Reports of Cases

JUDGMENT OF THE COURT (Grand Chamber)

5 February 2014*

(Request for a preliminary ruling — Direct taxation — Freedom of establishment — National tax legislation establishing an exceptional tax on the turnover of store retail trade — Retail store chains — Existence of a discriminatory effect — Indirect discrimination)

In Case C-385/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Székesfehérvári Törvényszék (Hungary), made by decision of 26 July 2012, received at the Court on 13 August 2012, in the proceedings

Hervis Sport- és Divatkereskedelmi Kft.

v

Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága,

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, E. Juhász, M. Safjan, J.L. da Cruz Vilaça, Presidents of Chambers, A. Rosas, A. Ó Caoimh, J.-C. Bonichot (Rapporteur), A. Arabadjiev and C. Toader, Judges,

Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 18 June 2013,

after considering the observations submitted on behalf of:

— Hervis Sport- és Divatkereskedelmi Kft., by L. Darázs and A. Dezső, ügyvédek,

— the Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága, by Z. Horváthné Ádám,

— the Hungarian Government, by Z. Fehér and K. Szíjjártó, acting as Agents,

— the Austrian Government, by C. Pesendorfer and F. Koppensteiner, acting as Agents,

— the European Commission, by K. Talabér-Ritz and W. Mölls, acting as Agents,

* Language of the case: Hungarian.

after hearing the Opinion of the Advocate General at the sitting on 5 September 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 18, 26, 49, 54 to 56, 63, 65 and 110 TFEU.

2 The request has been made in proceedings between Hervis Sport-és Divatkereskedelmi Kft. ('Hervis') and the Nemzeti Adó- és Vámhivatal Közép-dunántúli Regionális Adó Főigazgatósága (Central Transdanubia Regional Directorate-General for Tax of the National Tax and Customs Office), concerning the payment of the special tax on the turnover of certain sectors of the store retail trade introduced by Hungary for the years 2010 to 2012.

Legal context

3 The preamble to Law No XCIV of 2010 on the special tax on certain sectors (egyes ágazatokat terhelő különadóról szóló 2010. évi XCIV. Törvény) ('the law on the special tax') provides:

'In the context of the adjustment of the budgetary balance, the Parliament introduces this law on the establishment of a special tax imposed on taxpayers whose capacity to bear public burdens surpasses the general obligation to pay tax.'

4 Paragraph 1 of that law, dealing with 'Explanatory provisions', provides:

'For the purposes of the present law:

1. store retail trade: in accordance with the uniform system for classification of economic activities, in force on 1 January 2009, the activities classified in sector 45.1, apart from wholesale trade in vehicles and trailers, in sectors 45.32, 45.40, apart from wholesale trade in repairs of motorcycles, and in sectors 47.1 to 47.9, namely all commercial activities in the context of which the purchaser may also be a natural person not regarded as an undertaking.

…

5. net turnover: in the case of a taxable person subject to the accounting law, the net turnover from sales within the meaning of the accounting law; in the case of a taxable person subject to the simplified business tax and not covered by the accounting law, the turnover exclusive of [value added tax (VAT)] within the meaning of the law on the tax regime; in the case of a taxable person subject to the law on individual income tax, income exclusive of VAT within the meaning of the law on income tax. …

6. trader: the trader within the meaning of the law on local taxes.'

5 Under Paragraph 2 of the law on the special tax:

'Tax shall be chargeable on:

(a) store retail trade,

(b) telecommunications activities, and

(c) supply of energy.'

6 Paragraph 3 of that law defines taxable persons as follows:

'(1) Taxable persons are legal persons, other organisations within the meaning of the general tax code and self-employed persons who pursue an activity subject to tax within the meaning of Paragraph 2.

(2) Non-resident organisations and individuals shall also be subject to the tax with respect to the activities subject to the tax, referred to in Paragraph 2, where they pursue those activities in the internal market through subsidiaries.'

7 Under Paragraph 4 of that law:

'(1) The taxable amount shall be the net turnover of the taxable persons resulting from the activities referred to in Paragraph 2, during the tax year.

(2) In the case of an activity referred to in Paragraph 2(a), the taxable amount shall include the turnover from the service provided, in the context of the marketing of goods purchased for the purpose of a retail sale (the manufacturer or distributor of the goods), and the amount of income from the discount granted by that supplier.'

8 Paragraph 5 of that law, which sets the rate of that levy, provides:

'Applicable rates:

(a) concerning the activities referred to in Paragraph 2(a), 0% for the band of the taxable amount up to 500 million [Hungarian forints (HUF)], 0.1% for the band between HUF 500 million and HUF 30 billion, 0.4% for the band between HUF 30 billion and HUF 100 billion, and 2.5% for the band above HUF 100 billion.

…'

9 Paragraph 6 of the law on the special tax which includes provisions seeking to prevent double taxation, is worded as follows:

'Where the activity of a taxable person referred to in Paragraph 2(c) is also taxable under Paragraph 2(a) and/or (b), the taxable person must pay, for the activity referred to in Paragraph 2(a) or (b), only the highest amount calculated in accordance with the rates defined in Paragraph 5(a) and (c), or in Paragraph 5(b) and (c).'

10 Paragraph 7 of that law defines the circumstances in which that tax is applicable to so-called linked undertakings:

'(1) The tax of taxable persons classified as linked undertakings within the meaning of the Law [No LXXXI of 1996] concerning tax on companies and dividends ('Law No LXXXI of 1996') must be calculated by aggregating the net turnover from the activities referred to in Paragraph 2(a) and (b), pursued by taxable persons acting as linked undertakings, and the amount obtained by applying the rate defined in Paragraph 5 to that total must be divided between the taxable persons in proportion with their respective net turnover from the activities referred to in Paragraph 2(a) and (b), compared with the total net turnover from the activities referred to in Paragraph 2(a) and (b) earned by all the linked taxable persons.'

11 Paragraph 4 of Law No LXXXI of 1996, referred to in Paragraph 7 of the law on the special tax, defines linked undertakings as follows:

‘For the purposes of the present law,

…

23. a linked undertaking consists of:

(a) the taxable person and the undertaking in which the taxable person directly or indirectly holds a majority influence, in accordance with the civil code;

(b) the taxable person and the undertaking which directly or indirectly holds a majority influence over the taxable person, in accordance with the civil code;

(c) the taxable person and any other undertaking where a third party directly or indirectly holds a majority influence in the two undertakings, in accordance with the civil code, provided always that close relatives holding a majority influence over the other undertaking shall be considered to be third parties;

(d) the foreign trader and its Hungarian establishment, the establishments of the foreign trader, and the Hungarian establishment of the foreign trader and any undertaking which has with the foreign trader one of the relationships defined above in points (a) to (c);

(e) the taxable person and its foreign establishment, and the foreign establishment of any undertaking which has with the taxable person one of the relationships defined above in points (a) to (c).’

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

12 Hervis operates sports shops in Hungary under the name ‘Hervis Sport’. Its direct competitors are the retail store chains ‘Décathlon’, ‘Intersport’ and ‘SPG Sporcikk’.

13 Hervis is a legal person and is a subsidiary of SPAR Österreichische Warenhandels AG (‘SPAR’). Hervis is part of the SPAR group, in accordance with Paragraph 7 of the law on the special tax, defining ‘linked undertakings’ within the meaning of that law. On that basis, Hervis is liable to pay a share, in proportion to its turnover, of the special tax payable by all the undertakings belonging to that group on the basis of their overall turnover achieved in Hungary.

14 As a result of the application of the steeply progressive scale of the special tax to the overall turnover of that group, Hervis was subject to an average rate of tax considerably higher than that corresponding to the taxable amount consisting solely of the turnover of its own stores. Hervis maintains that the tax payable by the Hungarian retail store chains which are in competition with it is calculated on the basis of that taxable amount, since they are for the most part organised as sales outlets on the franchise model, having legal personality, and do not belong to a group.

15 Hervis concluded that such a system, since it resulted in the higher taxation of legal persons subject to the special tax linked, within the meaning of Law No LXXXI of 1996, to non-resident companies, infringed Articles 18, 49 to 55, 65 and 110 TFEU, and constituted prohibited State aid. After the tax authorities rejected its application to be exempted from the special tax for 2010, Hervis requested the Székesfehérvári Törvényszék (local court, Székesfehérvár), sitting as an administrative court, to hold that the provisions of the law on the special tax are contrary to European Union law.

16 In those circumstances, the Székesfehérvári Törvényszék decided to stay proceedings and to refer the following question to the Court:

'Is the fact that taxpayers engaged in store retail trade have to pay a special tax if their net annual turnover is higher than HUF 500 million compatible with the provisions of the Treaty governing the general principle of non-discrimination (Articles 18 TFEU and 26 TFEU), the principle of freedom of establishment (Article 49 TFEU), the principle of equal treatment (Article 54 TFEU), the principle of equal treatment as regards financial participation in the capital of companies or firms within the meaning of Article 54 TFEU (Article 55 TFEU), the principle of freedom to provide services (Article 56 TFEU), the principle of the free movement of capital (Articles 63 TFEU and 65 TFEU) and the principle of equality of taxation of companies (Article 110 TFEU)?'

Admissibility of the request for a preliminary ruling

17 The Hungarian Government maintains that the request for a preliminary ruling submitted by the Székesfehérvári Törvényszék lacks precision. It does not set out sufficiently clearly the exact reasons which led the referring court to consider that an interpretation of the provisions of the TFEU referred to in the order for reference was necessary for its decision in the proceedings.

18 However, the information provided in the order for reference bears a clear relation to the subject-matter of the dispute in the main proceedings and makes it possible to ascertain, as is apparent from paragraphs 12 to 15 of this judgment, the scope of the question referred for a preliminary ruling and the context in which it was referred. Moreover, the order for reference, which summarises the arguments of the applicant in the main proceedings regarding the interpretation of European Union law, and which expresses doubts concerning the correctness of that interpretation, states sufficiently clearly the reasons which led the referring court to take the view that an interpretation of European Union law was necessary to enable it to give judgment.

19 Accordingly, the request for a preliminary ruling must be regarded as admissible.

The question referred for a preliminary ruling

Introductory observations

20 Since the question referred refers both to the provisions of the Treaty relating to the freedom of establishment, the freedom to provide services and the free movement of capital, it is necessary first to determine which freedom is at issue in the main proceedings.

21 In that regard, it is clear from settled case-law that the purpose of the legislation concerned must be taken into consideration (Case C-35/11 *Test Claimants in the FII Group Litigation* [2012] ECR, paragraph 90 and case-law cited).

22 National legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the scope of Article 49 TFEU on freedom of establishment (see *Test Claimants in the FII Group Litigation*, paragraph 91 and the case-law cited).

23 The main proceedings concern the allegedly discriminatory rate of taxation imposed, by virtue of the special tax, on 'taxable persons classified as linked undertakings' within the meaning of Law No LXXXI of 1996. Paragraph 4 of that law refers, for the purpose of defining that concept, to a company's holding giving it a direct or indirect majority influence in another company.

24 In those circumstances, the request for a preliminary ruling concerns the interpretation of the provisions of the Treaty relating to freedom of establishment. It is, therefore, not necessary to interpret Articles 56 TFEU, 63 TFEU and 65 TFEU relating to the freedom to provide services and the free movement of capital.

25 It should, next, be noted that Article 18 TFEU is intended to apply independently only to situations governed by European Union law for which the Treaty lays down no specific prohibition of discrimination. In the field of freedom of establishment, the principle of the prohibition of discrimination is given specific expression in Article 49 TFEU (Case C-384/08 *Attanasio Group* [2010] ECR I-2055, paragraph 37 and case-law cited).

26 Therefore, it is not necessary to interpret Article 18 TFEU or Article 26 TFEU either.

27 Finally, since it does not appear that the special tax affects products from other Member States more than domestic products, the interpretation of Article 110 TFEU is not relevant in the context of the main proceedings.

28 From this it follows that the question referred must be regarded as concerning the question whether Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation relating to a turnover tax such as that at issue in the main proceedings.

The interpretation of Articles 49 TFEU and 54 TFEU

29 By its question, the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU preclude legislation relating to a turnover tax such as that at issue in the main proceedings, where that tax has potentially discriminatory effects with regard to taxable legal persons constituting, within a group, undertakings 'linked', within the meaning of that legislation, to a company whose registered office is located in another Member State.

30 According to settled case-law, the rules regarding equal treatment forbid not only overt discrimination based on the location of the registered offices of companies, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, by analogy, inter alia, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 26; Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 17; and Case C-440/08 *Gielen* [2010] ECR I-2323, paragraph 37).

31 The legislation at issue in the main proceedings imposes, in particular, a criterion of differentiation between, on the one hand, taxable persons subject to the special tax which are linked, within the meaning of the applicable national legislation, to other companies within a group, and, on the other hand, taxable persons which are not part of a group of companies.

32 That criterion of differentiation does not entail any direct discrimination where the special tax on store retail trade is levied in identical circumstances for all the companies exercising that activity in Hungary.

33 However, that criterion has the effect of disadvantaging legal persons which are linked to other companies within a group compared with legal persons which are not part of such a group of companies.

34 This is a result of the combination of two characteristics of the special tax.

35 First, the rate of that tax is steeply progressive in accordance with turnover, in particular in its upper band. Thus, the rate is 0.1% between HUF 500 million and HUF 30 billion, 0.4% between HUF 30 and HUF 100 billion and 2.5% above HUF 100 billion.

36 Second, that scale applies to a tax base which covers, for taxable persons belonging to a group of companies, the consolidated turnover of all the 'linked' taxable persons of the group (before division of the total tax in proportion to the turnover of each taxable person), although it is limited to the turnover of the taxable person on an individual basis in the case of legal persons such as independent franchisees. That means that the taxable persons belonging to a group of companies are taxed on the basis of a fictitious turnover.

37 Hervis, the Austrian Government and the Commission contend that Articles 49 TFEU and 54 TFEU preclude such a difference in treatment, which is based *de jure* on the apparently objective criterion of differentiation of the level of turnover, but which disadvantages *de facto* the subsidiaries of parent companies that have their registered offices in other Member States, in the light of the structure of store retail trade on the Hungarian market, and in particular the fact that retail stores belonging to such companies are generally organised, as is the case of Hervis, in the form of subsidiaries.

38 It must be observed that, in the context of a tax rule, such as that at issue in the main proceedings, which concerns the taxation of turnover, the situation of a person subject to the tax which belongs to a group of companies is similar to that of a person subject to the tax which does not belong to such a group. In particular, both the legal persons active on the store retail market in the Member State concerned which belong to a group of companies and those which do not belong to such a group are subject to the special tax and their turnover is independent of that of other taxable persons.

39 In those circumstances, if it is established that, on the store retail market in the Member State concerned, the taxable persons belonging to a group of companies and covered by the highest band of the special tax are, in the majority of cases, 'linked', within the meaning of the national legislation, to companies which have their registered offices in other Member States, the application of the steeply progressive scale of the special tax to a consolidated tax base consisting of turnover is liable to disadvantage, in particular, taxable persons 'linked' to companies which have their registered office in another Member State.

40 It is for the referring court to establish whether that condition has been fulfilled in the light of the overall context in which the national legislation has effect.

41 Where that is the case, legislation such as that at issue in the main proceedings, although it does not make a formal distinction according to the registered office of the companies, entails indirect discrimination on the basis of the registered office of the companies for the purposes of Articles 49 TFEU and 54 TFEU (see, to that effect, *Gielen*, paragraph 48).

42 According to settled case-law, such a restriction is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that it should be appropriate for ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (Case C-371/10 *National Grid Indus* [2011] ECR I-12273, paragraph 42 and case-law cited).

43 In that regard, the Hungarian Government did not rely, either in its written observations, or at the hearing, on a reason in the public interest in order to justify, if necessary, a system such as that at issue in the main proceedings.

44 It is necessary, in any event, to note that it is not possible to validly invoke, in support of such a system, either the protection of the economy of the country (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraphs 47 and 48), or the restoration of budgetary balance by increasing fiscal receipts (see, to that effect, Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 50).

45 In those circumstances, the answer to the question referred is that Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State.

Costs

46 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 (Grand Chamber) hereby rules:

Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State relating to tax on the turnover of store retail trade which obliges taxable legal persons constituting, within a group, 'linked undertakings' within the meaning of that legislation, to aggregate their turnover for the purpose of the application of a steeply progressive rate, and then to divide the resulting amount of tax among them in proportion to their actual turnover, if – and it is for the referring court to determine whether this is the case – the taxable persons covered by the highest band of the special tax are 'linked', in the majority of cases, to companies which have their registered office in another Member State.

[Signatures]