

Case C-318/22**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

12 May 2022

Referring court:

Fővárosi Törvényszék (Hungary)

Date of the decision to refer:

27 April 2022

Applicant:

GE Infrastructure Hungary Holding Kft.

Defendant:

Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary)

Subject matter of the main proceedings

Action for judicial review of a decision by the Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága (Appeals Directorate of the National Tax and Customs Administration, Hungary; ‘the defendant’) confirming a decision of the first-tier tax authority refusing to grant the reduction of the basis of assessment to corporation tax requested by the limited liability company GE Infrastructure Hungary Holding Kft. (‘the applicant’) in connection with income recognised in the accounts following a business conversion.

Subject matter and legal basis of the request

Subject matter: Interpretation of national legislation which applies to purely domestic situations provisions identical to those contained in an EU directive governing cross-border scenarios. Whether Article 8(2) of Directive 2009/133 is

applicable to the conversion of a single-member company and, if so, whether the application of that provision is subject to certain conditions.

Legal basis: Article 267 TFEU

Questions referred for a preliminary ruling

- a) Must Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States ('the Directive') be interpreted as meaning that compatibility with recital 2 and Article 1(a) thereof is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such national legislation (or such a provision of national law), pursuant to which the Directive is held not to apply to intra-State business conversions but only to international and cross-border business conversions, in circumstances in which the provisions of the Directive were transposed by the a társasági adóról és osztalékadóról szóló 1996. évi LXXXI. törvény (Law LXXXI of 1996 on corporation tax and tax on dividends; 'the Law on corporation tax') in such a way that, although [EU] law does not directly govern that matter, the national legislature provided in Article 31(1)(a) of that Law that the purpose of the latter was to align the legislation so enacted with acts of EU law, including the Directive?
- b) Must Article 8(2) of the Directive be interpreted as meaning that compatibility with that provision is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such legislation (or such a provision), whereby, in the context of a partial division of undertakings resident in a single Member State, the shareholder of the transferring company is obliged to reduce the nominal value of his holding in the transferring company (the subscribed capital of the transferring company) in order to reduce the book value of his holding (his shares) in the transferring company, the tax administration requiring that reduction as a precondition of eligibility for the tax treatment provided for in Article 8(2) of the Directive, even in the case where the partial division entails losses for the shareholder of the transferring company?
- c) Must Article 8(2) of the Directive be interpreted as meaning that compatibility with the rule set out therein is maintained by national legislation (or a provision of national law), or the interpretation and application in practice of such legislation (or such a provision of national law), whereby the treatment for corporation tax purposes envisaged in that rule is not applicable to a partial division if the transferring company concerned is a single-member commercial company, that is to say if, as a result of the partial division, the founder of the transferring company retains

his 100% holding in that company unchanged, or there is no change to the subscribed capital of the transferring commercial company?

Provisions of European Union law relied on

Council Directive 2009/133/EC of 19 October 2009 on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares concerning companies of different Member States and to the transfer of the registered office of an SE or SCE between Member States: recital 2; Article 1(a); Article 2(c); Article 8(2) and (5).

Provisions of national law relied on

A társasági adóról és az osztalékadóról szóló 1996. évi LXXXI. törvény (Law LXXXI of 1996 on corporation tax and tax on dividends; ‘the Law on corporation tax’): Article 1(5); Article 4, point 23/a; Article 7(1)(gy), point 1; Article 8(1)(m), point mb; Article 31(1)(a).

A számvitelről szóló 2000. évi C. törvény (Law C of 2000 on accounting; ‘the Law on accounting’): Article 85(1)(d).

Succinct presentation of the facts and procedure in the main proceedings

- 1 The applicant owned a 100% holding in the limited liability company GE Hungary Kft. (‘GE Hungary’), which in turn owned a 100% holding in the limited liability company GE Aviation Hungary Kft. (‘GE Aviation’). In 2017, those three companies signed an agreement for a so-called ‘partial division with merger by acquisition’.
- 2 As part of that transformation, two of GE Hungary’s business lines were spun off and merged by acquisition into GE Aviation. The spin-off of those lines of business was recognised in GE Hungary’s accounts by means of a reduction of that company’s reserves, no change having been made to its subscribed capital.
- 3 At the same time, the applicant acquired a direct 99.6% holding in GE Aviation. For that purpose, the latter company’s subscribed capital was increased by means of a charge against reserves. In addition, the value of GE Hungary’s holding in GE Aviation was reduced, that reduction having also been recognised in the accounts by means of a reduction of the reserves.
- 4 The applicant retained its 100% holding in GE Hungary.
- 5 Following a tax inspection carried out in 2019, the applicant applied to have its basis of assessment to corporation tax reduced by 83 331 000 000 HUF as a result of the aforementioned spin-off of certain lines of GE Hungary’s business. The first-tier tax authority turned down that application, on the ground that the amount

of the reduction applied for did not correspond to a reduction of the holding, that is to say that the business conversion had not led to any change either to the applicant's holding in GE Hungary or to the latter company's subscribed capital.

- 6 That decision was confirmed by the defendant, acting as second-tier authority, which took the view that, for the reasons given, Article 7(1)(gy), point 1, of the Law on corporation tax was not applicable. It further held that the applicant could not rely on the Directive, given that, according to Article 1([a]) thereof, this is applicable only to mergers involving companies from two or more Member States. The defendant concluded that, for the reasons given, there were no grounds for reducing the basis of assessment to corporation tax payable by the applicant for the 2017 financial year on the legal basis cited.
- 7 The applicant brought before the referring court an action for judicial review of the defendant's decision.

The essential arguments of the parties in the main proceedings

- 8 The *applicant* submits that the transaction at issue constitutes a partial division within the meaning of Article 2(c) of the Directive. According to the settled case-law of the Court of Justice, the Directive is to be applied to and governs all cases in which, in order to resolve a purely domestic situation, domestic law adheres to the solutions adopted by EU law. So far as concerns the transaction at issue here, the respondent should have taken into consideration the joint interpretation, based on the Directive, of the Law on accounting and the Law on corporation tax, according to which a business conversion of this kind will not give rise to any corporation tax liability on the part of the company.
- 9 The applicant submits that the provisions of the Directive on non-liability to tax were transposed by Article 7(1)(gy) of the Law on corporation tax, concerning cases of a reduction of the holding, which is based on the concept [of a holding reduction] contained in Article 85(1)(d) of the Law on accounting. However, the concept of partial division defined in Article 2(d) of the Directive does not support the inference that the transferring company must reduce its subscribed capital. Neither does this necessarily happen in practice, and the provisions of national law are also amenable to a reading that is consistent with the EU legislation.
- 10 The applicant argues that, since the Directive does not afford Member States any discretion in the transposition of the Directive, those States cannot subject to any further conditions the fiscal neutrality established for the benefit of the shareholders of the controlled company. The advantages granted by the Directive may be refused only if the main purpose of the transaction in question is tax evasion or avoidance, a situation which the applicant has not claimed to be present and is not at issue in this case.
- 11 The applicant also relies on the fundamental principle of the primacy of economic reality: the fact that the defendant makes eligibility for the advantages of the

Directive contingent upon a reduction of subscribed capital is a formal condition which cannot in any way be inferred from the Directive and cannot be inferred from the Law on accounting or the Law on corporation tax either. After all, the value of shares [in a limited liability company] does not depend exclusively on the company's subscribed capital but is influenced by other elements of its capital.

- 12 The *defendant* argues that there is an obligation to apply the Directive only if a transaction is concluded between companies established in two or more Member States, whereas, in this case, the transaction was concluded between commercial companies operating in a single Member State.
- 13 The defendant further considers that the tax base could have been reduced only if GE Hungary's subscribed capital had been reduced, that is to say if the transaction had not been recognised in the accounts as a charge against reserves. It takes the view that the case-law cited by the applicant is not applicable, since the facts of that case were different from those of the present case. Furthermore, that case-law does not support the inference that Article 7(1)(gy), point 1, of the Law on corporation tax is contrary to the Directive.

Succinct presentation of the reasoning in the request for a preliminary ruling

- 14 The referring court has to rule on whether, in the case of a business conversion (partial division) included within Article 2(c) of the Directive, compatibility with Article 8(2) and (5) of the Directive is maintained by an interpretation of Article 7(1)(gy), point 1, of the Law on corporation tax according to which the condition making a reduction of the basis of assessment to corporation tax contingent upon a 'reduction of the holding' is fulfilled only if the subscribed capital is changed, a change to the reserves being insufficient.
- 15 The Directive was incorporated into the Law on corporation tax by Article 31(1)(a) of that Law. In the view of the referring court, the national legislation contains provisions identical to those of the Directive in the case of both cross-border business conversions and purely domestic business conversions. The principles of equal treatment and fiscal neutrality require that that national legislation be interpreted in accordance with the Directive. In this regard, the referring court mentions the judgments in *Leur-Bloem* (C-28/95, EU:C:1997:369), *Andersen og Jensen* (C-43/00, EU:C:2002:15) and *Dzodzi* (C-297/88, EU:C:1990:360).
- 16 The referring court considers that Article 2(c) of the Directive does not constitute an *acte clair* or an *acte éclairé* in this regard.