Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

11 May 2023 *

(References for a preliminary ruling – Taxation – Article 49 TFEU – Freedom of establishment – Corporation tax – Group taxation (French 'intégration fiscale') – Tax exemption for dividends paid by subsidiaries belonging to the tax-integrated group – Resident parent company – Capital links with resident and non-resident companies without forming a tax-integrated group – Tax exemption of dividends paid by non-resident subsidiaries – Non-deductible costs and expenses relating to the holding – Lack of neutralisation as regards the add-back of those costs and expenses)

In Joined Cases C-407/22 and C-408/22,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decisions of 14 June 2022, received at the Court on 20 June 2022, in the proceedings

Ministre de l'Économie, des Finances et de la Relance

v

Manitou BF SA (C-407/22),

Bricolage Investissement France SA (C-408/22),

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, P.G. Xuereb, T. von Danwitz (Rapporteur), A. Kumin and I. Ziemele, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Manitou BF SA, by S. Joalland, S. Laisney, F. Locatelli, and G. Menu-Lejeune, avocats,

– Bricolage Investissement France SA, by M. Dervieux and F. Donnedieu de Vabres, avocats,

* Language of the case: French.

– the French Government, by R. Bénard and T. Stéhelin, acting as Agents,

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

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

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Article 49 TFEU.

2 The requests have been made in two sets of proceedings between the ministre de l'Économie, des Finances et de la Relance (Minister for Economic Affairs, Finance and Recovery, France), on the one hand, and Manitou BF SA (Case C-407/22) and Bricolage Investissement France SA (Case C-408/22), on the other, concerning the reimbursement to those companies of a proportion of the corporation tax and additional related amounts paid respectively in the tax years 2011 and 2012. The tax reclaimed is that levied on the proportion of costs and expenses added back to their profits and incurred in respect of dividends received from their subsidiaries established in Member States other than France.

French law

3 Article 216(I) of the code général des impôts (General Tax Code), in the version applicable to the facts at issue in the disputes in the main proceedings ('the CGI'), provides:

'Net revenues from holdings giving entitlement to application of the tax regime for parent companies and referred to in Article 145 which are received by a parent company in the course of a financial year may be deducted from the net total profits of that company, after deduction of a proportion of costs and expenses.

The proportion of costs and expenses referred to in the first subparagraph is fixed in every case at 5% of the gross revenue from the holdings, including tax credits.'

4 Under Article 223 A of the CGI:

'A company can render itself the sole party liable for corporation tax due on the overall profits of the group formed by the company itself and the companies of which it is the holder, continuously throughout the financial year, directly or indirectly through companies or permanent establishments in the group, of at least 95% of the capital …

…

Only those companies or permanent establishments which have given their consent and whose results are subject to corporation tax under the conditions of the general law or the rules laid down in Article 214 may be members of the group. …'

5 Article 223 B of the CGI provides:

'The overall profit is to be determined by the parent company through the algebraic sum of the results of each of the companies in the group, determined under the conditions of the general law or the rules laid down in Article 214.

The overall profit shall be reduced by the proportion of costs and expenses relating to revenue from holdings received by a group company from a company belonging to the group for more than one financial year and to revenue, derived from holdings, received by a group company from an intermediate company in respect of which the parent company provides evidence that it derives from revenue from holdings paid by a company which has been a member of the group for more than one financial year and which has not already justified corrections made pursuant to this paragraph or the third paragraph.

…'

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

Case C-407/22

6 In 2011, Manitou BF received dividends from subsidiaries established in Member States other than France, which it placed under the scheme for parent companies provided for in Articles 145 and 216 of the CGI. In accordance with Article 216(I), it deducted those dividends from its net profit, with the exception of a proportion of costs and expenses, fixed at 5% of the amount of dividends received.

7 By a complaint of 24 December 2014, Manitou BF sought reimbursement of part of the initial amount of corporation tax for which it was liable for the tax year ending in 2011, corresponding to the add-back of that proportion to its taxable revenue, on the ground that that add-back had been made pursuant to national provisions that undermine the freedom of establishment.

8 The tax authority rejected that complaint and Manitou BF brought an action against that decision. By a judgment of 26 September 2017, the tribunal administratif de Montreuil (Administrative Court, Montreuil, France) dismissed that action. By judgment of 27 May 2021, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles, France) set aside the judgment at first instance and granted Manitou BF reimbursement of the amounts claimed, finding that Article 223 B of the CGI was contrary to the freedom of establishment inasmuch as it did not provide for the possibility for a parent company to neutralise the proportion of costs and expenses added back in respect of revenue derived from holdings from subsidiaries established in a Member State other than France that meet the eligibility criteria of the tax integration scheme defined in that article. In that respect, that court held that it was irrelevant that that parent company, although it owned eligible subsidiaries in France, had not formed a tax-integrated group in that Member State.

9 Maintaining that that court incorrectly held Article 223 B of the CGI to be contrary to that freedom, the Minister for Economic Affairs, Finance and Recovery brought an appeal against that judgment before the Conseil d'État (Council of State, France), the referring court. In particular, the minister claims that the cour administrative d'appel de Versailles (Administrative

Court of Appeal, Versailles), by ruling that the fact that a parent company has or has not chosen to form a tax-integrated group with its French subsidiaries had no bearing on the merits of Manitou BF's claim for reimbursement, erred in law and incorrectly classified that facts.

Case C-408/22

10 In 2012, Bricolage Investissement France, which is wholly owned by the Adeo group, received dividends from a Polish subsidiary that it owns in full. Bricolage Investissement France placed those dividends, for the purpose of determining the corporation tax due for the tax year ending in 2012, under the scheme for parent companies provided for in Articles 145 and 216 of the CGI. In accordance with Article 216(I) of that code, it deducted the amount of those dividends from its net profit, with the exception of a proportion of costs and expenses, fixed at 5% of the amount of dividends received.

11 By a subsequent complaint, Bricolage Investissement France asked the tax authority to deduct all the dividends received from its Polish subsidiary, without any add-back of that proportion.

12 After that request was rejected, Bricolage Investissement France brought an action before the tribunal administratif de Montreuil (Administrative Court, Montreuil) for an order, in the amount of EUR 633 352, for the discharge of the corporation tax contributions and additional contributions to that tax which it paid for the tax year ending in 2012. That court dismissed that action by a judgment of 10 October 2019.

13 By a judgment of 19 October 2021, the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles), before which Bricolage Investissement France brought an appeal, set aside that judgment and granted that company a discharge of those contributions corresponding to the neutralisation of the proportion of costs and expenses that it had added back into its profits, on the basis of the considerations already referred to in paragraph 8 above.

14 The Minister for Economic Affairs, Finance and Recovery lodged an appeal against that judgment before the referring court. The Minister submits that the cour administrative d'appel de Versailles (Administrative Court of Appeal, Versailles) incorrectly held that Article 223 B of the CGI was not compatible with the freedom of establishment, disregarded the provisions of that article and incorrectly classified the facts by holding that a parent company that is not a member of a tax-integrated group may deduct from its taxable profit, without any add-back of that proportion, all dividends received from its subsidiaries, established in a Member State other than France, falling within the scope of that article.

Considerations applicable to both Cases C-407/22 and C-408/22

15 In the light of the submissions of the parties to the disputes in the main proceedings, the referring court has doubts as to the effect, for the cases brought before it, of the judgment of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524; 'the judgment in *Groupe Steria*'). In that judgment, the Court held that Article 49 TFEU precludes rules of a Member State that govern a tax integration scheme under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when it is

refused that neutralisation under those rules as regards the dividends distributed to it from subsidiaries located in another Member State, which, had they been resident, would have been eligible in practice, if they so elected.

16 In the light of the Court's considerations in that judgment, the Conseil d'État (Council of State) decided to stay the proceedings and to the refer the following question, which is formulated in identical terms in Cases C-407/22 and C-408/22, to the Court of Justice for a preliminary ruling:

'[Does] Article 49 [TFEU preclude] legislation of a Member State relating to a tax integration scheme under which a tax-integrated parent company benefits from the neutralisation of the proportion of costs and expenses added back in respect of dividends received by it from resident companies which are parties to the integration and, for the purpose of taking account of the judgment [in *Groupe Steria*], in respect of dividends received from subsidiaries established in another Member State which, had they been resident, would objectively have been eligible, if they so elected, for the tax integration scheme but which refuses the benefit of that neutralisation to a resident parent company which, despite the existence of capital links with other resident entities allowing for the constitution of a tax-integrated group, has not opted to belong to such a group, both in respect of the dividends distributed to it by its resident subsidiaries and in respect of those from subsidiaries established in other Member States which meet the eligibility criteria other than residence?'

17 By decision of the President of the Court of 21 July 2022, Cases C-407/22 and C-408/22 were joined for the purposes of the written and oral parts of the procedure and the judgment.

Consideration of the question referred

18 By its question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding legislation of a Member State, relating to a tax integration scheme under which

– a resident parent company that has opted for tax integration with resident companies is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from its subsidiaries located in other Member States who, had they been resident, would have been eligible in practice, if they so elected,

– whereas a resident parent company that has not opted for such tax integration despite the existence of capital links with other resident companies permitting it is refused such neutralisation.

19 The first paragraph of Article 49 TFEU provides that, within the framework of the provisions in Chapter 2 of Title IV in Part Three of the FEU Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are to be prohibited.

20 According to settled case-law, all measures which prohibit, impede or render less attractive the exercise of the freedom guaranteed by Article 49 TFEU must be regarded as restrictions on the freedom of establishment (judgment of 7 September 2022, *Cilevičs and Others*, C-391/20, EU:C:2022:638, paragraph 61 and the case-law cited).

21 Article 49 TFEU thus requires the abolition of restrictions on the freedom of establishment. Therefore, even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are aimed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (the judgment in *Groupe Steria*, paragraph 14 and the case-law cited).

22 It is also apparent from the Court's case-law that freedom of establishment is hindered if, under a Member State's legislation, a resident company having a subsidiary or a permanent establishment in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a permanent establishment or a subsidiary in the first Member State (the judgment in *Groupe Steria*, paragraph 15 and the case-law cited).

23 Under the national provisions at issue in the disputes in the main proceedings, dividends received by a resident parent company that are issued by a subsidiary, whether resident or not, are deducted from the net profits of the parent company, excluding a proportion of costs and expenses, fixed at 5% of the net amount of those dividends. The costs and expenses relating to the holdings from which the tax-exempt dividends are issued are considered non-deductible from the profits of the parent company.

24 However, that add-back of the proportion of costs and expenses to the profits of the parent company is neutralised in the case of a parent company that is part of a tax-integrated group as provided for in Article 223 A of the CGI in respect of dividends distributed by subsidiaries belonging to that group, pursuant to Article 223 B of that code.

25 It follows from those rules that the dividends received by a resident parent company that is part of a tax-integrated group, and which have been distributed by its subsidiaries belonging to the same tax group, are fully deducted from that parent company's net profit and, therefore, fully exempt from corporation tax in that Member State.

26 Those provisions were at issue in the judgment in *Groupe Steria*, in which the Court held that, since, under such rules, only resident companies can be part of a tax-integrated group, the tax advantage at issue in the main proceedings was reserved to dividends of national origin. The Court held that Article 49 TFEU must be interpreted as precluding rules of a Member State that govern a tax integration scheme under which a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from tax-integrated resident companies, when it is refused that neutralisation in another Member State, which, had they been resident, would have been eligible in practice, if they so elected.

27 It is apparent from the requests for a preliminary ruling that, following the judgment in *Groupe Steria*, a tax-integrated parent company is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it also from non-resident companies, which, had they been resident, would have been eligible in practice, if they so elected, to be part of a tax-integrated group.

28 Consequently, it follows from those rules, applied in the light of the judgment in *Groupe Steria*, that dividends received by a resident parent company belonging to a tax-integrated group, and which were distributed by its resident subsidiaries belonging to the same tax group, and by

non-resident subsidiaries which, had they been resident, would have been eligible in practice, if they so elected, to be part of that tax group, are deducted in full from the net profit of that parent company and are therefore fully exempt from corporation tax in that Member State.

29 By contrast, dividends received by a resident parent company that is not part of a tax-integrated group, from resident and non-resident subsidiaries, are only partially exempt from that tax, because of the add-back of the proportion of costs and expenses, fixed at 5%, into the profit of that parent company.

30 In the present case, and contrary to the situation at issue in the judgment in *Groupe Steria*, Manitou BF and Bricolage Investissement France are not part of a tax-integrated group, within the meaning of Article 223 A of the CGI. However, because of capital links between them and other companies resident in France, that possibility was open to them, if they so elected, with the latter companies, that is to say, as regards Manitou BF, because of capital links with its resident subsidiaries and, as regards Bricolage Investissement France, because of capital links with its resident parent company.

31 The fact remains that, in accordance with the national rules at issue in the disputes in the main proceedings, only companies resident in France may opt for the tax integration scheme and be part of a tax-integrated group in that Member State. Thus, Manitou BF and Bricolage Investissement France did not have the possibility of creating such a group with their subsidiaries established in Member States other than France.

32 In particular, under those rules, a resident parent company may opt for that scheme at any time with its subsidiaries located in France who meet the eligibility criteria. Moreover, according to those rules, the resident parent company may freely choose the integration perimeter without being obliged to integrate all of its eligible resident subsidiaries.

33 By contrast, a resident parent company does not have the possibility of opting for the tax integration scheme only with its subsidiaries located in other Member States who meet the eligibility criteria other than residence, but must necessarily form a tax-integrated group with at least one of the eligible resident companies.

34 It follows that, while a resident parent company with subsidiaries located in France may always be entitled to the tax advantage involving neutralisation as regards the add-back of the proportion of costs and expenses by exercising that option within a perimeter that it has freely chosen, a resident parent company with subsidiaries located in other Member States is not entitled to that advantage, unless it was previously part of a tax-integrated group in France with resident companies.

35 Such a difference in treatment results in a parent company that owns a subsidiary established in another Member State and that is not part of a tax-integrated group being excluded from the benefit of a tax advantage, such as that neutralisation, and is liable to make it less attractive for that parent company to exercise its freedom of establishment, since it would be deterred from setting up subsidiaries in other Member States (see, to that effect, the judgment in *Groupe Steria*, paragraph 20).

36 In order for such a difference in treatment to be compatible with the provisions of the Treaty on the freedom of establishment, it must relate to situations which are not objectively comparable or be justified by an overriding reason in the public interest (judgment of 25 February 2010, *X Holding*, C-337/08, EU:C:2010:89, paragraph 20 and the case-law cited).

37 As regards the comparability of the situations, the Court has already held, in relation to the provisions at issue in the main proceedings, that the fact that the dividends received by a parent company which benefit from full tax exemption come from subsidiaries that are part of the tax-integrated group to which the parent company concerned also belongs did not amount to an objective difference in the situation of parent companies that would justify the difference in treatment identified (the judgment in *Groupe Steria*, paragraph 22 and the case-law cited).

38 The Court held that, with regard to legislation which, through neutralisation as regards the add-back of the proportion of costs and expenses to the parent company's profits, provides for dividends received to be fully exempt from tax, the situation of companies belonging to a tax-integrated group is comparable to that of companies not belonging to such a group, be it the parent company or a subsidiary of that company. In each case, the parent company bears the costs and expenses related to its shareholding in the subsidiary, and, moreover, the profits made by the subsidiary and from which the dividends distributed are derived are, in principle, liable to be subject to economic double taxation or to a series of charges to tax (see, to that effect, the judgment in *Groupe Steria*, paragraph 22 and the case-law cited).

39 The French Government argues, however, with reference to the judgments of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 24), and of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 31), that the situation of a taxpayer who has opted for a tax integration scheme cannot be objectively comparable to that of a taxpayer who has not sought to benefit from it, a fortiori when he or she satisfied the objective conditions for doing so.

40 In that respect, the Court stated, in the judgment of 25 February 2010, *X Holding* (C-337/08, EU:C:2010:89, paragraph 24), that the situation of a resident parent company wishing to form a single tax entity with a resident subsidiary and the situation of such a resident parent company wishing to form such an entity with a non-resident subsidiary are objectively comparable with regard to the objective of a tax integration scheme, in so far as each seeks to benefit from the advantages of that scheme, which, in particular, allows the profits and losses of the companies constituting the single tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes.

41 Similarly, it noted, in the judgment of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraphs 29 to 31), that the situations of resident parent companies with resident sub-subsidiaries were objectively comparable with regard to such an objective, regardless of whether they held those sub-subsidiaries through resident or non-resident subsidiaries, provided that the single tax entity regime is sought in both situations for the group formed by the parent company and the sub-subsidiaries.

42 However, in so far as, first, a French resident parent company has no possibility of forming a tax-integrated group with subsidiaries established in another Member State, the fact that it has not formed such a group with at least one of its possible subsidiaries or other eligible resident

entities does not make it possible to establish that that parent company is not seeking to create such a group or to benefit from a tax integration scheme with one or more of its non-resident subsidiaries.

43 Secondly, in the present case, as is clear from the considerations set out in paragraph 38 above, the situation of companies belonging to a tax-integrated group must be regarded as comparable to that of companies not belonging to such a group with regard to rules providing not for tax integration but for full tax exemption of dividends received, by virtue of the tax advantage at issue in the disputes in the main proceedings.

44 In the light of those factors, the difference in treatment found in the main proceedings concerns situations that are objectively comparable.

45 As to whether that difference in treatment could be justified by an overriding reason in the public interest, it is sufficient to note that neither the referring court nor the French Government has relied on the existence of such overriding reasons in the public interest.

46 In the light of all the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as precluding legislation of a Member State relating to a tax integration scheme under which

– a resident parent company that has opted for tax integration with resident companies is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from its subsidiaries located in other Member States who, had they been resident, would have been eligible in practice, if they so elected,

– whereas a resident parent company that has not opted for such tax integration despite the existence of capital links with other resident companies permitting it is refused such neutralisation.

Costs

47 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 (First Chamber) hereby rules:

Article 49 TFEU must be interpreted as precluding legislation of a Member State relating to a tax integration scheme under which

– **a resident parent company that has opted for tax integration with resident companies is entitled to neutralisation as regards the add-back of a proportion of costs and expenses, fixed at 5% of the net amount of the dividends received by it from its subsidiaries located in other Member States who, had they been resident, would have been eligible in practice, if they so elected,**

– **whereas a resident parent company that has not opted for such tax integration despite the existence of capital links with other resident companies permitting it is refused such neutralisation.**

[Signatures]