Reports of Cases

JUDGMENT OF THE COURT (Sixth Chamber)

13 March 2025*

(Reference for a preliminary ruling – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 2011/96/EU – Article 1(4) – Prevention of tax evasion, tax fraud or abuse – Article 4(1) – Prohibition on taxing profits received – Direct effect – Inclusion of the dividend distributed by the subsidiary in the parent company's tax base – Deduction of the distributed dividend from the tax base of the parent company – Limitation of the deduction – Intra-group transfer scheme allowing profits made by certain companies to be transferred to others)

In Case C-135/24,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), made by decision of 29 January 2024, received at the Court on 20 February 2024, in the proceedings

John Cockerill SA

v

État belge,

THE COURT (Sixth Chamber),

composed of A. Kumin (Rapporteur), President of the Chamber, I. Ziemele and S. Gervasoni, Judges,

Advocate General: R. Norkus,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– John Cockerill SA, by M. Possoz, avocat, and H. Vanhulle, advocaat,

– the Belgian Government, by S. Baeyens, P. Cottin and C. Pochet, acting as Agents,

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

* Language of the case: French.

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 Article 1(4) and Article 4 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), as amended by Council Directive (EU) 2015/121 of 27 January 2015 (OJ 2015 L 21, p. 1) ('Directive 2011/96').

2 The request has been made in proceedings between John Cockerill SA and the État belge (Belgian State) concerning its tax return for the 2020 tax year.

Legal context

European Union law

3 Article 1 of Directive 2011/96 provides:

'1. Each Member State shall apply this Directive:

(a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

…

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

4. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.'

4 Article 4(1) of that directive provides:

‘Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:

(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or

(b) 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 fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.’

Belgian law

5 The dispute in the main proceedings is governed by the provisions of the code des impôts sur les revenus de 1992 (Income Tax Code 1992), in the version in force during the 2020 tax year (‘the CIR 1992’).

6 Article 4(1) of Directive 2011/96 is transposed into Belgian law by Article 202 et seq. of the CIR 1992. The Belgian legislature opted for the ‘inclusion/deduction’ method, according to which, in essence, dividends distributed by a subsidiary are first included in the tax base of the parent company and then deducted from that tax base, as ‘definitively taxed income’ (‘DTI’), if the legal conditions are satisfied. Where the DTI is higher than the company’s tax base, the surplus DTI may be carried forward to subsequent tax years.

7 The CIR 1992 also provides for an ‘intra-group transfer’ scheme. That scheme allows, under certain conditions, Belgian companies that are profit-making to transfer some or all of their profits to companies in the same group that would have incurred losses during the same tax period. For the company making the transfer, the amount transferred is deducted from the profit for the tax period (Article 205/5 of the CIR 1992). For the company receiving the transfer, the amount transferred is included in the tax base (Article 185(4) of the CIR 1992).

8 A limitation is provided for in the eighth paragraph of Article 207 of the CIR 1992, which is worded as follows:

‘None of the deductions provided for in Articles 199 to 206, 536 and 543 may be applied to the amount of the intra-group transfer referred to in the first subparagraph of Article 185(4), which is included in the tax base.’

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

9 John Cockerill is a company resident in Belgium subject to corporation tax.

10 In 2019, it received dividends from its shareholding in subsidiaries established in Belgium, in other Member States of the European Union and in third countries, part of which, in the amount of EUR 96 302 105, satisfied, according to that company, the conditions for benefiting from the DTI system. In addition, during that year, the company received an intra-group transfer of EUR 43 697 824.53, which was added to its tax base.

11 As a result of the restriction on deduction provided for in the eighth paragraph of Article 207 of the CIR 1992, John Cockerill was not, however, able to deduct from its tax base all the dividends received that satisfied the conditions for benefiting from the DTI system. Consequently, it was required to pay EUR 13 057 328.95 in corporation tax for the 2020 tax year. According to that company, if it had not received any dividend that satisfied the conditions for benefiting from the DTI system during the tax year in question, its tax base would have been negative, with the result that it would not have been liable to tax.

12 John Cockerill considers that that situation, as a result of which it is liable to tax even though it would not have been had it not received dividends, is contrary to Directive 2011/96. It therefore filed a complaint on 20 April 2021 with the Belgian tax authority challenging the tax levied on it. That complaint having been rejected, on 5 December 2022 it brought an action in respect of the same matter before the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), which is the referring court.

13 John Cockerill argued before that court that, since the eighth paragraph of Article 207 of the CIR 1992 does not allow the deduction of DTI for the current year from the intra-group transfer received, it is deprived of a tax advantage. It regards that as a difference in treatment contrary to Directive 2011/96 if the situation of a company that receives dividends exempted under that directive is compared with the situation of a company that does not receive dividends, even though both companies have benefited from the same intra-group transfer.

14 The Belgian State, for its part, submits that the purpose of the intra-group transfer scheme is to ensure fair compensation between profits and losses incurred within a group of companies. Accordingly, the purpose of the eighth paragraph of Article 207 of the CIR 1992 is to limit the interest of a transfer going beyond the tax loss of the company receiving the transfer and thus to thwart any desire to abuse that system by neutralising the advantages that would result from an intra-group transfer that is too high. In any event, DTI that could not be deducted under that provision may be carried forward to subsequent tax years.

15 Entertaining doubts as to the compatibility of the national legislation with Directive 2011/96, the tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 4 of [Directive 2011/96] have direct effect and, combined with other sources of EU law, must it be interpreted as precluding legislation of a Member State:

(i) which introduces a tax consolidation system (the intra-group transfer) allowing groups of companies to transfer, under certain conditions, some or all of the taxable profits made by some subsidiaries to other subsidiaries that have incurred losses in the tax year (the intra-group transfer), and

(ii) which excludes from that advantage loss-making companies, for the amount of the dividends received, which qualify for exemption under the legislation of the Member State transposing [Directive 2011/96]?

(2) Is that legislation likely to fall within the scope of [Article 1(4) of Directive 2011/96], which states that it "shall not preclude the application of domestic or agreement-based provisions required for the prevention of [tax evasion, tax] fraud or abuse"?'

Admissibility

16 The Belgian Government contends that the request for a preliminary ruling is inadmissible.

17 First of all, it maintains that that request does not contain sufficient information on the facts of the case in the main proceedings and on the relevant rules of national law.

18 Next, in so far as the referring court refers, in its first question, to 'loss-making companies', the Belgian Government submits that there is no question of losses in the present case, as John Cockerill generated a profit during the tax year at issue in the main proceedings. Thus, the request for a preliminary ruling is purely hypothetical.

19 Lastly, the Cour de cassation (Court of Cassation, Belgium) has already ruled on the manner in which, in the light of Directive 2011/96, the prohibition on deduction laid down in the eighth paragraph of Article 207 of the CIR 1992 should be interpreted, so that the referring court has all the information necessary to assess the specific facts in law and to rule on the substance.

20 According to the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of EU law, the Court of Justice is, in principle, bound to give a ruling (judgment of 28 November 2024, *ENGIE Deutschland*, C-293/23, EU:C:2024:992, paragraph 40 and the case-law cited).

21 It follows that the questions referred by a national court concerning the interpretation or assessment of the validity of EU law are presumed to be relevant in the factual and legislative context established by that court, the accuracy of which does not fall within the jurisdiction of the Court of Justice. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 28 November 2024, *ENGIE Deutschland*, C-293/23, EU:C:2024:992, paragraph 41 and the case-law cited).

22 In the present case, the request for a preliminary ruling contains information relating to the factual and legislative context of the case in the main proceedings which, although limited, is nevertheless sufficient to enable the scope of the questions referred to be understood and their relevance for the resolution of that case and to enable the Court to provide useful answers, while giving the governments of the Member States and other interested parties the opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union.

23 As regards, more specifically, the first question, it is not for the Court to establish whether the premiss on which that question is based is factually accurate and, in any event, that question does not appear to be manifestly hypothetical, having regard to the subject matter of the dispute in the main proceedings, as described by the referring court.

24 Lastly, the admissibility of the request for a preliminary ruling cannot be called into question in the light of any relevant case-law of the Cour de cassation (Court of Cassation). Even assuming that there is a rule of national law under which the legal rulings of the latter court are binding on the referring court, such a rule of law cannot take away from that court the discretion to refer to the Court of Justice questions of interpretation of the points of EU law relating to such rulings. A national court must be free, if it considers that a higher court's legal ruling could lead it to deliver a judgment contrary to EU law, to refer to the Court of Justice questions which concern it (see, to that effect, judgment of 15 January 2013, *Križan and Others*, C-416/10, EU:C:2013:8, paragraph 68 and the case-law cited).

25 It follows that the request for a preliminary ruling is admissible.

Consideration of the questions referred

26 By its two questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 4(1) of Directive 2011/96 must be interpreted as precluding legislation of a Member State that provides that dividends received by a parent company from its subsidiary must first be included in the tax base of the parent company, before they can subsequently be deducted, without that deduction applying to the amount of an intra-group transfer included in the tax base and, if so, whether Article 1(4) of that directive nevertheless authorises such legislation.

27 Article 4(1) of Directive 2011/96 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 Member State of the parent company and the Member State of its permanent establishment are, except when the subsidiary is liquidated, to 'refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary …', 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 fall within the definitions laid down in Article 2 [of that directive] and meet the requirements provided for in Article 3 [thereof], up to the limit of the amount of the corresponding tax due'.

28 Directive 2011/96 therefore expressly leaves it open to Member States to choose between the exemption system and the imputation system, set out in Article 4(1)(a) and (b) respectively (see, by analogy, judgment of 20 October 2022, *Allianz Benelux*, C-295/21, EU:C:2022:812, paragraph 30 and the case-law cited).

29 According to the documents before the Court, the Kingdom of Belgium opted for the exemption system provided for in Article 4(1)(a) of Directive 2011/96. Therefore, the questions referred must be answered by reference to that provision alone.

30 The obligation laid down in Article 4(1)(a) of Directive 2011/96 is not subordinated to any conditions and is expressly subject only to paragraphs 2 to 5 of that article and Article 1(2) to (4) of that directive (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 33 and the case-law cited).

31 Therefore, Member States may not make the benefit of the advantage derived from Article 4(1)(a) of that directive subject to conditions other than those laid down in that directive (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 34 and the case-law cited).

32 In that context, it is apparent from the Court's case-law that Directive 2011/96 is intended to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 35 and the case-law cited).

33 In order to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State, Directive 2011/96 aims to avoid, in particular, by the rule laid down in Article 4(1)(a) thereof, in economic terms, double taxation of profits, in other words, to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 36 and the case-law cited).

34 Thus, Article 4(1)(a) of Directive 2011/96 prohibits Member States from taxing the parent company in respect of the profits distributed by its subsidiary, without drawing a distinction based on whether the chargeable event of the taxation of the parent company is the receipt of those profits or their redistribution. That prohibition 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 (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 37 and the case-law cited).

35 Such legislation is compatible neither with the terms, nor with the objectives and scheme of Directive 2011/96, since it does not allow the objective of preventing economic double taxation, as set out in the rule established in Article 4(1)(a) of that directive, to be fully attained (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 38 and the case-law cited).

36 In the present case, as is apparent from paragraph 6 above, Article 4(1)(a) of Directive 2011/96 is transposed into Belgian law by Article 202 et seq. of the CIR 1992. In essence, those provisions lay down a system known as 'inclusion/deduction', under which, first, dividends received by the parent company are first included in its tax base and, subsequently, those dividends are deducted from that tax base, as DTI, in so far as the parent company retains taxable profits after deduction of losses and other exempt profits. If the DTI is higher than the tax base of the company concerned, the surpluses may be carried forward to subsequent tax years.

37 It is also apparent from the order for reference that the 'intra-group transfer' scheme allows, under certain conditions, Belgian companies that are profit-making to transfer some or all of their profits to companies in the same group that would have incurred losses during the same tax period, the amount transferred being included in the tax base of the company receiving the transfer.

38 However, the eighth paragraph of Article 207 of the CIR 1992 provides that no deduction, including the deduction of DTI, may be made from the amount of the intra-group transfer which is included in the tax base of the company receiving that transfer.

39 John Cockerill submits, in essence, that the application of the prohibition laid down in the eighth paragraph of Article 207 of the CIR 1992 results in indirect taxation of the dividends that it has received, even though they satisfy the conditions for exemption under Article 4(1)(a) of Directive 2011/96.

40 In that regard, as regards the existence of possible indirect taxation of dividends, which, as noted in paragraph 34 above, would preclude Article 4(1)(a), it is necessary to compare a situation such as that at issue in the main proceedings, in which a parent company such as John Cockerill, at the time of the tax deduction, had to comply with the prohibition laid down in the eighth paragraph of Article 207 of the CIR 1992, with a situation in which the Member State concerned has established a simple exemption system providing for the exclusion of dividends from the tax base of that company (see, by analogy, judgment of 20 October 2022, *Allianz Benelux*, C-295/21, EU:C:2022:812, paragraphs 42 to 44).

41 As the European Commission submits in its written observations, it appears that the combination of the Belgian DTI system, as it was in force during the tax year at issue in the main proceedings, with the intra-group transfer scheme, has the effect that the receipt of dividends which must be exempted under Article 4(1)(a) of Directive 2011/96 is liable to result in the parent company which has received an intra-group transfer being taxed more heavily than it would have been had it not received such dividends, or if those dividends had simply been excluded from its tax base.

42 If that is the case, which it is for the referring court to ascertain, the receipt of dividends is not fiscally neutral for the parent company, contrary to the objective pursued by Article 4(1)(a) of Directive 2011/96 (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 46).

43 It is irrelevant, in that context, that the intra-group transfer scheme is a voluntary mechanism under national law or that DTI that could not be used for a given year may be carried forward to the following year.

44 First, the manner in which the exemption scheme provided for in Article 4(1)(a) of Directive 2011/96 is implemented by the Belgian legislature necessarily implies an interaction between dividends and other elements of the tax base, such as the intra-group transfer; the effects of that interaction must however comply with Directive 2011/96 (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 49).

45 Secondly, while it is true that DTI that could not be used for a given year, pursuant to the prohibition on deduction laid down in the eighth paragraph of Article 207 of the CIR 1992, may be carried forward to the following tax year, the fact remains that the receipt of dividends, in the context of the application of a system of taxation such as that at issue in the main proceedings,

may, in certain situations, result in the parent company being taxed more heavily than if such dividends had been excluded from its tax base. Since the parent company's tax burden is likely to be affected, it must be concluded that the parent company is, as a result, indirectly taxed on the dividends received from its subsidiary (see, by analogy, judgment of 19 December 2019, *Brussels Securities*, C-389/18, EU:C:2019:1132, paragraph 53).

46 As regards the question whether such a system of taxation may nevertheless be authorised under Article 1(4) of Directive 2011/96, it should be recalled that, under that provision, that directive is not to preclude the application of domestic or agreement-based provisions required for the prevention of tax evasion, tax fraud or abuse.

47 In that regard, it is apparent from the case-law of the Court that, in order for national legislation to be regarded as seeking to prevent fraud and abuse, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the aim of which is unduly to obtain a tax advantage. However, a general presumption of fraud and abuse cannot justify a tax measure which undermines the objectives of a directive (see, to that effect, order of 14 June 2018, *GS*, C-440/17, EU:C:2018:437, paragraphs 43 and 44 and the case-law cited).

48 In the present case, there is nothing to indicate that the prohibition on deduction laid down in the eighth paragraph of Article 207 of the CIR 1992 has the specific objective of excluding from the benefit of a tax advantage wholly artificial arrangements the aim of which is to benefit unduly from that tax advantage. On the contrary, it appears that that provision generally excludes the deduction of DTI from the intra-group transfer, irrespective of the existence of tax abuse.

49 Article 1(4) of Directive 2011/96 does not therefore authorise a Member State to apply a national provision, such as the eighth paragraph of Article 207 of the CIR 1992, in so far as it goes beyond what is necessary to prevent tax evasion, tax fraud or abuse.

50 In so far as, in its written observations, the Belgian Government also refers to Article 1(2) of Directive 2011/96, it should be borne in mind that, under that provision, Member States are not to grant the benefits of that directive to an arrangement or a series of arrangements which, having been put in place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of that directive, are not genuine having regard to all relevant facts and circumstances.

51 In that regard, suffice it to note that, in the present case, the Belgian Government does not claim that the transaction which resulted in John Cockerill's receiving dividends eligible for exemption under Article 4(1)(a) of Directive 2011/96 was part of such an arrangement. Moreover, there is nothing in the documents before the Court to suggest that that was the case.

52 Lastly, if, after carrying out the comparison referred to in paragraph 40 above, the referring court were to conclude that, in the present case, John Cockerill's receipt of dividends was not fiscally neutral, it should be noted, as regards the implications of such a conclusion, that, first, in the light of the principle of primacy, the national court which is called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for that court to request or await the prior setting aside of such provision by legislative or other constitutional means (judgment of 24 June 2019, *Popławski*, C-573/17, EU:C:2019:530, paragraph 58 and the case-law cited).

53 Secondly, it is apparent from the case-law of the Court that Article 4(1)(a) of Directive 2011/96 has direct effect (see, by analogy, judgment of 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82, paragraphs 63 to 65).

54 In the light of all the foregoing considerations, the answer to the questions referred is that Article 1(4) and Article 4(1) of Directive 2011/96 must be interpreted as precluding legislation of a Member State that provides that dividends received by a parent company from its subsidiary must first be included in the tax base of the subsidiary, before they can subsequently be deducted, without that deduction applying to the amount of an intra-group transfer included in the tax base.

Costs

55 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 1(4) and Article 4(1) 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, as amended by Council Directive (EU) 2015/121 of 27 January 2015,

must be interpreted as precluding legislation of a Member State that provides that dividends received by a parent company from its subsidiary must first be included in the tax base of the subsidiary, before they can subsequently be deducted, without that deduction applying to the amount of an intra-group transfer included in the tax base.

[Signatures]