Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

12 June 2014*

(Freedom of establishment — Corporation tax — Single tax entity formed by companies in the same group — Request — Grounds for refusal — Seat of one or more intermediate companies, or of the parent company, located in another Member State — No permanent establishment in the State of taxation)

In Joined Cases C-39/13 to C-41/13,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Gerechtshof Amsterdam (Netherlands), made by decisions of 17 January 2013, received at the Court on 25 January 2013, in the proceedings

Inspecteur van de Belastingdienst/Noord/kantoor Groningen

v

SCA Group Holding BV (C-39/13),

X AG,

X1 Holding GmbH,

X2 Holding GmbH,

X3 Holding GmbH,

D1 BV,

D2 BV,

D3 BV

v

Inspecteur van de Belastingdienst Amsterdam (C-40/13),

and

Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam

v

* Language of the case: Dutch.

MSA International Holdings BV,

MSA Nederland BV (C-41/13),

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis, J.-C. Bonichot (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 9 January 2014,

after considering the observations submitted on behalf of:

— SCA Group Holding BV, by J.T. Schouten, S.C.W. Douma and G.F. Boulogne, acting as advisers,

— X AG, by J.M. van der Vegt and P.J. te Boekhorst, acting as advisers,

— MSA International Holdings BV, by H.T.P.M. van den Hurk, J.J. van den Broek, J.J.A.M. Korving, D. van Seggelen, J. van der Zande, and T. Arts, acting as advisers,

— the German Government, by T. Henze and K. Petersen, acting as Agents,

— the French Government, by J.-S. Pilczer, acting as Agent,

— the Netherlands Government, by K. Bulterman, M. Noort and B. Koopman, acting as Agents,

— the European Commission, by W. Roels, W. Mölls and P. Van Nuffel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2014,

gives the following

Judgment

1 These requests for a preliminary ruling concern Articles 49 TFEU and 54 TFEU.

2 The requests have been made in three sets of proceedings, between (i) the Inspecteur van de Belastingdienst/Noord/kantoor Groningen (Inspector of the Tax and Customs Administration, North/Groningen office) and SCA Group Holding BV ('SCA'), (ii) X AG ('X'), X1 Holding GmbH, X2 Holding GmbH, X3 Holding GmbH ('X3'), D1 BV ('D1'), D2 BV ('D2') and D3 BV, on the one hand, and the Inspecteur van de Belastingdienst Amsterdam (Inspector of the Tax and Customs Administration, Amsterdam), on the other hand, and (iii) the Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam (Inspector of the Tax and Customs Administration, Holland-North/Zaandam office), on the one hand, and MSA International Holdings BV ('MSA') and MSA Nederland BV, on the other hand, concerning the formation of tax entities.

Netherlands legal context

3 Under Article 13(1) of the Law on corporation tax of 1969 (Wet op de venootschapsbelasting 1969):

'For the purposes of determining the profit, no account shall be taken of the advantages derived from a holding or the costs incurred in respect of the acquisition or disposal of that holding (holding exemption).'

4 Article 15 of that law provides:

'1. Where a taxable person (the parent company) holds, legally and economically, at least 95% of the shares in the nominal paid-up capital of another taxable person (the subsidiary) and where both taxable persons so request, tax shall be levied on them as if they were a single taxable person, with the activities and assets of the subsidiary forming part of the activities and assets of the parent company. The tax shall be levied on the parent company. In that case, the taxable persons are together regarded as a tax entity. More than one subsidiary may form part of a tax entity. ...

3. Paragraph 1 shall apply only if:

…

b. for the purposes of determining the profits, the same provisions apply to both taxable persons;

c. both taxable persons are established in the Netherlands and, in the case where the taxation rules for the Kingdom of the Netherlands (Belastingregeling voor het Koninkrijk) or a double taxation agreement is applicable to one taxable person, that person is also, either under those rules or under that agreement, regarded as established in the Netherlands …;

...

4. By general administrative measures, rules may be introduced under which taxable persons to which, for the purposes of determining profits, the same provisions do not apply may together form a tax entity, notwithstanding paragraph 3(b). Furthermore, notwithstanding paragraph 3(c), a taxable person which, in accordance with its national law, on the basis of the taxation rules for the Kingdom or on the basis of a double taxation agreement, is not established in the Netherlands but operates a business through a permanent establishment in the Netherlands may, under conditions defined by general administrative measure, form part of a tax entity, on condition that the power to tax the profits from that company is granted to the Netherlands pursuant to the taxation rules for the Kingdom or a double taxation agreement, and if:

a. the place of actual management of that taxable person is situated in the Netherlands Antilles, in Aruba, in a Member State of the European Union or in a State with which an agreement for the avoidance of double taxation concluded with the Netherlands is applicable, which provides for a prohibition of discrimination against permanent establishments;

b. the taxable person referred to in (a) is a public limited liability company or a private company with limited liability, or a comparable organisation by reason of its nature and its manner of formation, and

c. when the taxable person referred to in (a) forms part of the tax entity as the parent company, the shareholding, as referred to in paragraph 1, in the subsidiary belongs to the assets of that parent company's permanent establishment in the Netherlands.

...'

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

Cases C-39/13 and C-41/13

5 SCA and MSA are companies which have their seat in the Netherlands.

6 They own companies which have their seat in Germany, either directly or indirectly through other companies also established in Germany.

7 Those companies themselves own companies which have their seat in the Netherlands.

8 SCA and MSA and their respective subsidiaries established in the Netherlands asked to be treated as two single tax entities within the meaning of Article 15 of the Law on corporation tax of 1969.

9 The Inspecteur van de Belastingdienst/Noord/kantoor Groningen and the Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam refused those requests on the ground that the intermediate companies were neither established in the Netherlands nor had a permanent establishment there.

10 On actions brought by SCA and MSA, the Rechtbank Haarlem (District Court, Haarlem) held that refusal to be contrary to the freedom of establishment.

11 The Inspecteur van de Belastingdienst/Noord/kantoor Groningen and the Inspecteur van de Belastingdienst Holland-Noord/kantoor Zaandam brought an appeal against those judgments before the Gerechtshof Amsterdam (Regional Court of Appeal, Amsterdam).

12 It was in those circumstances that the Gerechtshof Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

In Case C-39/13

‘(1) Does denying the respondent the opportunity of having the Netherlands tax entity regime applied to the activities and the assets of the (sub-)sub-subsidiaries established in the Netherlands — that is to say, Alphabet Holding, HP Holding and Alpha Holding — constitute a restriction of the freedom of establishment within the meaning of Article 43 EC in conjunction with Article 48 EC?

In that context, in the light of the objectives pursued by the Netherlands tax entity regime …, is the situation of the (sub-)sub-subsidiaries Alphabet Holding, HP Holding and Alpha Holding objectively comparable … to (a) the situation of companies established in the Netherlands which are (sub-)subsidiaries of an intermediate holding company established in the Netherlands which has not elected to be integrated in a tax entity with its parent company established in the Netherlands, and which therefore, as sub-subsidiaries, similarly to Alphabet Holding, HP Holding and Alpha Holding, have no access to the tax entity regime with — exclusively — their grandparent company, or to … (b) the situation of sub-subsidiaries established in the Netherlands which, together with their parent company/intermediate holding company established in the Netherlands, have elected to form a tax entity with their (grand-)parent company established in the Netherlands and whose activities and assets therefore, unlike those of Alphabet Holding, HP Holding and Alpha Holding, are consolidated for tax purposes?

(2) In answering the first sentence of Question 1, does it still make a difference … whether the domestic companies concerned are held by one single intermediate holding company (at a higher level of the group structure) in the other Member State or whether, as in the case of Alphabet

Holding, HP Holding and Alpha Holding, they are held by two (or more) intermediate holding companies — albeit situated in that other Member State — (at two or more higher levels of the group structure)?

(3) If and to the extent that the first sentence of Question 1 must be answered in the affirmative, can such a restriction then be justified by overriding reasons in the public interest, more particularly by the need to preserve fiscal coherence, including the prevention of unilateral and bilateral double use of losses …? Does it still make a difference in that context that it has been established in the specific case that there is no double use of losses …?

(4) If and to the extent that Question 3 must be answered in the affirmative, should the restriction be considered to be proportionate …?'

In Case C-41/13

'(1) Does denying the respondents the opportunity of having the Netherlands tax entity regime applied to the activities and the assets of the sub-subsidiary (the second respondent), established in the Netherlands, constitute a restriction of the freedom of establishment within the meaning of Article 43 EC in conjunction with Article 48 EC?

In that context, in the light of the objectives pursued by the Netherlands tax entity regime …, is the situation of the sub-subsidiary (the second respondent) objectively comparable … to (a) the situation of a company established in the Netherlands which is a subsidiary of an intermediate holding company established in the Netherlands not having elected to be integrated in a tax entity with its parent company established in the Netherlands and which therefore, as a sub-subsidiary, similarly to the second respondent, has no access to the tax entity regime with — exclusively — its grandparent company, or to … (b) the situation of a sub-subsidiary established in the Netherlands which, with its parent company/intermediate holding company established in the Netherlands, has elected to form a tax entity with its (grand)parent company established in the Netherlands and whose activities and assets therefore, in contrast to those of the second respondent, are consolidated for tax purposes?

(2) In answering the first sentence of Question 1, does it still make a difference … whether the foreign intermediate holding company concerned, if it did not operate in the Netherlands through a subsidiary but through a permanent establishment, had been able to elect — as regards the assets and the activities of that Netherlands permanent establishment — to form a tax entity with its parent company established in the Netherlands?

(3) If and to the extent that the first sentence of Question 1 must be answered in the affirmative, can such a restriction then be justified by overriding reasons in the public interest, more particularly by the need to preserve fiscal coherence, including the prevention of the unilateral and bilateral double use of losses …?

(4) If and to the extent that Question 3 must be answered in the affirmative, should such a restriction then be considered to be proportionate …?'

Case C-40/13

13 X is a company which has its seat in Germany. It owns directly or indirectly the companies X3, D1 and D2, which have their seat in the Netherlands.

14 By joint request, X3, D1 and D2 asked to be treated as a single tax entity.

15 The Inspecteur van de Belastingdienst Amsterdam refused their request on the ground that their common parent company, X, was neither established in the Netherlands nor had a permanent establishment there.

16 The Rechtbank Haarlem dismissed their action against that decision.

17 Those companies appealed against that judgment to the Gerechtshof Amsterdam.

18 It was in those circumstances that the Gerechtshof Amsterdam decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does denying the appellants the opportunity of having the Netherlands tax entity regime applied to the activities and assets of the sister companies [X3], [D1] and [D2], established in the Netherlands, constitute a restriction of the freedom of establishment within the meaning of Article 43 EC in conjunction with Article 48 EC?

In that context, in the light of the objectives pursued by the Netherlands tax entity regime …, is the situation of [X3], [D1] and [D2] objectively comparable … to (a) the situation of sister companies, established in the Netherlands, which have not elected to be integrated in a tax entity with their common parent company/companies, established in the Netherlands, and which therefore, jointly as sister companies, similarly to the appellants, have no access to the tax entity regime, or to (b) the situation of sister companies, established in the Netherlands, which, together with their common parent company/companies, established in the Netherlands, have elected to form a tax entity with their parent company/companies and whose activities and assets therefore, in contrast to those of the appellants, are consolidated for tax purposes?

(2) In answering the first sentence of Question 1, does it still make a difference … whether the companies concerned have (a), as in the case of [D1] and [D2], a common (direct) parent company in the other Member State or (b), as in the case of, on the one hand, [X3], and, on the other hand, [D1] and [D2], various (direct) parent companies in the other Member State, with the result that it is only at a higher level — albeit situated in that other Member State — of the group structure that there is a common (indirect) parent company of those various companies?

(3) If and to the extent that the first part of Question 1 must be answered in the affirmative, can such a restriction then be justified by overriding reasons in the public interest, more particularly by the need to preserve fiscal coherence, including the prevention of unilateral and bilateral double use of losses …?

(4) If and to the extent that Question 3 must be answered in the affirmative, should such a restriction be considered to be proportionate …?’

Consideration of the questions referred

The questions in Cases C-39/13 and C-41/13

19 By its questions, which should be examined together, the referring court asks, in essence, whether Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.

The existence of a restriction

20 Freedom of establishment, which Article 49 TFEU grants to European Union nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (Case C-80/12 *Felixstowe Dock and Railway Company and Others* EU:C:2014:200, paragraph 17 and the case-law cited).

21 The possibility granted by Netherlands law to resident parent companies and their resident subsidiaries to be taxed as if they formed one and the same tax entity, that is to say, to be subject to a tax integration scheme, constitutes a cash-flow advantage for the companies concerned. That scheme allows, in particular, the profits and losses of the companies constituting the tax entity to be consolidated at the level of the parent company and the transactions carried out within the group to remain neutral for tax purposes (see Case C-337/08 *X Holding* EU:C:2010:89, paragraph 18).

22 Netherlands law extends the benefit of the tax entity regime and the advantages flowing from it to resident parent companies wishing to be taxed jointly with their sub-subsidiaries, provided, however, that the intermediate subsidiaries are themselves resident or have a permanent establishment in the Netherlands.

23 Such a condition leads to different treatment for, on the one hand, resident parent companies holding resident sub-subsidiaries through resident intermediate subsidiaries and, on the other hand, resident parent companies holding resident sub-subsidiaries through non-resident subsidiaries.

24 The legislation at issue in the main proceedings accordingly creates a difference in treatment since the ability to elect for the tax entity regime is dependent on whether the parent company holds its indirect stakes through a subsidiary established in the Netherlands or in another Member State (see, by analogy, Case C-418/07 *Papillon* EU:C:2008:659, paragraph 22).

25 Contrary to the view taken by some of the parties, it is, in that regard, irrelevant that, even in a purely internal situation, no parent company can form a tax entity with sub-subsidiaries without also including the intermediate subsidiary. While a Netherlands parent company which holds Netherlands sub-subsidiaries by means of a non-resident subsidiary cannot, in any case, form a tax entity with those sub-subsidiaries, by contrast, a Netherlands parent company which holds Netherlands sub-subsidiaries through a resident subsidiary still has the ability to elect to do so.

26 An analogous difference of treatment exists where, as is the situation in Case C-39/13, it is not resident sub-subsidiaries that are at issue, but resident sub-sub-subsidiaries which cannot be integrated into a tax entity with the resident parent company because both the intermediate subsidiary and the intermediate sub-subsidiary are established in another Member State.

27 Inasmuch as, from a taxation perspective, they put cross-border situations at a disadvantage compared with domestic situations, the provisions of the Law on corporation tax of 1969 at issue in the main proceedings thus constitute a restriction which is, in principle, prohibited by the provisions of the FEU Treaty relating to freedom of establishment (*Papillon* EU:C:2008:659, paragraph 32).

Justification for the restriction

28 In order for such a difference in treatment to be compatible with the provisions of the Treaty on freedom of establishment, it must either relate to situations which are not objectively comparable — in which case the comparability of a cross-border situation with an internal situation must be examined having regard to the aim pursued by the national provisions at issue — or be justified by an overriding reason in the public interest (see, to this effect, *Felixstowe Dock and Railway Company and Others* EU:C:2014:200, paragraph 25 and the case-law cited).

29 As regards comparability, the provisions of the Law on corporation tax of 1969 at issue in the main proceedings aim to treat, as far as possible, a group constituted by a parent company with its subsidiaries and its sub-subsidiaries in the same way as an undertaking with a number of establishments, by enabling the results of all those companies to be consolidated for tax purposes.

30 That objective can be attained both in the situation of a parent company which is resident in a Member State and holds sub-subsidiaries also resident in that State through a subsidiary which is itself resident, and in the situation of a parent company which is resident in the same Member State and holds sub-subsidiaries also resident in that State, but through one or more subsidiaries established in another Member State (see, to this effect, *Papillon* EU:C:2008:659, paragraph 29).

31 Those two situations are therefore objectively comparable to the extent that the benefit of the advantages of the tax entity regime is sought in both situations for the group formed by the parent company and the sub-subsidiaries.

32 The referring court asks whether the restriction could be justified by an overriding reason in the public interest based on the coherence of the Netherlands tax system, related to the prevention of the double use of losses.

33 On this point, it should be recalled that although the Court has held that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty, it is however necessary, for such a justification to be accepted, that a direct link be established between the granting of the tax advantage concerned and the offsetting of that advantage by a particular tax (see, inter alia, Case C-181/12 *Welte* EU:C:2013:662, paragraph 59 and the case-law cited).

34 It is true that the Court accepted in *Papillon* (EU:C:2008:659) that, in principle, such a direct link exists between, on the one hand, the possibility of transferring losses between the companies of a group and, on the other hand, the neutralisation of certain transactions between those companies, such as provisions for doubtful claims or risks, waivers of debt, subsidies, provisions for depreciation of shares and the transfer of fixed assets. In that judgment, the Court relied on the fact that, in the tax system of the Member State at issue in that case, the purpose of neutralising those intra-group transactions was to avoid the double use of losses at the level of resident companies falling under the tax integration regime, and thus preserve the coherence of that tax system (*Papillon* EU:C:2008:659, paragraphs 6 and 43 to 50).

35 If the legislation of the Member State at issue in *Papillon* (EU:C:2008:659) had granted the benefit of tax integration where the intermediate company was not resident, it would have been possible for a loss suffered by a resident sub-subsidiary to be taken into account in the first instance with respect to the resident parent company, as a result of the tax integration, and in the second instance with respect to the non-resident intermediate subsidiary, as a result of the reduction of value stemming from the same losses on its shares in the sub-subsidiary or its claims against it. That reduction of value would have not been neutralised since the neutralising transactions could not apply to the non-resident intermediate company.

36 However, one aspect clearly distinguishes the legal context of that precedent from the situation of the present case in the main proceedings.

37 Article 13 of the Law on corporation tax of 1969 establishes a general 'holding exemption' rule, which applies to holdings greater than 5% of the capital. That rule covers all tax entities, since they require a holding of at least 95% of the capital.

38 As a result of the holding exemption, the profits or losses resulting from the possession, acquisition or disposal of a holding are not taken into account when determining the taxable profit of a tax entity. Therefore it is through this general exemption — and not specific provisions for the neutralisation of certain transactions, as in the system at issue in the case giving rise to the judgment in *Papillon* — that the Netherlands tax system seeks to prevent the double use of losses within a tax entity.

39 Accordingly, as the Netherlands Government acknowledged at the hearing, the holding exemption mechanism is designed in such a way that a resident parent company can never take into account a loss linked to a holding in one of its subsidiaries, even where that subsidiary has its seat in another Member State.

40 No direct link can therefore be established between the granting of the tax advantage linked to the formation of a tax entity and the offsetting of that advantage by a particular tax.

41 Consequently, the restriction on freedom of establishment resulting from the national legislation cannot be regarded as justified by an overriding reason in the public interest based on preserving the coherence of the tax system.

42 Moreover, although the Netherlands Government sought to justify the restriction at issue in the main proceedings on the ground of the risk of tax avoidance, it is settled case-law that that ground does not constitute, by itself, an autonomous justification for a tax restriction on freedom of establishment if it is not relied on in conjunction with a specific objective of combatting wholly artificial arrangements which do not reflect economic reality and the purpose of which is to escape the tax normally due (see, to this effect, inter alia Case C-264/96 *ICI* EU:C:1998:370, paragraph 26, and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* EU:C:2006:544, paragraph 55). Evidently, that is not the objective of the restriction provided for in the tax entity regime.

43 It follows from the foregoing that Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.

The questions in Case C-40/13

44 By its questions, which should be examined together, the referring court asks, in essence, whether Article 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.

The existence of a restriction

45 It should be borne in mind that, in the case of companies, their seat for the purposes of Article 54 TFEU serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. However, acceptance of the proposition that the Member State of

residence may freely apply different treatment merely by reason of the fact that the seat of a company is situated in another Member State would deprive Article 49 TFEU of all meaning. Freedom of establishment aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their seat (see Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* EU:C:2006:773, paragraph 43; Case C-170/05 *Denkavit Internationaal and Denkavit France* EU:C:2006:783, paragraph 22; and Case C-284/06 *Burda* EU:C:2008:365, paragraph 77).

46 A tax entity regime such as that at issue in the main proceedings constitutes a tax advantage for the companies concerned. By speeding up the relief of the losses of loss-making companies by allowing them to be set off immediately against the profits of other group companies, that regime confers a cash advantage on the group (Case C-446/03 *Marks & Spencer* EU:C:2005:763, paragraph 32).

47 The legislation at issue in the main proceedings therefore creates a difference in treatment between, on the one hand, parent companies the seat of which is in the Netherlands, which thanks to the single tax entity regime may, inter alia, in order to determine their taxable profit, immediately set off the losses of their loss-making subsidiaries against the profits of their profit-making subsidiaries, and, on the other hand, parent companies which also own subsidiaries in the Netherlands but have their seat in another Member State and are without a permanent establishment in the Netherlands, which are excluded from benefitting from the tax entity and, therefore, from the cash-flow advantage which the tax entity bestows.

48 Inasmuch as, from a taxation perspective, they put Community situations at a disadvantage compared with purely domestic situations, the provisions of the Law on corporation tax of 1969 at issue in the main proceedings thus constitute a restriction which is, in principle, prohibited by the provisions of the Treaty relating to freedom of establishment (*Papillon* EU:C:2008:659, paragraph 32).

49 The existence of that restriction is not called into question by the fact that the common parent company of the subsidiaries to be consolidated is situated at a higher level in the group's chain of interests, since the intermediate companies, the seat of which is not in the Netherlands and which do not have a permanent establishment there, cannot themselves form part of a tax entity as is apparent from paragraph 4 above.

Justification for the restriction

50 As regards comparability, within the meaning of the case-law cited in paragraph 28 above, the German Government submits that the Netherlands tax entity regime seeks to consolidate all of a group's results with respect to the ultimate parent company, so that the position of a group the parent company of which has its seat in the Netherlands would not be comparable to that of a group the parent company of which has its seat in another Member State.

51 However, the objective of the tax entity regime at issue in the main proceedings, which is to allow companies in the same group to be considered for tax purposes as if they constituted one and the same taxpayer, can be achieved both by groups the parent company of which is resident and by groups the parent company of which is not resident, at least so far as concerns the taxation of solely the sister companies which are taxable in the Netherlands. As the Advocate General observed in point 86 of her Opinion, the Law on corporation tax of 1969 allows the consolidation of the subsidiaries in the case of a group the parent of which is resident.

52 The difference of treatment, as regards the possibility of fiscally integrating sister companies, is therefore not justified by an objective difference of situation.

53 Nor is it justified by an overriding reason in the public interest based on the coherence of the tax system, related to the prevention of the double use of losses, a reason mentioned by the referring court.

54 It is not apparent from the order for reference, the observations submitted to the Court or the hearing that the granting of the benefit of the tax entity to sister companies would break any direct link between that advantage and a particular tax within the meaning of the case-law mentioned in paragraphs 34 and 35 above.

55 Moreover, as the Court has recalled in paragraph 42 above, the overriding reason in the public interest based on the prevention of the risk of tax avoidance cannot be relied upon independently.

56 It follows from the foregoing that Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.

Costs

57 Since these proceedings are, for the parties to the main proceedings, a step in the actions 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 (Second Chamber) hereby rules:

1. **In Cases C-39/13 and C-41/13, Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which a resident parent company can form a single tax entity with a resident sub-subsidiary where it holds that sub-subsidiary through one or more resident companies, but cannot where it holds that sub-subsidiary through non-resident companies which do not have a permanent establishment in that Member State.**

2. **In Case C-40/13, Articles 49 TFEU and 54 TFEU must be interpreted as precluding legislation of a Member State under which treatment as a single tax entity is granted to a resident parent company which holds resident subsidiaries, but is precluded for resident sister companies the common parent company of which neither has its seat in that Member State nor has a permanent establishment there.**

[Signatures]