Case C-126/10

Foggia – Sociedade Gestora de Participações Sociais SA

v

Secretário de Estado dos Assuntos Fiscais

(Reference for a preliminary ruling from the

Supremo Tribunal Administrativo)

(Approximation of laws – Directive 90/434/EEC – Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States – Article 11(1)(a) – Valid commercial reasons – Restructuring or rationalisation of the activities of companies participating in operations – Definition)

Summary of the Judgment

1. *Questions referred for a preliminary ruling – Jurisdiction of the Court – Limits – Interpretation sought owing to the applicability, to purely internal situations, of provisions of a directive transposed into national law after the treatment of internal situations has been aligned with European Union law*

(Art. 267 TFEU)

2. *Approximation of laws – Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States – Directive 90/434 – Operations having as their purpose tax evasion or tax avoidance*

(Council Directive 90/434, Art. 11(1)(a))

1. Where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in EU law in order, in particular, to avoid discrimination against nationals of the Member State in question or any distortion of competition, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly, irrespective of the circumstances in which they are to apply.

Accordingly, where a national regulation provides that the national and cross-border restructuring operations are subject to the same merger taxation system and that the rule that enables the benefit of that taxation system to be refused when there are no valid commercial reasons, set out in Article 11(1)(a) of Directive 90/434 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, is to be applied in purely internal situations too, the Court has jurisdiction to answer the questions referred by the national court relating to the interpretation of the provisions of Directive 90/434, even though they do not directly govern the situation at issue in the main proceedings.

(see paras 20-21, 23)

2. Article 11(1)(a) of Directive 90/434 on the common system of taxation applicable to

mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, is to be interpreted as meaning that, in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity, does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been carried out for 'valid commercial reasons' within the meaning of Article 11(1)(a). It is incumbent on the national court to verify, in the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute.

In that regard, the concepts of restructuring and rationalisation referred to in Article 11(1)(a) of Directive 90/434 must be understood as involving more than the attainment of a purely fiscal advantage and any operation of restructuring and rationalisation having only such an aim cannot constitute a valid commercial reason within the meaning of that provision. Therefore, in principle, there is nothing to prevent a merger operation from having valid commercial reasons where it carries out restructuring or rationalisation of a group that allows its administrative and management costs to be reduced. However, this would not be the case for an acquisition operation, where it seems clear that, having regard to the magnitude of the anticipated tax benefit, the saving made by the group concerned in terms of cost structure is quite marginal.

Furthermore, by automatically accepting that the saving in the cost structure resulting from the reduction of the administrative and management costs constitutes a valid commercial reason, without taking account of the other objectives of the proposed operation, and particularly the tax advantages, the rule set out in Article 11(1)(a) of Directive 90/434 would be entirely deprived of its purpose, which consists of safeguarding the financial interests of the Member States by providing, in accordance with the ninth recital in the preamble to that directive, the option for those Member States to refuse the benefit of the provisions laid down by the directive in the event of tax evasion or avoidance.

(see paras 46-47, 49, 52, operative part)

JUDGMENT OF THE COURT (Fifth Chamber)

10 November 2011 (*)

(Approximation of laws – Directive 90/434/EEC – Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States – Article 11(1)(a) – Valid commercial reasons – Restructuring or rationalisation of the activities of companies participating in operations – Definition)

In Case C?126/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Supremo Tribunal Administrativo (Portugal), made by decision of 3 February 2010, received at the Court on 10

March 2010, in the proceedings

Foggia – Sociedade Gestora de Participações Sociais SA

v

Secretário de Estado dos Assuntos Fiscais,

intervening party:

Ministério Público,

THE COURT (Fifth Chamber),

composed of M. Safjan, President of the Chamber, J.-J. Kasel (Rapporteur) and M. Berger, Judges,

Advocate General: J. Mazák,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 14 July 2011,

after considering the observations submitted on behalf of:

– Foggia – Sociedade Gestora de Participações Sociais SA, by F. Castro Silva, advogado,

– the Portuguese Government, by L. Inez Fernandes and J. Menezes Leitão, acting as Agents,

– the Spanish Government, by M. Muñoz Pérez, acting as Agent,

– the Netherlands Government, by C. Wissels and M. de Ree, acting as Agents,

– the United Kingdom Government, by F. Penlington, acting as Agent,

– the European Commission, by R. Lyal and M. Afonso, acting as Agents,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1).

2 The reference has been made in the course of a dispute between Foggia – Sociedade Gestora de Participações Sociais SA (‘Foggia – SGPS’) and the Secretário de Estado dos Assuntos Fiscais (‘the Ministry of Finance’) concerning the refusal by the latter to authorise a transfer of tax losses following an operation to merge companies belonging to the same group.

Legal context

European Union (‘EU’) law

3 According to the ninth recital in the preamble to Directive 90/434, ‘it is necessary to allow Member States the possibility of refusing to apply this Directive where the merger, division, transfer of assets or exchange of shares operation has as its objective tax evasion or avoidance …’.

4 Article 6 of Directive 90/434, which forms part of Title II thereof concerning rules applicable to mergers, divisions and exchanges of shares, provides:

‘To the extent that, if the operations referred to in Article 1 were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company’s permanent establishments situated within its territory.’

5 Article 11(1) of Directive 90/434, which appears under Title V, entitled ‘Final provisions’, provides:

‘A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

(a) has as its principal objective or as one of its principal objectives tax evasion or avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or avoidance as its principal objective or as one of its principal objectives;

…’

National legislation

6 The Corporation Tax Code (Código do Imposto sobre o Rendimento das Pessoas Colectivas, ‘the CIRC’), in the version applicable to the main proceedings, includes an Article 67 relating to the transferability of tax losses, subparagraphs 6, 7 and 10 of which read as follows:

‘6. For the purposes of Articles 68 and 70 [of the CIRC], in relation to mergers and de-mergers of companies from different European Union Member States, the term “company” shall have the meaning given to it in the Annex to Directive No 90/434.

7. The special scheme provided for in this subsection shall apply to mergers and de-mergers of companies and transfer of assets, as defined in paragraphs 1 to 3, involving:

(a) companies having their head office or place of effective management in Portugal subject to and not exempt from IRC, for which the taxable profit is not determined by the simplified scheme;

(b) a company or companies from other European Union Member States, provided that all companies are in compliance with the conditions set out in Article 3 of Directive 90/434;

…

10. The special scheme shall not apply either in whole or in part, when it is determined that the

transactions covered by it have as their main objective or as one of the main objectives tax avoidance, which may be considered to exist, in particular, where the companies involved are not all subject to the same system of corporation tax on all their income or where transactions have not been entered into for valid commercial reasons, such as restructuring or rationalisation of the activities of companies that participate in them, making then, if appropriate, the corresponding additional tax assessments.'

7 Article 69 (1) and (2) of the CIRC provides:

'1. The tax losses of merged companies may be offset against the taxable profits of the new company or the acquiring company until the end of the period set out in Article 47(1), counting from the accounting period in which they arose, provided that authorisation has been granted by the Minister of Finance, upon request of interested parties delivered at the Directorate-General of Taxation by the end of the month following the submission of the merger for registration in the Commercial Registry.

2. Authorisation shall be granted only where it is demonstrated that the merger is carried out for valid commercial reasons, such as restructuring or rationalisation of activities of the companies involved, and is part of a strategy of reorganisation and business development for the medium or long term, with positive effects on the productive structure. All information necessary or convenient for a complete understanding of the legal and economic aspects of the proposed transaction should be provided for this purpose.'

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

8 By merger operation of 29 September 2003, Foggia – SGPS, a Portuguese holding company, acquired three other holding companies belonging to the same group.

9 By application to the Ministry of Finance submitted on 28 November 2003, Foggia – SGPS sought authorisation, under Article 69(1) of the CIRC, to deduct from its taxable profits, if any, the tax losses incurred by the holding companies acquired and yet to be used, for the financial years 1997 to 2002 inclusive.

10 The Ministry of Finance granted that application in relation to two of the three companies but, by a decision of 6 October 2004, refused the transfer of tax losses from Riguadiana – SGPS SA ('Riguadiana') on the ground that, for Foggia – SGPS, there was no commercial interest in acquiring Riguadiana.

11 In that regard, the services of the Ministry of Finance stated that, for the years under consideration, Riguadiana had ceased to have a portfolio of holdings, that it had practically no revenue from its activity and that it had invested only in securities. Moreover, the origin of that company's tax losses in the income tax return for 2002, in the amount of around EUR 2 million, is unclear. Although the removal of Riguadiana from the structure of the group may clearly lead to a reduction in administrative and management costs, that positive effect in terms of the cost structure of the group cannot, according to the Ministry of Finance, be considered as being of commercial interest for Foggia – SGPS.

12 On 24 January 2005, Foggia – SGPS brought a special administrative action before the Tribunal Central Administrativo Sul for annulment of the abovementioned refusal and for adoption of an administrative measure authorising the transfer of the tax losses in question; this action was dismissed by that court.

13 On 3 December 2008, Foggia – SGPS appealed to the Supremo Tribunal Administrativo,

the court of final instance.

14 In its order for reference, that court notes that the existence of ‘valid commercial reasons’ constitutes one of the two cumulative conditions set out in Article 69(2) of the CIRC and that it is within the discretionary powers of the Ministry of Finance to determine whether that condition is satisfied. The national court expresses doubts, however, as to the compatibility of the interpretation made by the Ministry of Finance of the terms ‘valid commercial reasons’, having regard to the same concept referred to in Article 11(1)(a) of Directive 90/434.

15 It was in those circumstances that the Supremo Tribunal Administrativo decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) What are the meaning and effect of Article 11(1)(a) of Directive [90/434] and, in particular, what is the meaning of “valid commercial reasons” and “restructuring or rationalisation of the activities” of companies participating in operations covered by Directive [90/434]?

(2) Is the view taken by the tax authorities, that there are no serious commercial reasons for the acquiring company’s request to transfer tax losses, leading them to conclude that, from the acquiring company’s point of view, there was no apparent commercial interest in acquisition, since the acquired company had developed no activity as a holding company and had no financial holdings, and would consequently transfer only substantial losses, although the merger might represent a positive effect in terms of the cost structure of the group, compatible with that provision of Community law?’

The jurisdiction of the Court and the admissibility of the reference for a preliminary ruling

16 In its written observations, the Portuguese Government first claims that the Court has no jurisdiction to give a preliminary ruling and, second, submits that the reference for a preliminary ruling is inadmissible, disputing the relevance of the questions referred by the national court.

17 First, that government argues that the context of the main proceedings is purely national. There is reason to doubt that this dispute falls within the scope of Directive 90/434 and, consequently, within the jurisdiction of the Court since EU law does not govern, either directly or indirectly, the situation at issue before the national court.

18 In that connection, it must be borne in mind that, under the first paragraph of Article 267 TFEU, the Court has jurisdiction, inter alia, to give preliminary rulings concerning ‘the interpretation of the Treaties’ and the ‘… interpretation of acts of the institutions … of the Union’.

19 It is, admittedly, common ground that the dispute in the main proceedings concerns a provision of national law that applies within a purely internal context.

20 However, it is apparent from the documents before the Court that the national and cross-border restructuring operations are subject, under Article 67 of the CIRC, to the same merger taxation system and that the rule that enables the benefit of that taxation system to be refused when there are no valid commercial reasons, set out in Article 11(1)(a) of Directive 90/434, is to be applied also in purely internal situations.

21 According to the Court’s settled case-law, where, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in EU law in order, in particular, to avoid discrimination against nationals of the Member State in question or any distortion of competition, it is clearly in the European Union’s interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU law should be interpreted uniformly,

irrespective of the circumstances in which they are to apply (Case C?28/95 *Leur-Bloem* [1997] ECR I?4161, paragraph 32; Case C?43/00 *Andersen og Jensen* [2002] ECR I?379, paragraph 18; and Case C?352/08 *Modehuis A. Zwijnenburg* [2010] ECR I?4303, paragraph 33).

22 Moreover, it is for the national court alone to assess the precise scope of that reference to EU law, the jurisdiction of the Court being confined to considering and interpreting provisions of that law only (*Leur-Bloem*, paragraph 33, and *Modehuis A. Zwijnenburg*, paragraph 34).

23 It follows from the foregoing that the Court has jurisdiction to answer the questions referred by the Supremo Tribunal Administrativo relating to the interpretation of the provisions of Directive 90/434, even though they do not directly govern the situation at issue in the main proceedings.

24 In the second place, the Portuguese Government claims that the reference for a preliminary ruling is inadmissible because there is no connection between the interpretation requested of Article 11(1)(a) of Directive 90/434, the wording of which is reproduced in Article 67(10) of the CIRC, and the subject-matter of the main proceedings, which concerns Article 69(2) of that code, relating to the transferability of the tax losses referred to in Article 6 of that directive.

25 In accordance with the Court's settled case-law, in the context of the cooperation between the Court of Justice and the national courts established by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need of a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (see, inter alia, *Leur-Bloem*, paragraph 24, Case C?48/07 *Les Vergers du Vieux Tauves* [2008] ECR I?10627, paragraph 16, and Joined Cases C?78/08 to C?80/08 *Paint Graphos and Others* [2011] ECR I?0000, paragraph 30).

26 As a matter of fact, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling from a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see Joined Cases C?222/05 to C?225/05 *van der Weerd and Others* [2007] ECR I?4233, paragraph 22; *Les Vergers du Vieux Tauves*, paragraph 17; and *Paint Graphos and Others*, paragraph 31).

27 In the present case it cannot validly be claimed that the interpretation of Directive 90/434 has no connection with the facts or subject-matter of the dispute in the main proceedings or that the problem is hypothetical, since the national court's reference is intended precisely to permit that court to answer a question concerning the compatibility of the Ministry of Finance's position regarding the concept of 'valid commercial reasons' with the same concept referred to in Article 11(1)(a) of that directive.

28 It follows that, contrary to what the Portuguese Government maintains, the reference for a preliminary ruling must be declared admissible.

29 However, with regard to the wording of the second question, it should be noted that it is settled case-law that, although the Court may not, in proceedings under Article 267 TFEU, rule upon the compatibility of a provision of domestic law with EU law or interpret domestic legislation

or regulations, it may nevertheless provide the national court with an interpretation of EU law on all such points as may enable that court to determine the issue of compatibility for the purposes of the case before it (see, inter alia, Case C?292/92 *Hünermund and Others* [1993] ECR I?6787, paragraph 8, and Joined Cases C?338/04, C?359/04 and C?360/04 *Placanica and Others* [2007] ECR I?1891, paragraph 36).

30 In light of the foregoing, it must be held that, by its two questions, which should be examined together, the national court essentially asks whether Article 11(1)(a) of Directive 90/434 is to be interpreted as meaning that a merger operation between two companies of the same group can be considered to be carried out for 'valid commercial reasons', within the meaning of that provision, where it has a positive effect in terms of the cost structure of that group, even where the acquired company does not pursue any activity, has no financial holdings and transfers only substantial losses to the acquiring company.

The questions referred to the Court

31 It must be emphasised at the outset that the common tax rules laid down by Directive 90/434 cover different tax advantages and apply without distinction to all mergers, divisions, transfers of assets or exchanges of shares irrespective of the reasons, whether financial, economic or simply fiscal, for those operations (see *Leur-Bloem*, paragraph 36, and Case C?321/05 *Kofoed* [2007] ECR I?5795, paragraph 30).

32 The reasons for the proposed transaction are important, however, in giving effect to the option given to Member States, under Article 11(1) of that directive, not to grant the benefit of the provisions of that directive (*Modehuis A. Zwijnenburg*, paragraph 42).

33 In particular, under Article 11(1)(a) of Directive 90/434, as an exception and in specific cases Member States may refuse to apply, or may withdraw the benefit of, all or any part of the provisions of that directive, inter alia, where the exchange of shares has tax evasion or avoidance as its principal objective or as one of its principal objectives. That same provision also provides that the fact that the operation is not carried out for valid commercial reasons, such as the restructuring or rationalisation of the activities of the companies participating in the operation, may constitute a presumption that the operation has such an objective (see, to that effect, *Leur-Bloem*, paragraphs 38 and 39, and *Kofoed*, paragraph 37).

34 With regard to 'valid commercial reasons' within the meaning of that Article 11(1)(a), the Court has already had occasion to state that it is clear from the wording and aims of Article 11, as it is from those of Directive 90/434 in general, that the concept involves more than the attainment of a purely fiscal advantage. A merger by way of exchange of shares having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that provision (*Leur-Bloem*, paragraph 47).

35 Consequently, a merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant in the context of the proposed transaction.

36 Accordingly, under Article 11(1)(a) of Directive 90/434, where the merger operation has the sole aim of obtaining a tax advantage and is not carried out for valid commercial reasons, such a finding may constitute a presumption that the operation has tax evasion or avoidance as one of its principal objectives.

37 It follows from the case-law of the Court that, in order to determine whether the planned operation has such an objective, the competent national authorities may not confine themselves to

applying predetermined general criteria but must subject each particular case to a general examination of the operation in question. Indeed, the laying down of a general rule automatically excluding certain categories of operations from the tax advantage, without account being taken of whether or not there is actually tax evasion or avoidance, would go further than is necessary for preventing such tax evasion or avoidance and would undermine the aim pursued by Directive 90/434 (*Leur-Bloem*, paragraphs 41 and 44).

38 It is in the context of this general examination that consideration must be given to the aspects mentioned by the national court, namely, the fact that on the date of the merger operation, the acquired company was no longer carrying out any management activity, that it no longer had any financial holdings and that the acquiring company intended to take over the acquired company's losses which had not yet been exhausted for tax purposes.

39 However, none of those aspects can, as such, be considered decisive.

40 Indeed, a merger or restructuring carried out in the form of the acquisition of a company that does not carry on activity and that does not contribute assets to the acquiring company may, nevertheless, be considered by the latter to have been carried out for valid commercial reasons.

41 Likewise, it cannot be ruled out that a merger by acquisition of a company holding such losses may have valid commercial reasons since Article 6 of Directive 90/434 makes express reference to the legislative provisions that authorise taking over an acquired company's losses which have not yet been exhausted for tax purposes.

42 However, the fact that those tax losses are very substantial and that their origin has not been clearly determined may constitute an indicator of tax evasion or avoidance, where the operation of merger by acquisition of a company without contribution of assets is aimed only at obtaining a purely tax advantage.

43 Accordingly, the national court asks, drawing on the terms 'restructuring' and 'rationalisation' used in Article 11(1)(a) of Directive 90/434, whether the positive effect in terms of cost structure, resulting from reduction of the administrative and management costs of the group following the merger by acquisition, could constitute a valid commercial reason within the meaning of that article.

44 For the purpose of answering that question, it should be stated that Article 11(1)(a) of Directive 90/434, as it constitutes an exception to the tax rules established by Directive 90/434, must be subject to strict interpretation, regard being had to its wording, purpose and context (*Modehuis A. Zwijnenburg*, paragraph 46).

45 It is clear from the wording of Article 11(1)(a), and more specifically from the expression 'such as restructuring or rationalisation', that the operations referred to constitute examples of valid commercial reasons and that they must be interpreted in accordance with that latter concept.

46 As the Court has already held in paragraph 47 of *Leur-Bloem*, the concepts of restructuring and rationalisation must therefore be understood as involving more than the attainment of a purely fiscal advantage and any operation of restructuring and rationalisation having only such an aim cannot therefore constitute a valid commercial reason within the meaning of that provision.

47 Therefore, in principle, there is nothing to prevent a merger operation from having valid commercial reasons where it carries out restructuring or rationalisation of a group that allows its administrative and management costs to be reduced. However, this would not be the case for an acquisition operation, such as the one at issue in the main proceedings, where it seems clear that,

having regard to the magnitude of the anticipated tax benefit, that is, more than EUR 2 million, the saving made by the group concerned in terms of cost structure is quite marginal.

48 In that regard, it should be added that the cost savings resulting from the reduction of administrative and management costs, when the acquired company disappears, is inherent in any operation of merger by acquisition as this implies, by definition, a simplification of the structure of the group.

49 By automatically accepting that the saving in the cost structure resulting from the reduction of the administrative and management costs constitutes a valid commercial reason, without taking account of the other objectives of the proposed operation, and particularly the tax advantages, the rule set out in Article 11(1)(a) of Directive 90/434 would be entirely deprived of its purpose, which consists of safeguarding the financial interests of the Member States by providing, in accordance with the ninth recital in the preamble to that directive, the option for those Member States to refuse the benefit of the provisions laid down by the directive in the event of tax evasion or avoidance.

50 Furthermore, it should be noted that Article 11(1)(a) of Directive 90/434 reflects the general principle of EU law that abuse of rights is prohibited. The application of EU legislation may not be extended to cover abusive practices, that is to say, transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by that law (see, to that effect, Case C?212/97 *Centros* [1999] ECR I?1459, paragraph 24; Case C?255/02 *Halifax and Others* [2006] ECR I?1609, paragraphs 68 and 69; and *Kofoed*, paragraph 38).

51 In that regard, it is for the referring court to determine, in the light of all the circumstances of the dispute on which it is required to rule, whether, on the basis of the criteria set out at paragraphs 39 to 51 above, the constituent elements of the presumption of tax evasion or avoidance, within the meaning of Article 11(1)(a) of Directive 90/434, are present in the context of that dispute.

52 The answer to be given to the questions submitted, as reformulated in paragraph 30 of this judgment, must therefore be that Article 11(1)(a) of Directive 90/434 is to be interpreted as meaning that, in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity, does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been be carried out for 'valid commercial reasons' within the meaning of Article 11(1)(a). It is incumbent on the national court to verify, in the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute.

Costs

53 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 (Fifth Chamber) hereby rules:

Article 11(1)(a) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, is to be interpreted as meaning that, in the case of a merger operation between two companies of the same group, the fact that, on the date of the merger operation, the acquired company does not carry out any activity,

does not have any financial holdings and transfers to the acquiring company only substantial tax losses of undetermined origin, even though that operation has a positive effect in terms of cost structure savings for that group, may constitute a presumption that the operation has not been carried out for 'valid commercial reasons' within the meaning of Article 11(1)(a). It is incumbent on the national court to verify, in the light of all the circumstances of the dispute on which it is required to rule, whether the constituent elements of the presumption of tax evasion or avoidance, within the meaning of that provision, are present in the context of that dispute.

[Signatures]

* Language of the case: Portuguese.