JUDGMENT OF THE COURT (Third Chamber)

14 April 2016 (*)

(Reference for a preliminary ruling — Freedom of establishment — Article 49 TFEU — Legislation of a Member State requiring credit institutions to notify the tax authorities of deceased customers' assets for purposes related to the collection of inheritance tax — Application of that legislation to branches established in another Member State in which banking secrecy prohibits, in principle, the disclosure of such information)

In Case C?522/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 1 October 2014, received at the Court on 19 November 2014, in the proceedings

Sparkasse Allgäu

v

Finanzamt Kempten,

THE COURT (Third Chamber),

composed of L. Bay Larsen, President of the Chamber, D. Šváby, J. Malenovský, M. Safjan, and M. Vilaras (Rapporteur), Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Sparkasse Allgäu, by W.-R. Bub, Rechtsanwalt,

– Finanzamt Kempten, by L. Bachmann, acting as Agent,

– the German Government, by T. Henze and B. Beutler, acting as Agents,

– the Greek Government, by A. Dimitrakopoulou and A. Magrippi, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the European Commission, by W. Mölls and M. Wasmeier, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Sparkasse Allgäu and Finanzamt Kempten (Kempten tax office) concerning the refusal of that credit institution to disclose to the Kempten tax office information relating to the accounts held with its dependent branch established in Austria by persons who, at the time of their death, had their place of residence for tax purposes in Germany.

Legal context

EU law

Directive 2006/48/EC

3 Article 23 of Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (OJ 2006 L 177, p. 1), reads as follows:

‘The Member States shall provide that the activities listed in Annex I may be carried on within their territories, in accordance with Articles 25, 26(1) to (3), 28(1) and (2) and 29 to 37 either by the establishment of a branch or by way of the provision of services, by any credit institution authorised and supervised by the competent authorities of another Member State, provided that such activities are covered by the authorisation.’

4 The activities referred to in Annex I to Directive 2006/48 include ‘acceptance of deposits and other repayable funds’.

5 Article 31 of that directive states:

‘Articles 29 and 30 shall not affect the power of host Member States to take appropriate measures to prevent or to punish irregularities committed within their territories which are contrary to the legal rules they have adopted in the interests of the general good. This shall include the possibility of preventing offending credit institutions from initiating further transactions within their territories.’

Directive 2011/16/EU

6 Article 8(3a) of Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), as amended by Council Directive 2014/107/EU of 9 December 2014 (OJ 2014 L 359, p. 1), (‘Directive 2011/16’) provides:

‘Each Member State shall take the necessary measures to require its Reporting Financial Institutions to perform the reporting and due diligence rules included in Annexes I and II and to ensure effective implementation of, and compliance with, such rules in accordance with Section IX of Annex I.

Pursuant to the applicable reporting and due diligence rules contained in Annexes I and II, the competent authority of each Member State shall, by automatic exchange, communicate within the deadline laid down in point (b) of paragraph 6 to the competent authority of any other Member State, the following information regarding taxable periods as from 1 January 2016 concerning a Reportable Account:

(a) the name, address, [tax identification number(s) (TIN)] and date and place of birth (in the case of an individual) of each Reportable Person that is an Account Holder of the account and, in the case of any Entity that is an Account Holder and that, after application of due diligence rules consistent with the Annexes, is identified as having one or more Controlling Persons that is a Reportable Person, the name, address, and TIN(s) of the Entity and the name, address, TIN(s) and date and place of birth of each Reportable Person;

(b) the account number (or functional equivalent in the absence of an account number);

(c) the name and identifying number (if any) of the Reporting Financial Institution;

(d) the account balance or value (including, in the case of a Cash Value Insurance Contract or Annuity Contract, the Cash Value or surrender value) as of the end of the relevant calendar year or other appropriate reporting period or, if the account was closed during such year or period, the closure of the account;

…'

7 Pursuant to point D(1) of section VIII of Annex I to Directive 2011/16, the term 'Reportable Account' means, inter alia, a financial account that is maintained by a reporting financial institution of a Member State and is held by one or more reportable persons, provided that it has been identified as such pursuant to the due diligence procedures described in Sections II through VII of that annex.

German law

8 Under Paragraph 33(1) of the Law on Inheritance Tax and Gift Tax (Erbschaftsteuer- und Schenkungsteuergesetz; 'the ErbStG'), any person who engages by way of business in the custody or management of third-party assets is required to notify, in writing, the tax office responsible for the administration of inheritance tax of those assets in his custody and those claims directed against him which, at the time of the death of the owner of those assets, formed part of the latter's estate.

Austrian law

9 Under Paragraph 9(1) and (7) of the Law on Banking (Bankwesengesetz; 'the BWG'), branches of credit institutions which have their head office in other Member States may pursue activities within the territory of the Republic of Austria but are required to comply with a number of provisions of Austrian law, including those set out in Paragraph 38 of the BWG.

10 Paragraph 38 of the BWG is worded as follows:

'1. Credit institutions, their members, officers, employees and persons otherwise acting on behalf of credit institutions shall not disclose or exploit secrets which are entrusted or made accessible to them solely by reason of their business relations with customers ... (banking secrecy)…

2. There shall be no obligation to maintain banking secrecy:

…

(5) where the customer gives express written consent to disclosure of the secret;

…’

11 Paragraph 101 of the BWG provides for criminal penalties in the event of a breach of banking secrecy.

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

12 Sparkasse Allgäu is a credit institution within the meaning of Directive 2006/48 which operates pursuant to an authorisation issued by the German authorities. It operates, inter alia, a dependent branch in Austria.

13 On 25 September 2008 the Kempten tax office asked Sparkasse Allgäu to supply it with the information referred to in Paragraph 33 of the ErbStG, for the period from 1 January 2001, in relation to clients of its branch established in Austria who were resident in Germany at the time of their death.

14 Sparkasse Allgäu lodged an appeal against that decision, but the appeal was dismissed, as was the subsequent action brought by Sparkasse Allgäu before the court of first instance. In those circumstances, the appellant in the main proceedings appealed on a point of law (‘Revision’) to the Bundesfinanzhof (Federal Finance Court).

15 The referring court expresses uncertainty as to whether Paragraph 33(1) of the ErbStG restricts the freedom of establishment even though the notification obligation laid down in that provision applies in the same way to all German credit institutions. According to the referring court, that requirement has the result that German credit institutions may be deterred from exercising, by means of a branch office, commercial operations in Austria. However, the referring court is also unsure (i) whether a restriction on the freedom of establishment may also arise from the combined effect of the legislation of the Member State in which the credit institution’s head office is situated, namely the Federal Republic of Germany, and the legislation of the Member State in which the branch is situated, namely the Republic of Austria, and (ii) to which Member State such a restriction must be attributed.

16 It was in those circumstances that the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does the freedom of establishment (Article 49 TFEU, formerly Article 43 EC) preclude a provision in a Member State under which a credit institution established in its national territory must, on the death of a domestic testator, also notify the tax office responsible for the administration of inheritance tax in the national territory of those of the testator’s assets which are held or managed in a dependent branch of the credit institution in another Member State, where there is no similar notification obligation in the other Member State and credit institutions in that State are subject to banking secrecy any breach of which constitutes a criminal offence?’

The question referred for a preliminary ruling

17 By its question, the referring court essentially asks whether Article 49 TFEU must be interpreted as precluding legislation of a Member State which requires credit institutions having

their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and the credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.

18 As a preliminary point, it should be noted that Article 49 TFEU requires the elimination of restrictions on freedom of establishment. According to this provision, freedom of establishment for nationals of one Member State in the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State of establishment. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (see, inter alia, judgments in *Commission* v *France*, 270/83, EU:C:1986:37, paragraph 13; *Royal Bank of Scotland*, C?311/97, EU:C:1999:216, paragraph 22; and *CLT-UFA*, C?253/03, EU:C:2006:129, paragraph 13).

19 Under the second paragraph of Article 54 TFEU, legal persons governed by public law, save for those which are non-profit-making, also constitute companies or firms to which Article 49 TFEU applies. According to the information provided by the referring court, Sparkasse Allgäu is a legal person governed by public law to which Article 49 TFEU is applicable.

20 It is settled case-law that, even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are aimed at ensuring the benefit of national treatment in the host Member State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated in accordance with its legislation (judgment in *Verder LabTec*, C?657/13, EU:C:2015:331, paragraph 33 and the case-law cited).

21 Further, it should also be borne in mind that, under Paragraph 33(1) of the ErbStG, any person who engages by way of business in the custody or management of third-party assets is required to notify, in writing, the tax office responsible for the administration of inheritance tax of those assets in his custody and those claims directed against him which, at the time of the death of the owner of those assets, formed part of the latter’s estate.

22 That provision is drafted in general terms and does not make any distinction on the basis of the location in which the custody or management of the third-party assets to which it relates takes place. Consequently, the appellant in the main proceedings, which is a legal person established under German law and has its head office in Germany, is subject to the obligations arising from that provision not only with respect to the accounts held by its various agencies and branches established in Germany, but also with respect to accounts opened at its dependent branch established in Austria.

23 The referring court raises the question of whether the activity of a German credit institution which has opened a branch in Austria is impeded by reason of both the requirement to transmit information set out in Paragraph 33(1) of the ErbStG and the requirement to respect banking secrecy in Austria laid down by Paragraph 38(2) and Paragraph 101 of the BWG. In that regard, the referring court observes that, in order to comply with those two requirements, a credit institution in the position of the appellant in the main proceedings is obliged, under Paragraph 38(2)(5) of the BWG, to seek its clients’ consent to the possible transmission of information concerning them to the German authorities. The requirement of such consent might, in its view, lead potential clients of the Austrian branch of such a credit institution to have recourse to Austrian banks or Austrian subsidiaries of German banks inasmuch as neither of these are subject to a

similar obligation to divulge information.

24 While it is not inconceivable that Paragraph 33(1) of the ErbStG might deter credit institutions established in Germany from opening branches in Austria, inasmuch as compliance with that obligation would place them at a disadvantage simply because they would then be subject to an obligation which is not imposed on credit institutions established in Austria, it nevertheless cannot be concluded that the existence of that obligation is liable to be classified as a restriction on freedom of establishment for the purposes of Article 49 TFEU.

25 In the light of the information supplied by the referring court, it must be held that, in circumstances such as those at issue in the main proceedings, the adverse consequences which might arise from an obligation such as that laid down in Paragraph 33(1) of the ErbStG result from the exercise in parallel by two Member States of their powers (i) in regard to regulating the obligations of banks and other credit institutions towards their clients with regard to maintaining banking secrecy and (ii) of fiscal supervision (see, to that effect, judgments in *Kerckhaert and Morres*, C?513/04, EU:C:2006:713, paragraph 20; *Columbus Container Services*, C?298/05, EU:C:2007:754, paragraph 43; and *CIBA*, C?96/08, EU:C:2010:185, paragraph 25).

26 More specifically, under German law, compliance with banking secrecy cannot take precedence over the need to ensure that fiscal supervision is effective, for which reason Paragraph 33(1) of the ErbStG imposes, in the circumstances which it covers, an obligation to forward information to the tax authorities without the consent of the account holder concerned. By contrast, Austrian law, under Paragraph 38 of the BWG, has made the opposite choice, namely that banking secrecy must, in principle, be maintained in all regards, including with regard to the tax authorities.

27 It is true that a bilateral agreement concluded between the two Member States concerned, as well as measures taken at EU level, such as the mandatory automatic exchange of information provided for in Article 8(3a) of Directive 2011/16, ensure administrative cooperation in the field of taxation and therefore, in circumstances such as those in the main proceedings, make it easier for the German tax authorities to obtain the information concerned by the measure at issue in the main proceedings.

28 The referring court observes, however, that, even though there is an agreement providing for the exchange of information relating to tax matters, which was concluded between the Federal Republic of Germany and the Republic of Austria and entered into force on 1 March 2012, that agreement applies only to tax years or assessment periods beginning on or after 1 January 2011, and therefore does not apply to the request sent by the Kempten tax office to Sparkasse Allgäu. Likewise, Directive 2011/16 was adopted only after the facts which gave rise to the action in the main proceedings.

29 It must therefore be held that, under EU law as it applied at the time of the facts in the main proceedings, and in the absence of any harmonising measure in relation to the exchange of information for the requirements of fiscal supervision, Member States were free to impose on national credit institutions an obligation concerning their branches operating abroad, such as that at issue in the main proceedings, with the objective of ensuring the effectiveness of fiscal supervision, on condition that the transactions carried out in those branches are not treated in a manner that is discriminatory in comparison with transactions carried out by their national branches (see, to that effect, judgment in *Columbus Container Services*, C?298/05, EU:C:2007:754, paragraphs 51 and 53, and order in *KBC Bank and Beleggen, Risicokapitaal, Beheer*, C?439/07 and C?499/07, EU:C:2009:339, paragraph 80).

30 As has already been noted in paragraph 22 above, Paragraph 33(1) of the ErbStG applies,

according to its wording, to credit institutions which have their head office in Germany, with regard to transactions carried out both in Germany and in other Member States.

31 The mere fact that a notification obligation, such as that at issue in the main proceedings, is not prescribed by Austrian law cannot lead to the conclusion that the Federal Republic of Germany is precluded from imposing such an obligation. It follows from the Court's case-law that freedom of establishment cannot be understood as meaning that a Member State is required to draw up its tax rules and, in particular, a notification obligation such as that at issue in the main proceedings on the basis of those in another Member State in order to ensure, in all circumstances, that any disparities arising from national rules are removed (see, to that effect, judgments in *Columbus Container Services*, C?298/05, EU:C:2007:754, paragraph 51, and *National Grid Indus*, C?371/10, EU:C:2011:785, paragraph 62).

32 In view of all of the foregoing considerations, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.

Costs

33 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 (Third Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding legislation of a Member State which requires credit institutions having their head office in that Member State to notify the national authorities of assets held or managed at their dependent branches established in another Member State in the event of the death of the owner of those assets who is resident in the first Member State, in the case where there is no similar notification obligation in that second Member State and credit institutions there are subject to banking secrecy breach of which constitutes a criminal offence.

[Signatures]

** Language of the case: German.