Case C-827/21

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:

30 December 2021

Referring court:

Înalta Curte de Casație și Justiție (Romania)

Date of the decision to refer:

12 October 2021

Applicant for revision:

Banca A

Defendants:

Agenția Națională de Administrare Fiscală (ANAF)

President of ANAF

Subject matter of the main proceedings

Application for revision brought before the Înalta Curte de Casație și Justiție (High Court of Cassation and Justice, Romania) by the applicant for revision, Bank A, against the defendants Agenția Națională de Administrare Fiscală (National Agency for Fiscal Administration, Romania, 'ANAF') and the President of ANAF, against the final judgment delivered on appeal by the High Court of Cassation and Justice in a dispute concerning the taxation of the profit made upon a merger by incorporation.

Subject matter and legal basis of the request for a preliminary ruling

In accordance with Article 267 TFEU, interpretation is sought of Directive 2009/133/EC and of the principle that national law is to be interpreted in conformity with EU law.

Questions referred for a preliminary ruling

1. Is a national court required to interpret in a manner consistent with Council Directive 2009/133/EC the national tax legislation applicable to internal situations which governs the non-taxation of income arising on the cancellation of the shareholding of a receiving company in the capital of a transferring company, in circumstances such as those of this case, where:

– the national legislature has regulated internal transactions and similar cross-border transactions with separate, non-identical rules;

– the national rule applicable to internal transactions nevertheless operates using concepts contained in the directive – merger, transfer of assets and liabilities, cancellation of shareholdings;

– the explanatory memorandum to the national tax law can be interpreted as meaning that the legislature intended to establish the same tax treatment for national transactions as for cross-border transactions, covered by the transposition of the directive, in order to comply with the principle of the tax neutrality of mergers in a non-discriminatory manner and in such a way as to avoid distortions of competition?

2. Must Article 7 of Council Directive 2009/133/EC be interpreted as meaning that the benefit of the non-taxation of income arising from a transaction whereby one company cancels its shareholding in another company, following the transfer of the assets and liabilities of the latter company to the former, cannot be refused on the ground that the transaction in question does not satisfy all the conditions laid down in national law in order to be classified as a merger?

3. Must Article 7 of Council Directive 2009/133/EC be interpreted as meaning that the benefit of non-taxation applies to the profit arising from an acquisition on favourable terms, reflected in the profit and loss account of the incorporating company?

Provisions of EU 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 [European Company] or SCE [European Cooperative Society] between Member States: Article 2(a), Article 4(1) and Article 7, and the principle that national law is to be interpreted in conformity with EU law.

Provisions of national law relied on

Legea nr. 554/2004 contenciosului administrativ (Law No 554/2004 on administrative proceedings), Article 21(1), pursuant to which, in addition to the grounds provided for by the Code of Civil Procedure, judgments that have become final and binding and that infringe the primacy of EU law constitute grounds for revision.

Legea nr. 571/2003 privind Codul fiscal (Law No 571/2003 establishing the Tax Code, 'the Tax Code'), Article 27(3), (4) and (5), which provide as follows:

'3. The provisions of this article shall apply to the following reorganisation operations, provided that the main purpose of the operation is not tax evasion or tax avoidance:

(a) the merger of two or more Romanian legal persons, where the participants in any of the merging legal entities receive shares in the successor legal person;

…

4. The following rules shall apply to reorganisation operations as referred to in paragraph 3:

(a) the transfer of assets and liabilities shall not be treated as a taxable transfer for the purposes of this Title; …

5. Where a Romanian legal person holds at least 15% – or, from 2009 onwards, 10% – of the equity shareholding in another Romanian legal person which transfers assets and liabilities to the former, by means of an operation as referred to in paragraph 3, the cancellation of those shares shall not be treated as a taxable transfer.'

Legea nr. 31/1990 privind societățile comerciale (Law No 31/1990 on commercial companies), Article 238(1), Article 243[4] and Article 250(1)(b), which provide as follows:

'Article 238 – 1. A merger is an operation whereby:

(a) one or more companies are dissolved without going into liquidation and transfer all of their assets and liabilities to another company in exchange for the distribution to the shareholders of the company or companies being acquired of shares in the acquiring company and, if applicable, a cash payment not exceeding 10% of the nominal value of the shares so distributed, or

(b) several companies are dissolved without going into liquidation and transfer all of their assets and liabilities to another company which they form, in exchange for the distribution to their shareholders of shares in the newly established company and, if appropriate, a cash payment not exceeding 10% of the nominal value of the shares so distributed.

Article 243[4] – In the case of a merger by incorporation, whereby one or more companies are dissolved without going into liquidation and transfer all of their assets and liabilities to another company which holds all their shares or other securities conferring the right to vote at general meetings, the following articles shall not apply: … Article 250(1)(b) …:

Article 250 – 1. Mergers and divisions shall have the following consequences: …

(b) the shareholders or members of the company being acquired or divided shall become shareholders or members of the acquiring company or successor company, in accordance with the distribution rules set out in the merger/division prospectus; …'.

Hotărârea guvernului nr. 44/2004 pentru aprobarea Normelor metodologice de aplicare a Legii nr. 571/2003 privind Codul fiscal (Government Decision No 44/2004 approving the rules for the application of Law No 571/2003 establishing the Tax Code), paragraph 85, which provides that, in accordance with Article 27(3)(a) and (b) of the Tax Code, mergers and divisions are governed by Law No 31/1990.

Succinct presentation of the facts and procedure in the main proceedings

1 On 25 November 2015, the Tribunalul Specializat Cluj (Special Court, Cluj, Romania) authorised the entry in the Companies Register of information concerning the merger by incorporation carried out by Bank A, the acquiring company, and Bank B, the acquired company, at a time when Bank A had already purchased 100% of the shares in the bank being acquired. The share price had been agreed between the parties at a figure below market value and the shares were recorded in the financial statements of the acquiring company at their acquisition cost, in accordance with the applicable accounting rules set out in Ordinul Băncii Naționale a României nr. 27/2010 pentru aprobarea Reglementărilor contabile conforme cu Standardele Internaționale de Raportare Financiară (IFRS) (Order No 27/2010 of the National Bank of Romania approving accounting rules in accordance with International Financial Reporting Standards (IFRS)), which applies to credit institutions.

2 The merger took effect on 31 December 2015 and was recorded in the financial statements of the acquiring company in accordance with IFRS 3 – *Business Combinations*. Accordingly, the difference between the price which Bank A paid for the acquisition of the shares and the fair value of the assets and liabilities of the acquired company was stated in the individual profit and loss account of the acquiring company as a profit arising from an acquisition on favourable terms.

3 Before the date on which the merger took effect, Bank A had submitted to ANAF, on 22 June 2015, an application for an advance individual tax decision concerning the tax treatment of the profit arising from the acquisition on favourable terms, which Bank A was to record following the merger, on the date on which the merger took effect. In that application, Bank A stated that, in its opinion, the income stated in the profit and loss account for 2015 as a profit arising from the acquisition on favourable terms was not to be included in the calculation of corporation tax for the financial year in which the merger took effect, since a merger is a neutral transaction for tax purposes and the transfer of assets and liabilities is not subject to tax.

4 In response to that application, on 1 November 2016, the President of ANAF issued a decision stating that the income earned on an acquisition on favourable terms was not included in the list of non-taxable income items expressly set out in Article 20 of the Tax Code.

5 Bank A lodged an administrative appeal, which ANAF dismissed on 12 November 2017. The grounds of dismissal were that (i) the income in question did not fall into any of the categories expressly provided for by Article 20 of the Tax Code; (ii) Article 27^1 of the Tax Code and Articles 4 and 7 of Directive 2009/133 did not apply, since they concerned cross-border mergers, whereas the merger in this case was between two banks both resident for tax purposes in Romania, rather than in different Member States of the European Union, and (iii) Article 27(4) and (5) of the Tax Code were equally inapplicable, since a merger by incorporation in which the acquiring company holds all of the shares in the acquired company was not among the operations referred to in Article 27(3) of the Tax Code.

6 Bank A brought an action challenging ANAF's two decisions, in which the Curtea de Apel Cluj (Court of Appeal, Cluj, Romania) annulled the decision of 12 November 2017 dismissing the administrative appeal, along with the decision of ANAF's President of 1 November 2016, and instructed ANAF to issue a new individual tax decision establishing that the tax treatment of the profit arising from the acquisition on favourable terms which Bank A had recorded on the date of the merger should be that for non-taxable income.

7 The Court of Appeal, Cluj, held that Article 20 of the Tax Code was not the only provision that governed categories of non-taxable income, and that the provisions of Article 27 of the Tax Code, concerning reorganisations, liquidations and other transfers of assets and shareholdings, was also applicable. It held to be applicable Article 27(5) of the Tax Code, in accordance with which the cancellation of an acquiring company's shareholding in an acquired company is not a taxable transaction, that article governing a specific case of non-taxation. That solution, also advocated in the tax expert's report produced in the proceedings, ensured observance of the principle of the tax neutrality of mergers.

8 The appeal which ANAF lodged against the judgment of the Court of Appeal, Cluj, was upheld by the High Court of Cassation and Justice. By judgment of 23 June 2020, that court set aside the judgment under appeal and, ruling *ex novo* on the merits, dismissed Bank A's claim as unfounded, holding that the profit in question did not fall within the scope of any of the provisions of the Tax Code governing non-taxation.

9 The High Court of Cassation and Justice thus overruled the Court of Appeal's interpretation of Article 27(5) of the Tax Code and held that that provision did not apply because Bank A already held 100% of the shares in the incorporated bank prior to the date of the merger by incorporation, and no shares were issued to the shareholders of the incorporated bank.

10 Nor were the provisions of Article 27^1 of the Tax Code, transposing provisions of Directive 90/434, applicable, since they concerned cross-border mergers.

11 On 28 October 2020, pursuant to Article 21 of Law No 554/2004, Bank A lodged an application for revision of the judgment of 23 June 2020, requesting that it be set aside and a new ruling be given dismissing ANAF's appeal.

12 Bank A maintains that there is a conflict between the national tax legislation and the rules of EU law concerning the common system of taxation applicable to reorganisations and transfers of assets, and that that conflict can only be resolved by applying the principle of the primacy of EU law.

The essential arguments of the parties in the main proceedings

13 According to the applicant for revision, Articles 20 and 27 of the Tax Code, as interpreted by the tax authority and the High Court of Cassation and Justice [in its judgment of 23 June 2020], constitute an obstacle to the free functioning of the internal market.

14 Where national legislation adopts solutions enacted in EU law it should be interpreted in conformity with EU law, even in connection with purely internal situations, so as to avert discrimination against its nationals or possible distortions of competition.

15 Article 27 of the Tax Code is based on the provisions of Directive 90/434, as is clear from the explanatory memorandum to the Tax Code. That Article 27 was amended, prior to Romania's accession to the European Union, by Law No 343/2006, which inserted Article 27^1 governing cross-border mergers. The provisions of the third indent of Article 2(a) of Directive 90/434 have been correctly transposed by Article $27^1(3)(1)(c)$ of the Tax Code. However, the rules which apply to Romanian legal persons under Article 27 have not been amended in a corresponding manner. One consequence of that omission is that national law may be interpreted incorrectly, in such a way as to infringe EU law.

16 The applicant for revision also states that the tax solutions for mergers between Romanian legal persons in the new Tax Code, adopted by Law No 227/115, which came into force on 1 January 2016, are fully aligned with Directive 2009/133.

17 Leaving aside the irregularity which emerged in 2003 when the definition of a merger in Directive 90/434 was incorporated into the Tax Code, the solution of non-taxation of such transactions, laid down in Article 27(5) of the Tax Code, is identical to that which applies to transactions referred to in the third indent of Article 2(a) of Directive 90/434 pursuant to Article 7 of that directive.

18 If the applicability of a special non-taxation regime were to be made conditional on the formal classification of a transaction cancelling an acquiring company's shareholding in an acquired company as a merger within the meaning of Article 27(3) of the Tax Code, that would render Article 27(5) of the Tax Code inapplicable.

19 The High Court of Cassation and Justice, hearing Bank A's application for revision, has decided, at the applicant's request, to refer questions to the Court of Justice for a preliminary ruling.

20 ANAF contends that the referring court should dismiss the application for revision as inadmissible and, in the alternative, unfounded. It considers that Directive 2009/133 does not apply in the present case and that the question of the primacy of EU law has already been finally settled and any revisiting of that question, in the absence of any new factors, would be contrary to the authority of *res judicata*. Furthermore, national law is, it submits, in line with and consistent with EU law.

Succinct presentation of the grounds for the reference for a preliminary ruling

21 First of all, the referring court emphasises that, if the tax treatment confirmed in this final stage of the legal proceedings were to be the taxation of the profit arising on the acquisition of Bank B, contrary to the express provisions of EU law in the matter, Bank A would suffer a loss of 264 096 036 Romanian Lei (RON), representing corporation tax for 2016, and that, once the main proceedings have been resolved, the issue of the tax treatment of the profit earned from the acquisition on favourable terms will be decided and the parties will no longer be able to commence further proceedings concerning the taxation or otherwise of that profit.

22 The answer to the first question will enable the referring court to rule on the admissibility of the application for revision. Three conditions must be satisfied in order for that application to be admissible: (i) it must be alleged that the judgment of which revision is sought infringes EU law; (ii) the appellate court must have failed to address, in the judgment of which revision is sought, arguments of EU law on which reliance is placed in the application for revision, and (iii) the application for revision must observe the limits of the ruling on the substance.

23 The applicant for revision has not argued that the merger by incorporation was a cross-border merger, merely that Article 27 of the Tax Code, which applies to domestic transactions, must be interpreted in conformity with EU law applicable to cross-border transactions, in order to ensure equality in tax treatment and non-discrimination. The case-law of the Court of Justice on which the applicant relies, in particular, the judgments in *Foggia-SGPS* (C-126/10, EU:C:2011:718), *Modehuis A. Zwijnenburg* (C-352/08, EU:C:2010:282), *Andersen og Jensen* (C-43/00, EU:C:2002:15) and *Leur-Bloem* v *Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* (C-28/95, EU:C:1997:369), concern the application of Directive 90/434 to purely internal situations, in relation to which the Court of Justice held that it had jurisdiction to answer the questions which had been referred to it for a preliminary ruling.

24 Since the appellate court did not address the arguments which Bank A made concerning the neutrality of the merger and the effect of EU law in the context of the voluntary harmonisation effected by the Romanian legislature, and since the applicant for revision has confined itself to reiterating the arguments it put forward in the administrative appeal, the application for revision meets the last two conditions of admissibility.

25 In so far as the first condition of admissibility is concerned, the referring court states that it must ascertain whether the appellate court was under an obligation to interpret the national legislation in conformity with Directive 2009/133 or, in other words, whether or not EU is applicable in the present case, which concerns a purely domestic situation, but one where EU law might be applicable for reasons similar, if not identical to those identified in the abovementioned case-law of the Court of Justice.

26 Since the interpretation of national law in conformity with EU law is a principle of EU law (see, to that effect, the judgment of 5 October 2004, *Pfeiffer and Others*, C-397/01 to C-403/01, EU:C:2004:584, paragraph 114), jurisdiction to rule on the conditions governing that principle and on the scope of that principle lies with the Court of Justice.

27 In setting out the circumstances in which it must rule on the applicability of EU law in this case, the referring court gives a brief overview of the relevant national legislation.

28 The adoption of Article 27 of Law No 571/2003 establishing the Tax Code was modelled on Directive 90/434, as is clear from the explanatory memorandum to that law, according to which the legislature’s intention was to harmonise the national tax-law framework with that directive. The concept of a merger in national law, however, does not perfectly match the concept of a merger in Directive 90/434, inasmuch as, in Article 238 of Law No 31/1990, there is no definition of merger by incorporation, whereby a company, on being dissolved without going into liquidation, transfers all of its assets and liabilities to the

company holding all the securities representing its capital, which is referred to in the third indent of Article 2(a) of Directive 90/434.

29 Subsequently, with Law No 343/2006, the Romanian legislature amended Article 27 of the Tax Code, at the same time inserting Article 27^1, designed to govern cross-border transactions. Article 27^1 faithfully transposes the provisions of Directive 90/434. Article 27 of the Tax Code, however, which governs internal transactions, was not amended in such a way as to render it identical to Article 27^1. Article 27(3)(a), read in conjunction with point 85 of the rules for the application of the Tax Code, continues to refer to a 'merger' as defined in Article 238 of Law No 31/1990, and paragraph 4 of Article 27, pursuant to which the transfer of assets and liabilities is not to be treated as a taxable transfer, and paragraph 5 of Article 27, pursuant to which income arising from the cancellation of the acquiring company's shareholding in the acquired company is not to be treated as a taxable transfer, are linked to paragraph 3 by a reference to the reorganisation transactions mentioned in that paragraph.

30 Although the Romanian legislature chose to regulate the tax regime for internal reorganisations and that for cross-border reorganisations in two separate articles, the explanatory memorandum to the Tax Code and the explanatory memorandum to the 2006 law amending the Tax Code state that, even in relation to internal reorganisations, voluntary harmonisation of the applicable national legislation with EU law was pursued.

31 Evidence of the Romanian legislature's intention to harmonise may be found in the new Tax Code, adopted by Law No 227/2015, Article 32 of which, governing domestic transactions, faithfully transposes Directive 2009/133. The explanatory memorandum to the new Tax Code, which is not, however, applicable in the present case, makes clear the intention to remedy the inconsistency in the definition of the types of merger, which had resulted in a different approach being taken to domestic transactions from that for cross-border transactions.

32 Since the tax authority and the appellate court took the view that the transaction between Bank A and Bank B was not a merger within the meaning of Article 27(3) of the Tax Code, because the two conditions laid down in point (a) of that provision were not met, and given that Article 27(5) of the Tax Code corresponds to Article 7 of Directive 2009/133, the referring court asks the second question, in order to determine whether the benefit of the non-taxation of the income arising from the transaction in question is dependent on the classification of that transaction as a merger under national law.

33 Next, the referring court states that Bank A applied International Financial Reporting Standard IFRS 3 – *Business Combinations* and recorded the difference between the price which it paid to acquire the shares and the fair value of Bank B's assets and liabilities at the time of the merger in its profit and loss account as a profit arising from an acquisition on favourable terms. By contrast, in the case of businesses which do not apply the International Financial Reporting Standards,

but instead the common framework for financial reporting, the difference between the market value of the net assets transferred and the accounting par value of the shares held by the acquiring company which correspond to those assets is not recorded in the acquiring company's profit and loss account.

34 It is because the tax authority and the appellate court concluded that the recording of that profit in the acquiring bank's profit and loss account demonstrates that the income is taxable that the referring court has raised the third question for a preliminary ruling.