court) dismissed the action brought by HaTeFo, stating that a purely formal application of the criteria laid down in the SME Recommendation which characterise the autonomy of an enterprise should not result in their being manipulated or circumvented and that it was also necessary to take into account, when assessing that autonomy, the other business relationships of the enterprises concerned, in particular with regard to sales management, supplier and customer contacts, and the shared implementation of logistics.

19 HaTeFo appealed to the Bundesfinanzhof (Federal Finance Court) on a point of law against the decision of the Finanzgericht in which it claimed inter alia that the criteria set out in Article 3 of the Annex to the SME Recommendation, by which 'linked' enterprises are to be categorised for the purposes of that recommendation, must instead be regarded as definitive.

20 The Bundesfinanzhof relies on Joined Cases C-297/88 and C-197/89 Dzodzi [1990] ECR I-3763 as support for its view that the Court has jurisdiction to interpret the term SME, since that term is used in national legislation which refers to the definition provided by the SME Recommendation.

21 The Bundesfinanzhof furthermore states that that recommendation partially reproduces the conditions for drawing up consolidated accounts set out in Article 1 of Directive 83/349, so that enterprises required by virtue of that directive to keep consolidated accounts can be regarded as linked for the purposes of the SME Recommendation. It adds that in a situation, as in the case in the main proceedings, where an enterprise does not keep consolidated accounts, it is nevertheless appropriate to assess whether it can also be regarded as being linked to another enterprise in accordance with the criteria set out in the annex to that recommendation.

22 In the first place, the Bundesfinanzhof is enquiring about the criterion relating to a 'group of natural persons acting jointly' laid down in the fourth subparagraph of Article 3(3) of that annex. In particular, it raises the question whether, in order to categorise such a group, it is enough to find evidence of functional cooperation between those persons or whether it is also necessary to establish that they adopted a concerted course of conduct and forged contractual ties.

23 The Bundesfinanzhof then asks whether, notwithstanding the different types of relationships that characterise those linked enterprises listed in the first subparagraph of Article 3(3) of that annex, an overall economic examination of the enterprises concerned, in which the fact that members belong to the same family or the identity of the directors are taken into account, can support the view that those enterprises are linked through a group of natural persons acting jointly. Finally, it asks whether such an economic examination must be limited to cases in which those persons wished to circumvent the definition of the term SME.

24 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. (a) What requirements are to be set for a finding that persons are "acting jointly" within the meaning of the fourth subparagraph of Article 3(3) of the Annex to the [SME Recommendation]? Is it simply sufficient in this respect that there is [some] enterprise-related cooperation between the natural persons with shareholdings in both enterprises, without disputes or conflicts of interest coming to light, or rather is some recognisably coordinated course of conduct by these persons required?

(b) If some coordinated course of conduct is required, does such conduct follow simply from purely de facto cooperation?

2. Where no obligation to draw up consolidated accounts exists, is it necessary, in order to decide whether an enterprise is linked with another enterprise via a person or a group of natural persons acting jointly, to undertake, over and above an examination of the "relationships" set out in the first subparagraph of Article 3(3) of the Annex to the SME Recommendation, an overall economic examination, in which aspects such as property relationships – in this case particularly the fact that shareholders belong to [the same] family – the share structure and the degree of economic integration – [and] in particular … the identity of the managing directors – of the enterprises in question are to be scrutinised?

3. In the event that, also where the SME Recommendation applies, an overall economic examination going beyond the formal examination is possible, does this presuppose the intention, or at least the risk, of circumventing the SME definition?'

Consideration of the questions referred

25 By these three questions, which should be examined together, the national court asks, essentially, whether the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted as meaning that only enterprises which, through one or more natural persons acting jointly, have any of the relationships described in the first subparagraph of Article 3(3) of that annex must be regarded as 'linked' for the purposes of that article, or whether the existence of that link can also be inferred from an overall economic analysis during which in particular the intention of those persons to circumvent the SME definition is established. The national court also seeks, essentially, to determine the conditions in which natural persons are regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation, and in particular whether, for that to be the case, they must be linked by contractual relations.

26 Under Article 1 of that annex, any entity, irrespective of its legal form, engaged in an economic activity is regarded as an enterprise.

27 Article 3(3) of that annex stipulates the criteria for classifying enterprises as 'linked' in order to determine whether they are SMEs.

28 It is apparent from the wording of the first and fourth subparagraphs of Article 3(3) of the Annex to the SME Recommendation that as a general rule those provisions cover only a case where enterprises have one or other of the relationships set out in points (a) to (d) of the first subparagraph of Article 3(3) of that annex.

29 Nevertheless, it cannot be concluded from this that formal non-compliance with that condition precludes, in all cases, a finding that the enterprises concerned are linked.

30 Thus, the SME Recommendation must be interpreted by taking into account the reasons for its adoption (see, by analogy, Case C-91/01 *Italy* v *Commission* [2004] ECR I-4355, paragraph 49).

31 In that regard, it is apparent from recitals 9 and 12 of the preamble to that recommendation that the definition of linked enterprises aims to gain a better understanding of the economic position of SMEs and to remove from that qualification of SMEs groups of enterprises whose economic power may exceed that of genuine SMEs, with a view to ensuring that only those enterprises which really need the advantages accruing to the category of SMEs from the different rules or measures in their favour actually benefit from them. Those recitals also state that in order to limit to the strict minimum the examination of relations between enterprises which pass through natural persons, the account taken of such relationships must be restricted to cases where those enterprises engage in activities in the relevant market or in adjacent markets.

32 The advantages afforded to SMEs are in most cases exceptions to the general rules, such as for example in the area of State aid, and therefore the definition of an SME must be interpreted strictly.

33 In those circumstances, in order to include only enterprises that are genuinely independent SMEs, it is necessary to examine the structure of SMEs which form an economic group, the power of which exceeds the power of an SME, and to ensure that the definition of SMEs is not circumvented by purely formal means (see *Italy* v *Commission*, paragraph 50).

34 Therefore the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted in the light of that objective, so that enterprises which do not formally have one or other of the relationships referred to in paragraph 28 above, but which, because of the role played by a natural person or group of natural persons acting jointly, nevertheless constitute a single economic unit, must also be regarded as linked enterprises for the purposes of that provision, since they engage in their activities or in part of their activities in the same relevant market or in adjacent markets (see, by analogy, *Italy* v *Commission*, paragraph 51).

35 Moreover, the condition that natural persons are acting jointly is satisfied where those persons work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another. Whether that condition is satisfied depends on the circumstances of the case, and that is not necessarily conditional on the existence of contractual relations between those persons or even a finding that they intended to circumvent the definition of an SME.

36 Concerning the economic and financial relations between HaTeFo and X, it is apparent from the order for reference that X sells all of HaTeFo's production, while HaTeFo is not visible on the market. A representative of X is responsible for the technical aspects of HaTeFo's production. Furthermore, HaTeFo transferred to X its computer and procurement management, and its research activity. Finally, HaTeFo uses one of X's bank accounts for the purposes of its business activity.

37 It must also be noted, as is apparent from the order for reference, that there is a family relationship between A, B and D, who own the two enterprises, and that A and C simultaneously manage both. Those links appear to be such as to give those persons the opportunity to work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of one another.

38 In view of the foregoing, it seems that two companies which are in an analogous situation to that of the companies in the main proceedings may be regarded in fact as constituting, through a group of natural persons acting jointly, a single economic unit, so that they should be regarded as linked enterprises for the purposes of the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation; that is, however, a matter for the referring court to assess, and it must be open to the interested parties to prove otherwise.

39 It follows from all of the above considerations that the answer to the questions referred is that the fourth subparagraph of Article 3(3) of the Annex to the SME Recommendation must be interpreted as meaning that enterprises may be regarded as 'linked' for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of that annex. Natural persons who work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent of each other are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether that condition is satisfied depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation.

Costs

40 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 (Seventh Chamber) hereby rules:

The fourth subparagraph of Article 3(3) of the Annex to Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises must be interpreted as meaning that enterprises may be regarded as 'linked' for the purposes of that article where it is clear from the analysis of the legal and economic relations between them that, through a natural person or a group of natural persons acting jointly, they constitute a single economic unit, even though they do not formally have any of the relationships referred to in the first subparagraph of Article 3(3) of that annex.

Natural persons who work together in order to exercise an influence over the commercial decisions of the enterprises concerned which precludes those enterprises from being regarded as economically independent from each other are to be regarded as acting jointly for the purposes of the fourth subparagraph of Article 3(3) of that annex. Whether that condition is satisfied

depends on the circumstances of the case and is not necessarily conditional on the existence of contractual relations between those persons or a finding that they intended to circumvent the definition of a micro, small or medium-sized enterprise within the meaning of that recommendation.

[Signatures]