Provisional text

JUDGMENT OF THE COURT (First Chamber)

8 March 2017 (*)

(Reference for a preliminary ruling — Direct taxation — Companies of different Member States — Common system of taxation — Merger by acquisition — Prior approval of the tax authority — Directive 90/434/EEC — Article 11(1)(a) — Tax evasion or avoidance — Freedom of establishment)

In Case C?14/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d'État (Council of State, France), made by decision of 30 December 2015, received at the Court on 11 January 2016, in the proceedings

Euro Park Service, having assumed the rights and obligations of SCI Cairnbulg Nanteuil,

v

Ministre des Finances et des Comptes publics,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, E. Regan, J.-C. Bonichot, C.G. Fernlund (Rapporteur) and S. Rodin, Judges,

Advocate General: M. Wathelet,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 7 September 2016,

after considering the observations submitted on behalf of:

– Euro Park Service, having assumed the rights and obligations of SCI Cairnbulg Nanteuil, initially by N. Boullez, avocat, and subsequently by N. Boullez and M. Castro, avocats,

– the French Government, initially by D. Colas and S. Ghiandoni, acting as Agents, and subsequently by D. Colas, E. de Moustier and S. Ghiandoni, acting as Agents,

– the European Commission, by W. Roels and L. Pamukcu, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 October 2016,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU and of Article 11 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 request has been made in proceedings between Euro Park Service (‘Euro Park’), which has assumed the rights and obligations of the French company SCI Cairnbulg Nanteuil (‘Cairnbulg’), and the Ministre des Finances et des Comptes publics (Minister for Finance and Public Accounts, France) (‘the tax authority’) concerning the refusal of that authority to acknowledge Cairnbulg’s entitlement to deferral of the taxation of the capital gains relating to that company’s assets at the time of its merger through acquisition by a company established in another Member State, on the ground that the merging companies had not sought the prior approval of the tax authority.

Legal context

EU law

3 According to its first recital, Directive 90/434 seeks to ensure that operations involving the restructuring of companies of different Member States, such as mergers, divisions, transfers of assets and exchanges of shares, are not hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States.

4 For that purpose, the directive lays down a body of rules according to which those operations may not, as such, give rise to taxation. Possible capital gains associated with those operations may, in principle, be taxed, but not until the time of actual disposal.

5 The first four recitals and the ninth recital of that directive are worded as follows:

‘Whereas mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;

Whereas tax provisions disadvantage such operations, in comparison with those concerning companies of the same Member State; whereas it is necessary to remove such disadvantages;

Whereas it is not possible to attain this objective by an extension at the Union level of the systems presently in force in the Member States, since differences between these systems tend to produce distortions; whereas only a common tax system is able to provide a satisfactory solution in this respect;

Whereas the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;

…

Whereas 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 …'.

6 Article 4(1) of that directive provides:

'A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. ...'

7 Article 11(1)(a) of that directive 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 tax 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 tax avoidance as its principal objective or as one of its principal objectives.'

French law

8 The relevant provisions of the code général des impôts (General Tax Code) ('the CGI') in force in France at the material time are as follows.

9 Article 210 A of the CGI provides:

'1. Net capital gains and profits generated by all assets transferred as a result of a merger shall not be subject to corporation tax.

…

3. The application of those provisions shall be subject to the condition that the acquiring company undertakes, in the merger instrument, to comply with the following requirements:

…

b. It must take the place of the acquired company for the reinstatement of the final balance which had been deferred for the purposes of the taxation of the acquired company;

c. It must calculate the capital gains which arise subsequently on the disposal of the non-depreciable fixed assets transferred to it, on the basis of the value which they had for tax purposes in the acquired company's records;

d. It must reinstate in its taxable profits the capital gains generated when the depreciable assets are transferred ...'.

10 Article 210 B(3) of the CGI provides:

'... Approval shall be granted where, having regard to the assets transferred:

a. the operation is justified for commercial reasons, resulting, inter alia, in the exercise by the company receiving the transfer of an independent activity, or in the improvement of structures, or in an association between the parties;

b. the operation does not have as its principal objective or as one of its principal objectives tax evasion or tax avoidance;

c. the manner in which the operation is carried out makes it possible for the capital gains deferred for tax purposes to be taxed in the future.'

11 According to the referring court, Article 210 C of the CGI transposes Directive 90/434 into French law. That article states:

'1. The provisions of Articles 210 A and 210 B shall apply to operations entered into exclusively by legal persons or organisations liable to corporation tax.

2. Those provisions shall apply to transfers made to foreign legal persons by French legal persons only where those transfers were approved beforehand in accordance with the conditions laid down in Article 210 B(3).'

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

12 On 26 November 2004, Cairnbulg, a company governed by French law, was wound up, without going into liquidation, by and for the benefit of its sole shareholder, Euro Park, a company governed by Luxembourg law. At that time, Cairnbulg opted in its profit and loss account, signed on 25 January 2005 for the financial year ending 26 November 2004, for the special system for mergers provided for in Article 210 A et seq. of the CGI. Consequently, it did not declare, for the purposes of corporation tax, the net capital gains and profits generated by the assets which it had transferred to Euro Park.

13 By notarised deed of 19 April 2005, the assets of Cairnbulg were valued at their net accounting value, in the event EUR 9 387 700. On the same date, those assets were transferred by Euro Park to SCI IBC Ferrier for EUR 15 776 000, corresponding to the market value of those assets as at 26 November 2004.

14 Following an inspection, the tax authority called into question the use of the special system for mergers on the grounds, first, that Cairnbulg had not sought the ministerial approval provided for under Article 210 C of the CGI and, secondly, that that approval would not, in any event, have been granted, since that operation was not justified by commercial reasons but had been carried out for the purpose of tax evasion or avoidance. Consequently, Euro Park, which had assumed the rights and obligations of Cairnbulg, was made liable for additional tax and tax contributions together with the penalties laid down in the CGI in the event of a deliberate infringement.

15 Euro Park requested the tribunal administratif de Paris (Administrative Court, Paris, France) to order the cancellation of those taxes and penalties. As that court rejected Euro Park's request, the latter appealed to the cour administrative d'appel de Paris (Administrative Court of Appeal, Paris, France), which upheld that rejection.

16 Euro Park then brought an appeal in cassation before the Conseil d'État (Council of State, France), arguing that, by making only transfers made to non-resident legal persons, and not transfers made to resident legal persons, subject to a process of prior approval, Article 210 C(2) of the CGI introduced an unjustified restriction of Article 49 TFEU and, therefore, of the principle of the freedom of establishment.

17 In those circumstances, the Conseil d'État (Council of State) decided to stay the

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

‘(1) When national legislation of a Member State makes use, in domestic law, of the option under Article 11(1) of Directive 90/434, is there scope for the measures adopted for the implementation of that option to be reviewed in the light of primary EU law?

(2) If so, must the provisions of Article 49 TFEU be interpreted as precluding national legislation, aimed at preventing tax evasion or avoidance, from imposing a condition that the use of the common system of taxation applicable to mergers and transactions treated as such is to be subject to a process of prior approval only as regards transfers made to foreign legal persons, but not transfers made to legal persons incorporated under national law?’

Consideration of the questions referred

The first question

18 By its first question, the referring court asks, in essence, whether EU law allows the assessment of the compatibility of national legislation, such as that at issue in the main proceedings, in the light of primary law, when that legislation was adopted to transpose into national law the option provided for in Article 11(1)(a) of Directive 90/434.

19 In accordance with settled case-law, any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law (judgment of 12 November 2015, *Visnapuu,* C?198/14, EU:C:2015:751, paragraph 40 and the case-law cited).

20 Consequently, it is necessary to determine whether Article 11(1)(a) of Directive 90/434 carries out such harmonisation.

21 In the present case, it is sufficient to note that it follows clearly from the wording of that provision that that is not the case.

22 First of all, as is apparent from that wording, that provision allows Member States to refuse to apply or withdraw the benefit of all or part of the provisions of that directive only where the operation coming within its scope, such as a merger involving the companies of various Member States (a cross-border merger), has as its principal objective, or one of its principal objectives, tax evasion or tax avoidance (see, to that effect, judgment of 17 July 1997, *Leur-Bloem,* C?28/95, EU:C:1997:369, paragraph 38).

23 Next, as part of that reservation of competence, Article 11(1)(a) of Directive 90/434 allows the Member States to provide for a presumption of tax evasion or tax avoidance in cases where the merger is not carried out for valid commercial reasons (see, to that effect, judgment of 17 July 1997, *Leur-Bloem,* C?28/95, EU:C:1997:369, paragraph 39).

24 Lastly, concerning the exercise of that option and the application of that presumption, it is apparent from the case-law of the Court that, in the absence of more detailed EU law provisions in that regard, it is for the Member States, observing the principle of proportionality, to determine the provisions needed for the purposes of applying Article 11(1)(a) of Directive 90/434 (see, to that effect, judgment of 17 July 1997, *Leur-Bloem,* C?28/95, EU:C:1997:369, paragraph 43).

25 In those circumstances, it must be held that that provision is not intended, as regards the measures designed to counter tax evasion and avoidance, to achieve exhaustive harmonisation at EU level.

26 Consequently, the answer to the first question is that, in so far as Article 11(1)(a) of Directive 90/434 does not carry out exhaustive harmonisation, EU law allows for the assessment of the compatibility of national legislation, such as that at issue in the main proceedings, in the light of primary law, where that legislation was adopted to transpose into national law the option provided for in that provision.

The second question

27 By its second question, the referring court asks, in essence, whether Article 49 TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the case of a cross-border merger, subjects the granting of the tax concessions applicable to such a transaction pursuant to Directive 90/434, in the present case the deferral of the taxation of capital gains relating to the assets transferred by a French company to a company established in another Member State, to a process of prior approval under which, in order to obtain that approval, the taxpayer must show that the operation concerned is justified on economic grounds, that it does not have as its principal objective, or as one of its principal objectives, tax evasion or avoidance, and that its terms make it possible for the capital gains deferred for tax purposes to be taxed in the future, whereas in a national merger such a deferral is granted without the taxpayer being made subject to such a process.

28 In this regard, it should be recalled that the Court has already held that a cross-border merger constitutes a particular method of exercise of the freedom of establishment, important for the proper functioning of the internal market, and is therefore among those economic activities in respect of which Member States are required to comply with that freedom (see, to that effect, judgment of 13 December 2005, *SEVIC Systems,* C?411/03, EU:C:2005:762, paragraph 19).

29 In order for that particular method of exercising the freedom of establishment not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States, Directive 90/434, as is apparent from the first to fifth recitals thereof, lays down a common system of taxation by providing tax advantages, such as the deferral of taxation of capital gains tax relating to the assets transferred at the time of such a merger.

30 In that context, the Court has already clarified that the Member States must grant those tax advantages to operations coming within the scope of that directive, unless those operations have as their principal objective, or as one of their principal objectives, tax evasion or tax avoidance within the meaning of Article 11(1)(a) of the directive (judgment of 11 December 2008, *A.T.,* C?285/07, EU:C:2008:705, paragraph 30).

31 In so far as the referring court and the French Government stated that the legislation at issue seeks to ensure the transposition of Directive 90/434 into national law and, in particular, the transposition of Article 11(1)(a), it is thus necessary to determine, first of all, whether the adoption of national legislation, such as that at issue in the main proceedings, may be based on that provision and, in that regard, whether or not that directive precludes such legislation.

Article 11(1)(a) of Directive 90/434

32 Under the legislation at issue in the main proceedings, the deferral of taxation of the capital gains relating to the assets transferred by a French company to a company established in another

Member State is subject to a preliminary procedure under which, in order to obtain that deferral, the taxpayer must show that three conditions are fulfilled, namely, (i) that the transaction envisaged is justified on economic grounds, (ii) that it does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance, and (iii) that the terms of the transaction make it possible for the capital gains deferred for tax purposes to be taxed in the future.

33 The question then arises as to whether Article 11(1)(a) of Directive 90/434 precludes the adoption of such legislation.

– *The existence of a preliminary procedure*

34 Concerning the existence of a preliminary procedure, it should be borne in mind that Directive 90/434 does not contain any procedural requirement with which the Member States are required to comply for the purpose of granting the tax advantages provided for in that directive.

35 Even assuming that that directive allows the Member States to provide for such a requirement, the requirement laid down by the legislation at issue in the main proceedings is not compatible with that directive.

36 In the absence of relevant EU rules, the detailed procedural rules designed to ensure the protection of the rights which taxpayers acquire under EU law are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the European Union legal order (principle of effectiveness) (judgment of 18 October 2012, *Pelati,* C?603/10, EU:C:2012:639, paragraph 23 and the case-law cited).

37 With regard to the principle of effectiveness, it should be borne in mind that every case in which the question arises as to whether a national procedural rule makes the exercise of rights conferred on individuals by the legal order of the European Union impossible in practice or excessively difficult must be analysed by reference, where appropriate, to the basic principles of the national legal system concerned, including the principle of legal certainty (see, to that effect, judgments of 27 June 2013, *Agrokonsulting,* C?93/12, EU:C:2013:432, paragraph 48, and of 6 October 2015, *Târ?ia,* C?69/14, EU:C:2015:662, paragraph 36).

38 In that regard, the Court has already held that the requirement of legal certainty must be observed all the more strictly in the case of EU rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which those rules impose on them (see, to that effect, judgments of 21 February 2006, *Halifax and Others,* C?255/02, EU:C:2006:121, paragraph 72, and of 9 July 2015, *Cabinet Medical Veterinar Dr. Tomoiag? Andrei,* C?144/14, EU:C:2015:452, paragraph 34).

39 In the present case, with regard to the principle of equivalence, the French Government stated at the hearing that the preliminary procedure provided for in the legislation at issue in the main proceedings in principle applies only to cross-border mergers. However, the Court does not have the information concerning the procedural rules for national mergers necessary to enable it to determine whether cross-border mergers are treated less favourably than national mergers. It is for the referring court, by comparing the procedural rules applicable to cross-border mergers and national mergers, respectively, to determine whether that legislation complies with that principle.

40 With regard to the principle of effectiveness, compliance with the requirement of legal certainty requires that the procedural rules implementing Directive 90/434 and, in particular, Article

11(1)(a) should be sufficiently precise, clear and foreseeable to enable taxpayers to know precisely their rights in order to ensure that they are able to benefit from tax advantages under the directive and to rely on them, if necessary, before the national courts (see, to that effect, judgments of 28 February 1991, *Commission* v *Germany,* C?131/88, EU:C:1991:87, paragraph 6; of 10 March 2009, *Heinrich,* C?345/06, EU:C:2009:140, paragraphs 44 and 45; of 15 July 2010, *Commission* v *United Kingdom,* C?582/08, EU:C:2010:429, paragraphs 49 and 50; and of 18 October 2012, *Pelati,* C?603/10, EU:C:2012:639, paragraph 36 and the case-law cited).

41 However, in the present case, it must be observed that the legislation at issue in the main proceedings does not specify the detailed rules for the application of the preliminary procedure concerned. At the hearing, while confirming that that was the case, the French Government, in referring to the practice applied by the tax authorities, provided some details concerning those rules. In that regard, that government stated that, although that legislation sets out three conditions for obtaining prior approval, according to the practice applied by the tax authority, it is sufficient for the grant of approval that the single condition of the existence of a commercial reason is fulfilled. Furthermore, that government stated that, according to the same practice, the process of prior approval does not suspend the cross-border merger. Accordingly, that operation, to the extent that an application for approval was submitted before it took place, may be carried out before the tax authority's agreement is obtained.

42 In that regard, as the Advocate General has observed in points 30 to 34 and 57 of his Opinion, it should be noted that the provisions of the legislation at issue in the main proceedings do not, however, correspond to the practice applied by the tax authority, a situation which is liable to generate uncertainty as to the detailed rules for the application of Article 11(1)(a) of Directive 90/434. Consequently, those detailed rules do not appear to be sufficiently precise, clear and foreseeable to enable taxpayers to ascertain their rights, particularly since at least some of those rules may be changed at the discretion of the tax authority.

43 Moreover, at the hearing the French Government pointed out that reasons were always given for rejection decisions, while stating, however, that the fact that four months had passed with no response from the tax authority to that application amounted to an implied rejection decision, which, in such a case, is reasoned only if the taxpayer so requests.

44 It must be held that such a detailed rule also does not satisfy the requirement of legal certainty.

45 In order for the taxpayer to know precisely the extent of the rights and obligations that he derives from Directive 90/434 and to take steps accordingly (see, to that effect, judgments of 10 March 2009, *Heinrich,* C?345/06, EU:C:2009:140, paragraphs 44 and 45, and of 15 July 2010, *Commission* v *United Kingdom,* C?582/08, EU:C:2010:429, paragraphs 49 and 50), a decision of the tax authority refusing that taxpayer a tax advantage under that directive must always be reasoned so that the taxpayer may ascertain whether the reasons that led that authority not to grant him the advantage laid down in the directive were well founded and, where appropriate, to vindicate his right before the courts having jurisdiction.

46 In those circumstances, it appears that the detailed procedural rules at issue in the main proceedings fail to satisfy the requirement of legal certainty and, therefore, that that legislation is not consistent with the principle of effectiveness.

– *The conditions to be satisfied in order to obtain tax advantages under Directive 90/434*

47 Concerning the conditions laid down by that legislation, it should be noted that the Court has repeatedly held that the common tax rules laid down by Directive 90/434, which cover a variety of

tax advantages, apply without distinction to all operations within the scope of that directive irrespective of the reasons, whether financial, economic or simply fiscal, for those operations (judgment of 20 May 2010, *Modehuis A. Zwijnenburg,* C?352/08, EU:C:2010:282, paragraph 41 and the case-law cited).

48 The Court has also made it clear that it is only by way of exception and in specific cases that Member States may, pursuant to Article 11(1)(a) of Directive 90/434, refuse to apply or withdraw the benefit of all or any part of the provisions of that directive (judgment of 20 May 2010, *Modehuis A. Zwijnenburg,* C?352/08, EU:C:2010:282, paragraph 45 and the case-law cited).

49 Since that provision provides an exception to the general rules laid down by Directive 90/434, namely the common tax rules applicable to operations coming within the scope of that same directive, it must be subject to strict interpretation (see, to that effect, judgment of 20 May 2010, *Modehuis A. Zwijnenburg,* C?352/08, EU:C:2010:282, paragraph 46).

50 First, it should be pointed out that, in the present case, while Directive 90/434 lays down as a principle the deferral of taxation of the capital gains relating to the assets transferred and allows that deferral to be refused only on one condition, namely when the planned operation has as its objective tax evasion or tax avoidance (see, to that effect, judgment of 17 July 1997, *Leur-Bloem,* C?28/95, EU:C:1997:369, paragraph 45), the legislation at issue in the main proceedings refuses in a general way to grant that deferral unless the taxpayer first complies with the procedural and substantive requirements under that legislation.

51 Secondly, in so far as that legislation makes the grant of that advantage subject to the three conditions referred to in paragraph 32 above, it extends, as the Advocate General noted in points 34 to 36 of his Opinion, the scope of the reservation of competence of the Member States, referred to in paragraphs 22 and 23 above, beyond what is provided for in Article 11(1)(a) of Directive 90/434.

52 Thirdly, as the Advocate General observed in point 36 of his Opinion, contrary to what is claimed by the French Government, the third condition laid down by the legislation at issue in the main proceedings, namely that the terms of the transaction make it possible for the capital gains deferred for tax purposes to be taxed in the future, which, moreover, is not provided for in Directive 90/434, cannot be justified by the prevention of tax evasion or tax avoidance, since that objective is already expressly covered by the second condition set out in that legislation.

53 Fourthly, concerning the presumption of tax evasion or tax avoidance under Article 11(1)(a) of Directive 90/434, it should be recalled that that provision authorises Member States to provide for a presumption of tax evasion or tax avoidance only where the planned operation has the sole objective of obtaining a tax advantage and is thus not carried out for valid commercial reasons (see, to that effect, judgments of 17 July 1997, *Leur-Bloem,* C?28/95, EU:C:1997:369, paragraph 45, and of 10 November 2011, *Foggia — Sociedade Gestora de Participações Sociais,* C?126/10, EU:C:2011:718, paragraph 36).

54 Fifthly, it follows from the Court's case-law that Member States may not, in transposing Article 11(1)(a) of Directive 90/434, have recourse to a general presumption of tax evasion or tax avoidance.

55 The Court has already held, in that regard, that, in order to determine whether the operation concerned pursues the objective of tax evasion or avoidance, the competent national authorities may not confine themselves to applying predetermined general criteria but must subject each particular case to a general examination of that operation, since the imposition 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 objective pursued by that directive (judgment of 10 November 2011, *Foggia — Sociedade Gestora de Participações Sociais,* C?126/10, EU:C:2011:718, paragraph 37).

56 However, in so far as the legislation at issue in the main proceedings, in order to grant the benefit of the deferral of the taxation of the capital gains under Directive 90/434, systematically and unconditionally requires the taxpayer to show that the operation concerned is justified on economic grounds and does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance, without the tax authority being required to provide even prima facie evidence that there are no valid commercial reasons or evidence of tax evasion or tax avoidance, that legislation introduces a general presumption of tax evasion or tax avoidance.

57 For the reasons set out above, Article 11(1)(a) of Directive 90/434 must be interpreted as precluding the adoption of national legislation such as that at issue in the main proceedings.

Article 49 TFEU

58 According to settled case-law, Article 49 TFEU requires the abolition of restrictions on the freedom of establishment. Even though, according to their wording, the provisions of the FEU Treaty on freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (judgment of 29 November 2011, *National Grid Indus,* C?371/10, EU:C:2011:785, paragraph 35 and the case-law cited).

59 All measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be considered to be restrictions on that freedom (judgment of 29 November 2011, *National Grid Indus,* C?371/10, EU:C:2011:785, paragraph 36 and the case-law cited).

60 It must be held that, in the case in the main proceedings, it is only in the case of cross-border mergers that the grant of a deferral of the taxation of capital gains relating to the assets transferred by a French company to a company established in another Member State is subject to the requirements of the legislation at issue.

61 As acknowledged by the French Government, that legislation treats cross-border mergers and national mergers differently.

62 Such a difference is liable to deter them from exercising their freedom of establishment and, therefore, constitutes an obstacle to that freedom.

63 Such a restriction is permissible only if it is justified by overriding reasons in the public interest recognised by EU law. It is further necessary, in such a case, that it should be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain that objective (judgment of 29 November 2011, *National Grid Indus,* C?371/10, EU:C:2011:785, paragraph 42 and the case-law cited).

64 According to the French Government, the obstacle in question in the main proceedings is justified by the overriding public interest reason linked to preventing tax evasion or tax avoidance and that of protecting the balanced allocation of the power to impose taxes between the Member States.

65 In that regard, it should be borne in mind that the Court has already held that prevention of

tax evasion is an overriding reason relating to the public interest, capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty, as is the need to safeguard the balanced allocation between the Member States of the power to impose taxes (judgment of 5 July 2012, *SIAT,* C?318/10, EU:C:2012:415, paragraphs 36 and 37 and the case-law cited.).

66 With regard to the latter objective, it should, however, be noted, as did the Advocate General in point 39 of his Opinion, that it is already guaranteed by Directive 90/434 itself.

67 As is clear from the case-law of the Court, it follows from the fourth and sixth recitals of that directive that it establishes only a system of deferral of the taxation of the capital gains relating to the assets transferred, which, while avoiding taxation arising from the business transfer itself, safeguards the financial interests of the State of the transferring company while ensuring taxation of those capital gains at the date of their actual disposal (judgment of 19 December 2012, *3D I,* C?207/11, EU:C:2012:818, paragraph 28).

68 Therefore, that objective cannot, in the case in the main proceedings, justify a restriction of the freedom of establishment.

69 With regard to the overriding reason in the public interest in preventing tax avoidance and tax evasion, suffice it to note, as the Advocate General observed in points 72 and 73 of his Opinion, that that objective has the same scope whether it is relied on under Article 11(1)(a) of Directive 90/434 or as justification for an exception to primary law. Therefore, the considerations set out in paragraphs 54 to 56 above, concerning the proportionality of the legislation at issue in the main proceedings and relating to that provision, also apply to the analysis of the proportionality of that legislation in relation to the freedom of establishment. It follows that tax legislation, such as that at issue in the main proceedings, which introduces a general presumption of tax evasion or tax avoidance, goes beyond what is necessary to achieve that objective and cannot, therefore, justify an obstacle to that freedom.

70 In the light of all of the foregoing, the answer to the second question referred is that Article 49 TFEU and Article 11(1)(a) of Directive 90/434 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the case of a cross-border merger, makes the granting of the tax advantages applicable to such an operation under that directive, in the present case the deferral of the taxation of the capital gains relating to the assets transferred by a French company to a company established in another Member State, subject to a process of prior approval under which, in order to obtain that approval, the taxpayer must show that the operation concerned is justified for commercial reasons, that it does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance, and that its terms make it possible for the capital gains deferred for tax purposes to be taxed in the future, whereas in the case of a national merger such a deferral is granted without the taxpayer being made subject to such a process.

Costs

71 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 (First Chamber) hereby rules:

1. **In so far as 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 does not carry out exhaustive harmonisation, EU law allows for the assessment of the compatibility of national legislation, such as that at issue in the main proceedings, in the light of primary**

law, where that legislation was adopted to transpose into national law the option provided for in that provision.

2. **Article 49 TFEU and Article 11(1)(a) of Directive 90/434 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in the case of a cross-border merger, makes the granting of the tax advantages applicable to such an operation under that directive, in the present case the deferral of the taxation of the capital gains relating to the assets transferred by a French company to a company established in another Member State, subject to a process of prior approval under which, in order to obtain that approval, the taxpayer must show that the operation concerned is justified for commercial reasons, that it does not have as its principal objective, or as one of its principal objectives, tax evasion or tax avoidance and that its terms make it possible for the capital gains deferred for tax purposes to be taxed in the future, whereas in the case of a national merger such a deferral is granted without the taxpayer being made subject to such a process.**

[Signatures]

* Language of the case: French.