Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

15 June 2017*

(Reference for a preliminary ruling — Directive 78/660/EEC — Annual accounts of certain types of companies — Principle that a true and fair view must be given — Principle that valuation must be made on a prudent basis — Issuing company of a share option recognising the grant date price of the option in the course of the accounting year in which the option is exercised or at the end of its period of validity)

In Joined Cases C-444/16 and C-445/16,

REQUESTS for a preliminary ruling under Article 267 TFEU from the cour d'appel de Mons (Court of Appeal of Mons, Belgium), made by decisions of 3 August 2016, received at the Court on 8 August 2016, in the proceedings

Immo Chiaradia SPRL (C-444/16),

Docteur De Bruyne SPRL (C-445/16)

v

État belge,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, C. Vajda (Rapporteur) and K. Jürimäe, Judges,

Advocate General: M. Bobek,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— Immo Chiaradia SPRL and Docteur De Bruyne SPRL, by J.-J. Vandenbroucke, avocat,

— the European Commission, by H. Støvlbæk and N. Gossement, acting as Agents,

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

gives the following

* Language of the case: French.

Judgment

1 These requests for a preliminary ruling concern the interpretation of Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article [50(2)(g) TFEU] on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11), as amended by Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 (OJ 2003 L 178, p. 16) ('Directive 78/660').

2 The requests have been made in proceedings between, in one case, Immo Chiaradia SPRL and, in the other, Docteur De Bruyne SPRL and the **État belge** (Belgian State) concerning the corporation tax payable by the applicants in the main proceedings, respectively, for the 2006 and 2008 tax years.

Legal context

EU law

3 The third recital of Directive 78/660 states:

'… it is necessary … to establish in the Community minimum equivalent legal requirements as regards the extent of the financial information that should be made available to the public by companies that are in competition with one another'.

4 According to Article 2(3) of Directive 78/660:

'The annual accounts shall give a true and fair view of the company's assets, liabilities, financial position and profit or loss.'

5 Article 20(1) of Directive 78/660 provides:

'Provisions are intended to cover liabilities the nature of which is clearly defined and which at the date of the balance sheet are either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which they will arise.'

6 Article 31(1) of Directive 78/660 provides:

'The Member States shall ensure that the items shown in the annual accounts are valued in accordance with the following general principles:

…

(c) valuation must be made on a prudent basis, and in particular:
  (aa) only profits made at the balance sheet date may be included,
  (bb) account must be taken of all liabilities arising in the course of the tax year concerned or of a previous one, even if such liabilities become apparent only between the date of the balance sheet and the date on which it is drawn up,
  (cc) account must be taken of all depreciation, whether the result of the financial year is a loss or a profit;

(d) account must be taken of income and charges relating to the financial year, irrespective of the date of receipt or payment of such income or charges;

(e) the components of asset and liability items must be valued separately;

…’

Belgian law

7 Article 41 of the loi du 26 mars 1999 relative au plan d’action belge pour l’emploi 1998 et portant des diverses dispositions (Law of 26 March 1999 on the Belgian employment action plan of 1998 and laying down various provisions) (*Moniteur belge* of 1 April 1999, p. 10904), in the version applicable to the main proceedings (‘the Law of 26 March 1999’), provides:

‘For the purposes of the present subsection, the following terms shall bear the following meanings:

1° company: any Belgian or foreign company with legal personality;

2° shares: any listed, ordinary or preferential shares in a company;

3° option: the right to buy or subscribe, on an increase in a company’s share capital, to a specific number of shares at an ascertained or ascertainable price for a specified period of time;

…

5° stock market: any regulated market or other regularly held open market.’

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

8 It is stated in the order for reference in Case C-444/16 that on 11 February 2002 Immo Chiaradia issued a share option in favour of its manager, in return for consideration, relating to a group of 2 360 shares in another undertaking under the Law of 26 March 1999. The price of the option was EUR 12 942 and corresponded to the value of the benefit in kind, as established by that law, namely 20% of the value of the shares, amounting to EUR 64709.36.

9 On 26 August 2005, Immo Chiaradia issued a second share option in favour of its manager, in return for consideration, relating to a group of 18 423 shares in another undertaking under the Law of 26 March 1999. The price of the option was EUR 9996.35 and corresponded to the value of the benefit in kind, as established by that law, namely 20% of the value of the shares, amounting to EUR 49981.77.

10 The price of the options was recognised as deferred income against the liabilities of Immo Chiaradia and was therefore not accounted for as income in the profit and loss account.

11 The manager of Immo Chiaradia exercised in part his second option in the 2006 tax year, in which Immo Chiaradia recorded a loss of EUR 3 265.

12 On 13 November 2008, the tax authorities sent Immo Chiaradia a correction notice informing the company of its intention to charge tax immediately on the price of the options, as hidden reserves, in respect of the 2006 tax year in the amount of EUR 22708.35.

13 Despite the objections of Immo Chiaradia, the tax authorities sent an assessment to tax to Immo Chiaradia confirming its intention to charge tax on the price, as an overvaluation of liabilities, for the option paid by the manager, which the tax authorities considered to be a benefit in kind to be recognised as income for the 2006 tax year with a balance sheet dated 31 December 2005. On 23 December 2008, the tax authorities accordingly imposed a supplementary charge on Immo Chiaradia in respect of the 2006 tax year.

14 The objection lodged by Immo Chiaradia against that tax charge on 14 January 2009 was rejected by decision of the tax authorities of 24 May 2012.

15 On 6 August 2012, Immo Chiaradia brought an action seeking the annulment of the contested tax charge before the tribunal de première instance du Hainaut, division de Mons (Court of First Instance of Hainaut, Mons Division, Belgium), an action which was dismissed in a judgment of 3 April 2014.

16 Immo Chiaradia subsequently appealed against that judgment before the cour d'appel de Mons (Court of Appeal of Mons, Belgium) on 30 June 2014. By its action, it seeks an order for the annulment of the contested tax charge on the ground that no legislative provision prescribes an accounting method or sets up a specific tax regime in respect of the share option at issue. It maintains that it recognised the transaction in accordance with Opinion 167/1 of the [Belgian] Commission des Normes Comptables (Commission for Accounting Standards (CNC)) by opting to consider that the price received by the issuer of an option amounts to remuneration for the liability it incurs during the whole term of the option and that it is only once that option has expired that the purchase price is financially relevant and must be recognised in the profit and loss account.

17 The referring court points out that, in several judgments, it has held that the tax authorities could not charge tax on an option as a hidden reserve. In those judgments, it held that, failing any express derogation from the tax rules, taxable profits must be determined in accordance with the accounting rules. It then analysed three opinions of the CNC, including Opinion 167/1.

18 In those judgments, the referring court considered that Opinion 167/1 suggests two approaches for the accounting treatment of the price received in consideration for an option issued. According to the first approach, the price of the option is recorded immediately in the profit and loss account. According to the second approach, the price is treated as 'deferred income' until the date when the option falls due and, therefore, must be recognised as such. The referring court took the view that the second approach was justified and also noted that that approach was preferred by the CNC in accordance with the principle of prudence.

19 The Belgian State is sceptical as to the conformity of the second approach with Directive 78/660. It doubts, in particular, whether the fact that a company can recognise as income the price of the option at issue in the course of the accounting year in which the option is exercised or at the end of its period of validity in order to take into account the liability incurred by the option issuer as a result of the commitment it makes, rather than in the course of the accounting year in which the grant of the option is made and the price definitively received, the liability incurred by the issuer of the option being valued separately by the recording of a provision, is compatible with the directive.

20 It is stated in the order for reference in Case C-445/16 that, in an agreement of 12 December 2006, Docteur De Bruyne issued a share option in favour of its manager in return for consideration relating to 540 shares in another undertaking under the Law of 26 March 1999. The price of the option was EUR 12550.68 and corresponded to the value of the benefit in kind, as established by that law, namely 20% of the value of the shares amounting to EUR 62753.40.

21 The price of the option was recognised as a deferred income liability of Docteur De Bruyne and was therefore not entered as income in the profit and loss account.

22 On 16 November 2009, the tax authorities sent Docteur De Bruyne a correction notice informing it that, in respect of the 2008 tax year, the purchase price of the option of EUR 12550.68 amounted to accrued income for the company and, on that basis, it should have been recognised as income in respect of the 2007 accounting year.

23 Despite the objections of Docteur De Bruyne, the tax authorities sent a tax assessment to Docteur De Bruyne on 21 December 2009 confirming its intention to charge tax on the price of the option which it considered to be a benefit in kind to be recognised as income for the 2008 tax year with a balance sheet dated 31 December 2007. On 14 January 2010, the tax authorities accordingly imposed a supplementary charge on Docteur De Bruyne in respect of the 2008 tax year.

24 The objection lodged by Docteur De Bruyne against that tax charge on 5 March 2010 was rejected by decision of the tax authorities of 26 April 2012.

25 On 18 July 2012, Docteur De Bruyne brought an action seeking the annulment of the contested charge to tax before the tribunal de première instance du Hainaut, division de Mons (Court of First Instance of Hainaut, Mons Division), an action which was dismissed in a judgment of 8 May 2014.

26 Docteur De Bruyne appealed against that judgment before the cour d'appel de Mons (Court of Appeal of Mons) on 4 July 2014.

27 In those circumstances, the cour d'appel de Mons (Court of Appeal of Mons) decided, on similar grounds in both cases, to stay the proceedings and to refer the same question in both cases to the Court of Justice for a preliminary ruling:

'Is the fact that a company issuing a share option may recognise as income the grant date price of that option in the course of the accounting year in which that option is exercised or at the end of its period of validity, in order to take into account the risk borne by the option issuer which results from the commitment he makes, [rather than] in the course of the accounting year in which the grant of the option is made and the price definitively received — the liability borne by the issuer being valued separately by the recording of a provision — compatible with the accounting rules concerning balance sheets laid down by [Directive 78/660], according to which:

— the annual accounts are to give a true and fair view of the company's assets, liabilities, financial position and profit or loss (Article 2(3) of Directive 78/660);

— provisions for liabilities and charges are intended to cover losses or debts the nature of which is clearly defined and which at the date of the balance sheet are either likely to be incurred, or certain to be incurred but uncertain as to amount or as to the date on which they will arise (Article 20(1) of Directive 78/660);

— the principle of prudence must in all circumstances be observed, and in particular:

  — only profits made at the balance sheet date may be included;

  — account must be taken of all foreseeable liabilities and potential losses arising in the course of the financial year concerned or of a previous one, even if such liabilities or losses become apparent only between the date of the balance sheet and the date on which it is drawn up (Article 31(1)(c)(aa) and (bb) of Directive 78/660);

— account must be taken of income and charges relating to the financial year to which the accounts relate, irrespective of the date of receipt or payment of such income or charges (Article 31(1)(d) of Directive 78/660);

— the components of asset and liability items are to be valued separately (Article 31(1)(e) of Directive 78/660)?'

28 By order of the President of the Court of Justice of 13 September 2016, Cases C-444/16 and C-445/16 were joined for the purposes of the written and oral procedure and judgment.

Consideration of the question referred

Admissibility

29 The issue of the admissibility of the question referred has been raised both by the applicants in the main proceedings and by the European Commission.

30 In the first place, the Commission observes that the dispute in the main proceedings relates to taxation. However, according to the Commission, the question referred relates to an interpretation of Directive 78/660, which concerns the annual accounts of certain types of companies.

31 It is true that Directive 78/660 is not designed to lay down the conditions in which such accounts may or must serve as a basis for the determination by the tax authorities of the Member States of the basis for assessment and the amount of taxes, such as the corporate tax at issue in the main proceedings (see, to that effect, judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 28).

32 Nevertheless, that fact does not permit the conclusion that the question referred is inadmissible. It should be noted that the Court may refuse to give a ruling 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 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 17 and the case-law cited).

33 In that regard, it should be noted that the Court has previously held that companies' annual accounts can be used by Member States as a reference base for tax purposes (see, to that effect, judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 28 and the case-law cited). It is stated in the orders for reference that, under Belgian law, failing any express derogation from the tax rules, taxable profits are determined in accordance with the accounting rules and that the relevant Belgian legislation does not contain any provision relating to the accounting method for the price of an option.

34 In those circumstances, it is not obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main actions or their purpose.

35 In the second place, the applicants in the main proceedings ask, in essence, whether Directive 78/660 may be validly relied on by the Belgian State in the actions in the main proceedings, given that, according to the applicants in the main proceedings, that directive has not actually been transposed into Belgian law.

36 In that regard, it should be noted that, although the provisions of national law at issue in the main proceedings have not reproduced the provisions of Directive 78/660 verbatim, it is common ground that the aim, the principles and the provisions of that directive are complied with as regards drawing up the annual accounts of companies, so that the interpretation given by the Court of the provisions of the directive would be binding for the resolution of the actions in the main proceedings by the referring court (see, by analogy, judgment of 7 January 2003, *BIAO*, C-306/99, EU:C:2003:3, paragraphs 92 and 93). In addition, in accordance with the Court's settled case-law, the referring court is in such circumstances bound, as far as possible, to interpret national law in the light of EU law and, in the present cases, of Directive 78/660 (see, by analogy, judgment of 17 March 2016, *Aspiro*, C-40/15, EU:C:2016:172, paragraph 18).

37 The question referred for a preliminary ruling must therefore be considered to be admissible.

Substance

38 By its question, the referring court asks, in essence, whether, in particular, the principles that a true and fair view must be given and that valuation must be made on a prudent basis provided for in Articles 2(3) and 31(1)(c) respectively of Directive 78/660 must be interpreted as precluding an accounting method according to which a company issuing a share option may recognise as income the grant date price of that option in the course of the accounting year in which that option is exercised or at the end of its period of validity.

39 As a preliminary matter, the point must be made that Directive 78/660, according to the third recital thereof, is designed only to establish minimum conditions as to the extent of the financial information to be made available to the public (judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 29 and the case-law cited).

40 As is apparent from the Court's case-law, compliance with the principle that a true and fair view must be given is the primary objective of Directive 78/660. According to that principle, contained in Article 2(3) of that directive, annual accounts must give a true and fair view of the assets and liabilities, financial position and the profit and loss of the company (see, to that effect, judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 30 and the case-law cited).

41 The Court has interpreted that principle broadly, by considering that it requires, first, that the accounts reflect the activities and transactions which they are supposed to describe and, second, that the accounting information be given in the form judged to be the soundest and most appropriate for satisfying third parties' needs for information, without harming the interests of the company concerned (judgment of 14 September 1999, *DE + ES Bauunternehmung*, C-275/97, EU:C:1999:406, paragraph 27).

42 The Court has previously had occasion to rule that the application of the principle that a true and fair view must be given must, as far as possible, be guided by the general principles contained in Article 31 of Directive 78/660, within which the principle of making valuations on a prudent basis set out in Article 31(1)(c) is of particular importance (judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 32 and the case-law cited).

43 In accordance with the provisions of Article 31(1)(c) of Directive 78/660, which states the principle of making valuations on a prudent basis, taking account of all elements — profits made, charges, income, liabilities and losses — which actually relate to the financial year in question ensures observance of the requirement of a true and fair view (judgment of 3 October 2013, *GIMLE*, C-322/12, EU:C:2013:632, paragraph 33 and the case-law cited).

44 As regards share options, such as those at issue in the main proceedings, the directive contains no specific guidance as to the method according to which the price of those options must be recognised. As the Commission noted in its observations submitted to the Court, there are, therefore, necessarily various methods compatible with Directive 78/660 provided that they comply with the general principles set out in that directive.

45 In that regard, it should be noted that it is not apparent from the documents in the case file submitted to the Court that an accounting method, such as that at issue in the actions in the main proceedings, according to which a company issuing a share option may recognise as income the grant date price of that option in the course of the accounting year in which that option is exercised or at the end of its period of validity, does not comply with those principles.

46 First, the fact that a company issuing a share option recognises as income the grant date price of that option only after the option is exercised or at the end of its validity is not incompatible with the principle that valuation must be made on a prudent basis. It is stated in the orders for reference that

the purchase price amounts to remuneration for the liability the issuing company incurs during the whole term of the option. It is therefore justified, in the light of the principle of prudence, to recognise the price as income only once it is possible to determine finally whether that liability, to which the purchase price is intimately related, has or has not materialised.

47 Second, it cannot be ruled out, as the applicants in the main proceedings maintain in their observations submitted to the Court, that, where the grant date price for the option is recognised as income in the course of the tax year in which that option is issued and before being exercised or, where relevant, before the end of its validity, the accounts of issuing companies show, in the tax years following the issuing of the option, liabilities that are greater than those which they show if the purchase price is recognised in the course of the financial year in which the option is exercised or falls due. The liability arising from a potential increase in the value of the shares underlying the options may, in fact, be mitigated by the amount of the grant date price of the option, which amounts to remuneration for that liability. In those circumstances, according to the applicants, an accounting method such as that at issue in the actions in the main proceedings is not incompatible with the principle that a true and fair view must be given.

48 It should be added that, although the question submitted refers to Article 20 of Directive 78/660, that article is not relevant for answering that question which, in essence, concerns the recognition of the price of an option and not the recording of a provision for covering losses or debts which are likely or certain to be incurred.

49 In those circumstances, the answer to the question referred is that the principles that a true and fair view must be given and that valuation must be made on a prudent basis set out in Articles 2(3) and 31(1)(c) respectively of Directive 78/660 must be interpreted as not precluding an accounting method according to which a company issuing a share option may recognise as income the grant date price of that option in the course of the accounting year in which that option is exercised or at the end of its period of validity.

Costs

50 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 (Ninth Chamber) hereby rules:

The principles that a true and fair view must be given and that valuation must be made on a prudent basis set out in Articles 2(3) and 31(1)(c) respectively of Council Directive 78/660/EEC of 25 July 1978 based on Article [50(2)(g) TFEU] on the annual accounts of certain types of companies, as amended by Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003, must be interpreted as not precluding an accounting method according to which a company issuing a share option may recognise as income the grant date price of that option in the course of the accounting year in which that option is exercised or at the end of its period of validity.

[Signatures]