



Reports of Cases

Case C-14/16

Euro Park Service

v

Ministre des Finances and des Comptes publics

(Request for a preliminary ruling
from the Conseil d'État (France))

(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)

Summary — Judgment of the Court (First Chamber), 8 March 2017

1. *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 — Exhaustive harmonisation — Absence — Possibility to assess the compatibility of national legislation in the same area on the basis of primary law*

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

2. *EU law — Rights conferred on individuals — National rules of procedure — Common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States — Directive 90/434 — National legislation implementing that directive — Compliance with the principle of legal certainty requiring clarity, precision and foreseeability of the procedural rules*

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

3. *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 — National legislation implementing Directive 90/434 by providing a general presumption of tax evasion or avoidance — Not permissible*

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

4. *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 — Cross-border mergers — Deferral of taxation of capital gains relating to assets*

transferred to a company established in another Member State — National legislation making the grant of tax advantages subject to prior approval — Not permissible, also in the light of primary law concerning freedom of establishment — Justification — None

(Art. 49 TFEU; Council Directive 90/434, Art. 11(1)(a))

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.

(see para. 26, operative part 1)

2. 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).

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, *Târșia*, C-69/14, EU:C:2015:662, paragraph 36).

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. Tomoiagă Andrei*, C-144/14, EU:C:2015:452, paragraph 34).

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).

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.

(see paras 36-38, 40, 45)

3. See the text of the decision.

(see paras 47-49, 54, 55)

4. 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.

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 of the present judgment, 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.

(see paras 69, 70, operative part 2)