JUDGMENT OF THE COURT (Third Chamber)

5 June 2014

(Free movement of capital — Restrictions — Payment of dividends from a Member State to an overseas territory of the same State — Scope of European Union law — Special European Union-OCTs arrangements)

In Joined **Cases C-24/12 and C-27/12**,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Hoge Raad der Nederlanden (Netherlands), made by decisions of 23 December 2011, received at the Court on 18 and 19 January 2012 respectively, in the proceedings

X BV (C-24/12),

TBG Limited (C-27/12)

v

Staatssecretaris van Financiën,

THE COURT (Third Chamber),

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

Advocate General: N. Jääskinen,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 October 2013,

after considering the observations submitted on behalf of:

– TBG Limited, by B. J. Rubbens, advocaat,

– the Netherlands Government, by B. Koopman and C. Wissels, acting as Agents,

– the United Kingdom Government, by L. Christie, acting as Agent, and by S. Ford, Barrister,

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

after hearing the Opinion of the Advocate General at the sitting on 16 January 2014,

gives the following

Judgment

1 These requests for a preliminary ruling concern the question whether the rules of the European Union on the free movement of capital, such as Article 56 EC, must be interpreted as precluding a measure of a Member State which is likely to hinder movements of capital between that Member State and the overseas countries and territories (OCTs) of the Member State at issue ('own OCTs').

2 The requests have been made in two sets of proceedings brought respectively by X BV and TBG Limited against Staatssecretaris van Financiën (State Secretary for Finance) concerning a tax levied in the Netherlands on dividends paid by companies established in the Netherlands to their holding companies established in the Netherlands Antilles, but where the payment of dividends to a company established in the Netherlands or in another Member State is exempt.

Legal context

European Union law

3 The Netherlands Antilles are listed in Annex II to the EC Treaty entitled 'Overseas Countries and Territories to which the provisions of Part Four of the Treaty apply'.

4 Part Four of the EC Treaty, entitled 'Association of the overseas countries and territories', comprises Articles 182 EC to 188 EC.

5 Article 187 EC provides:

'The Council, acting unanimously, shall, on the basis of the experience acquired under the association of the [OCTs] with the Community and of the principles set out in this Treaty, lay down provisions as regards the detailed rules and the procedure for the association of the [OCTs] with the Community.'

6 The Council has on several occasions adopted specific rules under Article 187 EC to give concrete expression to the special arrangements for association between the European Union and the OCTs and to enable the objectives of association to be attained.

7 At the date of the facts in the main proceedings, the applicable legislation was Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') (OJ 2001 L 314, p. 1; 'the OCT Decision').

8 Recital 6 in the preamble to the OCT Decision states:

'Though not third countries, the OCTs do not form part of the single market and must comply with the obligations imposed on third countries in respect of trade, notably rules of origin, health and plant health standards and safeguard measures.'

9 Under recital 16 of that decision :

‘The general provisions of the Treaty and legislation derived thereunder do not automatically apply to the OCTs, barring express provisions to the contrary. OCT products imported into the Community must nevertheless comply with the Community rules in force.’

10 Article 47 of the OCT Decision, entitled ‘Current payments and capital movements’, provides:

‘1. Without prejudice to paragraph 2:

(a) Member States and the OCT authorities shall impose no restrictions on any payments in freely convertible currency on the current account of balance of payments between residents of the Community and of the OCTs;

(b) with regard to transactions on the capital account of balance of payments, the Member States and the OCT authorities shall impose no restrictions on the free movement of capital for direct investments in companies formed in accordance with the laws of the host Member State, country or territory and to ensure that the assets formed by such investment and any profit stemming therefrom can be realised and repatriated.

2. The Community, Member States and OCTs shall be entitled to take the measures referred to *mutatis mutandis* in Articles 57, 58, 59, 60 and 301 of the Treaty in accordance with the conditions laid down therein. …’

11 Article 55 of the OCT Decision, entitled ‘Tax carve-out clause’, provides in paragraph 2:

‘Nothing in this Decision may be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or fraud of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements, or domestic fiscal legislation in force.’

Netherlands law

12 The legal composition of the Kingdom of the Netherlands is set out in the Charter for the Kingdom of the Netherlands (Statuut voor het Koninkrijk der Nederlanden). During the tax years relevant to the cases in the main proceedings, namely 2005 and 2006, the Kingdom of the Netherlands (Koninkrijk der Nederlanden) consisted of three entities, namely the Netherlands (Nederland), the Netherlands Antilles (Nederlandse Antillen) and Aruba.

13 The fiscal relations between the three entities are regulated by the Taxation Rules for the Kingdom (Belastingregeling voor het Koninkrij; ‘theBRK’). Within the limits set by the BRK, each of the entities of the Kingdom of the Netherlands has independent taxing powers.

14 Article 11(1) and (2) of the BRK, on tax on share dividends provides:

‘1. Dividends received by a resident of one of the countries and owed by a legal entity established in one of the other countries are taxable in the first country.

2. If the country of establishment of the legal entity which must pay the dividends levies a withholding tax on dividends, paragraph 1 does not prevent such taxation provided that the rate does not exceed 15%.'

15 Until 1 January 2002, Article 11(3) of the BRK provided:

'In conditions to be specified in order to guarantee a correct application of this Article in both its purpose and spirit, the rate of taxation referred to in paragraph 2 shall not exceed 7.5% if the dividends are received by a company the capital of which is divided totally or partly into shares, which is established in another country and which is shareholder of at least one quarter of the issued share capital of the company which must issue the dividends. In conditions to be specified in order to guarantee a correct application of this Article in both its purpose and spirit, the rate shall however not exceed 5% in the case referred to in the preceding sentence if, in the country of establishment of the company which receives the dividends, the dividends are subject to a tax on profits at a rate of at least 5.5%.'

16 Thus, until 1 January 2002, share dividends distributed in the Netherlands to a company established in the Netherlands Antilles were, under Article 11(3) of the BRK, subject, in this case in the Netherlands, to a withholding tax rate of 7.5% or 5%.

17 For their part the Netherlands Antilles levied, under Articles 8A, 8B, 14 and 14A of the (old) National Ordinance on the taxation of profits (Landsverordening op de winstbelasting), a tax on profits at a minimum rate of 2.4% to 3%, or a maximum rate of 5.5%.

18 Furthermore, in the Netherlands Antilles, there was an option, pursuant to the 'Netherlands Antillean rulings' — namely individual arrangements granted by the Netherlands Antillean tax authorities — to deduct from the taxable profit costs, whether real or not, and, inter alia, interest on loans, when establishing the Netherlands Antillean tax on profits.

19 Disregarding the 'Netherlands Antillean rulings' practice, the combined tax burden of the Netherlands dividends tax and the Netherlands Antillean tax on profits was about 10%.

20 From 1 January 2002, Article 11(3) of the BRK ('Article 11(3) of the BRK as amended') was amended as follows:

'… Notwithstanding the two preceding sentences, dividends received by a company established in the Netherlands Antilles and payable by a company established in the Netherlands shall be subject to the following system:

(a) the tax rate referred to in paragraph 2 shall not exceed 8.3% if the dividends are received by a company the capital of which is divided totally or partly into shares and which is shareholder of at least one quarter of the issued share capital of the company which must issue the dividends and if, in the Netherlands Antilles, the tax referred to in paragraph 2 is not taken into account, officially or in fact, so that the effective tax burden on the dividends pursuant to the combined provisions of both paragraph 1 and paragraphs 2 and 3 is less than 8.3%;

(b) an amount corresponding to the tax thus paid shall be immediately forwarded to the Netherlands Antillean authorities without further conditions;

…'

21 Thus, from 1 January 2002, share dividends distributed in the Netherlands to a company established in the Netherlands Antilles are subject to a withholding tax rate, levied by the Netherlands, of 8.3%. However, the tax thus levied is entirely paid to the Netherland Antilles.

22 Articles 8A, 8B, 14 and 14A of the (old) National Ordinance on the taxation of profits were repealed on 1 January 2002. Dividends on shareholdings in subsidiaries established in the Netherlands were therefore exempt from tax in the Netherlands Antilles.

23 As regards dividends paid by companies established in the Netherlands to companies established in the Netherlands or in another Member State, Articles 4 and 4a of the 1965 Law on the taxation of dividends (Wet op de dividendbelasting 1965) provided that such dividends are exempt from withholding tax if certain conditions are fulfilled.

24 By contrast, such an exemption is not granted to dividends paid by companies established in the Netherlands to companies established in the Netherlands Antilles.

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

25 In Case C-24/12, X BV is a company incorporated under Netherlands law and established in the Netherlands. All the shares representing the capital of the company are held by Stichting A van aandelen X BV. The share certificates issued are held by B NV, which is established in the Netherlands Antilles.

26 On 27 June 2005, X BV issued a dividend of EUR 5 000 000 to B NV. That payment gave rise to dividend tax of 8.3% or EUR 415 000 which was withheld and paid in accordance with Article 11(3) of the BRK as amended.

27 X BV lodged an objection to that tax, which the Staatssecretaris van Financiën rejected. X BV brought an action against that rejection before the Rechtbank Haarlem (District Court, Haarlem) which declared the action unfounded. X BV appealed before the Gerechtshof te Amsterdam (Regional Court of Appeal, Amsterdam) which confirmed the Rechtbank Haarlem's decision. X BV appealed in cassation to the referring court against the Gerechtshof te Amsterdam's decision.

28 In Case C-27/12, Hollandsche-Amerikaansche Beleggingsmaatschappij Holland-American Investment Corporation NV ('HAIC') is a company incorporated under Netherlands law, established in the Netherlands and a wholly-owned subsidiary of TBG Holding NV ('TBG Holdings'), a company established in the Netherlands Antilles.

29 On 1 September 2006, HAIC issued a dividend of EUR 376 369 430 to TBG Holding. That payment gave rise to dividend tax of 8.3% or EUR 31 238 663 which was withheld and paid in accordance with Article 11(3) of the BRK as amended.

30 HAIC and TBG Holding both lodged an objection to that tax which the Staatssecretaris van Financiën rejected. They each brought an action against that rejection before the Rechtbank Haarlem, which joined the actions and declared them unfounded. HAIC and TBG Holding appealed before the Gerechtshof te Amsterdam, which confirmed the Rechtbank Haarlem's decision.

31 TBG Limited, successor to the rights and obligations of HAIC and TBG Holding, appealed in cassation to the referring court against the Gerechtshof te Amsterdam's decision.

32 The referring court explains that the proceedings before the Gerechtshof te Amsterdam concerned, in essence, the question whether a dividend tax such as that in this case is contrary to the free movement of capital referred to in Article 56 EC. The Gerechtshof te Amsterdam held that Article 56 EC is not of general application to OCTs. It deduced from the OCT Decision that the relationship between the Netherlands and the Netherlands Antilles had to be treated in the same way as an internal situation under European Union law and, therefore, is governed exclusively by the BRK and the 1965 Law on the taxation of dividends.

33 The referring court notes that Article 56 EC prohibits all restrictions on the movement of capital between Member States and between Member States and third countries. It points out that, in Case C-384/09 *Prunus* EU:C:2011:276, the Court held, in paragraph 20, that in view of the unlimited territorial scope of that provision, it necessarily applies to movements of capital to and from OCTs and, at paragraphs 30 and 31, that OCTs benefit from the liberalisation of the movement of capital provided for in Article 56 EC in their capacity as third countries since the EU Treaty, in the version preceding the Treaty of Lisbon, and the EC Treaty do not contain any express reference to movements of capital between Member States and OCTs.

34 However, the referring court raises the question whether *Prunus* EU:C:2011:276 is applicable to the disputes before it, given that the judgment did not concern a movement of capital between a Member State and its own OCT.

35 In this respect, it notes that it could certainly be deduced from that judgment that OCTs, for the purposes of the application of the principle of the free movement of capital, must generally be qualified as third countries and treated like them. However, it would also be possible, according to it, to argue that the freedoms provided for by the EC Treaty are not, in principle, applicable to movements of capital which take place entirely within the Kingdom of the Netherlands, of which the Netherlands and the Netherlands Antilles form part.

36 On the assumption that the movements at issue come under the free movement of capital, that court asks whether the proviso in Article 57(1) EC, which is a 'standstill' provision, applies.

37 In this regard, the referring court states that the history of the law which amended the BRK indicates that the measure aims to rid the Netherlands Antilles of the image of being a tax haven while maintaining the existing effective tax burden on share dividends paid from the Netherlands to the Netherlands Antilles.

38 It considers that the amendment of the BRK as from 1 January 2002 does not constitute a new restriction since only the rate of dividend tax was increased as from that date. In those circumstances, it wonders whether, to determine whether there is an increase within the meaning of the 'standstill' provision, account should be taken only of the increase of withholding tax by the Netherlands in comparison with 31 December 1993, or whether account should also be taken of the change to the tax on profits by the Netherlands Antilles, in this case the exemption granted by them. The second approach is supported by the fact that the withholding tax levied by the Netherlands must, pursuant to Article 11(3) of BRK as amended, be paid to the Netherlands Antilles and that the Netherlands is in fact collecting the tax for the Netherlands Antilles.

39 If account must be taken of total tax burden in the Netherlands and in the Netherlands Antilles, the referring court asks whether account should also be taken of the 'Netherlands Antillean rulings'. One argument against taking them into account is that the consequences for the tax burden of the individual taxpayer may vary depending on the individual circumstances of the case.

40 In the light of those considerations, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) decided to stay the proceedings and to refer the following questions, which are worded identically in Case C-24/12 and Case C-27/12, to the Court of Justice for preliminary rulings:

1. For the purposes of Article 56 EC ..., can an own OCT [of a Member State] be regarded as a third country, in which case it would be possible to rely on Article 56 EC in respect of the movement of capital between a Member State and its own OCT?

2. (a) If Question 1 is answered in the affirmative, is it necessary in order to determine whether, for the purposes of Article 57(1) EC ..., there has been an increase, for account to be taken in the present case — in which the withholding tax on share dividends paid by a subsidiary company established in the Netherlands to its holding company established in the Netherlands Antilles was increased from the 1993 rate of 7.5 or 5% to 8.3% as from 1 January 2002 — exclusively of the increase in the Netherlands withholding tax, or must account also be taken of the fact that, as from 1 January 2002, the Netherlands Antillean authorities have — in conjunction with the increase in the Netherlands withholding tax — granted an exemption in respect of share dividends received from a subsidiary company established in the Netherlands, whereas previously those dividends formed part of profits taxed at a rate of 2.4, 3% or 5%?

   (b) If account must also be taken of the tax reduction in the Netherlands Antilles effected by the introduction of the share exemption referred to in Question 2(a) above, should Netherlands Antillean implementation arrangements (in the present case: Netherlands Antillean rulings practice), the result of which may have been that prior to 1 January 2002 — including in 1993 — the actual tax liability in respect of dividends received from the/a subsidiary company established in the Netherlands was substantially lower than 8.3%, also be taken into consideration?

41 By order of 27 February 2012, the President of the Court ordered Cases C-24/12 and C-27/12 to be joined for the purposes of the written procedure, the oral procedure and judgment.

Consideration of the questions referred

The first question

42 By its first question the referring court asks, in essence, whether the rules of the European Union on the free movement of capital, such as Article 56 EC, must be interpreted as precluding a measure of a Member State which is likely to hinder movements of capital between that Member State and its own OCT.

43 As a preliminary point, it should be noted that, in accordance with Article 299(3) EC, the OCTs listed in Annex II to the EC Treaty form the subject-matter of the special arrangements for association set out in Part Four thereof, namely Articles 182 EC to 188 EC, the detailed rules and procedures of which are, in accordance with Article 187 EC, established by decisions of the Council.

44 In this respect, the Netherlands Antilles, which, under the Netherlands Constitution, is one of the three entities which constitute the Kingdom of the Netherlands, is on that list and, therefore, is the subject-matter of the special arrangements for association set out in Part Four of the EC Treaty.

45 The existence of the special arrangements between the European Union and OCTs results in the general provisions of the EC Treaty, namely those which are not referred to in Part Four of that treaty, not being applicable to OCTs in the absence of an express reference (Case C-260/90 *Leplat* EU:C:1992:66, paragraph 10; Case C-300/04 *Eman and Sevinger* EU:C:2006:545, paragraph 46; and *Prunus* EU:C:2011:276, paragraph 29 and the case-law cited).

46 As regards Part Four of the Treaty, it should be noted that, although it contains some provisions concerning the free movement of goods, namely Articles 184 EC and 185 EC, and the free movement of workers, namely Article 186 EC, as well as the freedom of establishment, namely Article 183(5) EC, by contrast it does not contain any provision relating to the free movement of capital.

47 As regards the OCT Decision, adopted by the Council on the basis of Article 187 EC to implement the arrangements for association, it states, in Article 47(1), what restrictions on payment and on movements of capital are prohibited between the European Union and OCTs.

48 By referring to balance of payments and by prohibiting, first, all restrictions on payments in freely convertible currency on the current account of that balance and, second, restrictions on the movement of capital linked to investments in companies and which concern transactions on the capital account of that balance, Article 47(1) of the OCT Decision has a particularly wide scope, close to the scope of Article 56 EC in the relations between Member States and third countries (see, to that effect and concerning Article 63 TFEU, *Prunus* EU:C:2011:276, paragraphs 29 to 31).

49 Consequently, by prohibiting, inter alia, restrictions on the acquisition of shares in companies and the repatriation of profits stemming therefrom, Article 47(1)(b) of the OCT Decision prohibits, among others, restrictions on the payment of dividends between the European Union and OCTs, along the lines of the prohibition of such measures set out in Article 56 EC as regards, inter alia, relations between Member States and third countries.

50 However, having regard to the case-law cited at paragraph 45 above and to the fact that neither Part Four of the EC Treaty nor the OCT Decision, adopted pursuant to that part of the treaty, expressly refer to Article 56 EC, it is necessary to examine the question referred from the point of view of Article 47(1) of the OCT Decision and to verify whether the scope of that provision is clarified or circumscribed by other rules of the special arrangements applying to the EU-OCT association.

51 In this respect, as noted in particular by the United Kingdom Government, upon the liberalisation, for the EU-OCT association, of movements of capital, particular attention was paid to the fact that numerous OCTs are considered to be tax havens. Thus, the OCT Decision includes, in Article 55, a tax carve-out clause expressly aimed at preventing tax avoidance.

52 Under Article 55(2) 'nothing in [the OCT Decision] may be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance ... of taxes pursuant to the tax provisions of ... domestic fiscal legislation in force'.

53 A tax measure such as that at issue in the main proceedings, which is, according to the referring court's description of its history and purpose, intended to prevent excessive capital flow towards the Netherlands Antilles and to counter the appeal of that OCT as a tax haven, comes under the tax carve-out clause cited above and remains, consequently, outside the scope of application of Article 47(1) of the OCT Decision, provided it pursues that objective in an effective and proportionate manner, which is a matter for the referring court to assess.

54 It follows from the foregoing, and without there being a need to examine the question as to what extent the rules of European Union law applicable to the relations between the European Union and OCTs apply between a Member State and its own OCT, that the answer to the first question is that European Union law must be interpreted as not precluding a tax measure of a Member State which restricts movements of capital between that Member State and its own OCT whilst pursuing the objective of combating tax avoidance in an effective and proportionate manner.

The second question

55 Given the answer to the first question, there is no need to answer the second question.

Costs

56 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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:

European Union law must be interpreted as not precluding a tax measure of a Member State which restricts movements of capital between that Member State and its own overseas country and territory whilst pursuing the objective of combating tax avoidance in an effective and proportionate manner.