Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 13 July 2017 [1]

Case C-292/16

A Oy,
other party:
Veronsaajien oikeudenvalvontayksikkö

(Request for a preliminary ruling from the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland))

(Reference for a preliminary ruling — Tax legislation — Taxation of undertakings — Mergers Directive (Directive 90/434/EEC) — Transfer to a foreign company of the foreign permanent establishment of a national company — Immediate taxation in a cross-border case in contrast to non-taxation in a domestic case — Examination of secondary law in the light of the basic freedoms — Comparability of exit tax — Proportionality of immediate taxation with reduction of the tax burden)

I. Introduction

1. In this case the Court of Justice is dealing with the transposition 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 ('Mergers Directive) [2] in Finland. The case relates to the specific situation where a national company transfers a foreign permanent establishment to a company resident abroad and receives in return not money but shares in that company. Such a transfer is taxed in Finland immediately — unlike the transfer of a domestic permanent establishment to a domestic company. However, there is provision for relief in respect of a notional foreign tax applying in the country in which the permanent establishment is situated. It has to be clarified whether this is compatible with freedom of establishment.

2. The Mergers Directive in Article 10(2) permits a charge to tax because, as a result of the cross-border transfer, the possibility of taxing the permanent establishment abroad is lost. Thenceforth it no longer belongs to a company resident in Finland and is now on the territory of a foreign State. It is essentially a kind of exit tax which is now, in principle, actually required under EU law. [3] In general, an *immediate* charge to exit tax is disproportionate. The question to be determined here is whether relief under the directive in respect of a notional charge to foreign tax makes any difference, thus on that account permitting an immediate charge to tax.

1 Original language: German.

2 OJ 1990 L 225, p. 1.

3 Pursuant to Article 5 of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1) which is, however, not yet applicable in the present case. Article 5 of Directive 2016/1164 provides as follows: 'A taxpayer shall be subject to tax at an amount equal to the market value of the transferred assets, at the time of exit of the assets, less their value for tax purposes, in any of the following circumstances: … (c) a taxpayer transfers its tax residence to another Member State …'

3. The Court of Justice is therefore called on to elaborate further its case-law on the restriction of fundamental freedoms by the Member States owing to the loss of their powers of taxation.

II. Legal context

A. EU law

4. The Union law framework of the case is provided by the Mergers Directive, along with Article 43 in conjunction with Article 48 of the EU Treaty (now Article 49 in conjunction with Article 54 TFEU).

5. Article 10 of the Mergers Directive, which is relevant to this case and is to be found in Title IV under the heading 'Special case of the transfer of a permanent establishment', reads as follows:

'1. Where the assets transferred in a merger, a division or a transfer of assets include a permanent establishment of the transferring company which is situated in a Member State other than that of the transferring company, the latter State shall renounce any right to tax that permanent establishment. The Member State of the transferring company may reinstate in the taxable profits of that company such losses of the permanent establishment as may previously have been set off against the taxable profits of the company in that State and which have not been recovered. The State in which the permanent establishment is situated and the State of the receiving company shall apply the provisions of this Directive to such a transfer as if the former State were the State of the transferring company.

2. By way of derogation from paragraph 1, where the Member State of the transferring company applies a system of taxing worldwide profits, that Member State shall have the right to tax any profits or capital gains of the permanent establishment resulting from the merger, division or transfer of assets, on condition that it gives relief for the tax that, but for the provisions of this Directive, would have been charged on those profits or capital gains in the Member State in which that permanent establishment is situated, in the same way and in the same amount as it would have done if that tax had actually been charged and paid.'

B. Finnish law

6. According to the national court, the Mergers Directive was transposed in Finland by the Law on taxation of business income ('Law 1733/1995').

7. Under the second subparagraph of Paragraph 52d of Law 1733/1995, on the taxation of the transferring company, the undepreciated part of the acquisition cost is included in the taxable disposal price of the assets disposed of, provided that the transfer has taken place on the basis of the undepreciated book value.

8. Under the third subparagraph of Paragraph 52d of Law 1733/1995, on the taxation of the receiving company, in regard to deductible expenditure, for the acquisition of the assets transferred, the amount corresponding to that regarded as the taxable disposal price of the transferring company under the second subparagraph of Paragraph 52d is regarded as a deductible acquisition cost of the transferred asset. The result is therefore a tax neutral transfer of the assets transferred.

9. Where the transferred assets and liabilities are allocated to a permanent establishment of a Finnish company situated in another Member State of the European Union, under the third subparagraph of Paragraph 52e of Law 1733/1995, the market value of the assets passing, together with the provisions deducted previously on taxation of the permanent establishment's income, is included in the taxable income in Finland in the tax year in which the merger, division or transfer of an activity occurs. Thus,

in the result, there appears to be a charge to tax on the hidden reserves of the permanent establishment. From the tax payable on that income in Finland there is deducted the tax which would have been paid in the State in which the permanent establishment is situated, were it not for the provisions of the Mergers Directive.

10. According to the statement of reasons for the third subparagraph of Paragraph 52e of Law 1733/1995, this provision governs situations in which assets, allocated to a Finnish company, of a permanent establishment situated in another Member State of the European Union are transferred to a foreign company. If assets located abroad were to pass into the ownership of a foreign company, they would no longer be subject to Finland's tax jurisdiction. The deduction of the tax of the State in which the permanent establishment is located is a set-off of tax which also features in some double taxation agreements. For applying the provision, the amount of tax to be calculated is that which would have had to be paid in the other State were it not for the provisions of the Mergers Directive.

III. The main proceedings

11. In 2006, A Oy (or 'the Company') transferred an Austrian permanent establishment, by way of the transfer of an activity, to the Austrian group company B and received new shares from it as consideration. The assets, liabilities, provisions and reserves attributed to the production plant passed under the transfer.

12. The likely disposal price to be achieved for the assets passing on the transfer of the activity was included in the taxable income of the company; that figure was estimated in the present case at EUR 249 663 661.59, together with investment aid of EUR 11 256 146 granted by the Austrian State, thus making a total of EUR 260 919 807.59. The non-depreciated acquisition costs were deducted. In the tax computation, aid granted by the Austrian State was not included in the deductible costs of acquisition.

13. The tax was determined in the 2006 tax year on the basis of the first subparagraph of Paragraph 52d and the third subparagraph of Paragraph 52e of Law 1733/1995. There would be no such charge to tax in an analogous Finnish situation, in which tax liability arises only on realisation of the profit by the receiving company.

14. In its objection, A Oy sought rectification of an amendment to the tax notice effected on 30 November 2010 to the detriment of the taxable person. It claimed that the third subparagraph of Paragraph 52e of Law 1733/1995 was incompatible with freedom of establishment under Article 49 TFEU.

15. This objection was rejected by the tax appeals board. A Oy brought proceedings in the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland). That court decided to stay the proceedings and to make a reference for a preliminary ruling.

IV. Proceedings before the Court of Justice

16. The Helsingin hallinto-oikeus (Administrative Court, Helsinki), before which the proceedings were brought, referred the following questions to the Court:

'(1) Does Article 49 TFEU preclude Finnish legislation under which, where a Finnish company, by way of a transfer of activity, transfers assets of a permanent establishment situated in another EU Member State to a company established in that State in return for new shares, the transfer of the assets is taxed immediately in the year of transfer, but in a corresponding national situation is not taxed until the time of realisation?

(2) Is there indirect or direct discrimination if Finland levies tax immediately in the year of the transfer of activity before the income has been realised, and in a domestic situation not until the time of realisation?

(3) If the answer to Questions 1 and 2 is in the affirmative, may the restriction of the right of establishment be justified on grounds such as an overriding reason of the public interest or the preservation of the national power of taxation? Does the prohibited restriction comply with the principle of proportionality?'

17. In the proceedings before the Court, A Oy, Finland, Sweden and the European Commission submitted written observations on these questions. The Federal Republic of Germany also took part in the hearing on 8 June 2017.

V. Law

A. Assessment criterion

18. By its questions, which must be examined together, the referring court is essentially asking whether freedom of establishment as part of primary law is undermined by national legislation which, when transposing Article 10(2) of the Mergers Directive, provides for taxation, and, if so, whether that taxation may be justified. In that connection, according to the national court, that taxation will be immediate only in a cross-border case, while in a purely internal case no taxation is imposed upon the transferor.

19. However, as the participating Member States have almost unanimously submitted, the Court of Justice has on several occasions ruled that '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'. [4]

20. Even if the Mergers Directive were to constitute such an exhaustive harmonisation, that could not prevent the directive from having to be interpreted in conformity with primary law and, if appropriate, from being examined as an incidental point for its compatibility with the fundamental freedoms. The Court of Justice ruled early on that the prohibition of restrictions of freedom to provide services applies not only to national measures but also to measures adopted by the Union institutions. [5] The Treaties as primary law remain, as the Court has already stated, in respect of all legal acts adopted by the Union, 'their basis, their framework and their bounds'. [6] Therefore, they are to be observed even where those legal acts are transposed by the Member State. [7]

4 Thus, most recently, judgments of 8 March 2017, *Euro Park Service* (C-14/16, EU:C:2017:177, paragraph 19); of 12 November 2015, *Visnapuu* (C-198/14, EU:C:2015:751, paragraph 40), of 11 December 2003, *Deutscher Apothekerverband* (C-322/01, EU:C:2003:664, paragraph 64); and of 16 December 2008, *Gysbrechts and Santurel Inter* (C-205/07, EU:C:2008:730, paragraph 33) — albeit always in the specific case rejecting a lack of applicability of primary law.

5 Judgments of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 39); of 18 September 2003, *Bosal* (C-168/01, EU:C:2003:479, paragraphs 25 and 26); of 23 February 2006, *Keller Holding* (C-471/04, EU:C:2006:143, paragraph 45); of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 46); of 29 February 1984, *REWE-Zentrale* (37/83, EU:C:1984:89, paragraph 18); and of 26 October 2010, *Schmelz* (C-97/09, EU:C:2010:632, paragraph 50).

6 Judgment of 5 October 1978, *Viola* (26/78, EU:C:1978:172, paragraph 9).

7 As stated expressly in the judgment of 28 April 1998, *Decker* (C-120/95, EU:C:1998:167, paragraph 27) and judgment of 28 April 1998, *Kohll* (C-158/96, EU:C:1998:171, paragraph 25) — 'It must be stated that the fact that a national measure may be consistent with a provision of secondary legislation, in this case Article 22 of Regulation No 1408/71, does not have the effect of removing that measure from the scope of the provisions of the Treaty'.

21. Apart from that, the Merger Directive does not constitute an exhaustive harmonisation. As is apparent from the structure and wording, paragraph 2 contains an exception to paragraph 1. Under paragraph 1, the State in which the transferring company is resident in principle definitively waives its right to tax the permanent establishment. It may only correct losses claimed earlier. As an exception to that, a Member State which applies a system of taxation on worldwide profits is *entitled* under paragraph 2 to tax the profit arising on the transfer.

22. Whether, when and in what actual amount that power of taxation may be exercised is not, however — as the Commission too emphasises — provided for in Article 10(2) of the Mergers Directive. In particular, on that wording there is no duty for Finland to tax the transfer of a permanent establishment in that manner and in that amount, but only an entitlement. In such a case, the national legislature continues in any event to be bound by the fundamental freedoms when transposing secondary law.

B. Restriction of the right of establishment

23. According to Article 43 in conjunction with Article 48 of the EC Treaty (now Article 49 in conjunction with Article 54 TFEU), freedom of establishment includes the right for nationals of one Member State to take up and pursue activities as self-employed persons on the territory of another Member State.[8] Although, according to their wording, the Treaty provisions on the 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 — in particular by means of a permanent establishment[9] — of one of its nationals or of a company incorporated in accordance with its legislation.[10] In tax law, the matter turns on the discriminatory nature of the restriction.

24. In accordance with settled case-law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom.[11]

25. Viewed in isolation, the setting up of the permanent establishment abroad is not impeded by the national tax provision. However, first, the cross-border activity of an undertaking is affected by virtue of the fact that, in the event of a subsequent transfer of the foreign permanent establishment to a foreign company, a corresponding charge to tax arises. This would not occur if the permanent establishment were situated in national territory. In the light of subsequent restructuring measures and the taxation of them, the creation of a permanent establishment within the country and not abroad is consequently the more attractive option.

26. It should be borne in mind, second, that not only the setting up of a permanent establishment but also its closure form part of the cross-border economic activity protected by the fundamental freedoms. The transfer of a permanent establishment to another undertaking means that economic activity is no longer carried on abroad. The cessation of this economic activity is charged to tax only because the permanent establishment situated abroad is transferred to a foreign company and not to a domestic company. In that connection as well, there can be no denying the existence of a cross-border connection. Cessation of cross-border activity by transfer to a foreign company is rendered less attractive than cessation by way of a transfer to a domestic company.

8 Judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 40 and the case-law cited); of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 38); and of 13 December 2005, *SEVIC Systems* (C-411/03, EU:C:2005:762, paragraph 18).

9 Expressly stated in the judgments of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 18), and of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 19 and 20).

10 Judgments of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 39); of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 31); and of 6 September 2012, *Commission* v *Portugal* (C-38/10, EU:C:2012:521, paragraph 25).

11 Judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 36); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 34); and of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

27. Under the Court's settled case-law, the taxation of hidden reserves on the transfer of the seat is a restriction of freedom of establishment if there is no analogous charge to tax on unrealised gains in an internal situation (that is, a move within national territory). [12]

28. The configuration in the current case is comparable with that. As a result of taxation under the third subparagraph of Paragraph 52d of Law 1733/1995, the hidden reserves in the permanent establishment (increases in asset values or book-value losses in the case of tax deferral by way of depreciation) are taxed, even though the taxpayer has not received the requisite cash funds for that purpose. Conversely, there is no charge to tax on a transfer of a permanent establishment within the country owing to the continued applicability of the book values. At most the 'acquirer' (that is, the receiving company) will have to pay tax at some point on the increases in value when they are realised.

29. The exit occurs here not through the taxpayer itself but only by way of a transfer to a foreign company of its permanent establishment situated abroad. However, that has the same legal consequence as where a taxpayer had previously moved abroad with the assets of his domestic permanent establishment. Taxation occurs, as in the case of 'classic' exit tax, solely by virtue of the fact that from now on another Member State acquires the sole power of taxation over the assets of the permanent establishment.

30. The national legislative provision in the third subparagraph of Paragraph 52e of Law 1733/1995 means that, in view of subsequent transfer procedures, the creation of a permanent establishment abroad is rendered less attractive than the creation of a permanent establishment within the country. This runs counter — as the Commission and A Oy have submitted — both to the objectives of the Mergers Directive (its preamble states that transfers of shares in an undertaking should not be impeded by specific restrictions) and to freedom of establishment.

31. The restriction of freedom of establishment may already be identified in the tax determination [13] for the year 2006 and does not become apparent only when it falls due. In comparison with similar operators who transfer permanent establishments situated within the country to foreign companies (or permanent establishments situated abroad to companies within the country), A Oy transferring its permanent establishment situated abroad to another (foreign) company experiences a liquidity disadvantage at the time of determination of the tax and the resultant liability in regard to the tax debt.

C. Justification

1. Justification of an exit tax

32. The Court of Justice has already held on several occasions that, under the principle of fiscal territoriality, a Member State has the right to tax, at the time of the taxpayer's exit, increases in asset values that have accrued to resident taxpayers but have not yet been realised. [14]

12 Judgments of 11 March 2004, *de Lasteyrie du Saillant* (C-9/02, EU:C:2004:138, paragraph 46); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 33); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 35); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 35).

13 When the tax is payable, on the other hand, is — as I stated in my Opinion in *Trustees of the P Panayi Accumulation & Maintenance Settlements* (C-646/15, EU:C:2016:1000, point 59) — irrelevant. On the basis of the tax determination, the taxpayer already owes the tax and is burdened by it, even if the tax is not yet due. In that respect, collection of the tax merely completes the restriction.

14 Judgments of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 49); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 44 and 45); and of 7 September 2006, *N* (C-470/04, EU:C:2006:525, paragraph 46).

33. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its tax jurisdiction in respect of the activities carried out on its territory, and can therefore be justified on grounds of preserving the allocation of powers of taxation between Member States.[15] It is, however, a condition that the exit does in fact jeopardise the powers of taxation of the exit State. That will normally be the case where the power of taxation ceases to exist.[16]

34. The power of taxation ceases not only on exit from a territory but also where a permanent establishment situated abroad is allocated under a transfer of assets to a non-resident company. This idea, as Finland and Sweden rightly submit, manifestly also underpins Article 10(2) of the Mergers Directive, which permits the Member State, where it applies taxation on worldwide profits, a (last) possibility of taxing hidden reserves (gain on disposal).

35. In contrast to a classic exit tax, in the case of a transfer in exchange for shares, the shares in the receiving company will, however, now be subject to the tax jurisdiction of the exit State. There is merely a kind of exchange of assets (in balance sheet terms on the assets side). Article 8(2)(2) of the Mergers Directive expressly permits taxation of the profit from a subsequent disposal of the assets received. Hidden reserves arising in future in the permanent establishment thus remain *indirectly* subject to the tax jurisdiction of Finland.

36. Tax jurisdiction in relation to shares in a foreign company situated abroad is however a different matter as compared with the tax jurisdiction over the assets of a foreign permanent establishment. The shares received are not the same as the assets of the permanent establishment. It therefore remains the fact that recourse to reserves arising in the permanent establishment is definitively lost. That means that the Member State which is losing its direct tax jurisdiction has a legitimate interest in levying one (last) charge to tax.

2. Proportionality of the restriction

37. The restriction must further be suitable for ensuring attainment of the objective and may not go beyond what is necessary to attain the objective — in this case, maintaining the allocation of powers of taxation.[17]

15 Judgments of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 45 and 46); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45 et seq.); of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 47); and of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 60).

16 Expressly: judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 48); of 25 April 2013, *Commission* v *Spanien* (C-64/11, unpublished, EU:C:2013:264, paragraph 31); and of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 60 and the case-law cited).

17 Judgments of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 42); of 12 September 2006, *Cadbury Schweppes and Cadbury Schweppes Overseas* (C-196/04, EU:C:2006:544, paragraph 47); of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 35); of 17 July 2014, *Nordea Bank* (C-48/13, EU:C:2014:2087, paragraph 25); of 15 May 2008, *Lidl Belgium* (C-414/06, EU:C:2008:278, paragraph 27); and of 13 December 2005, *SEVIC Systems* (C-411/03, EU:C:2005:762, paragraph 23).

(a) Necessity of deferral

38. The Court has already held on a number of occasions that the taxpayer must have the choice on exit between immediate taxation and deferred payment, together with, if appropriate, interest in accordance with the applicable national legislation.[18] In that connection, it considered recovery of tax on hidden reserves over a period of five years rather than immediately to be proportionate.[19] However, there is no such possibility in Finnish law. So the Finnish legislation is said to constitute a disproportionate restriction on freedom of establishment.

39. Contrary to the views expressed by Finland and Sweden, it cannot be argued against that the Court's case-law on exit taxation cannot be transposed to taxation on the transfer of a permanent establishment in consideration for the grant of company shares.

40. The transfer of a permanent establishment in consideration of the grant of company shares is indeed — as Sweden rightly says — in contrast to exit, a realisation, giving rise in principle to the disclosure and taxation of hidden reserves. However, the transfer in consideration of the grant of company shares is precisely not a genuine realisation of the value of the permanent establishment by way of sale but merely a restructuring measure. The permanent establishment is not sold, but transferred to a legal person in which a greater holding is now owned than before. Such cross-border restructurings are specifically intended to be facilitated by the Mergers Directive.

41. In addition, no financial liquidity necessary for the payment of tax is realised, rather the transferring company merely receives a corresponding amount of shares in the receiving company. This is also the reason why Finland, despite the 'realisation', also allows for a book-value neutral restructuring in the case of transfers that are not cross-border ones. The Mergers Directive does not require such non-taxation in a purely internal situation.

42. The objective of the directive — to facilitate cross-border restructurings — is also much more effectively achieved if cross-border restructurings are taxed, if at all, then not immediately, and only in instalments over a longer period.

43. If, in the event of a transfer of a permanent establishment within the country, the Member State, despite the 'realisation', does not subject the transferor to taxation, the imposition of immediate taxation without any possibility of deferral, having regard to the taxpayer's lack of liquidity, is not the most emollient way of taking into account the loss of the Member State's power of taxation in a cross-border case.

44. A levying of tax spread over several years also enables the loss of the power of taxation to be taken into account and clearly mitigates the unequal treatment (non-taxation in a national situation). The Court of Justice has already ruled on the latter point — and this was referred to by the Commission at the hearing — in connection with various deferral provisions in regard to gains realised for the purpose of acquiring replacement assets.[20]

18 Judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 49); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 56 et seq., 58, 62); and of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 67 and the case-law cited).

19 Judgments of 23 January 2014, *DMC* (C-164/12, EU:C:2014:20, paragraph 64), and of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 52).

20 Judgment of 16 April 2015, *Commission* v *Germany* (C-591/13, EU:C:2015:230, paragraph 71 et seq.).

45. There is the additional fact that the tax debtor — unlike in the exit cases — remains subject to the territorial reach of the tax creditor, as the Commission rightly points out. An extended levying of tax gives rise to no administrative difficulties which would require immediate taxation. In this case it is therefore, as the Commission suggests, sufficient for the loss of the State's possibility of levying tax to be offset by a final levying of tax, and for account to be taken of the lack of liquidity on the part of the taxable person by arranging for taxation to be spread over a period of time.

46. Contrary to the view expressed by A Oy, it is not to be inferred from the fundamental freedoms that taxation must compulsorily be deferred until the 'actual' realisation of the hidden reserves. Since subsequent realisation, moreover by a third party (the receiving company), is not mandatory — for example, in the event of subsequent losses of value or loss of the assets — and can hardly be monitored by Finland, this idea runs counter to the principle of preserving the allocation of powers of taxation between the Member States. It would give rise to a situation in which subsequent asset-value losses outside a State's own tax jurisdiction would have to be taken into consideration.[21] On the basis of the territoriality principle in conjunction with the balance-sheet date principle prevailing in tax law, it is permissible to tax hidden reserves at the time when the right to levy taxation is lost, even where the hidden reserves are not realised and are furthermore in the hands of a third party. The principle of proportionality merely precludes an immediate charge to tax.

(b) Proportionality owing to set-off of a notional tax?

47. This conclusion is not altered by the set-off of a notional foreign tax provided for in Finnish law and in Article 10(2) of the Mergers Directive. That is because it affects 'only' the amount of the tax burden in a cross-border situation. This amount would be the full rate of tax if there were no taxation in the receiving state. It would be a reduced rate of tax if the (notional) tax to be set off were lower, and there would be no tax burden at all if the (notional) tax to be set off were greater or in the same amount.

48. In the result the set-off of a foreign tax, as even Finland and Sweden submit, 'only' avoids possible double taxation. The infringement does not consist in double taxation. EU law recognises no prohibition of double taxation.[22] If, however, double taxation is not a question of EU law and thus of the fundamental freedoms, then *a contrario* avoidance of double taxation can have no effect on the justification of a restriction of a fundamental freedom.

49. This is particularly the case where, as a result of the set-off, there is no diminution in the unequal treatment of the cross-border situation as opposed to the national situation. The unequal treatment to be justified lies not solely in the amount of the taxation (or the rate of tax) but in the *immediate taxation* imposed on the transferring company in a cross-border situation in contrast to *non-taxation* in a so-called national situation.[23]

21 This approach — no duty to take losses into account — has been confirmed by the Court on several occasions in recent rulings in connection with exit tax — cf. judgments of 21 May 2015, *Verder LabTec* (C-657/13, EU:C:2015:331, paragraph 43 et seq.), and of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 56 et seq.). See also on this point my Opinion in *Trustees of the P Panayi Accumulation & Maintenance Settlements* (C-646/15, EU:C:2016:1000, point 61 et seq.).

22 Judgments of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 27 et seq.); of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 26 et seq.); and of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraphs 30 and 31); and Opinion of Advocate General Bot in *Glaxo Wellcome* (C-182/08, EU:C:2009:438, point 58 et seq.).

23 That is to say, the permanent establishment is within national territory or the receiving company is a national company.

50. In the result, Article 10(2) of the Mergers Directive does not lay down a tax rate lower than the 'normal tax rate' but defines the normal tax rate which the Member States may levy in a cross-border situation. In contrast to other tax rates, this one is merely variable and dependent on other factors (computation of a notional foreign tax). On the other hand, when this tax rate is to be levied is not determined by the Mergers Directive, as stated above in points 21 and 22. It can, however, be deduced from the abovementioned case-law of the Court of Justice on exit tax.

51. Where in a comparable national situation there is no taxation at all of restructuring measures, the less stringent means, equally appropriate for preserving powers of taxation, is a deferral or levying by instalments of the tax (if appropriate, reduced) in the event of restructuring measures in a cross-border situation.

52. That is all the more so in the present case, since, by way of Article 8(2) of the Mergers Directive — unlike in cases of the classic exit tax — an indirect tax jurisdiction even continues to subsist in respect of future increases in value of the permanent establishment. If, however, there continues to be indirect participation in future changes in value, then immediate taxation (at a specific tax rate) appears even less proportionate than in the case of an exit where all connections with the tax basis are lost.

53. There is therefore an unjustified restriction of freedom of establishment. It is, however, for the referring court to examine whether the incompatibility with EU law of the national legislation can be remedied by an interpretation in conformity with EU law, namely an entitlement to payment of tax staggered over a period of time under Finnish fiscal procedural law.

VI. Conclusion

54. I therefore propose that, taken together, the questions referred by the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) should be answered as follows:

Article 43 in conjunction with Article 48 of the EC Treaty (now Article 49 in conjunction with Article 54 TFEU) precludes national legislation enacted to transpose Article 10(2) of Directive 90/434/EEC which, solely in a cross-border case of the transfer to a foreign company of a foreign permanent establishment, imposes immediate taxation, while that is not done in a national situation. Relief in respect of a notional foreign tax cannot alter that, because it prevents only double taxation but not immediate taxation.