JUDGMENT OF THE COURT (Fourth Chamber)

27 November 2008 *

In Case C-418/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Conseil d'État (France), made by decision of 10 July 2007, received at the Court on 12 September 2007, in the proceedings

Société Papillon

v

Ministère du Budget, des Comptes publics et de la Fonction publique,

THE COURT (Fourth Chamber),

composed of K. Lenaerts (Rapporteur), President of the Chamber, R. Silva de Lapuerta, E. Juhász, G. Arestis and J. Malenovský, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2008,

after considering the observations submitted on behalf of:

— Société Papillon, by G. Calisti, avocat,

— the French Government, by G. de Bergues and J.-C. Gracia, acting as Agents,

— the German Government, by C. Blaschke, acting as Agent,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the Netherlands Government, by C. Wissels, C. ten Dam and M. de Grave, acting as Agents,

— the Commission of the European Communities, by R. Lyal and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 4 September 2008, gives the following

Judgment

1 This reference for a preliminary ruling relates to the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2 That reference was made in proceedings between Société Papillon ('Papillon'), established in France, and the Ministère du Budget, des Comptes publics et de la Fonction publique (French Ministry of the Budget, Public Accounts and the Civil Service) relating to the refusal by the latter to acknowledge Papillon's entitlement to benefit from the scheme known as the 'tax integration' regime.

Legal context

3 In the version applicable to the facts of the dispute in the main proceedings, Article 223A of the Code général des impôts (French General Tax Code) ('the CGI') stated:

'A company … can render itself the sole party liable for corporation tax due on the overall profits of the group formed by it and the companies of which it is the holder, continuously throughout the financial year, directly or indirectly through companies in the group, of at least 95% of the capital … . The companies in the group remain obliged to declare their results …. Only those companies which have given their consent and whose results are subject to corporation tax may be members of the group …'.

4 The national court states that the effect of Article 223A of the CGI is that the parent company of the group is entirely free to determine the membership of that group. However, the parent company may hold another of the group's member companies indirectly only through a company which is itself a member of the integrated group and therefore subject to corporation tax in France.

5 Article 223B of the CGI provides that 'the overall profit is to be determined by the parent company through the algebraic sum of the results of each of the companies in the group …'.

6 Articles 223B, 223D and 223F of the CGI provide, inter alia, for the neutrality of intra-group transactions, such as provisions for doubtful claims or risks between the companies in the group, waivers of debt or intra-group payments, provisions for depreciation of shares held in other companies in the group, and the transfer of fixed assets within the group.

The dispute in the main proceedings and the questions referred

7 During the tax years at issue in the main proceedings, that is to say, from 1 January 1989 to 31 December 1991, Papillon held 100% of the capital of the Netherlands

company Artist Performance and Communication, which in turn held 99.99% of the shares in Kiron SARL, a company resident in France. In those circumstances, Papillon elected to be taxed under the tax integration regime, governed by Articles 223A to 223F of the CGI, which allows a resident company to assume sole liability for the corporation tax due in respect of the whole of the results of the group comprising that company and the companies in which it holds, directly or indirectly, a minimum of 95% of their capital. For that purpose, Papillon included Kiron SARL and a number of subsidiaries of that company which were also resident in France as members of the integrated group of which it was the parent.

8 The tax authorities refused to extend the benefit of that regime to Papillon on the ground that it could not form part of an integrated group with companies held indirectly through a company resident in the Netherlands, since, in the absence of a permanent establishment in France, the latter company was not subject to corporation tax in France.

9 On its tax liability being recalculated as a result, Papillon was charged to tax on the amount of the profits it had itself declared, and was unable to offset them by the results of the other companies in the integrated group.

10 Papillon challenged the additional corporation tax levied on it for the period from 1989 to 1991 as a result before the Tribunal administratif de Paris (Administrative Court, Paris) which rejected its arguments by judgment of 9 February 2004. In an appeal against that judgment before the Cour administrative d'appel de Paris (Administrative Court of Appeal, Paris) that court ordered only a partial discharge of the disputed taxes and penalties by judgment of 24 June 2005.

11 In an appeal brought by Papillon against that judgment, the Conseil d'État (French Council of State) asks whether the tax integration regime, as in force in France, which allows a resident parent company to offset the results of all of the companies in the integrated group and enables tax neutrality to be achieved for all intra-group transactions, is liable to constitute a restriction on the freedom of establishment of at least one of the members of the group, inasmuch as a resident sub-subsidiary cannot take advantage of that regime where the shares in it are held by a non-resident subsidiary.

12 The Conseil d'État asks whether, on the assumption that such a restriction is found to exist, it may be justified by overriding reasons of public interest, in particular by the need to ensure the coherence of the tax system.

13 In those circumstances, the Conseil d'État decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Inasmuch as the tax benefit arising under the "tax integration" scheme affects the liability to tax of the parent company of the group, which can offset the profits and losses of all the companies of the integrated group, and benefit from the tax neutrality of the internal transactions of that group, does the impossibility — resulting from the scheme defined by Article 223A et seq. of the [CGI] — of including within the membership of a tax-integrated group a sub-subsidiary of the parent company, when it is held through a subsidiary which, being established in another Member State … and not carrying on business in France, is not subject to French corporation tax and thus cannot itself form part of the group, constitute a restriction on the freedom of establishment by reason of the tax consequences arising from the choice of the parent company as to whether to hold a sub-subsidiary through a French subsidiary or instead through a subsidiary established in another Member State?

(2) If the answer is in the affirmative, can such a restriction be justified either by the need to maintain the coherence of the “tax integration” system — in particular the arrangements for the tax neutrality of transactions within the group, having regard to the consequences of a system which consists of treating a subsidiary established in another Member State as belonging to the group solely for the purposes of the condition as to the indirect holding of the sub-subsidiary, while remaining automatically excluded from the application of the group scheme since it is not subject to French tax — or by any other overriding reason of public interest?’

The questions referred

14 By its two questions, which should be considered together, the national court is essentially asking whether legislation of a Member State in terms of which a group taxation regime is made available to a parent company which is resident in that Member State and has subsidiaries and sub-subsidiaries which are also resident in that State, but the benefit of that regime is excluded in the case of a parent company if its sub-subsidiaries are held through a subsidiary which is resident in another Member State, constitutes a restriction on the freedom of establishment, and, should that be the case, whether that restriction can be justified.

15 In that regard, it should be pointed out that freedom of establishment entails 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 Community, the right to exercise their activity in other Member States through a subsidiary, branch or agency (Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29, and Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 18).

16 Even though, according to their wording, the provisions of the EC Treaty concerning freedom of establishment are directed to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21; Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33; and *Lidl Belgium*, paragraph 19).

17 It must be noted at the outset that the national court does not, in the main proceedings, ask whether the fact that it is impossible for the Netherlands subsidiary of Papillon to be included in the tax integration constitutes a restriction on the freedom of establishment. As the Advocate General observed in points 5 and 24 of her Opinion, the reference for a preliminary ruling asks whether a restriction on the freedom of establishment under Article 52 of the Treaty arises by virtue of the fact that a parent company established in one Member State cannot benefit from the tax integration regime as regards the group constituted by that company and its sub-subsidiaries, all of whom have their seat in the same State, where the intermediate subsidiary, which is established in another Member State, is not subject to corporation tax in the first State.

18 As the order for reference states, the tax integration regime reduces the tax liability of the parent company by allowing it to offset the profits and losses of all the companies in the fiscally-integrated group. That regime constitutes a tax advantage inasmuch, in particular, as the offsetting which is permitted allows a group to take the losses of certain of its members into account immediately.

19 Under Article 223A et seq. of the CGI, that tax advantage is, however, not available where a parent company established in France holds a sub-subsidiary which also has its registered office in France through a subsidiary which is established in another Member State and which does not carry on business in France.

20 As was noted in paragraphs 3 and 4 of this judgment, the parent company of the group can, if it is to benefit from the tax integration regime, have an indirect holding in another group company only if this is done through a company which is itself a member of the integrated group and is accordingly liable to corporation tax in France.

21 Thus, a parent company which has its registered office in France and which holds its French sub-subsidiaries through a subsidiary established in another Member State cannot benefit from the tax integration regime. By contrast, a French parent company is able to achieve tax integration with its French sub-subsidiaries where the intermediate subsidiary is established in France.

22 As the Advocate General stated at point 30 of her Opinion, the effect is that the provisions of the CGI at issue in the main proceedings create a difference in treatment since the ability to elect for the tax integration regime is dependent on whether the parent company holds its indirect shares through a subsidiary established in France or in another Member State.

23 The French Government contends, however, that that difference in treatment can be explained by the fact that those two situations are not objectively comparable.

24 In a situation such as that which arises in the main proceedings, a subsidiary which is established in a Member State other than the French Republic is, by virtue of that fact, not subject to corporation tax in France, unlike the position which arises when the subsidiary has its registered office in that State.

25 That argument cannot be accepted.

26 Acceptance of the proposition that the Member State may freely apply a different treatment solely by reason of the fact that a company's registered office is situated in another Member State would deprive the rules relating to the freedom of establishment of all meaning (see, to that effect, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 42).

27 In order to establish whether discrimination exists, the comparability of a Community situation with one which is purely domestic must be examined by taking into account the objective pursued by the national provisions at issue (see, to that effect, *Metallgesellschaft and Others*, paragraph 60, and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 38).

28 In the main proceedings, the provisions of the CGI at issue 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 permanent establishments, by allowing the results of each company to be consolidated.

29 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 a subsidiary established in another Member State.

30 Having regard to the objectives of the CGI at issue in the main proceedings, those situations are thus objectively comparable.

31 Consequently, the tax regime at issue in the main proceedings gives rise to unequal treatment based on the place of the registered office of the subsidiary through which the resident parent company holds its resident sub-subsidiaries.

32 Inasmuch as, from a taxation perspective, they put Community situations at a disadvantage compared with purely domestic situations, the provisions of the CGI at issue in the main proceedings thus constitute a restriction which is, in principle, prohibited by the provisions of the Treaty relating to the freedom of establishment.

33 It is clear from the Court's case-law that such a restriction of the freedom of establishment is permissible only if it is justified by overriding reasons of public interest. It is necessary in such a case, moreover, that its application be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain it (*Lidl Belgium*, paragraph 27 and the case-law cited).

34 In that regard, it must be noted, first, that the German and Netherlands Governments argue in the written observations which they have submitted to the Court that the restriction on the freedom of establishment which arises under the legislation at issue in the main proceedings may be justified by the necessity to preserve the allocation of the power to impose taxes between Member States.

35 In that regard, those Governments refer to Case C-446/03 *Marks & Spencer* [2005] ECR I-10837 and to *Oy AA* and argue that the restriction imposed by the CGI at issue in the main proceedings is necessary in order to prevent losses being used twice and the risk of tax avoidance.

36 Those justifications cannot be accepted.

37 In *Marks & Spencer* and *Oy AA*, the questions referred related, in the former case, to the taking into account of losses recorded in a Member State other than that in which the taxpayer was resident and, in the latter case, to a risk of tax avoidance.

38 In the main proceedings, those questions do not arise, since the object of the reference for a preliminary ruling is to establish whether the fact that a company which is resident in a Member State cannot benefit from the tax integration regime with its sub-subsidiaries which are also resident in that State when the intermediate subsidiary is established in another Member State constitutes a restriction, and not to establish whether the non-resident subsidiary should be capable of falling under that regime.

39 In the main proceedings, the question as to whether the profits and losses of companies belonging to the group in question should be taken into account arises only in relation to companies which are resident in a single Member State. Accordingly, the question which is put relates to the taking into account of losses recorded in one and the same Member State, which also excludes, prima facie, a risk of tax avoidance.

40 Consequently, the restriction established in paragraphs 22 to 32 of this judgment cannot be justified by the allocation of the power to impose taxes between Member States.

41 Secondly, it must be noted that the national court asks whether the restriction at issue can be justified by the need to ensure the coherence of the tax system, with the French Government considering, in the written observations it has submitted to the Court, that that is the case in the main proceedings.

42 The national court observes that, since the non-resident subsidiary is automatically excluded from the application of the tax integration regime, because it is not subject to corporation tax in France, the coherence of the system for neutralising intra-group transactions is affected, since the treatment of transactions involving that subsidiary is different from that applying to transactions involving a resident subsidiary and might lead to cases of double deduction, unlike a system which applies only to companies subject to that tax.

43 In that regard, it must be pointed out that the Court has already acknowledged that the need to maintain the coherence of a tax system can justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty (Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; and *Keller Holding*, paragraph 40).

44 For an argument based on such a justification to succeed, the Court requires, however, that a direct link be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18; *ICI*, paragraph 29; *Manninen*, paragraph 42; and *Keller Holding*, paragraph 40), with the direct nature

of that link falling to be examined in the light of the objective pursued by the rules in question (*Manninen*, paragraph 43, and Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 39).

45 In the main proceedings, the French Government states that the tax integration regime provides for the tax consolidation of companies and, to offset this, for the neutralisation of certain transactions between the group companies in accordance with Articles 223B, 223D and 223F of the CGI.

46 In that regard, it must be pointed out that neutralisation of transactions which are internal to the group avoids, inter alia, the use of losses twice at the level of resident companies falling under the tax integration regime.

47 In the case of losses recorded by the sub-subsidiary, the subsidiary will generally provide for the depreciation of its holding in that sub-subsidiary and the parent company will, as a result, provide for the depreciation of its holding in its subsidiary. Since those circumstances involve one and the same loss, originating at the level of the sub-subsidiary, where each of those companies is subject to the tax integration regime, the neutralisation mechanism results in the provision for depreciation made by the parent company and the subsidiary being disregarded.

48 Nevertheless, should the subsidiary be a non-resident company, the losses recorded by the sub-subsidiary would be taken into account twice, first, in the form of the direct losses of that sub-subsidiary and, secondly, in the form of a provision made by the parent company for the depreciation of its holding in that subsidiary. The internal transactions would not be neutralised because the non-resident subsidiary is not subject to the tax integration regime.

49 In such circumstances, it is clear that resident companies would enjoy the advantages of the tax integration regime, as regards the consolidation of results and the immediate taking into account of the losses of all the companies subject to that regime, without the losses of the sub-subsidiary and the provisions made by the parent company being capable of being neutralised.

50 As a result, the direct link which exists under the tax integration regime between the tax advantages and the neutralisation of intra-group transactions would thus be eliminated, thereby affecting the coherence of that regime.

51 Consequently, in refusing to extend the benefit of the tax integration regime to a resident parent company wishing to include its resident sub-subsidiaries in that regime where it holds those sub-subsidiaries through a non-resident subsidiary, the provisions of the CGI at issue in the main proceedings have the effect of ensuring the coherence of that regime.

52 However, it is also necessary that that national legislation does not go beyond what is necessary to attain that objective, that is to say, that the same objective cannot also be attained by measures which are less restrictive of the freedom of establishment.

53 In that regard, the French Government argues that the provisions of the CGI in question are made necessary by the difficulty which the French tax authorities have in ascertaining whether a risk exists that losses may be used twice where a non-resident subsidiary is interposed between the parent company and its sub-subsidiaries. The amount of a provision does not generally correspond to the loss of the subsidiary and it is not always possible to identify the exact origin of a provision.

54 In this respect, it must first be pointed out that practical difficulties cannot of themselves justify the infringement of a freedom guaranteed by the Treaty (Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 29; Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 48; and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 70).

55 Next, it must be noted that Community legislation, namely Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), allows the Member States to request from the competent authorities of the other Member States all information which may be relevant in assessing, inter alia, the corporation tax payable.

56 Lastly, it must be added, as the Advocate General stated at point 66 of her Opinion, that the tax authorities concerned are entitled to demand from the parent company such documents as they consider necessary in order to determine whether the provisions made by that company for the losses in share values in the subsidiary can be explained indirectly by a loss of the sub-subsidiary through the provisions of that subsidiary (see, to that effect, *Centro di Musicologia Walter Stauffer*, paragraph 49; Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 54; Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 57; and Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 95).

57 In relations between Member States, information requested or provided by the tax authorities concerned is all the more likely to allow it to be ascertained whether the conditions laid down under national legislation are satisfied since Community harmonisation measures apply in the field of company accounts, with the result that it is possible to produce reliable and verifiable evidence relating to a company established in another Member State (see, to that effect, Case C-101/05 *A* [2007] ECR I-11531, paragraph 62).

58 Thus, where parent companies which are resident in a Member State wish to benefit from the tax integration regime together with sub-subsidiaries held through subsidiaries resident in another Member State, as in the main proceedings, the tax authorities of the first State may request those subsidiaries to provide the evidence the authorities consider necessary in order for the transparency of the provisions made by the subsidiaries to be fully guaranteed.

59 Companies established in France which hold resident sub-subsidiaries through subsidiaries which are resident in another Member State and which are accordingly not entitled to benefit from the tax integration regime are not permitted, under the provisions of the CGI at issue in the main proceedings, to provide documentary evidence which might serve to establish that there is no risk of losses being used twice.

60 Consequently, that legislation prevents, in every case, those resident companies from proving that there is no risk of losses being used twice under the tax integration regime.

61 It follows that measures which are less restrictive of the freedom of establishment exist for the purposes of attaining the objective of ensuring the coherence of the tax system.

62 Accordingly, the provisions of the CGI at issue in the main proceedings go beyond what is necessary in order to attain that objective and cannot, as a result, be justified by the need to ensure the coherence of the tax system.

63 In the light of all of the above, the answer to the questions referred must be that Article 52 of the Treaty is to be interpreted as meaning that it precludes legislation of a Member State by virtue of which a group tax regime is made available to a parent

company which is resident in that Member State and holds subsidiaries and sub-subsidiaries which are also resident in that State, but is unavailable to such a parent company if its resident sub-subsidiaries are held through a subsidiary which is resident in another Member State.

Costs

64 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 (Fourth Chamber) hereby rules:

Article 52 of the Treaty (now, after amendment, Article 43 EC) is to be interpreted as meaning that it precludes legislation of a Member State by virtue of which a group tax regime is made available to a parent company which is resident in that Member State and holds subsidiaries and sub-subsidiaries which are also resident in that State, but is unavailable to such a parent company if its resident sub-subsidiaries are held through a subsidiary which is resident in another Member State.

[Signatures]