JUDGMENT OF THE COURT (Fourth Chamber)

6 October 2015 (*)

(Reference for a preliminary ruling — Articles 49 TFEU, 54 TFEU, 107 TFEU and 108(3) TFEU — Freedom of establishment — State aid — Taxation of groups of companies — Acquisition of a holding in a subsidiary — Depreciation of the goodwill — Limitation on holdings in resident companies)

In Case C?66/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Verwaltungsgerichtshof (Austria), made by decision of 30 January 2014, received at the Court on 10 February 2014, in the proceedings

Finanzamt Linz

v

Bundesfinanzgericht, Außenstelle Linz,

parties concerned:

IFN-Holding AG,

IFN Beteiligungs GmbH,

THE COURT (Fourth Chamber),

composed of L. Bay Larsen, President of the Chamber, K. Jürimäe, J. Malenovský, M. Safjan and A. Prechal (Rapporteur), Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– IFN-Holding AG and IFN Beteiligungs GmbH, by A. Damböck and B. Stürzlinger, Steuerberater,

– the Austrian Government, by J. Bauer, acting as Agent,

– the European Commission, by W. Roels and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 16 April 2015

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 49 TFEU, 54 TFEU, 107 TFEU and 108(3) TFEU.

2 The request has been made in proceedings between the Finanzamt Linz (Tax Office, Linz, 'the Tax Office') and the Bundesfinanzgericht, Außenstelle Linz (formerly Unabhängiger Finanzsenat, Außenstelle Linz) (Federal Finance Court, Linz Division), concerning the Tax Office's decision refusing, in the context of the taxation of a group of companies, to allow a company acquiring a holding in a non-resident company to depreciate the goodwill of that company.

Relevant provisions of Austrian law

3 In Austrian law, Paragraph 9 of the Law on Corporation Tax (Körperschaftsteuergesetz) of 7 July 1988 (BGBl. 401/1988), as amended by the Tax Reform Law of 2005 (Steuerreformgesetz 2005, BGBl. I 57/2004; 'the Law on Corporation Tax of 1988') lays down a taxation system for groups of companies. Under that system, a company together with its subsidiaries and other controlled companies in each of which a stake of at least 50% is held can come together to form a group. In that case, the various companies' taxable results (profits and losses) belonging to that group are regarded as those of the common parent company alone and are taxed at the level of that parent company.

4 Paragraph 9(7) of the Law on Corporation Tax of 1988 provides:

'Where a member of a group or the parent company of the group or a company suitable for forming a group of companies acquires a holding … in a company with unlimited tax liability and carrying on an activity …, other than directly or indirectly from a member of the group or directly or indirectly from a shareholder with a controlling influence, from the point in time at which that company becomes a part of the group, the group member with the direct holding or the parent company of the group shall depreciate the goodwill in the following manner:

– The goodwill shall be the difference, proportionate to the size of the holding, between the subsidiary company's equity capital for commercial-law purposes plus hidden reserves in non-depreciable fixed assets and the acquisition costs for tax purposes, provided always that such differences shall not exceed 50% of those acquisition costs. The depreciable goodwill shall be deducted evenly over a period of 15 years.

...

– Where the acquisition of the holding results in negative goodwill, that negative goodwill must be recognised in the profit and loss account ….

– The fifteenth parts allowable for tax purposes shall reduce or increase the book value for tax purposes.'

5 Paragraph 10 of the Law on Corporation Tax of 1988, relating to international holdings, provides, at points 2 and 3 thereof:

‘(2) Profit shares of any kind from international inter-company holdings shall be exempt from corporation tax. An international inter-company holding exists where it is established that taxable entities coming under Paragraph 7(3) or other foreign corporations with unlimited tax liability comparable to a domestic taxable entity coming under Paragraph 7(3) have held a stake of at least 10%, in the form of holdings, for a continuous period of at least one year in:

(a) foreign companies comparable to a domestic capital company,

(b) other foreign companies which fulfil the conditions … of Article 2 of Council Directive 90/435/EEC of 23 July 1990 [on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States] (OJ 1990 L 225, p. 6), in the applicable version. The said period of one year shall not apply for shares acquired as a result of an increase in capital, in so far as the extent of the equity interest is not thereby increased.

(3) Profits, losses and other changes in value from international inter-company holdings within the meaning of subparagraph (2) shall be disregarded for the purpose of calculating income. This shall not apply for actual and final pecuniary losses caused by the closure (liquidation or insolvency) of the non-resident company. Losses shall be reduced by tax-free profit shares of any kind accruing within the last five financial years prior to that in which liquidation began or insolvency occurred. The tax neutrality of the holding shall not apply if:

1. When submitting the corporation tax return for the year in which an international inter-company holding was acquired or an international inter-company holding was created by the additional acquisition of shares, the taxable entity declares that profits, losses and other changes in value are to be taken into account for tax purposes (option to have the holding taken into account for tax purposes).

...’

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

6 According to the order for reference, IFN Beteiligungs GmbH (‘IFN’) holds 99.71% of the shares in the capital of IFN-Holding AG (‘IFN-Holding’), which in turn has a majority holding in a number of capital companies which have limited or unlimited tax liability. In 2006 and 2007, IFN-Holdings held 100% of the shares of CEE Holding GmbH (‘CEE’), which in 2005 acquired 100% of the shares in HSF s.r.o. Slowakei (‘HSF’), a company established in Slovakia. CEE and HSF became, from 2005 and 2006 respectively, members of a group of companies within the meaning of Paragraph 9 of the Law on Corporation Tax of 1988. Following a merger between IFN-Holding and CEE, which took effect on 31 December 2007, IFN Holding assumed all of CEE’s rights and obligations in law, including its holding in HSF.

7 In corporation tax returns for the years 2006 to 2010, first CEE and subsequently IFN-Holding each claimed depreciation of the goodwill in respect of that holding for the purposes of Paragraph 9(7) of the Law on Corporation Tax of 1988, equivalent in each case to a fifteenth of one-half of the purchase price (namely, EUR 5.5 million). In an annex to their corporation tax return they stated that the restriction of the depreciation of goodwill to domestic holdings in resident companies, under Paragraph 9(7) of the Law on Corporation Tax of 1988, was at variance with the freedom of establishment and hence contrary to EU law.

8 In its tax notices, the Tax Office, as the fiscal authority of first instance, refused to allow that depreciation of goodwill on the ground that, under Paragraph 9(7) of the Law on Corporation Tax of 1988, only holdings in companies with unlimited tax liability were entitled to depreciation of that

kind.

9 Following actions brought by IFN-Holding and IFN against those notices, the Unabhängiger Finanzsenat, Außenstelle Linz annulled, by decision of 16 April 2013, the decision of the Tax Office. The Unabhängiger Finanzsenat considered that the restriction of the depreciation of goodwill to holdings in companies with unlimited tax liability under Paragraph 9(7) of the Law on Corporation Tax of 1988 was at variance with the freedom of establishment and could not be justified by any overriding reasons in the general interest. According to it, in order to ensure conformity with EU law, the depreciation of goodwill had to be extended to holdings in companies resident in another Member State.

10 The Tax Office appealed against that decision before the referring court, which, in turn, asks, first, whether the depreciation of goodwill provided for under Paragraph 9(7) of the Law on Corporation Tax of 1988, is compatible with Articles 107 TFEU and 108(3) TFEU. It considers that that depreciation creates an advantage for the beneficiary but questions whether that advantage must be regarded as favouring certain undertakings or the production of certain goods.

11 Second, the referring court questions the compatibility of the depreciation of goodwill, under Paragraph 9(7) of the Law on Corporation Tax of 1988 with Article 49 TFEU and Article 54 TFEU. It wishes to know whether that measure, which it considers to be a restriction on the freedom of establishment, may nevertheless be justified either on the ground that it relates to situations that are not objectively comparable or by an overriding reason in the general interest.

12 As regards the Tax Office’s argument that the situation of resident companies and that of non-resident companies which are, in both cases, members of a group of companies are not comparable inasmuch as, for resident companies, the result (profits and losses) is attributed in full to the ultimate holding company, whereas, for non-resident companies, only losses are attributed and, moreover, only in proportion to the size of the holding, the referring court asks whether the allowance of, or the refusal to allow the depreciation of goodwill is connected to that difference in situation between the two categories of companies, which are members of a group of companies. In the context of a group of companies, goodwill can be depreciated in respect of holdings regardless of whether the subsidiary makes a profit or incurs a loss and also regardless of whether or not the value of the holding has changed.

13 The referring court also observes that the depreciation of goodwill has the effect of reducing the book value of the holding for tax purposes, as a result of which the taxable capital gain on disposal is higher if the holding is subsequently disposed of. However, strategic holdings are normally held for the long term and even if the holding is sold on, the depreciation of goodwill will in any case give the parent company a cash-flow advantage, with the result that its situation on acquiring a holding in a resident company is more favourable than on acquiring a holding in a subsidiary established in another Member State.

14 Regarding the Tax Office’s argument that there are no obstacles to the freedom of establishment relating to international inter-company holdings for which the option to have the holding taken into account for tax purposes, provided for in Paragraph 10(3) of the Law on Corporation Tax of 1988, has not been exercised, the referring court states that, the taxable entity can, by exercising that option, which is exercisable only once, choose between the profits and losses resulting from the disposal of the holding, on the one hand, being tax neutral, or, on the other hand, being taken into account for tax purposes. The referring court notes, however, that, even if that option to have taken into account for tax purposes is exercised, the depreciate of goodwill would not be permissible in respect of a holding in a non-resident company.

15 In those circumstances, the Verwaltungsgerichtshof (Administrative Court) decided to stay

the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does Article 107 TFEU …, in conjunction with Article 108(3) TFEU …, preclude a national measure under which, in the context of the taxation of a group of companies, goodwill is to be depreciated in the case where a holding is acquired in a domestic company — thereby reducing the basis of assessment for tax purposes, and hence the tax burden — whereas such depreciation of goodwill on acquisition of a holding is not permissible in other cases of income and corporation tax?

(2) Does Article 49 TFEU …, in conjunction with Article 54 TFEU …, preclude legal provisions of a Member State under which, in the context of the taxation of a group of companies, goodwill is to be depreciated in the case where a holding is acquired in a resident company, whereas such depreciation of goodwill may not be carried out in regard to acquisition of a holding in a non-resident corporation (in particular, a corporation established in another … Member State)?’

Consideration of the questions referred

The admissibility of the first question

16 IFN-Holding and the European Commission contend that the first question is not admissible, since the reasons for which the referring court needs a response to that question in order to resolve the dispute brought before it, do not appear to be clear.

17 Referring to the judgment in *P* (C?6/12, EU:C:2013:525, paragraph 39), IFN-Holding claims, in particular, that, in State aid cases, the sole task of the national courts is to safeguard the rights of individuals until the final decision is taken by the Commission, pursuant to Article 108(3) TFEU. That is not the situation in the present case, since none of the parties to the dispute in the main proceedings had introduced a claim on the basis of Article 107 TFEU et seq.

18 The Commission, for its part, considers that IFN-Holding and IFN could not, in any event, plead before the national court, that the rule set out in Paragraph 9(7) of the Law on Corporation Tax of 1988 was unlawful in the light of the law relating to State aid.

19 It must be borne in mind that a request for a preliminary ruling made by a national court may be declared inadmissible only where it is quite obvious that the interpretation of EU law that is sought is unrelated 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 (see, inter alia, judgment in *Belvedere Costruzioni*, C?500/10, EU:C:2012:186, paragraph 16 and the case-law cited).

20 The first question concerns the compatibility with Articles 107 and 108(3) TFEU of a fiscal measure, such as that at issue in the main proceedings, permitting, subject to certain conditions, a company, which acquires a holding in a resident company, to depreciate the goodwill.

21 It must, however, be pointed out, that those liable to pay a tax cannot rely on the argument that a fiscal measure enjoyed by other businesses constitutes State aid in order to avoid payment of that tax (see, to that effect, judgment in *Air Liquide Industries Belgium*, C?393/04 and C?41/05, EU:C:2006:403, paragraph 43).

22 In addition, the order for reference contains no information from which it could be inferred that, despite it being impossible for IFN and IFN-Holding to draw any benefit from a possible breach of Articles 107 and 108(3) TFEU, the answer to the first question would none the less be necessary for the referring court in order for it to resolve the dispute before it.

23 In those conditions, it must be held that it is manifestly clear that the first question bears no relation to the subject-matter of the main proceedings.

24 The first question is consequently inadmissible.

The second question

25 By its second question, the referring court asks, in essence, whether Article 49 TFEU precludes legislation of a Member State, such as that at issue in the main proceedings, which, in the context of the taxation of a group of companies, allows a parent company, in the case of the acquisition of a holding in a resident company which becomes a member of such a group, to depreciate the goodwill up to a maximum of 50% of the purchase price of the holding, while such depreciation is prohibited in the case of the acquisition of a holding in a non-resident company.

26 Whilst the provisions of the FEU Treaty concerning freedom of establishment are directed to 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 a company incorporated under its legislation, in particular through a subsidiary. In particular, freedom of establishment is hindered if, under a Member State's legislation, a resident company having a subsidiary in another Member State or in another State that is party to the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3), suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a subsidiary in the first Member State (see, to that effect, judgment in *Nordea Bank*, C?48/13, EU:C:2014:2087, paragraphs 18 and 19).

27 It must be found that legislation such as that at issue in the main proceedings creates a tax advantage for a parent company acquiring a holding in a resident company, in cases of positive goodwill. As the referring court observes, the fact of being able to depreciate the goodwill, within the meaning of Paragraph 9(7) of the Law on Corporation Tax of 1988, reduces the basis of assessment for tax purposes of the parent company, and hence the tax burden.

28 By not granting, in those circumstances, that tax advantage to a parent company which acquires a holding in a non-resident company, that legislation introduces a difference in tax treatment between parent companies to the detriment of those which acquire a holding in a non-resident company.

29 That difference in treatment is such as to hinder the exercise by the parent company which acquires a holding in a non-resident company of its freedom of establishment for the purposes of Article 49 TFEU by deterring it from acquiring or setting up subsidiaries in other Member States (see, to that effect, judgment in *Commission* v *United Kingdom*, C?172/13, EU:C:2015:50, paragraph 23 and the case-law cited).

30 Such a difference in treatment is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest (see, inter alia, judgment in *Nordea Bank*, C?48/13, EU:C:2014:2087, paragraph 23).

31 As regards the question whether the situations at issue are objectively comparable, it must

be recalled that the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue (judgment in *Commission* v *Finland*, C?342/10, EU:C:2012:688, paragraph 36 and the case-law cited).

32 As the Verwaltungsgerichtshof states in its order for reference, by adopting the Tax Reform Law of 2005, the Austrian legislature intended to create a tax incentive for the creation of groups of companies by ensuring equal treatment between the purchase of the establishment (‘asset deal’) and the purchase of the holding in the company that owns the establishment (‘share deal’).

33 However, where, by virtue of legislation such as that at issue in the main proceedings, a group of companies can be composed of both resident and non-resident companies the situation of a parent company wishing to form such a group with a resident subsidiary and the situation of a resident parent company wishing to form a group of companies with a non-resident subsidiary are objectively comparable with regard to the aim of a tax scheme such as that at issue in the main proceedings, in so far as each seeks to benefit from the advantages of that scheme (see, to that effect, judgment in *X Holding*, C?337/08, EU:C:2010:89, paragraph 24).

34 That finding is not undermined by the existence, referred to by the Republic of Austria, of a difference in the attribution, to the earnings of the parent company, of the profits and losses of resident subsidiaries, on the one hand, and non-resident subsidiaries, on the other hand, in the context of the taxation of a group of companies.

35 As the referring court points out, legislation such as that at issue in the main proceedings allows the parent company to depreciate the goodwill, irrespective of whether the company in which a holding is acquired makes a profit or incurs a loss.

36 In those circumstances, as stated by the Advocate General in point 40 of her Opinion, the attribution, or absence of attribution to the earnings of a parent company, of the profits and losses of a company in which a holding is acquired cannot be regarded as a relevant criterion in order to compare the situation of the two categories of parent companies concerned in relation to the aim pursued by legislation such as that at issue in the main proceedings.

37 The finding set out in paragraph 33 above is not called into question by the argument of the Republic of Austria that the objective of legislation such as that at issue in the main proceedings is to give the ‘share deal’ the same treatment as that accorded to the ‘asset deal’. According to that Member State, allowing the parent company, in the event of the acquisition of a holding in a non-resident company which becomes a member of a group of companies, to depreciate the value of the company would place, in a cross-border situation, the ‘share deal’ in a more favourable position than the ‘asset deal’.

38 Even assuming that that were the case, the fact remains that legislation such as that at issue in the main proceedings creates a difference in treatment between a parent company acquiring a holding in a resident company, on the one hand, and a parent company acquiring a holding in a non-resident company, on the other hand, even though those two categories of companies are in a comparable situation in the light of that legislation’s very objective which is, as is clear from paragraph 32 above, to create a tax incentive for the creation of groups of companies.

39 The difference in treatment, such as that at issue in the main proceedings, can therefore be justified only by overriding reasons in the public interest. It is further necessary, in such a case, that that difference in treatment be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (see judgment in *Nordea Bank Danmark*, C?48/13, EU:C:2014:2087, paragraph 25 and the case-law cited).

40 The Republic of Austria considers that the difference in treatment, established by legislation such as that at issue in the main proceedings, is justified by the principle of the balanced allocation of the power to impose taxes between Member States, since it does not have the power to impose taxes on the profits of non-resident companies which are members of a group of companies.

41 In that regard, it should be recalled that, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation, and that preservation of that allocation is a legitimate objective recognised by the Court (see judgment in *Nordea Bank Danmark*, C?48/13, EU:C:2014:2087, paragraph 27 and the case-law cited).

42 However, as was noted in paragraph 35 above, legislation such as that at issue in the main proceedings allows the parent company to depreciate the goodwill, irrespective of whether the company in which a holding is acquired makes a profit or incurs a loss. Regarding the granting of that tax advantage, that legislation concerns neither the exercise of the power to impose taxes in respect of the profits and losses of the company in which a holding is acquired, nor, consequently, the allocation of the power to impose taxes between the Member States.

43 The Republic of Austria also submits that the difference in treatment arising from legislation such as that at issue in the main proceedings is justified by the need to ensure the cohesion of the tax system.

44 Admittedly, the Court has already recognised that the need to maintain the cohesion of a tax system can justify a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. For an argument based on such a justification to succeed, the Court requires, however, that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (judgment in *Grünewald*, C?559/13, EU:C:2015:109, paragraph 48 and the case-law cited).

45 The Republic of Austria contends, first, that such a direct link exists, under legislation such as that at issue in the main proceedings, between the tax advantage consisting in the depreciation of the goodwill, on the one hand, and the tax attribution to the parent company of the results of the resident company, on the other hand.

46 Such an argument cannot, however, be accepted. For the same reason as already set out in paragraphs 35 and 42 above, it cannot be considered that there is a direct link between that tax advantage and the tax burden consisting of the tax attribution to the parent company of the profit made by the company in which a holding is acquired, even assuming that that latter company makes in all circumstances profits and not losses.

47 Second, the Republic of Austria argues that there is a direct link, within the meaning of the case-law cited in paragraph 44 above, between the tax advantage concerned, on the one hand, and the taxation in so far as concerns the parent company of the capital gain realised upon the disposal of a holding in the resident company, on the other hand. Where the holding of a parent

company in a non-resident company is fiscally neutral, such taxation does not occur, and therefore not granting the tax advantage directly linked to the same taxation is justified.

48 However, it should be noted, first, that the tax advantage consisting of the depreciation of the goodwill produces immediate effects for the parent company, while the taxation of the capital gains realised upon the disposal of the investment in the resident company is remote and uncertain. The referring court notes, moreover, in that regard that strategic holdings are generally held for the long term. In those conditions, the fact that it is possible to tax capital gains realised upon a disposal of the holding is not such as to constitute a consideration based on fiscal cohesion justifying a refusal to grant that tax advantage where a parent company acquires a holding in a non-resident company which becomes a member of a group of companies (see, to that effect, judgments in *Rewe Zentralfinanz*, C?347/04, EU:C:2007:194, paragraph 67, and *DI. VI. Finanziaria di Diego della Valle & C.*, C?380/11, EU:C:2012:552, paragraph 49).

49 Second, as the Advocate General noted in point 61 of her Opinion, the national law does not allow the parent company to depreciate the goodwill even where the parent company exercises its option to have a foreign holding taken into account for tax purposes, in accordance with Paragraph 10(3), point 1, of the Law on Corporation Tax of 1988 and, thus rendering the disposal of such a holding taxable.

50 It follows that legislation such as that at issue in the main proceedings does not, by itself, establish a direct link between, first, the tax advantage consisting of the depreciation of the goodwill and, second, the levy consisting of the taxation in so far as concerns the parent company of the capital gain realised upon the disposal of a holding in its subsidiary, such that it could not be considered that difference in treatment, such as that at issue in the main proceedings, is justified by the need to ensure the coherence of the tax system of the Member State concerned (see, to that effect, judgment in *Commission v Spain*, C?269/09, EU:C:2012:439, paragraph 87).

51 Third, according to the Republic of Austria, it is permissible, in order to preserve the cohesion of the Austrian tax system, which prohibits the deduction of expenses related to non-taxable receipts, to deny the advantages of the depreciation referred to above in the case of tax neutral holdings in non-resident companies. Otherwise, those holdings would benefit from a double advantage, which is incompatible with that system.

52 However, that argument, founded on a lack of power to impose taxes in respect of the benefits of non-resident companies, does not concern the existence of a direct link between an advantage and a levy, but is the same, in fact, as that based on the principle of the balanced allocation of the power to impose taxes between Member States, mentioned in paragraph 40 above. That argument must therefore be rejected for the same reason as that referred to in paragraph 42 above.

53 Since it is not apparent from the documents before the Court that a difference in treatment, such as that at issue in the main proceedings, would be justified by an overriding reason of general interest, it must be considered incompatible with the freedom of establishment.

54 Consequently, the answer to the second question is that Article 49 TFEU precludes legislation of a Member State, such as that at issue in the main proceedings, which, in the context of the taxation of a group of companies, allows a parent company, in the case of the acquisition of a holding in a resident company which becomes a member of such a group, to depreciate the goodwill up to a maximum of 50% of the purchase price of the holding, while such depreciation is prohibited in the case of the acquisition of a holding in a non-resident company.

Costs

55 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 (Fourth Chamber) hereby rules:

Article 49 TFEU precludes legislation of a Member State, such as that at issue in the main proceedings, which, in the context of the taxation of a group of companies, allows a parent company, in the case of the acquisition of a holding in a resident company which becomes a member of such a group, to depreciate the goodwill up to a maximum of 50% of the purchase price of the holding, while such depreciation is prohibited in the case of the acquisition of a holding in a non-resident company.

[Signatures]

* Language of the case: German.