Provisional text

JUDGMENT OF THE COURT (Ninth Chamber)

15 February 2017 (*)

(Reference for a preliminary ruling — Free movement of capital — Article 64 TFEU — Movement of capital to or from third countries involving the provision of financial services — Financial assets held in a Swiss bank account — Additional assessment for recovery — Recovery period — Extension of the recovery period in the case of assets held outside the Member State of residence)

In Case C?317/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Supreme Court of the Netherlands), made by decision of 10 April 2015, received at the Court on 26 June 2015, in the proceedings

X

v

Staatssecretaris van Financiën,

THE COURT (Ninth Chamber),

composed of C. Vajda (Rapporteur), acting as President of the Chamber, K. Jürimäe and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Netherlands Government, by M.L. Noort, M.K. Bulterman and J. Langer, acting as Agents,

– the German Government, by J. Möller and T. Henze, acting as Agents,

– the Italian Government, by G. Palmieri, acting as Agent, assisted by G.M. De Socio, avvocato dello Stato,

– the European Commission, by W. Roels and C. Soulay, acting as Agents,

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

gives the following

Judgment

1 The present request for a preliminary ruling concerns the interpretation of Article 64(1) TFEU.

2 The request has been made in proceedings between X, a natural person, and the Staatssecretaris van Financiën (State Secretary for Finance, the Netherlands) concerning additional assessments for recovery in relation to income tax and social insurance contributions for the tax years from 1998 to 2006.

Legal context

EU law

3 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5) provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

4 Among the capital movements listed in Annex I to Directive 88/361 are, under Heading VI, ‘operations in current and deposit accounts with financial institutions’, which include ‘operations carried out by residents with foreign financial institutions’.

Netherlands law

5 Article 16 of the Algemene Wet inzake Rijksbelastingen (General Law relating to national taxation; ‘AWR’) provides as follows:

‘1. If any fact provides grounds for the assumption that an assessment has wrongly not been issued or has been issued at too low an amount, … the Inspector may recover the unpaid tax …

…

3. The authority to issue an additional assessment for recovery shall lapse five years after the date on which the tax debt arose. …

4. If too little tax has been levied on components of the subject matter of any tax which have been held or have arisen abroad, the authority to recover the underpaid tax shall lapse, in derogation from the first sentence of paragraph 3, 12 years after the date on which the tax debt arose.’

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

6 In May 2002 a complaint was brought regarding an infringement of the Wet toezicht effectenverkeer (Law on the supervision of security transactions). A criminal investigation was subsequently opened, in the course of which X was questioned several times.

7 By letter of 13 January 2009, X provided the Netherlands tax authorities with information relating to an account which he had held in a banking institution in Switzerland, under a codename, until the beginning of 2004 and to an account which he had held in a banking institution in Luxembourg since the beginning of 2004, neither of which he had included in his tax

declarations for the years preceding that letter.

8 On 27 July 2010, the Officier van Justitie (Netherlands Public Prosecution Service) forwarded the results of the criminal investigation to the tax authorities. The additional assessments for the years 1998 to 2006 were imposed on 30 November 2010.

9 X brought proceedings against those additional assessments before the Rechtbank te Breda (District Court, Breda, the Netherlands). By decision of 12 September 2012, that court found that the additional assessments covering the years up to and including 2004, imposed pursuant to the extended recovery period under Article 16(4) of the AWR, had not been effected with the diligence required by the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C?155/08 and C?157/08, EU:C:2009:368). Nevertheless, that court held, on the basis of the standstill clause in Article 64(1) TFEU, that the free movement of capital, and accordingly the case-law resulting from that judgment, was not applicable to the additional assessment in so far as the recovery related to the Swiss bank account. On those grounds, it upheld the additional assessments for the years up to and including 2003 — apart from a correction in relation to the distribution of income between X and his spouse — and reduced the additional assessment for 2004 by the amount of tax relating to the Luxembourg bank account.

10 The tax inspector lodged an appeal against the decision of the Rechtbank te Breda (District Court, Breda) before the Gerechtshof te ’s?Hertogenbosch (Regional Court of Appeal, ’s?Hertogenbosch, the Netherlands), in so far as that decision related to the additional assessment for 2004, and disputed the contention that he had not exercised the requisite diligence. Meanwhile, X lodged a cross-appeal against that decision before the Gerechtshof te ’s?Hertogenbosch (Regional Court of Appeal, ’s?Hertogenbosch) in so far as the decision related to the additional assessments for all of the years in dispute before the Rechtbank te Breda (District Court, Breda) and, in that context, challenged the contention that the standstill clause in Article 64(1) TFEU implied that the free movement of capital was not applicable in as much as the recovery related to his Swiss bank account.

11 The Gerechtshof te ’s?Hertogenbosch (Regional Court of Appeal, ’s?Hertogenbosch) dismissed the main appeal lodged by the tax inspector as unfounded. As regards the cross-appeal brought by X, that court deemed it to be inadmissible in so far as it concerned the additional assessments for the years up to and including 2003 as well as for the years 2005 and 2006, but held that it was well founded in so far as it related to the additional assessment for 2004. In that regard, that court took the view that the recovery in respect of the Swiss bank account came fully within the scope of the case-law resulting from the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C?155/08 and C?157/08, EU:C:2009:368). It took the view that Article 64(1) TFEU was not applicable to the main proceedings since the measure referred to in Article 16(4) of the AWR is a general measure that can be applied in situations that have nothing to do with direct investment, the provision of financial services or the admission of securities to capital markets, which are the categories expressly mentioned in Article 64(1) TFEU.

12 X and the State Secretary for Finance brought appeals on a point of law against the judgment of the Gerechtshof te ’s?Hertogenbosch (Regional Court of Appeal, ’s?Hertogenbosch) before the Hoge Raad der Nederlanden (Supreme Court of the Netherlands). The State Secretary for Finance submits that the Gerechtshof te ’s?Hertogenbosch (Regional Court of Appeal, ’s?Hertogenbosch) erred in taking the view that Article 64(1) TFEU does not cover measures such as the additional assessment for 2004 in respect of the Swiss bank account with the application of the extended recovery period provided for in Article 16(4) of the AWR.

13 The Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt, in the first place, as to whether the scope *ratione materiae* of Article 64(1) TFEU is delineated by the

purpose of the corresponding national legislation or by the transaction restricted by that national legislation. In that regard, it notes, on the one hand, that the reference to the ‘application’ of restrictions set out in Article 64(1) TFEU appears to be an argument in favour of the latter interpretation. In addition, it takes the view that the first interpretation could have the consequence of divesting that provision of much of its practical effect. On the other hand, it observes that an argument in favour of the former interpretation might be found in the judgment of 14 December 1995, *Sanz de Lera and Others* (C?163/94, C?165/94 and C?250/94, EU:C:1995:451). It states that, in that judgment, the Court held that Article 73c(1) of the EC Treaty (now Article 64(1) TFEU) does not cover rules that apply generally to all exports of coins, banknotes or bearer cheques, including those which do not involve, in third countries, direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

14 In the second place, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt as to whether Article 64(1) TFEU must be interpreted as covering only national law which applies to financial service providers and determines the conditions or mechanisms of the provision of services. In that regard, it notes, on the one hand, that, in the case which was pending on the date of the order for reference and subsequently gave rise to the judgment of 21 May 2015, *Wagner-Raith* (C?560/13, EU:C:2015:347), the referring court and the Commission had both advocated such an interpretation. On the other hand, it observes that it could be argued that the wording of Article 64(1) TFEU contains nothing to support that interpretation and that the actual meaning of Article 64(1) TFEU would thereby be greatly restricted.

15 In the third place, and lastly, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) expresses doubt as to whether the phrase ‘restrictions ... in respect of the movement of capital to or from third countries involving ... the provision of financial services’ in Article 64(1) TFEU covers the application of Article 16(4) of the AWR in connection with the bank account held by X with a bank in Switzerland. In that regard, it observes that, although it may be possible to categorise the holding of a securities account as a financial service in the light of the judgment of 11 June 2009, *X and Passenheim-van Schoot* (C?155/08 and C?157/08, EU:C:2009:368), that judgment concerns the interpretation of Article 49 EC and Article 56 EC (now Article 56 TFEU and Article 63 TFEU) and it is doubtful whether Article 64(1) TFEU has to be interpreted in the same way.

16 In those circumstances, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘1. Does the respect for the application to third countries of restrictions, as provided for in Article 64(1) TFEU, extend also to the application of restrictions existing under national rules, such as the extended recovery period at issue in the case in the main proceedings, which rules can also be applied in situations that have nothing to do with direct investment, the provision of financial services or the admission of securities to capital markets?

2. Does the respect for the application of restrictions relating to the movement of capital involving the provision of financial services, as provided for in Article 64(1) TFEU, concern also restrictions that, like the extended recovery period at issue in the case in the main proceedings, are not directed at the provider of the services and do not determine either the conditions or the mechanisms of the provision of services?

3. Does a situation such as that in the case in the main proceedings, in which a resident of a Member State has opened a (securities) account with a banking institution outside the European Union, also come within the definition of “the movement of capital ... involving … the provision of financial services” within the meaning of Article 64(1) TFEU, and does it matter in this connection

whether (and if so, to what extent) that banking institution carries out activities for the benefit of the account holder?'

Consideration of the questions referred

Preliminary observations

17 The questions referred for a preliminary ruling concern the interpretation of Article 64(1) TFEU, which provides that Article 63 TFEU is to be without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or EU law in respect of the movement of capital to or from third countries involving direct investment — including in real estate — establishment, the provision of financial services or the admission of securities to capital markets.

18 It should be noted, first, that those questions are based on the assumption that the legislation at issue in the main proceedings, which provides for an extended recovery period, constitutes a restriction on the movement of capital within the meaning of Article 63 TFEU.

19 Secondly, the order for reference states that that legislation entered into force on 8 June 1991. Thus, that legislation was in force before 31 December 1993, the relevant deadline under Article 64(1) TFEU, and therefore satisfies the temporal criterion laid down in that article.

The first question

20 By its first question, the referring court asks, in essence, whether Article 64(1) TFEU, must be interpreted as applying to national legislation which imposes a restriction on the capital movements referred to in that article, such as the extended recovery period at issue in the main proceedings, where that restriction also applies in situations which bear no relation to direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

21 In that regard, it should be noted, first, that it is apparent from the wording of Article 64(1) TFEU that that provision contains a derogation from the prohibition laid down in Article 63(1) TFEU in favour of the 'application' of any restrictions which existed on 31 December 1993 under national law adopted in respect of the movement of capital involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets. Thus, the applicability of Article 64(1) TFEU depends, not on the purpose of the national legislation containing such restrictions, but on its effect. That provision applies to the extent to which that national legislation imposes a restriction on movements of capital involving direct investment, establishment, the provision of financial services or the admission of securities to capital markets. Accordingly, the fact that that legislation may also apply to other situations is not such as to preclude Article 64(1) TFEU from being applicable in the circumstances which it covers.

22 Secondly, that interpretation is confirmed by the Court's case-law. According to that case-law, a restriction on capital movements, such as a less favourable tax treatment of foreign-sourced dividends, comes within the scope of Article 64(1) TFEU, inasmuch as it relates to holdings acquired with a view to establishing or maintaining lasting and direct economic links between the shareholder and the company concerned and which allow the shareholder to participate effectively in the management of the company or in its control (judgment of 24 November 2016, *SECIL*, C?464/14, EU:C:2016:896, paragraph 78 and the case-law cited). Similarly, according to the Court, a restriction is covered by Article 64(1) TFEU as being a restriction on the movement of capital involving direct investment in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between

the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (see, to that effect, judgment of 20 May 2008, *Orange European Smallcap Fund*, C?194/06, EU:C:2008:289, paragraph 102). It is clear from those judgments, and, in particular, from their use of the phrases ‘inasmuch as’ and ‘in so far as’, that the scope of Article 64(1) TFEU does not depend on the specific purpose of a national restriction, but on its effect on the movements of capital referred to in that provision.

23 That interpretation of Article 64(1) TFEU is not called into question by the judgment of 14 December 1995, *Sanz de Lera and Others* (C?163/94, C?165/94 and C?250/94, EU:C:1995:451), cited by the referring court. It is true that, having stated, in paragraph 33 of that judgment, that the physical export of means of payment cannot itself be regarded as a capital movement, the Court held in paragraphs 35 and 36 of that judgment that national legislation which applies generally to all exports of coins, banknotes or bearer cheques, including those which do not involve, in non-member countries, direct investment (including in real estate), establishment, the provision of financial services or the admission of securities to capital markets do not come within the scope of Article 73c(1) of the EC Treaty (now Article 64(1) TFEU). However, in paragraph 37 of that judgment, the Court held that Member States are entitled to verify the nature and reality of the transactions and transfers in question, with a view to satisfying themselves that such transfers will not be used for the purposes of the capital movements which are specifically covered by the restrictions authorised by Article 73c(1) of the EC Treaty. It follows from the judgment of 14 December 1995, *Sanz de Lera and Others* (C?163/94, C?165/94 and C?250/94, EU:C:1995:451), that Member States can rely on Article 64(1) TFEU in so far as the national rules apply to the movements of capital referred to in that provision.

24 Thirdly, it should be pointed out that an interpretation according to which Article 64(1) TFEU applies only where the national legislation at issue relates solely to the movements of capital referred to in that article would undermine the practical effectiveness of that provision. As the Netherlands Government has noted in its observations submitted to the Court, such an interpretation would have had the consequence of compelling all the Member States, in order to be able to apply the restrictions set out in Article 64(1) TFEU, to revise their national legislation and adapt it very precisely to the scope of that provision before the deadline of 1 January 1994. As the Netherlands Government has noted in its observations submitted to the Court, under such an interpretation, all Member States would have been compelled, in order to be able to apply the restrictions set out in Article 64(1) TFEU, to revise their national legislation and adapt it very precisely to the scope of that provision before the deadline of 1 January 1994.

25 Accordingly, the answer to the first question is that Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a restriction on the movements of capital referred to in that provision, such as the extended recovery period at issue in the main proceedings, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.

The third question

26 By its third question, which it is appropriate to examine before the second question, the referring court essentially asks whether the opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

27 In that regard, it should first be pointed out that, in the absence of a definition of ‘movement of capital’ in the TFEU, the Court has recognised the nomenclature that constitutes Annex I to

Directive 88/361 as having indicative value, it being understood that, as pointed out in the introduction to that annex, the list which it contains is not exhaustive (judgment of 21 May 2015, *Wagner-Raith*, C?560/13, EU:C:2015:347, paragraph 23 and the case-law cited). Nevertheless, as the Commission observed in its observations submitted to the Court, that annex makes reference, under Heading VI, to ‘operations in current and deposit accounts with financial institutions’, which include ‘operations carried out by residents with foreign financial institutions’. Accordingly, the opening of a securities account with a banking institution, such as that at issue in the main proceedings, comes within the concept of ‘movement of capital’.

28 Secondly, the Court has held that, in order to be capable of being covered by the derogation provided for in Article 64(1) TFEU, the national measure must relate to capital movements that have a sufficiently close link with the provision of financial services, which requires that there be a causal link between the movement of capital and the provision of financial services (see, to that effect, judgment of 21 May 2015, *Wagner-Raith*, C?560/13, EU:C:2015:347, paragraphs 43 and 44).

29 In that regard, it should be pointed out that the capital movements resulting from the opening of a securities account with a banking institution involve the provision of financial services. First, it is common ground that that banking institution carries out, for the benefit of the account holder, account-management services, which must be regarded as constituting a provision of financial services.

30 Secondly, there is a causal link between the capital movements concerned and the provision of financial services given that the holder places his capital in a securities account by reason of the fact that, in return, he benefits from the management services which he receives from the banking institution. Accordingly, in a situation such as that at issue in the main proceedings, there is a sufficiently close link between the capital movements and the provision of financial services.

31 It follows that the answer to the third question is that the opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.

The second question

32 By its second question, the referring court asks whether the possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the case in the main proceedings, are not related to either the provider of the services or the conditions or mechanisms of the provision of services.

33 In that regard, it should be noted that the decisive criterion for the application of Article 64(1) TFEU is concerned with the causal link between the capital movements and the provision of financial services and not with the personal scope of the contested national measure or its relationship with the provider, rather than the recipient, of such services. The field of application of that provision is defined by reference to the categories of capital movements which are capable of being subject to restrictions (judgment of 21 May 2015, *Wagner-Raith*, C?560/13, EU:C:2015:347, paragraph 39).

34 Consequently, the fact that a national measure concerns first and foremost the investor and not the provider of a financial service cannot preclude that measure from coming within the scope of Article 64(1) TFEU (judgment of 21 May 2015, *Wagner-Raith*, C?560/13, EU:C:2015:347,

paragraph 40). Likewise, the fact that a national measure bears no relation to the conditions or mechanisms of the provision of a financial service cannot preclude that measure from coming within the scope of that provision.

35 It follows that the answer to the third question is that the possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.

Costs

36 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:

1. **Article 64(1) TFEU must be interpreted as applying to national legislation which imposes a restriction on the movements of capital referred to in that provision, such as the extended recovery period at issue in the main proceedings, even where that restriction can also be applied to situations which have nothing to do with direct investment, establishment, the provision of financial services or the admission of securities to capital markets.**

2. **The opening of a securities account by a resident of a Member State with a banking institution outside the European Union, such as that at issue in the main proceedings, comes within the concept of a movement of capital involving the provision of financial services, within the meaning of Article 64(1) TFEU.**

3. **The possibility, provided for in Article 64(1) TFEU, for Member States to apply restrictions on capital movements involving the provision of financial services also applies to restrictions which, like the extended recovery period at issue in the main proceedings, are not related to either the provider of the services or the conditions and mechanisms of the provision of services.**

[Signatures]

* Language of the case: Dutch.