Opinion Statement ECJ-TF 4/2015 on the Decision of the European Court of Justice in *Groupe Steria SCA* (Case C-386/14), on the French *Intégration Fiscale*

1. Introduction

This is an Opinion Statement prepared by the CFE ECJ Task Force on *Groupe Steria SCA* (Case C-386/14),[1] in respect of which the Second Chamber of the Court of Justice of the European Union (ECJ) delivered its decision on 2 September 2015, following the Opinion of Advocate General Kokott of 11 June 2015.[2] The decision, which has also been the subject of an ECJ Press Release,[3] further interprets the freedom of establishment in the context of the French *intégration fiscale* and clarifies that taxpayers can claim some benefits of a group taxation regime even if EU law would not allow for the full benefit of such a regime. It also confirms that an option granted to Member States under secondary EU legislation cannot justify a breach of the fundamental freedoms.

2. Background and Issues

Groupe Steria SCA (henceforth Steria) is a French company with holdings in France and in other EU Member States. For French corporate tax purposes, it requested to be treated, together with its at least 95%-owned French subsidiaries, as a single company under article 223 A of the French Tax Code (CGI).[4]

The general French tax rules on dividends that parent companies receive from their subsidiaries provided for a deduction of such dividends from the income of the parent, except for 5% of the dividends. The intention behind making this 5% taxable was to claw back the tax deduction given for costs and expenses related to the holding. If the companies were treated as a single company under article 223 A of the CGI, however, the exception was not applied and the dividends were completely untaxed.

One condition of article 223 A of the CGI was that all companies must be subject to (French) corporation tax. This requirement was not met by the non-French EU subsidiaries of Steria such that French law required 5% of their dividends to be included in Steria's taxable profits. Without claiming a general extension of the fiscal unity to the non-French subsidiaries, Steria challenged the exclusion of these dividends from the tax exemption. The Administrative Tribunal of Montreuil found against Steria,[5] but on appeal the Administrative Tribunal of Appeal of Versailles[6] asked the ECJ whether or not this exclusion was compatible with the freedom of establishment under article 43 of the EC Treaty (now article 49 of the Treaty on the Functioning of the European Union (2007) (TFEU)).[7]

The Commission supported Steria's case, but the four governments that participated in the Court procedure (France, Germany, the Netherlands and the United Kingdom) argued that there was no incompatibility with EU law. They also referred to article 4(2) of the EU Parent-Subsidiary Directive (2011/96),[8] according to which Member States "retain the option of providing that any charges relating to the holding […] may not be deducted from the taxable profits of the parent company" up to – if the legislation uses a fixed amount – 5% of the profits distributed by that subsidiary.

In her Opinion, Advocate General Kokott[9] provided an in-depth assessment of the legal situation. The legislation was, in her view, a clear restriction of intra-EU establishment, without a valid justification. With reference to other decisions of the Court, she dismissed the argument based on the Directive, saying that a Directive cannot overrule the Treaty. She also rejected a possible justification by reference to the allocation of taxing rights, as no other tax jurisdiction was involved in this instance. Moreover, she did not accept that there was any "fiscal cohesion" justification.

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1. FR: ECJ, 2 Sept. 2015, Case C-386/14, *Groupe Steria SCA v. Ministry of Finance and Public Account*, ECJ Case Law IBFD.
2. FR: Opinion of Advocate General Kokott, 11 June 2015, Case C-386/14, *Groupe Steria SCA v. Ministry of Finance and Public Account*, ECJ Case Law IBFD.
3. Court of Justice of the European Union Press Release No. 92/15 (2 Sept. 2015).
4. FR: Tax Code, National Legislation IBFD.
5. FR: TA Montreuil, 4 Oct. 2012, Case 1103063, *Sté Groupe Steria*.
6. FR: CAA Versailles, 29 July 2014, Case 12VE0369, *Sté Groupe Steria*.
7. Treaty on the Functioning of the European Union of 13 December 2007, OJ C115 (2008), EU Law IBFD.
8. Parent-Subsidiary Directive (1990): Council Directive 90/435/EEC on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, EU Law IBFD, as amended by Parent-Subsidiary Directive (2003): Council Directive 2003/123/EC of 22 December 2003 Amending Directive 90/435/EEC on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 007, 13 Jan. 2004, EU Law IBFD.
9. AG Opinion in *Groupe Steria SCA* (C-386/14).

3. The Decision of the Court

The Court's Second Chamber starts by stating that the exclusion of dividends, other than national ones, from the full exemption is liable to make it less attractive for a parent company to make use of the freedom of establishment under the EU Treaties.[10] The Court then goes on to consider the potential reasons for a difference in treatment to be compatible with the Treaty: (1) an objectively non-comparable situation, or (2) overriding reasons in the general interest, and concludes that neither applies in the present case.

First, the Court does not see an objective difference in the situation of parent companies according to whether they receive dividends from subsidiaries that are included rather than not included in the French *intégration fiscale*.[11] Thus, French parent companies with French subsidiaries within the *intégration fiscale* are comparable to French parent companies with subsidiaries located in another Member State (meeting the same requirements as French subsidiaries would need to meet to be included in the French *intégration fiscale* regime). This comparability exists insofar as in both instances (1) both parent companies bear costs and expenses related to shareholdings in their subsidiaries, and (2) there is a risk of potential economic double taxation of profits.[12]

Second, the Court examines whether or not an overriding reason of public interest could justify such a difference in treatment.[13]

With reference to its decision in *X Holding* (Case C-337/08),[14] in which the exclusion of a cross-border fiscal unity had been accepted in order to preserve the competence of different taxing jurisdictions,[15] the Court considered that in the present case there was no issue of allocation of taxing rights because, "[t]he difference in treatment concerns only incoming dividends, received by resident parent companies, so that what is concerned is the fiscal sovereignty of one and the same Member State".[16] Hence, the Court clearly distinguishes its decision in *X Holding*[17] by stating that that decision only concerned the residence requirement as a condition for access to the fiscal unity itself (given the benefits that this entailed). Hence, "as regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must be therefore made".[18]

The Court also rejects the national governments' argument based on fiscal cohesion, saying that there is no direct link between the tax exemption and a particular tax levy, since the French rules at issue do not entail any tax disadvantage for the parent company of the tax-integrated group that would offset the tax advantage (full exemption from tax on dividends) conferred on it.[19] Although in *Papillon* (Case C-337/08),[20] the risk of double use of losses under French law meant fiscal cohesion was relevant, the Court held that, in *GroupeSteria*, no similar risk existed.

Finally, the Court did not accept the argument based on article 4(2) of the Parent-Subsidiary-Directive (2003/123), as "[i]t is evident from settled case-law that the decision which Article 4(2) of Directive 90/435 leaves in the hands of the Member States may be exercised only in compliance with the fundamental provisions of the Treaty, in this instance Article 49 TFEU".[21]

4. Comments

Most notably, *Groupe Steria* brings clarity to *X Holding*.[22] While *X Holding* has evidently been interpreted as "immunizing" all aspects of group taxation regimes from scrutiny under the freedoms,[23] the Court sent a clear message in *Groupe Steria* that it cannot "be inferred from the judgment in *X Holding* [...] that any difference in treatment between companies belonging to a tax-integrated group, on the one hand, and companies not belonging to such a group, on the other, is compatible with Article 49 TFEU".[24] Indeed, it makes it clear that *X Holding* only concerned the residence condition for joining a fiscal unity in so far as the fiscal unity allows for cross-border loss utilization (and perhaps the neutrality of intra-group transactions).[25] For other "tax advantages [...] within the tax-integrated group, a separate assessment must be therefore made".[26] This finding was also confirmed in the recent decision in

10. *Groupe Steria SCA* (C-386/14), paras. 14-19.
11. *Groupe Steria SCA* (C-386/14), para. 22.
12. The Court refers to its decisions in AT: ECJ, 10 Feb. 2011, Joined Cases C-436/08 and C-437/08, *Haribo Lakritzen Hans Riegel BetriebsgmbH and Österreichische Salinen AG v. Finanzamt Linz,* para. 113, ECJ Case Law IBFD and FR: ECJ, 10 May 2012, Joined Cases C-338/11 to C-347/11, *Santander Asset Management SGIIC SA and others v. Direction des résidents à l'étranger et des services généraux,* para. 42, ECJ Case Law IBFD.
13. *Groupe Steria SCA* (C-386/14), paras. 23-39.
14. NL: ECJ, 25 Feb. 2010, Case C-337/08, *X Holding BV v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.
15. Id., paras. 31-33.
16. *Groupe Steria SCA* (C-386/14), para. 29, referring to the decision in FR: ECJ, 27 Nov. 2008, Case C-418/07, *Société Papillon v. Ministère du budget, des comptes publics et de la fonction publique,* paras. 39 and 40, ECJ Case Law IBFD.
17. *X Holding* (C-337/08).
18. *Groupe Steria SCA* (C-386/14), para. 28, explicitly referring to the AG Opinion in *Groupe Steria SCA* (C-386/14), para. 34.
19. *Groupe Steria SCA* (C-386/14), paras. 30-36.
20. *Papillon* (C-418/07).
21. *Groupe Steria SCA* (C-386/14), para. 39, with reference to the decisions in NL: ECJ, 18 Sept. 2003, Case C-168/01, *Bosal Holding BV v. Staatssecretaris van Financiën*, para. 26, ECJ Case Law IBFD; DE: ECJ, 23 Feb. 2006, Case C-471/04, *Keller Holding*, para. 45, ECJ Case Law IBFD and UK: ECJ, 12 Dec. 2006, Case C-446/04, *Test Claimants in the FII Group Litigation*, para. 46, ECJ Case Law IBFD.
22. *X Holding* (C-337/08).
23. This approach becomes visible in the submissions by the French, Netherlands and UK governments, which argued "that the neutralisation of the add-back of the proportion of costs and expenses is indissociable from the tax integration scheme, which is justified by the need to safeguard the allocation of the power to impose taxes between the Member States"; *see* *Groupe Steria SCA* (C-386/14), para. 24.
24. *Groupe Steria SCA* (C-386/14), para. 27.
25. Many group taxation regimes indeed provide for a completely neutral tax treatment of intra-group transactions as a derogation from the ordinary tax treatment of transactions between different (but perhaps related) taxpayers. It is unclear, however, if the Court reads *X Holding* as dealing only with cross-border losses or also with the neutralization of transactions, as both items are mentioned in para. 25 of the present decision, whereas only losses are mentioned in paras. 26, 27 and 28.
26. *Groupe Steria SCA* (C-386/14), para. 28, explicitly referring to the AG Opinion in *Groupe Steria SCA* (C-386/14), para. 34.

Finanzamt Linz (Case C-66/14) concerning the goodwill amortization that was considered an (integral) part of the Austrian group taxation regime.[27]

Undoubtedly, following *Groupe Steria*, Member States will have to review the various beneficial features of their group taxation regimes, even if they consider that such benefits are intrinsically connected with the essence of the regime. Discrimination may, of course, be eliminated either by extending advantages to cross-border situations or by abandoning them for internal situations. Clearly, the first alternative would be more in line with the expectations of taxpayers.[28]

Within the French tax system, *Groupe Steria* may also have consequences for the additional contribution (of 3%) to corporate income tax, which applies to dividend distributions, except for intra-group dividends (article 235 ter ZCA of the CGI). Indeed, *Groupe Steria* provides strong arguments in favour of not applying this contribution in the event the distribution is made to a 95%-parent company established in the European Union or the European Economic Area and that could have been allowed to form an integrated group had it been established in France.

Finally, *Groupe Steria* further confirms previous case law on the relationship between the fundamental freedoms and secondary EU law. With regard to the Parent-Subsidiary Directive, the Court had already confirmed that (1) the "non-regulation" or exclusion of a situation in the Directive does not imply that such a situation is likewise excluded from the freedom's impact,[29] and (2) Member States have to exercise the general options offered in the Directive in compliance with the fundamental freedoms.[30] *Groupe Steria* reiterates this.

5. The Statement

The Confédération Fiscale Européenne welcomes the Court's clarification that cross-border company structures may not automatically be excluded from all the benefits of group taxation regimes but that rather, in general, a case-by-case assessment has to be made. This resolves concerns arising from the *X Holding* case, which, it is now clear, only addresses cross-border loss relief and perhaps tax-neutral intra-group transactions.

27. AT: ECJ, 6 Oct. 2015, Case C-66/14, *Finanzamt Linz v. Bundesfinanzgericht, Außenstelle Linz*, ECJ Case Law IBFD.
28. As a consequence of *Groupe Steria*, the French legislation has been amended to eliminate any discrimination; the choice of the French Parliament has been to tax intra-group dividends on 1% of their amount and to levy the tax not only on dividends from the French subsidiaries that belong to the tax group, but also on EU subsidiaries that would qualify to be part of the group had they been incorporated under French law.
29. FI: ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, para. 28, ECJ Case Law IBFD; NL: ECJ, 8 Nov. 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*, paras. 18-24, ECJ Case Law IBFD and UK: ECJ, 12 Dec. 2006, Case C-374/04, *Test Claimants in Class IV of the ACT Group Litigation v. Commissioners of Inland Revenue*, paras. 53-54, ECJ Case Law IBFD.
30. *Bosal* (C-168/01), paras. 21-28, *Keller Holding* (C-471/04), para. 45; and *FII Group Litigation* (C-446/04), para. 46.