Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

16 November 2023*

[Text rectified by order of 8 January 2024]

(Reference for a preliminary ruling – Approximation of laws – Common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares – Directive 2009/133/EC – Partial division – Purely internal situation – No reduction in share capital – Company holding 100% of the share capital of the transferring company)

In Case C-318/22,

REQUEST for a preliminary ruling under Article 267 TFEU from the Fővárosi Törvényszék (Budapest High Court, Hungary), made by decision of 27 April 2022, received at the Court on 12 May 2022, in the proceedings

GE Infrastructure Hungary Holding Kft.

v

Nemzeti Adó – és Vámhivatal Fellebbviteli Igazgatósága,

THE COURT (Ninth Chamber),

composed of O. Spineanu-Matei, President of the Chamber, J.-C. Bonichot (Rapporteur) and L.S. Rossi, Judges,

Advocate General: L. Medina,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– GE Infrastructure Hungary Holding Kft., by G. Szimler and Z. Várszegi, ügyvédek,

– the Hungarian Government, by M.Z. Fehér and K. Szíjjártó, acting as Agents,

– the European Commission, by A. Armenia and B. Béres, acting as Agents,

* Language of the case: Hungarian.

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(a) and Article 8(2) of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States (OJ 2009 L 310, p. 34), read in the light of recital 2 of that directive.

2 The request has been made in proceedings between GE Infrastructure Hungary Holding Kft. ('GE Infrastructure') and Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary) concerning the tax consequences, for that company, of a partial division with merger by acquisition carried out within companies held by the latter.

Legal context

European Union law

3 According to recital 2 of Directive 2009/133:

'Mergers, divisions, partial 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 effective functioning of such an internal market. Such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. To that end it is necessary, with respect to such operations, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.'

4 Article 1 of that directive provides:

'Each Member State shall apply this Directive to the following:

(a) mergers, divisions, partial divisions, transfers of assets and exchanges of shares involving companies from two or more Member States;

…'

5 Article 2 of that directive is worded as follows:

'For the purposes of this Directive, the following definitions shall apply:

…

(c) “partial division” means an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of those securities;

…’

6 Article 8 of that directive provides:

‘1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

2. On a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.

…

5. Paragraphs 2 and 3 shall apply only if the shareholder does not attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the transferring company had immediately before the partial division.

…

7. For the purpose of this Article, “value for tax purposes” shall mean the value on the basis of which any gain or loss would be computed for the purposes of tax upon the income, profits or capital gains of a shareholder of the company.

…’

7 Article 15 of Directive 2009/133 provides:

‘1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Articles 4 to 14 where it appears that one of the operations referred to in Article 1:

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

…’

Hungarian law

8 In accordance with Article 3:45(1) of the a Polgári törvénykönyvről szóló 2013. évi V. törvény (Law No V of 2013 on the Civil Code):

‘Legal persons may be divided into two or more legal persons through complete division or partial division. In complete division, the legal person shall terminate and its assets shall pass to two or more legal persons created by the division as legal successors. In partial division, the legal person shall continue to operate and a part of its assets shall pass to another legal person created by the division as a legal successor.’

9 Article 3:45(2)(b) of Law No V of 2013 on the Civil Code provides:

‘Division of a legal person may also take place in a way that in complete division, the separating members join, with their own share of the legal person’s assets, various operating legal persons as legal successors (complete division by merger).’

10 According to Article 1(5) of the az társasági adóról és osztalékadóról szóló 1996. évi LXXXI. törvény (Law No LXXXI of 1996 concerning tax on companies and dividends), in the version applicable to the main proceedings (‘the Law on corporation tax’):

‘This Law shall be interpreted having regard to and in accordance with the provisions of the Law on accounting. Departures from the provisions of the Law on accounting intended to ensure compliance with the principle that a true and fair image is given may not give rise to changes in tax liabilities.’

11 Article 4, point 23/a, of the Law on corporation tax is worded as follows:

‘eligible transformation: a transformation (including, in what follows, a merger or division) in which only companies referred to in point 32/a are involved, both as legal predecessors and as legal successors, if

(a) by way of the legal transaction, the member or shareholder of the legal predecessor acquires, in the context of the conversion, merger or division, a shareholding in the legal successor and a cash payment not exceeding 10% of the nominal value of the entire shareholding acquired (or in the absence of a nominal value, of the value determined in proportion to the share capital),

(b) in the event of a division, the partners or shareholders of the legal predecessor acquire a proportional stake – in relation to each other – in the legal successor,

(c) the single-member company is absorbed by its sole member or shareholder,

provided that the conversion is based on genuine economic and commercial grounds, the taxpayer being required to prove the existence of these genuine economic and commercial grounds.’

12 Article 7(1)(dz) of that law provides that profit before tax is to be reduced by ‘the gain realised during the tax year on the sale of the notified holding or its derecognition as a non-cash contribution (less, in both cases, the charge recognised following the derecognition of goodwill), provided that the shareholding has been continuously as an asset by the taxable person

(including its legal predecessor) for at least one year prior to the sale thereof (derecognition due to a transformation, merger or division does not constitute a break in the continuity of the holding), and any impairment loss reversed on the notified shareholding during the tax year'.

13 Article 7(1)(gy)(1) of that law provides that the pre-tax result for the member (shareholder, holder of a holding) is to be reduced by 'the part exceeding the book value of the investment value, within the meaning of paragraph 10, of the holding less the income recognised during the tax year as a result of a derecognised (partially derecognised) holding – including a claim on the predecessor company based on a contribution in kind, but not including the reduction of a holding in a controlled foreign company – if the indicative capital investment has disappeared or been reduced as a result of dissolution without legal succession, a reduction in share capital by way of disinvestment or an eligible transformation, subject to the provisions of point 2'.

14 Article 8(1)(m)(mb) of that law provides that the pre-tax profit or loss is to be increased by 'the loss or decrease in value (also taking into account the charge recognised following the goodwill impairment) recognised as a result of an impairment, a foreign exchange loss or the reduction of an interest in any capacity (excluding the recognition of a transformation, merger or division) recorded by the taxable person, in relation to the interest declared, as an expense for the tax year'.

15 Article 31(1)(a) of the Law on corporation tax provides:

'This law is intended to ensure compliance with the following acts of European Union law:

(a) [Directive 2009/133]

…'

16 In accordance with Article 84(2) of the a számvitelről szóló 2000 évi C. törvény (Law No C of 2000 on accounting):

'The following shall be recognised as income or gain from investments:

…

(d) for the holder of the equity interest (shareholder) in the company which has been transformed, merged or divided, the difference between the recorded value (book value) of the cancelled long-term holding (shares, corporate units or other holdings) in the transferring company and the investment value – of an amount equal to the amount of equity in the company's last balance sheet corresponding to the cancelled holding, legal predecessor – of the shareholding in the company created by transformation, merger or division, on the day following the date of transformation, if the value of the shareholding acquired is higher (in the case of a division, the amount of the equity capital of the divided company according to the last balance sheet shall be taken into account in order to calculate the difference).

…'

17 Article 85(1)(d) of that law states:

‘The following shall appear as expenses or capital losses arising from shareholdings:

…

(d) for the holder of the equity interest (shareholder) in the company which has been transformed, merged or divided, the difference between the recorded value (book value) of the cancelled long-term holding (shares, corporate units or other holdings) in the legal predecessor and the investment value – of an amount equal to the amount of shareholders’ equity in the last balance sheet of the company corresponding to the cancelled holding, legal predecessor – of the shareholding in the company created by transformation, merger or division, on the day following the date of transformation, if the value of the shareholding acquired is lower (in the case of a division, the amount of the equity capital of the divided company according to the last balance sheet shall be taken into account in order to calculate the difference).’

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

18 On 30 September 2009, GE Infrastructure, the applicant in the main proceedings, acquired a 100% stake in GE Hungary Kft. The nominal value of the shares held was 100 000 000 Hungarian forints (HUF) (approximately EUR 260 000). On 7 July 2016, GE Hungary created the company GE Aviation Hungary Holding (‘GE Aviation’), in which it owned a 100% holding with a nominal value of HUF 3 500 000 (approximately EUR 9 100).

19 [As rectified by order of 8 January 2024] On 31 May 2017, in the context of the global restructuring of the group to which they belong, those three companies entered into a division agreement with a merger by acquisition, taking effect on 30 September 2017. As part of that process, GE Hungary’s ‘renewable energies’ and ‘aviation’ business lines were spun off from the latter and merged into GE Aviation. The market value of the contributed business lines was HUF 397 025 000 000 (approximately EUR 1 032 000 000). As part of this transaction, GE Infrastructure acquired a stake in GE Aviation corresponding to the value of the business lines spun off.

20 Following the merger transaction, the share capital of GE Aviation had increased to HUF 25 000 000 (approximately EUR 65 000) and GE Infrastructure held a direct 99.6% holding in that share capital. The remaining 0.4% was held indirectly by GE Infrastructure through the intermediary of GE Hungary, in which GE Infrastructure retained its 100% holding.

21 [As rectified by order of 8 January 2024] GE Infrastructure states that the assets transferred to GE Aviation were recorded by the latter at the net book value that was recorded in GE Hungary’s accounts, that is, HUF 83 474 000 000 (approximately EUR 217 000 000). That value was well below the market value of these assets, which amounted to HUF 397 025 000 000 (approximately EUR 1 032 000 000), as stated in paragraph 19 of the present judgment. According to GE Infrastructure, the main purpose of the transaction was to prepare for the potential sale of the business lines concerned, and it would therefore have had a negative impact, in the nature of a loss, on its balance sheet.

22 [As rectified by order of 8 January 2024] The share capital of GE Hungary remained unchanged at HUF 100 000 000 (approximately EUR 260 000), with the impact of the partial division of HUF 83 474 000 000 (approximately EUR 217 000 000) being reflected only in the company's equity capital, by a reduction in its retained earnings.

23 [As rectified by order of 8 January 2024] According to GE Infrastructure, the disposal of the business lines would nevertheless have had an impact on the real value of its holding in GE Hungary. The applicant in the main proceedings estimates the reduction in that value at HUF 397 025 000 000 (approximately EUR 1 032 000 000), corresponding to the value of the branches of activity recorded in its accounting books, whereas the branches acquired by GE Aviation were recorded in the accounts only for an amount of HUF 83 474 000 000 (approximately EUR 217 000 000), corresponding to the book value of those assets at the time of their transfer. Overall, the applicant in the main proceedings takes the view that the combined book value of GE Aviation and GE Hungary was more than HUF 313 000 000 000 (approximately EUR 813 800 000) lower than the book value of GE Hungary before the merger.

24 [As rectified by order of 8 January 2024] The tax authorities took the view that the transaction had given rise to taxable income or capital gains of HUF 83 331 000 000 (approximately EUR 217 000 000) for GE Infrastructure (corresponding to the book value of GE Infrastructure's 99.6% shareholding in GE Aviation), and that the applicant in the main proceedings could not benefit from the tax deferral mechanism provided for in Article 7(1)(gy) of the Law on corporation tax on the ground that the partial division had not given rise to a reduction in the share capital of GE Hungary and that GE Infrastructure continued to hold 100% of that company.

25 That dispute gave rise to litigation before the Fővárosi Törvényszék (Budapest High Court, Hungary), the referring court. That court considers that, for the purposes of ruling on the dispute, it is for that court to determine whether Article 7(1)(gy) of the Law on corporation tax, as interpreted by the tax authorities, complies with the provisions of Directive 2009/133, to which that law refers.

26 In those circumstances, the Fővárosi Törvényszék (Budapest High Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Must Directive [2009/133] be interpreted as meaning that compatibility with recital 2 and Article 1(a) thereof is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such national legislation (or such a provision of national law), pursuant to which the [directive] is held not to apply to intra-State business conversions but only to international and cross-border business conversions, in circumstances in which the provisions of the [directive] were transposed by the [Law on corporation tax] in such a way that, although EU law does not directly govern that matter, the national legislature provided in Article 31(1)(a) of that Law that the purpose of the latter was to align the legislation so enacted with acts of EU law, including [that directive]?

(2) Must Article 8(2) of Directive [2009/133] be interpreted as meaning that compatibility with that provision is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such legislation (or such a provision), whereby, in the context of a partial division of undertakings resident in a single Member State, the shareholder of the transferring company is obliged to reduce the nominal value of his holding in the transferring company (the subscribed capital of the transferring company) in order to reduce the book value of his holding (his shares) in the transferring company, the

tax administration requiring that reduction as a precondition of eligibility for the tax treatment provided for in Article 8(2) of [that directive], even in the case where the partial division entails losses for the shareholder of the transferring company?

(3) Must Article 8(2) of Directive [2009/133] be interpreted as meaning that compatibility with [that provision] … is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such legislation (or such a provision of national law), whereby the treatment for corporation tax purposes envisaged in that rule is not applicable to a partial division if the transferring company concerned is a single-member commercial company, that is to say if, as a result of the partial division, the founder of the transferring company retains his 100% holding in that company unchanged, or there is no change to the subscribed capital of the transferring commercial company?'

Consideration of the questions referred

The first question

27 By its first question, the referring court asks, in essence, whether Article 1(a) of Directive 2009/133, read in the light of recital 2 of that directive, must be interpreted as precluding the national legislature from treating in the same way purely internal transactions and transactions involving companies of different Member States, in a case where that legislature has not drawn any distinction between those two categories of transaction in the provisions adopted to transpose that directive.

28 In order to answer that question, it must first be determined whether the Court has jurisdiction to interpret a directive, on the basis of Article 267 TFEU, in a case where the directive does not directly govern the situation at issue, but the national legislature has chosen, when transposing the provisions of that directive into national law, to treat purely domestic situations in the same way as situations falling within the scope of that directive.

29 In order to provide a useful answer to the national court, the first question should therefore be reworded to the effect that that court is thereby asking, in essence, whether, when transposing a directive, the national legislature may choose to apply the same treatment to situations governed by that directive as to purely domestic situations and whether the Court has jurisdiction to interpret the provisions of that directive on the basis of Article 267 TFEU in a case where the situation at issue in the main proceedings is of a purely domestic nature.

30 In that respect, it should be remembered that it is open to the national legislature to follow the solutions adopted by EU law when dealing with purely domestic situations. In such cases, it is manifestly in the interest of the EU legal order that, in order to forestall future differences of interpretation, every EU law provision should be given a uniform interpretation irrespective of the circumstances in which it is to be applied (see, to that effect, judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraph 37, and of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraph 32).

31 It should also be remembered that, in the context of the division of functions between the national courts and the Court of Justice provided for in Article 267 TFEU, the national court alone has jurisdiction to assess the exact scope of any reference made by national law to EU law. Consideration of the limits which the national legislature may have placed on the application of

EU law to purely internal situations is a matter for domestic law and hence falls within the exclusive jurisdiction of the courts of the Member State concerned (judgments of 18 October 1990, *Dzodzi*, C-297/88 and C-197/89, EU:C:1990:360, paragraphs 41 and 42, and of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraph 33).

32 Under Article 1(a) of Directive 2009/133, that directive applies only to transactions – inter alia, partial divisions – involving companies from two or more Member States.

33 However, it is apparent from the reference for a preliminary ruling that the Hungarian legislature did not distinguish, in the provisions adopted to transpose Directive 2009/133, between the tax treatment of partial divisions occurring in a purely domestic context and the tax treatment of such transactions where they involve companies from different Member States. The referring court considers that, in so doing, that legislature extended the regime provided for by that directive to purely domestic transactions, as the Hungarian Government moreover confirmed in its written observations.

34 It follows from the foregoing that, when transposing a directive, the national legislature may choose to apply the same treatment to situations governed by that directive and to purely domestic situations; the Court then has jurisdiction, on the basis of Article 267 TFEU, to interpret the provisions of that directive in a case where the situation at issue in the main proceedings is of a purely domestic nature.

The second and third questions

35 By its second and third questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 8(2) of Directive 2009/133 must be interpreted as meaning that it allows the application of the system of fiscal neutrality laid down that directive in the case of a partial division to be made subject to conditions relating to the reduction in the shareholding of the shareholder of the transferring company in that company, or to the reduction in the share capital of that company.

36 Pursuant to Article 2(c) of Directive 2009/133, 'partial division' means an operation whereby a company transfers, without being dissolved, one or more branches of activity, to one or more existing or new companies, leaving at least one branch of activity in the transferring company, in exchange for the pro-rata issue to its shareholders of securities representing the capital of the companies receiving the assets and liabilities, and, if applicable, a cash payment.

37 Article 8(2) of that directive provides that, on a partial division, the allotment to a shareholder of the transferring company of securities representing the capital of the receiving company is not, of itself, to give rise to any taxation of the income, profits or capital gains of that shareholder.

38 Neither those provisions nor the other provisions of Directive 2009/133 make the application of the system of fiscal neutrality laid down in Article 8(2) of that directive subject to a reduction in the nominal value or the percentage holding of the transferring company's shareholder in the transferring company, or to the condition that the partial division results in a reduction in the transferring company's share capital rather than a reduction in its reserved profits.

39 Article 8(5) of Directive 2009/133 requires the shareholder of the transferring company, in order to benefit from Article 8(2) of that directive, not to attribute to the sum of the securities received and those held in the transferring company, a value for tax purposes higher than the value the securities held in the capital the transferring company had immediately before the partial division, which is a matter for the national court to determine.

40 It should be noted in particular that, unlike Article 8(1) of Directive 2009/133, which relates to mergers, divisions and exchanges of shares, Article 2(c) and Article 8(2) of that directive, which relate specifically to partial divisions, refer only to the allocation to the shareholder of the transferring company of securities representing the share capital of the transferee company, corresponding to the assets and liabilities transferred. However, those provisions make no mention of the consequences of that transaction on the shareholding held by that shareholder in the transferring company or on the share capital of the transferring company.

41 Moreover, as the European Commission highlighted in its written observations, making the benefit of the system of fiscal neutrality laid down in Article 8(2) of Directive 2009/133 subject to a reduction in the percentage holding of the shareholder of the transferring company in that company would be tantamount to precluding the application of that system in cases where the transferring company is held by a single shareholder, whereas the directive does not provide for such an exclusion.

42 It follows from the foregoing that the system of fiscal neutrality from which any partial division transaction covered by the provisions of Directive 2009/133 must benefit cannot be made subject to a condition not provided for by that directive, such as a reduction in the percentage holding of the shareholder of the transferring company in that company or a reduction in the share capital of that company.

43 Contrary to the Hungarian Government's arguments, subject to Article 15 of Directive 2009/133 and in particular in the case referred to in Article 15(1)(a) thereof, operations which have tax evasion or tax avoidance as their principal objective or as one of their principal objectives, in which Member States may refuse to apply all or part of the provisions of that directive or may withdraw the benefit thereof, which case is not the subject of the questions referred to the Court in the present case, Article 8(2) of that directive does not leave Member States discretion with regard to implementation which would permit them to make the fiscal neutrality provided for subject to conditions additional to those set out in Chapter II of that directive (see, to that effect, judgment of 11 December 2008, *A.T.*, C-285/07, EU:C:2008:705, paragraph 26).

44 That conclusion is not invalidated by the judgment of 22 March 2018 in *Jacob and Lassus* (C-327/16 and C-421/16, EU:C:2018:210), referred to by the Hungarian Government in its written observations, in which the Court recognised that the Member States had, in compliance with EU law, a certain discretion in so far as concerns the adoption of tax measures for the purposes of implementing Article 8 of Directive 2009/133. It is sufficient to note that the national legislation at issue in that judgment did not make the exchange of securities, which was the subject matter of the main proceedings, subject to an additional condition in order to benefit from the system of fiscal neutrality laid down in that directive but, on the contrary, sought to ensure the fiscal neutrality of that transaction, by taxing only the capital gains relating to the securities received in exchange on the date of the subsequent disposal thereof.

45 It follows that the answer to the second and third questions must be that Article 8(2) of Directive 2009/133 must be interpreted as precluding national legislation which makes the benefit of that provision subject to conditions relating to a reduction in the shareholding of the shareholder of the transferring company in that company or to a reduction in the share capital of that company, which are not provided for by that directive.

Costs

46 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 (Ninth Chamber) hereby rules:

1. **The Court of Justice of the European Union has jurisdiction, on the basis of Article 267 TFEU, to interpret European Union law where that law does not directly govern the situation at issue, but the national legislature has chosen, when transposing the provisions of a directive into national law, to apply the same treatment to purely domestic situations as to those governed by the directive, as it is free to do.**

2. **Article 8(2) of Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States,**

   must be interpreted as precluding national legislation which makes the benefit of that provision subject to conditions relating to a reduction in the shareholding of the shareholder of the transferring company in that company or to a reduction in the share capital of that company, which are not provided for by that directive.

[Signatures]