JUDGMENT OF THE COURT (Fifth Chamber)

18 July 2013 (*)

(State aid – Articles 107 and 108 TFEU – Condition of ‘selectivity’ – Regulation (EC) No 659/1999 – Article 1(b)(i) – Existing aid – National legislation concerning corporate income tax – Deductibility of losses sustained – Non-deductibility in the case of change of ownership – Authorisation of derogations – Degree of latitude of the tax authorities)

In Case C-6/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Korkein hallinto-oikeus (Finland), made by decision of 30 December 2011, received at the Court on 3 January 2012, in the proceedings

P Oy

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas, E. Juhász (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: E. Sharpston,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 22 November 2012,

after considering the observations submitted on behalf of:

– P Oy, by O.A. Haapaniemi, asianajaja,

– the Finnish Government, by J. Heliskoski and S. Hartikainen, acting as Agents,

– the German Government, by T. Henze and K. Petersen, acting as Agents,

– the European Commission, by I. Koskinen, R. Lyal and T. Maxian Rusche, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2013,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of relevant provisions of European Union (‘EU’) law on State aid.

2 The request has been made in proceedings between P Oy (‘P’) and the national authorities responsible for corporate income tax concerning the refusal of those authorities to authorise P to deduct losses incurred in previous years, as provided for, in principle, by applicable national legislation, and to carry forward those losses to later tax years.

Legal context

EU law

3 Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article [108 TFEU] (OJ 1999 L 83, p. 1) provides in Article 1, which is entitled 'Definitions':

'For the purposes of this Regulation:

…

(b) "existing aid" shall mean:

(i) without prejudice to Articles 144 and 172 of the Act [concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ("the Act of Accession")], all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty;

…'

Finnish law

4 Law No 1535/1992 of 30 December 1992 on income tax (Tuloverolaki, 'the TVL') provides in Paragraph 117, which is entitled 'Losses and deduction of losses':

'Established losses shall be deducted from the profit from the following tax years as provided for in this part of the law.

Losses are to be deducted in the order in which they are incurred.'

5 Paragraph 119 of that law, which is entitled 'Losses resulting from economic or agricultural activity', provides:

'Losses incurred from economic or agricultural activity during the course of a tax year shall be deducted from the profit from the economic or agricultural activity over the following 10 years as the profits arise.

"Losses incurred from economic activity" means the amount of the losses calculated pursuant to the Law on the taxation of business income (laki elinkeinotulon verottamisesta), …'

6 Paragraph 122 of the TVL, which is entitled 'The effect of a change in ownership on the deductibility of losses', provides in the first subparagraph that losses sustained by a company are not deductible if, during the year in which they arise or thereafter, more than half of the company's shares have changed ownership otherwise than by way of inheritance or will, or more than half of its members are replaced.

7 The third subparagraph of Paragraph 122 of the TVL provides that, notwithstanding the provisions of the first subparagraph, the competent tax office may, for special reasons, where it is necessary for the continuation of the activities of the company, authorise the deduction of losses when such an application is made.

8 In order to clarify the provision laid down in the third subparagraph of Paragraph 122 of the TVL and to harmonise administrative practices, the Tax Directorate of Finland issued, on 14 February 1996, guidance letter No 634/348/96, the relevant provisions of which are as follows:

‘(2) Authorisation procedure for derogation

2.1 Conditions of authorisation

Under Paragraph 122 of the TVL, a [company] may, on application, where necessary for the continuation of its activities, be granted authorisation to deduct established losses.

The following may, inter alia, be considered to be special reasons:

– transfers from one generation to another;

– the sale of an undertaking to its employees;

– the purchase of a new undertaking not yet active;

– changes of ownership within a group of companies;

– changes of ownership related to a rescue programme;

– particular impact on employment; and

– changes in ownership of listed companies.

2.1.1. Special conditions

The purpose of Paragraph 122 of the TVL is to prevent loss-making companies from being converted into a commodity. If an undertaking’s change of ownership does not have the characteristics described, the authorisation for loss deduction may be granted.

…

2.1.2 Continuation of activities

Authorisation for loss deduction may be granted where deduction is necessary for a [company] to continue its activities. An absolute condition may be that the [company] continues its activities after the change in ownership. If, in practice, the [company] has ceased activities and its value is essentially based on the established losses, authorisation to derogate should not be granted.’

9 Circular No 2/1999 of 17 February 1999, published by the Finnish Tax Directorate, also mentions the expansion of activity by the acquisition of undertakings as a special reason.

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

10 It is apparent from the documents submitted to the Court that P, a company established in 1998, requested the competent tax authorities on 3 September 2008 to grant it authorisation to deduct the losses sustained by it in the tax years 1998 to 2004, notwithstanding the change of ownership in August 2004, pursuant to the third subparagraph of Paragraph 122 of the TVL. The company continued to trade after that change of ownership and after subsequent changes of ownership. That application was rejected by the competent tax authorities on 24 October 2008 on the ground that P had not demonstrated any special reasons on the basis of which the grant of

authorisation would have been justified, notwithstanding the changes of ownership.

11 By decision of 2 December 2009, the Helsingin hallinto-oikeus (Administrative Court, Helsinki) dismissed P's appeal on the same grounds as those referred to by the competent tax authorities. P brought an appeal against that decision before the Korkein hallinto-oikeus (Supreme Administrative Court) which is uncertain, in essence, whether the provisions of EU law on State aid, in particular the criterion of selectivity interpreted in the light of the degree of latitude enjoyed by the tax authorities in the present case, preclude a decision authorising the deduction of losses of a company, notwithstanding changes of ownership, so long as that measure has not been duly notified to the European Commission in accordance with Article 108(3) TFEU.

12 According to the referring court, in order to determine whether a measure is selective, it is appropriate to examine whether, within the context of a particular legal system, that measure constitutes an advantage for certain undertakings in comparison with others which are in a comparable legal and factual situation. The determination of the reference framework for that purpose has a particular importance in the case of tax measures, since the very existence of an advantage may be established only when compared with 'normal' taxation.

13 The referring court states that there are two alternatives with regard to determination of the reference framework. According to the first alternative, the general rule that losses are carried forward, laid down in Paragraphs 117 and 119 of the TVL, may be regarded as the reference framework. Pursuant to that rule, authorisation to derogate in the event of a change of ownership would not give rise to a situation which is more favourable for the benefiting company than that provided for by the general rule. The second alternative is that the reference framework is constituted by the rule set out in the first subparagraph of Paragraph 122 according to which losses cannot be deducted after a change of ownership. In relation to that reference system, the derogation set out in the third subparagraph of Paragraph 122 of the TVL grants the tax authorities a degree of latitude which may place the benefiting undertaking in a more favourable position than an undertaking which has not been granted a right to deduct in the authorisation procedure.

14 The referring court also states that it is settled case-law of the Court of Justice that State measures which differentiate between undertakings and are therefore *prima facie* selective may be justified where that differentiation results from the nature or the general scheme of the tax system of which they form part. The referring court notes in that regard that the tax system established by the legislation at issue in the main proceedings seeks to avoid company losses being misused or being traded. That risk concerns, in particular, inactive undertakings which have incurred losses, that other undertakings could, by various means, attempt to acquire in order to deduct the losses from their own profits. The degree of latitude enjoyed in the present case by the tax authorities could be considered in the context of the tax system as a whole, the objective of which is to grant authorisation to deduct losses in all cases where a risk of abuse has not been established.

15 In the light of those considerations, the Korkein hallinto oikeus decided to stay the proceedings and to refer the following questions to the Court for Justice for a preliminary ruling:

'(1) In the context of an authorisation procedure, such as that in the third subparagraph of Paragraph 122 of the [TVL], must the criterion of selectivity in Article 107(1) TFEU be interpreted as precluding the authorisation of the deduction of losses in the case of changes of ownership if the procedure referred to in the last sentence of Article 108(3) TFEU is not observed?

(2) In the interpretation of the criterion of selectivity, in particular in order to determine the reference group, is it necessary to take into account the general rule on the deductibility of established losses in Paragraphs 117 and 119 of the [TVL] or the provisions concerning changes of ownership?

(3) If the criterion of selectivity in Article 107 TFEU is a priori regarded as being fulfilled, may the system resulting from the third subparagraph of Paragraph 122 of the [TVL] be regarded as justified by the fact that it is a mechanism inherent in the tax system itself which is necessary for example in order to prevent tax evasion?

(4) When assessing possible justification and whether the system is a mechanism inherent in the tax system, what importance must be given to the extent of the discretion of the tax authorities? Is it necessary, as regards the mechanism inherent in the tax system itself, that the body applying the law has no discretion and that the conditions for the application of the derogation are set out precisely in the legislation?'

Consideration of the questions referred

The second, third and fourth questions

16 By its second, third and fourth questions, which it is appropriate to examine together first, the referring court asks, in essence, whether a tax regime such as that established under the first and third subparagraphs of Paragraph 122 of the TVL satisfies the condition of selectivity as an element of the concept of 'State aid' within the meaning of Article 107(1) TFEU and, in the event of that question being answered in the affirmative, whether the exception provided for in the third subparagraph of Paragraph 122 of the TVL is justified by the fact that it is inherent in the nature of the tax regime. The referring court also requests guidance from the Court on the possible relevance of the scope of the latitude of the competent authorities in the application of that regime.

17 It should be noted at the outset that Article 107(1) TFEU prohibits, in principle, aid 'favouring certain undertakings or the production of certain goods', that is to say selective aid.

18 Thus, a measure by which the public authorities grant certain undertakings favourable tax treatment which, although not involving the transfer of State resources, places the recipients in a more favourable financial position than other taxpayers amounts to State aid within the meaning of Article 107(1) TFEU. On the other hand, advantages resulting from a general measure applicable without distinction to all economic operators do not constitute State aid within the meaning of Article 107 TFEU (Joined Cases C-106/09 P and C-107/09 P *Commission and Spain* v *Government of Gibraltar and United Kingdom* [2011] ECR I-11113, paragraphs 72 and 73 and the case-law cited).

19 The Court has held that in order to classify a domestic tax measure as 'selective', it is necessary to begin by identifying and examining the common or 'normal' tax regime applicable in the Member State concerned. It is in relation to this common or 'normal' tax regime that it is necessary, secondly, to assess and determine whether any advantage granted by the tax measure at issue may be selective by demonstrating that the measure derogates from that common regime inasmuch as it differentiates between economic operators who, in light of the objective assigned to the tax system of the Member State concerned, are in a comparable factual and legal situation (see Joined Cases C-78/08 to C-80/08 *Paint Graphos and Others* [2011] ECR I-7611, paragraph 49 and the case-law cited).

20 In that regard, it must be stated that such classification presupposes not only familiarity with

the content of the provisions of relevant law but also requires examination of their scope on the basis of administrative and judicial practice and of information relating to the ambit *ratione personae* of those provisions.

21 As the referring court has not submitted all that information, the Court considers that it is unable to adopt a position on that classification.

22 According to the case-law of the Court, a measure which, although conferring an advantage on its recipient, is justified by the nature or general scheme of the system of which it is part does not fulfil the condition of selectivity (Case C-143/99 *Adria-Wien Pipeline and Wietersdorfer & Peggauer Zementwerke* [2001] ECR I-8365, paragraph 42 and the case-law cited). Thus, a measure which constitutes an exception to the application of the general tax system may be justified if the Member State concerned can show that that measure results directly from the basic or guiding principles of its tax system (see *Paint Graphos and Others*, paragraph 65 and the case-law cited).

23 The fact that an authorisation procedure exists does not in itself preclude such justification.

24 Justification is possible if, under the authorisation procedure, the degree of latitude of the competent authorities is limited to verifying the conditions laid down in order to pursue an identifiable tax objective and the criteria to be applied by those authorities are inherent in the nature of the tax regime.

25 So far as concerns the power of the competent authorities, it has been established by the Court's case-law that discretion which enables those authorities to determine the beneficiaries or the conditions under which the financial assistance is provided cannot be considered to be general in nature (see, to that effect, Case C-256/97 *DM Transport* [1999] ECR I-3913, paragraph 27 and the case-law cited).

26 Thus, the application of an authorisation system which enables losses to be carried forward to later tax years, such as that in question in the present case, cannot, in principle, be considered to be selective if the competent authorities have, when deciding on an application for authorisation, only a degree of latitude limited by objective criteria which are not unrelated to the tax system established by the legislation in question, such as the objective of avoiding trade in losses.

27 On the other hand, if the competent authorities have a broad discretion to determine the beneficiaries or the conditions under which the financial assistance is provided on the basis of criteria unrelated to the tax system, such as maintaining employment, the exercise of that discretion must then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation (see, to that effect, *Commission and Spain* v *Government of Gibraltar and United Kingdom*, paragraph 75).

28 In that regard, it is apparent from the order for reference that the Tax Directorate of Finland issued a guidance letter, referred to in paragraph 8 above, which lists, as a 'special reason' for the purpose of authorisation to derogate from the prohibition on the deduction of losses, inter alia particular impact on employment.

29 In this context, it should be borne in mind that the Court has held that the application of a regional development or social cohesion policy cannot in itself enable a measure adopted within the framework of that policy to be regarded as justified by the nature and general scheme of a national tax system (see, to that effect, Case C-88/03 *Portugal* v *Commission* [2006] ECR I-7115, paragraph 82).

30 Although it is apparent from the order for reference that the aforementioned guidance letter is not legally binding, it must be noted that if the competent authorities were to be able to determine the beneficiaries of the deduction of losses on the basis of criteria unrelated to the tax system, such as maintaining employment, such an exercise of that power should then be regarded as favouring 'certain undertakings or the production of certain goods' in comparison with others which, in the light of the objective pursued, are in a comparable factual and legal situation.

31 However, the Court does not have sufficient information before it to assess justification of any selectivity of the tax regime at issue in the main proceedings.

32 In those circumstances, the answer to the second, third and fourth questions is that a tax regime such as that at issue in the main proceedings may satisfy the condition of selectivity as an element of the concept of 'State aid' within the meaning of Article 107(1) TFEU if it were to be established that the reference system, namely the 'normal' system, consists in a prohibition on the deduction of losses in the case of a change of ownership for the purposes of the first subparagraph of Paragraph 122 of the TVL, in relation to which the authorisation procedure provided for in the third subparagraph of Paragraph 122 would constitute an exception. Such a regime may be justified by the nature or general scheme of the system of which it forms part, but justification is not possible if the competent national authorities, so far as concerns authorisation to derogate from the prohibition on the deduction of losses, have a discretion which empowers them to base authorisation decisions on criteria unrelated to that tax regime. However, the Court does not have sufficient information before it to rule definitively on those classifications.

33 Moreover, the Court points out that selectivity is only one element of State aid incompatible with the internal market. In the absence of information in that regard, the Court has not examined the other elements.

The first question

34 By its first question, the referring court asks, in essence, whether the prohibition on putting aid proposals into effect laid down in Article 108(3) TFEU precludes the application of the tax regime provided for in the first and third subparagraphs of Paragraph 122 of the TVL.

35 As regards the supervision of Member States' compliance with their obligations under Articles 107 TFEU and 108 TFEU, attention should be drawn to the structure of Article 108 TFEU and to the powers and responsibilities which it confers on the Commission, on the one hand, and on the Member States, on the other.

36 Article 108 TFEU establishes different procedures according to whether the aid is existing or new. Whilst under Article 108(3) TFEU new aid must be notified to the Commission and may not be implemented until that procedure has led to a final decision, under Article 108(1) TFEU existing aid may be lawfully implemented so long as the Commission has made no finding of incompatibility (Case C-262/11 *Kremikovtzi* [2012] ECR, paragraph 49 and the case-law cited).

37 Under that system of supervision, the Commission and the national courts have different powers and responsibilities (Case C-44/93 *Namur-Les assurances du crédit* [1994] ECR I-3829,

paragraph 14).

38 Proceedings may be commenced before national courts requiring those courts to interpret and apply the concept of aid contained in Article 107(1) TFEU, in particular in order to determine whether State aid introduced without observance of the preliminary examination procedure provided for in Article 108(3) TFEU ought to have been subject to this procedure. On the other hand, national courts do not have jurisdiction to give a decision on whether State aid is compatible with the internal market (Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraphs 50 and 51 and the case-law cited).

39 Whilst the Commission must examine the compatibility of the proposed aid with the internal market, even where the Member State has acted in breach of the prohibition on giving effect to aid contained in the final sentence of Article 108(3) TFEU, national courts, in such a situation, do no more than preserve, until the final decision of the Commission, the rights of individuals faced with a possible breach by State authorities of that prohibition (see, to that effect, Case C-199/06 *CELF and Ministre de la Culture et de la Communication* [2008] ECR I-469, paragraph 38 and the case-law cited).

40 As far as existing aid is concerned, it should be borne in mind that Article 108(1) TFEU gives the Commission the power, in cooperation with the Member States, to keep existing aid under constant review. That review may prompt the Commission to propose to the Member State concerned the appropriate measures required by the progressive development or by the functioning of the common market and, if necessary, to decide to abolish or alter aid which it considers to be incompatible with the common market.

41 That aid must be regarded as lawful so long as the Commission has not found that it is incompatible with the internal market (Case C-322/09 P *NDSHT* v *Commission* [2010] ECR I-11911, paragraph 52 and the case-law cited). Accordingly, in such circumstances Article 108(3) TFEU does not give national courts the power to prohibit existing aid from being put into effect.

42 According to Article 1(b)(i) of Regulation No 659/1999, without prejudice to Articles 144 and 172 of the Act of Accession, ‘existing aid’ means all aid which existed prior to the entry into force of the Treaty in the respective Member States, that is to say, aid schemes and individual aid which were put into effect before, and are still applicable after, the entry into force of the Treaty.

43 According to the information in the file submitted to the Court, and as the Finnish Government and the Commission have observed, the regime provided for in the first and third subparagraphs of Paragraph 122 of the TVL was established before the entry into force on 1 January 1994 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 1) and continued to be applicable thereafter. The Republic of Finland acceded to the European Union on 1 January 1995.

44 In addition, according to the Commission, the circumstances specified in Articles 144 and 172 of the Act of Accession in which Article 1(b)(i) of Regulation No 659/1999 concerning the definition of ‘existing aid’ would not be applicable are not relevant in the present case.

45 The Court notes that amendment of the detailed arrangements for the implementation of an aid regime may lead, in some circumstances, to classifying such a regime as new aid.

46 It is for the referring court to verify whether the detailed arrangements for the implementation of the regime at issue in the main proceedings have been amended.

47 If it were to transpire that any amendments extended the scope of the regime, it could be

necessary to classify that regime as new aid with the result that the notification procedure set out in Article 108(3) TFEU applies.

48 Consequently, the answer to the first question is that Article 108(3) TFEU does not preclude a tax regime such as that provided for in the first and third subparagraphs of Paragraph 122 of the TVL, if that regime should be classified as 'State aid', from continuing to be applied in the Member State which established it because it grants 'existing' aid, without prejudice to the competence of the Commission under Article 108(3) TFEU.

Costs

49 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:

1. **A tax regime such as that at issue in the main proceedings may satisfy the condition of selectivity as an element of the concept of 'State aid' within the meaning of Article 107(1) TFEU if it were to be established that the reference system, namely the 'normal' system, consists in a prohibition on the deduction of losses in the case of a change of ownership for the purposes of the first subparagraph of Paragraph 122 of Law No 1535/1992 of 30 December 1992 on income tax (Tuloverolaki), in relation to which the authorisation procedure provided for in the third subparagraph of Paragraph 122 would constitute an exception. Such a regime may be justified by the nature or general scheme of the system of which it forms part, but justification is not possible if the competent national authorities, so far as concerns authorisation to derogate from the prohibition on the deduction of losses, have a discretion which empowers them to base authorisation decisions on criteria unrelated to that tax regime. However, the Court does not have sufficient information before it to rule definitively on those classifications.**

2. **Article 108(3) TFEU does not preclude a tax regime such as that provided for in the first and third subparagraphs of Paragraph 122 of Law No 1535/1992, if that regime should be classified as 'State aid', from continuing to be applied in the Member State which established it because it grants 'existing' aid, without prejudice to the competence of the European Commission under Article 108(3) TFEU.**

[Signatures]

* Language of the case: Finnish.