JUDGMENT OF THE COURT (Third Chamber)

21 May 2015 (*)

(Reference for a preliminary ruling — Taxation — Freedom of establishment — Article 49 TFEU — Restrictions — Staggered recovery of tax on unrealised capital gains — Preservation of allocation of powers of taxation between Member States — Proportionality)

In Case C-657/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Düsseldorf (Germany), made by decision of 5 December 2013, received at the Court on 12 December 2013, in the proceedings

Verder LabTec GmbH & Co. KG

v

Finanzamt Hilden,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh, C. Toader, E. Jarašiūnas and C.G. Fernlund (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Verder LabTec GmbH & Co. KG, by O. Kress, Steuerberater,

– the Finanzamt Hilden, by U. Franz, acting as Agent,

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

– the Belgian Government, by M. Jacobs and J.-C. Halleux, acting as Agents,

– the Danish Government, by C. Thorning and M.S. Wolff, acting as Agents,

– the Spanish Government, by L. Banciella Rodríguez-Miñón, acting as Agent,

– the Italian Government, by G. Palmieri, acting as Agent, and by S. Fiorentino, avvocato dello Stato,

– the Netherlands Government, by J. Langer and M. Bulterman, acting as Agents,

– the Swedish Government, by U. Persson and A. Falk, acting as Agents,

– the European Commission, by A. Cordewener and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 February 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 49 TFEU.

2 The request has been made in proceedings between Verder LabTec GmbH & Co. KG, established in Germany ('Verder LabTec') and Finanzamt Hilden ('the Finanzamt') concerning the taxation of unrealised capital gains pertaining to that partnership's assets at the time of the transfer of those assets to its permanent establishment located within the Netherlands.

Legal context

3 It is apparent from the documents before the Court that the German legislation on the taxation of unrealised capital gains on the assets of a company established in Germany which were transferred to a permanent establishment of that company located outside the national territory was based, initially, on the case-law of the Bundesfinanzhof (the Federal Finance Court).

4 In a judgment of 16 July 1969, that court had established the 'theory of final withdrawal'. The order for reference indicates, in essence, that that theory was based on the principle that the Federal Republic of Germany, as the State of establishment of a company, lost its right with respect to the taxation of unrealised capital gains, pertaining to an asset of that company, generated on German territory where that asset had been transferred to a permanent establishment located within the territory of another State, to the extent that the Federal Republic of Germany was required to exempt the profits of that permanent establishment under the double taxation agreement with the State in whose territory the permanent establishment was located. The transfer of assets from a company established in Germany to a permanent establishment located within the territory of another State was therefore regarded as a withdrawal, to be valued as part of a going concern, within the meaning of the second sentence of Paragraph 4(1) of the Law on Income Tax (Einkommensteuergesetz, 'the EStG').

5 The effect of that case-law of the Bundesfinanzhof was that the value of the asset regarded as having been withdrawn from the business assets of the company established in Germany had to be specifically determined at the time of the withdrawal. The difference between that value and the book value of that asset appeared in the accounts at the time of the transfer. The amount of the unrealised capital gains pertaining to that asset which were disclosed was then added to that company's current annual profits.

6 Relying on that case-law, the German tax authorities had decided that such a transferred asset had to be valued at the time of the transfer, at the arm's length price, that is to say at the price to which independent third parties would have agreed under the same or similar conditions.

7 The tax authorities had also decided to moderate, on grounds of equity, the effects of the abovementioned case-law and not to tax the profit associated with such a withdrawal in its entirety, but to allow the undertaking concerned to establish a compensatory item in order to offset that profit. That item was, in the case of depreciable capital goods, to be written down proportionately over the remaining period of the asset's useful life, or at the latest incorporated in profits 10 years after the withdrawal at issue.

8 Situations where unrealised capital gains, relating to assets transferred by a company established in Germany to a permanent establishment located within the territory of another State, are withdrawn were regulated for the first time in the Law on accompanying tax measures with a view to the introduction of the European Company and amending further tax provisions of 7 December 2006 (BGBl. 2006 I, p. 2782, 'the SEStEG').

9 The aim of that legislation was, on the one hand, to adapt tax provisions to requirements of European Union law in the field of taxation and company law, and, on the other hand, both to ensure the consistent protection of the Federal Republic of Germany's rights of taxation and to permit the taxation of unrealised capital gains when the power of that Member State to tax the assets at issue had been removed.

10 To that end, a new third sentence was inserted by the SEStEG into Paragraph 4(1) of the EStG, according to which: '[t]he exclusion or the restriction of the right of taxation of the Federal Republic of Germany with regard to the profit from the sale or the use of an asset amounts to a withdrawal for non-business purposes'. According to the explanatory memorandum to the SEStEG, the objective of that provision is to clarify the applicable law.

11 The SEStEG also introduced Paragraph 4g into the EStG. Under that paragraph, in cases where an asset is deemed to be withdrawn in accordance with the third sentence of Paragraph 4(1) of the EStG, as amended by the SEStEG, due to its attribution to a permanent establishment of the same taxpayer in an EU Member State other than the Federal Republic of Germany, a compensatory item amounting to the difference between the book value and the market value of the asset is to be established at the request of the taxpayer. According to the first sentence of subparagraph 2 of Paragraph 4g, that compensatory item is to be incorporated in profits by means of the profit being increased by one fifth in the financial year of establishment of that item and in each of the following four financial years.

12 In addition, the SEStEG inserted subparagraph 8b into Paragraph 52 of the EStG, according to which the third sentence of Paragraph 4(1) of the EStG, as amended by the SEStEG, applies as from the 2006 financial year.

13 In a judgment of 17 July 2008, delivered in a case relating to the 1995 tax period, the Bundesfinanzhof departed from its earlier case-law on the 'theory of final withdrawal'. The Bundesfinanzhof justified that departure by finding, firstly, that the EStG, in the version applicable before the entry into force of the SEStEG, did not provide a sufficient basis for its previous case-law. Accordingly, the Bundesfinanzhof held that the transfer of an asset by a company established in Germany to a permanent establishment located within the territory of another State was not a withdrawal.

14 The Bundesfinanzhof also justified its change of opinion by holding that there was no need to regard the transfer of an asset by a German company to its permanent establishment located within the territory of another State as an event of profit realisation, because the fact that the profits of that permanent establishment are exempt from German taxation does not impinge on the later taxation of unrealised capital gains generated in Germany.

15 On the basis of that reversal of the case-law, the German legislature decided to issue disapplication legislation and to amend the third sentence of Paragraph 4(1) of the EStG, as amended by the SEStEG.

16 By the 2010 tax law of 8 December 2010 (BGBl. 2010 I, p. 1768), the German legislature first, inserted a new fourth sentence into Paragraph 4(1) of the EStG, as amended by the SEStEG,

explaining the main circumstances where the third sentence of Paragraph 4(1) is applicable. That fourth sentence states that '[a]n exclusion or a restriction of the right of taxation with regard to the profit arising from the sale of an attributable asset exists in particular where an asset previously attributable to a German permanent establishment of the taxpayer becomes attributable to a foreign permanent establishment'.

17 Second, Paragraph 52(8b) of the EStG, as amended by the SEStEG, was supplemented by second and third sentences, under which the third and fourth sentences of Paragraph 4(1) of the EStG, as amended by the 2010 tax law, also apply to the 2005 tax year.

The dispute in the main proceedings and the question referred

18 Verder LabTec is a limited partnership under German law established in Germany. From May 2005 that partnership dealt exclusively with the administration of its own patent, trademark and model rights. By a contract of 25 May 2005, it transferred those rights to its permanent establishment located in the Netherlands.

19 During a tax audit, the Finanzamt came to the view that the transfer of those rights had to take place with disclosure of the unrealised capital gains pertaining to those rights at their arm's length value at the time of the transfer.

20 However, the Finanzamt considered that those unrealised capital gains, whose value was not in dispute, should not immediately be subject to taxation in full. For reasons of equity, the amount of those unrealised capital gains was, according to the Finanzamt, to be offset by a nominal item of the same value and incorporated in profits on a straight line basis over a period of 10 years.

21 On the basis of the results of that audit, on 17 August 2009 the Finanzamt issued a notice on the separate and uniform determination of bases of taxation for the 2005 tax year. It calculated Verder LabTec's profit by adding, to the profit realised, the proportional incorporation of the nominal item for that tax year by an amount equal to one tenth of the value of the unrealised capital gains at issue and subtracting the amount for the increase in business tax provision relating thereto.

22 By decision of 19 September 2011, the Finanzamt rejected as unfounded the complaint lodged against that notice of 17 August 2009.

23 Verder LabTec brought an action against that decision before the Finanzgericht Düsseldorf, claiming, in essence, that the tax legislation at issue undermines the freedom of establishment guaranteed by Article 49 TFEU. Verder LabTec believes that the staggered recovery of tax on unrealised capital gains relating to the assets transferred at the time of the transfer of those assets is a disproportionate measure. The recovery of that tax at the time of the realisation of those capital gains would be a less restrictive option.

24 The Finanzamt contends that the action should be dismissed. It is of the view that the tax system at issue is not contrary to European Union law principles and that any infringement on freedom of establishment is justified by overriding reasons in the public interest. In addition, the tax legislation at issue is proportionate since the unrealised capital gains disclosed are not immediately taxed in full.

25 The Finanzgericht Düsseldorf notes that the third and fourth sentences of Paragraph 4(1) of the EStG, as amended by the 2010 tax law, apply to the tax year in dispute, namely 2005.

26 That court considers that the national legislation at issue on withdrawal is contrary to freedom of

establishment. Furthermore, it is of the view, in the light of the judgment in *National Grid Indus* (C-371/10, EU:C:2011:785), that that legislation cannot be justified since, under the fiscal principle of territoriality, the Federal Republic of Germany is entitled to tax unrealised capital gains generated during the period preceding the transfer of the assets at issue to a permanent establishment located within another Member State. Even if the determination of the amount of the unrealised capital gains at the time of the transfer of the assets at issue could be regarded as a proportionate measure, the recovery of taxes on those capital gains prior to their being realised, notwithstanding spreading such recovery over 5 or 10 years, cannot, in its view, be a proportionate measure.

27 In those circumstances the Finanzgericht Düsseldorf decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is it consistent with freedom of establishment under Article 49 TFEU if, upon the transfer of an asset from a domestic to a foreign permanent establishment of the same undertaking, a national rule stipulates that there is a withdrawal for non-business purposes, with the result that the disclosure of unrealised [capital gains] leads to a profit linked to the withdrawal, and another national rule provides the possibility of spreading that profit in equal proportions over 5 or 10 financial years?’

Consideration of the question referred for a preliminary ruling

28 Verder LabTec claims that the question referred is inadmissible because of its hypothetical nature since, according to Verder LabTec, no 5 or 10 year period for the recovery of the tax referred to by the Finanzgericht Düsseldorf was applicable to the tax year at issue, namely 2005. The Finanzamt and the German Government are of the view that the question referred is hypothetical, as regards staggered recovery over five annual instalments, since staggering over a period of five years was not applicable to the 2005 tax year. The European Commission also maintains that the question is, or may be, hypothetical, as regards the recovery spread over five annual instalments. In this regard, it states that since the Finanzamt’s decision of 19 September 2011 relates to a staggered recovery of 10 annual instalments, it may be that the Finanzamt is prevented from subsequently changing that period to 5 years.

29 In that regard, it should be noted that, according to settled case-law, questions on the interpretation of European Union law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment in *Stanley International Betting and Stanleybet Malta*, C-463/13, EU:C:2015:25, paragraph 26 and the case-law cited).

30 In the present case, it is clear from the order for reference that the tax notice of 17 August 2009, the challenge to which resulted in the Finanzamt’s decision of 19 September 2011, concerns the staggered recovery of tax over 10 annual instalments and not over 5 annual instalments. Therefore it is quite obvious that the problem of staggered recovery of that tax over five annual instalments is hypothetical. Accordingly, as noted by the Advocate General in point 18 of his Opinion, the question referred for a preliminary ruling must be held to be inadmissible in so far as it relates to such recovery.

31 It follows that the question referred has to be understood as asking whether Article 49 TFEU must

be interpreted as precluding tax legislation of a Member State, such as that at issue in the main proceedings, which, in the case of a transfer of assets from a company located within the territory of that Member State to a permanent establishment of that company located within the territory of another Member State, provides for the disclosure of unrealised capital gains pertaining to those assets which have been generated within the territory of the former Member State, the taxation of such gains and the staggered recovery of the tax relating to those gains over 10 annual instalments.

32 It should be borne in mind that Article 49 TFEU requires the elimination of restrictions on freedom of establishment. That freedom includes, for companies established in accordance with the legislation 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 other Member States through a subsidiary, branch or agency (judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 54 and the case-law cited).

33 Although, according to their wording, the provisions of the FEU Treaty on 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 of one of its nationals or of a company incorporated in accordance with its legislation (judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

34 Furthermore, it is settled case-law that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom (judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 56 and the case-law cited).

35 In that regard, freedom of establishment is applicable to the transfer of activities of a company in the territory of a Member State to another Member State, irrespective of whether the company in question transfers its registered office and its effective management outside that territory or whether it transfers assets of a permanent establishment located within that territory to another Member State (judgment in *Commission* v *Denmark*, C-261/11, EU:C:2013:480, paragraph 28 and the case-law cited).

36 As regards the taxation of unrealised capital gains, generated within the tax jurisdiction of a Member State, relating to the assets transferred to a permanent establishment located within another Member State, if the first Member State loses its right to tax income generated by those assets at the time of that transfer, it is clear, in essence, from the case-law of the Court, that tax legislation of a Member State which results in the immediate taxation of those capital gains in the event of such a transfer, whereas they are not taxed on a similar transfer within the national territory, is likely to deter a company established in the first Member State from transferring its assets from the territory of that State to another and, therefore, constitutes a restriction on freedom of establishment (see, to that effect, *Commission* v *Denmark*, C-261/11, EU:C:2013:480, paragraphs 29 to 31 and the case-law cited).

37 In the present case, the tax legislation at issue in the main proceedings results in the disclosure and taxation of unrealised capital gains pertaining to the assets transferred to a permanent establishment located within a Member State other than the Federal Republic of Germany at the time of that transfer. Such disclosure and such taxation would not take place in relation to a similar transfer within the national territory, since those unrealised capital gains are not taxed until they have actually been realised. That difference in treatment is likely to result in a disadvantage in terms of liquidity for a company wishing to transfer assets to a permanent establishment located within the territory of another Member State. Accordingly, that difference in treatment regarding the disclosure

and the taxation of the capital gains at issue is likely to deter a company incorporated under German law from transferring its assets to another Member State.

38 Such a difference in treatment cannot be explained by an objective difference in situation. Under legislation of a Member State which seeks to tax unrealised capital gains generated within its territory, the situation of a company which transfers assets to a permanent establishment located in another Member State is, as regards the taxation of the capital gains related to those transferred assets which were generated in the former Member State prior to that transfer, comparable to that of a company which makes a similar transfer to a permanent establishment located within the territory of that Member State (see, to that effect, judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 60).

39 It follows that the difference in treatment applied, under the legislation at issue in the main proceedings, to a company located within the territory of the Federal Republic of Germany, in the case of the transfer of assets to a permanent establishment of that company located within the territory of another Member State, constitutes a restriction on freedom of establishment within the meaning of Article 49 TFEU.

40 The Court must however determine whether that restriction may be objectively justified by overriding reasons in the public interest recognised by European Union law. If that is the case, it is also necessary that the restriction does not go beyond what is necessary to attain that objective.

41 According to the German Government, the restriction on freedom of establishment may be justified by overriding reasons in the public interest related to the preservation of the allocation of powers of taxation as between Member States. The referring court, however, expresses doubts in that respect.

42 In that regard it should be borne in mind, first, that the preservation of the balanced allocation of powers of taxation between Member States is a legitimate objective recognised by the Court, and that, in the absence of any unifying or harmonising measures of the European Union, the Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 64 and the case-law cited).

43 Second, according to the fiscal principle of territoriality, a Member State is entitled, in the case of a transfer of assets to a permanent establishment located within another Member State, to impose tax, at the time of the transfer, on the capital gains generated on its territory prior to that transfer. Such a measure is intended to prevent situations capable of jeopardising the right of the Member State of origin to exercise its powers of taxation in relation to activities carried on in its territory (see, to that effect, judgment in *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 45 and 46 and the case-law cited).

44 Accordingly, the transfer of the assets at issue in the main proceedings from the Federal Republic of Germany to another Member State cannot mean that the former State must waive its right to tax the capital gains generated within its tax jurisdiction prior to the transfer of those capital gains outside its territory.

45 Besides, Member States entitled to tax capital gains generated when the assets in question were on their territory have the power, for the purposes of such taxation, to make provision for a chargeable event other than the actual realisation of those gains, in order to ensure that those assets are taxed (judgment in *DMC*, C-164/12, EU:C:2014:20, paragraph 53 and the case-law cited).

46 In the present case, it is apparent from the order for reference that the tax legislation at issue in the

main proceedings covers the case of a transfer of assets to a permanent establishment located within the territory of a Member State other than the Federal Republic of Germany, whose income is exempt from tax in Germany.

47 Accordingly, the disclosure of unrealised capital gains relating to those transferred assets generated prior to that transfer within the tax jurisdiction of the Federal Republic of Germany, and the taxation of those unrealised capital gains, is intended to ensure the taxation of those unrealised capital gains, generated within the tax jurisdiction of the Federal Republic of Germany. The taxation of income relating to those assets generated after such a transfer falls to the other Member State, in whose territory the permanent establishment is located. Accordingly, tax legislation such as that at issue in the main proceedings is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned.

48 As regards the proportionality of the legislation at issue in the main proceedings, it should be noted, at the outset, that it is proportionate for a Member State, for the purpose of safeguarding the exercise of its powers of taxation, to determine the amount of the tax due on the unrealised capital gains that have been generated in its territory pertaining to the assets transferred outside its territory, at the time when its powers of taxation in respect of the assets concerned cease to exist, namely, in the present case, at the time of the transfer of the assets at issue outside the territory of that Member State (see, to that effect, judgments in *Commission* v *Spain*, C-64/11, EU:C:2013:264, paragraph 31, and *DMC*, C-164/12, EU:C:2014:20, paragraph 60 and the case-law cited).

49 As regards the recovery of such a tax, the Court has held that it was appropriate to give the taxable person the choice between, on the one hand, immediate payment of that tax, and, on the other hand, deferred payment of that tax, together with, if appropriate, interest in accordance with the applicable national legislation (judgment in *Commission* v *Germany*, C-591/13, EU:C:2015:230, paragraph 67 and the case-law cited).

50 In that context, the Court further held that account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time, which may be taken into account by the Member State in question, in its national legislation applicable to deferred payment of tax liabilities (see, to that effect, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 74).

51 In the present case, the question therefore arises whether a staggered recovery of the amount of tax at issue by 10 annual instalments may be a proportionate measure to attain the objective of preserving the allocation of taxation powers between the Member States.

52 In that regard, suffice it to note that recovery of tax on unrealised capital gains spread over five annual instalments, instead of immediate recovery, was considered to be a proportionate measure to attain that objective (judgment in *DMC*, C-164/12, EU:C:2014:20, paragraph 64). A staggered recovery of tax on unrealised capital gains over 10 annual instalments, such as that at issue in the main proceedings, can only therefore be considered, as the Advocate General has observed in points 72 and 73 of his Opinion, as a proportionate measure to attain that objective.

53 In the light of all the foregoing, the answer to the question referred is that Article 49 TFEU must be interpreted as not precluding tax legislation of a Member State, such as that at issue in the main proceedings, which, in the case of a transfer of assets from a company located within the territory of that Member State to a permanent establishment of that company located within the territory of another Member State, provides for the disclosure of unrealised capital gains pertaining to those assets which have been generated within the territory of that first Member State, the taxation of such capital gains and the staggered recovery of the tax relating to those gains over 10 annual instalments.

Costs

54 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 (Third Chamber) hereby rules:

Article 49 TFEU must be interpreted as not precluding tax legislation of a Member State, such as that at issue in the main proceedings, which, in the case of a transfer of assets from a company located within the territory of that Member State to a permanent establishment of that company located within the territory of another Member State, provides for the disclosure of unrealised capital gains pertaining to those assets which have been generated within the territory of that first Member State, the taxation of such capital gains and the staggered recovery of the tax relating to those gains over 10 annual instalments.

[Signatures]

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* Language of the case: German.