Case C-201/24

Request for a preliminary ruling

Date lodged:

13 March 2024

Referring court:

Najvyšší Správny súd Slovenskej republiky (Slovakia)

Date of the decision to refer:

29 February 2024

Appellant:

A.En. Slovensko s.r.o.

Respondent:

Úrad pre vybrané hospodárske subjekty

Finančné riaditeľstvo Slovenskej republiky

NAJVYŠŠÍ [case number]

SPRÁVNY SÚD **[…]**

SLOVENSKEJ REPUBLIKY **[…]**

(Supreme Administrative Court of the Slovak Republic, Slovakia)

DECISION

The Najvyšší správny súd Slovenskej republiky (the Supreme Administrative Court of the Slovak Republic) [composition of the court seised] […] in the case of the appellant: **A.En. Slovensko s.r.o. […]** [lawyer details] […] against the respondent: **1/ Úrad pre vybrané hospodárske subjekty, 2/ Finančné riaditeľstvo Slovenskej republiky**, in the proceedings relating to the appellant's appeal on a point of law against the judgment by the Krajský súd v Bratislave (Regional Court of Bratislava, Slovakia) [case number] […] of 2 July 2020 [ECLI code] […]

o r d e r s:

I. The proceedings are **s t a y e d**.

II. Pursuant to Article 267 of the Treaty on the Functioning of the European Union, the following questions are referred to the Court of Justice of the European Union for a preliminary ruling:

1. Should Article 4(1) in conjunction with Article 9 of Directive 2009/133/EC be interpreted as precluding a provision of national law (zákon o osobitnom odvode (Law on the Special Levy)) under which a special levy is also charged on capital gains resulting from a transaction (transfer of assets) between companies established in Slovakia?

2. Can the effect of Article 4(1) in conjunction with Article 9 of Directive 2009/133/EC, namely the non-taxation of capital gains resulting from a transfer of assets, calculated as the difference between the real values of the assets and liabilities transferred and their values for tax purposes, also be invoked in the case of a national transaction, carried out between companies established in the same Member State, if the national provisions charge a payment, akin to taxation in its effects, on capital gains resulting from such a transaction (i.e. a special levy)?

G r o u n d s

1 A request is made to the Court of Justice of the European Union (the '**Court**') for a preliminary ruling on the interpretation of Article 4(1) in conjunction with Article 9 of 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 (**'Directive 2009/133**').

2 This request centres around the legal ambiguities arising in the context of a judicial review of decisions by the financial administration authorities concerning the imposition of a levy on the appellant, which had made contributions in kind to its subsidiaries (asset contribution or the **'transaction'**), whereby the capital gains that arose as a result of carrying out that transaction were subject to charges in the form of a special levy on regulated activities in accordance with the zákon č. 235/2012 Z. z. o osobitnom odvode z podnikania v regulovaných odvetviach a o zmene a doplnení niektorých zákonov (Law No 235/2012 establishing a special levy on the revenue of entities generated in regulated sectors, amending and supplementing certain laws; 'Law on the Special Levy').

Legal framework

European Union law

3 Article 4(1) of Directive 2009/133 provides:

'A merger, division or partial division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes.'

4 Article 9 of Directive 2009/133 states:

'Articles 4, 5 and 6 shall apply to transfers of assets.'

Slovak law

Slovak law provides for a special levy on revenues from economic activities falling within the scope of activities regulated by the Law on the Special Levy.

5 According to Paragraph 3(1)(a)(1) and (b) of the Law on the Special Levy in the version applicable in the present dispute:

'"Regulated entity" means any person or permanent establishment of a foreign entity that:

(a) has an authorisation to carry on activity in the sector:

(*inter alia*) 1. of energy on the basis of an authorisation granted by the Úrad pre reguláciu sieťových odvetví [(Energy Regulation Authority, Slovakia)] pursuant to a special law;

(b) expects to carry on activity in the sector referred to in point (a) throughout the entire accounting period'.

6 Paragraph 13(1) of the Law on the Special Levy in the version in force at the time when the transaction was carried out stipulated:

'Any person or permanent establishment of a foreign entity which, on 1 September 2012, is authorised to perform the activity referred to in Paragraph 3(1)(a) and whose revenue generated from that activity in the sector referred to in Paragraph 3(1)(a) for the accounting period preceding the entry into force of the present law amounts to at least 50% of its total revenue for that accounting period shall have the status of a regulated entity within the meaning of the present law. That regulated entity is subject to payment of the levy, starting from the accounting period during which the levy becomes payable, namely from September 2012, if the economic result which that entity achieved in the accounting period preceding the entry into force of the present law amounted to at least the levy base provided for in Paragraph 4(2). "Accounting period" in the above sense means the accounting period immediately preceding the entry into force of the present law, during the course of which the obligation arose duly to draw up a financial statement and submit it together with the tax return, within a deadline expiring before the entry into force of the present law'.

7 Paragraph […] [5] […] [(1)] of the Law on the Special Levy in the version in force at the time when the transaction was carried out stipulated: 'the economic result is disclosed for the accounting period in which the regulated entity is authorised to carry on activities in a sector referred to in Paragraph 3(1)(a), and multiplied by the factor referred to in Paragraph 3(5); the aforementioned levy base is used to calculate the levy for the purpose of levy settlement in accordance with Paragraph 9, with respect to the levy settlement periods falling within the accounting period for which the economic result is disclosed'.

8 Paragraph 17d(1)(a) of zákon č. 595/2003 Z. z. o dani z príjmov (Law No 595/2003 on Income Tax; '**Law on Income Tax**'), in the version in force when the transaction was carried out, stipulated that: 'the tax base of a contributor which makes the contribution in kind in the form of individually contributed assets, enterprise, or a part thereof, and which determines its tax base pursuant to Paragraph 17(1)(b) or (c), shall, in the accounting period in which the contribution in kind is made, not include the difference between the value of the contribution in kind counted towards a contribution paid by a partner and the value of the contribution in kind recorded in the books of account; the beneficiary of the contribution in kind shall take over the contributed assets and liabilities at their historical costs pursuant to special legislation and the tangible assets and intangible assets at their historical costs pursuant to Paragraph 25'.

9 According to Paragraph 17d(1) of the Law on Income Tax, the above paragraph 1 also applies, 'if the contribution in kind constitutes individually contributed assets, such as a security or business interest or enterprise or part thereof, which is

contributed by a provider of a contribution in kind with its registered office in the territory of the Slovak Republic to a beneficiary of the contribution in kind in a Member State of the European Union or a State which is a Contracting Party to the Agreement on the European Economic Area, where these assets, enterprise or part thereof remain functionally connected with the permanent establishment of the beneficiary of the contribution in kind situated in the territory of the Slovak Republic and the beneficiary of the contribution in kind takes over the contribution in kind at historical prices. If, on the part of the beneficiary of the contribution in kind, the assets, enterprise or a part thereof do not remain functionally connected with the permanent establishment situated in the territory of the Slovak Republic, the provider of the contribution in kind shall follow Paragraph 17b' (provisions regulating the contribution in kind in real terms).

The dispute in the main proceedings

10 According to the Law on the Special Levy, the commercial company A.En. Slovensko s.r.o. […], the **'appellant'**, is a 'regulated entity' that carries on 'regulated activities', which may be subject to an obligation to pay a special levy under that law. The appellant is a Slovak commercial company and at the same time a member of the A.En. Group, which is made up of companies from a number of different Member States of the European Union that carry on activities in electrical energy production, electricity trade, natural gas and district heating. In 2017 there were changes to the structure of the A.En. Group; as part of these changes, between October and December 2017 the appellant completed a number of national transactions involving the transfer of contributions in kind to other Slovak subsidiaries. This meant that over 98% of the assets disclosed in the company's economic result declared for 2017 originated from revised transfers of contributions in kind.

11 On 19 July 2019, Respondent 1 issued a decision by means of which, on the basis of past levy settlements, it ascertained the underpayment by the appellant, as a regulated entity, of special levies for settlement in the amount of EUR 701 222.40 for the levy settlement periods covered by the accounting period from 1 January 2017 until 31 December 2017.

12 The appellant lodged an appeal against that decision in accordance with Paragraph 8(6) of the Law on the Special Levy, appealing against the basis for the special levy based on the carrying on of the economic activity in regulated sectors, the amount of the levy and the amount resulting from the levy settlement. The appellant alleged that the pre-tax economic result of EUR 10 319 149.01 was made up of the pre-tax economic result from operating activities of EUR 157 711.25 and the pre-tax economic result from financial activities of EUR 10 161 437.76. The appellant stated that the economic result from financial activities was derived solely from a one-off accounting operation involving activities that were not regulated activities by a regulated entity, which did not lead to its financial enrichment and which related only to the appellant's reorganisation within the framework of its business, as a result of which the pre-

tax economic result for 2017 originated predominantly from profit on activities that were not regulated activities. For this reason the appellant alleged that the basis for the special levy and its actual amount, ascertained by means of the decision taken by the authority competent as regards the levy, could not be calculated on the basis of the economic result, which was not obtained through income from regulated activities.

13 When considering the appellant's appeal, Respondent 2 stated that from the date on which the Law on the Special Levy had entered into force, it had been assumed – in application of Paragraph 5 of that Law – that the basis for the levy was the pre-tax economic result disclosed in line 100 of the tax return (Paragraph 5(3) of that law) or the pre-tax economic result disclosed in accordance with international accounting standards, corrected according to separate provisions. The respondent emphasised that the Law on Income Tax did not allow any subsequent corrections of the economic result, which served as the basis for the levy regardless of the financial transactions which were carried out by the regulated entity and whose result then made up the economic result from an accounting perspective. The respondent noted that it was furthermore not competent to assess whether the appellant had carried out, and if so on which legal basis, a transaction leading to a situation where a regulated entity had accrued a difference taking the form of income that had gone towards the economic result disclosed in line 100 of the tax return. Although this result served as the basis for the levy, from a tax perspective it was not included in the tax base pursuant to Paragraph 17d of the Law on Income Tax, and thus this income obtained from financial activities was then deducted from the economic result in the tax return. In this context, Respondent 2 emphasised that the special levy was regarded as a payment which, after it had been made, constituted a tax expense and thus reduced the tax base and the income tax to be paid.

Proceedings before the national courts

14 The appellant lodged an administrative appeal before the Krajský súd v Bratislave (Regional Court of Bratislava; **'the Administrative Court'**) against those decisions by the financial administration authorities; that appeal was dismissed by the Administrative Court. In the grounds for its ruling, the Administrative Court found that the key contentious issue was whether it was admissible to ascertain the amount of the levy on the basis of the overall economic result achieved by a regulated entity, or whether that amount should instead be based solely on the economic result obtained from the carrying out of regulated activities. The Administrative Court thus argued that the shares and holdings in commercial companies that had been transferred and that made up the contributions in kind were, at the time when the contribution in kind was transferred, recorded in the appellant's accounting ledgers at their (lower) book value, and not at their (higher) assessed value, determined on the basis of expert opinions at the time when the contributions were transferred (real value), and for this reason the appellant was obliged to record the additional difference between the real value of the shares and holdings in commercial companies counted towards the contribution and their

book value as revenues which, from an accounting perspective, resulted in an increase in the economic result, but did not arise from the supply (sale) of electricity, i.e. the appellant's regulated activity. In view of the fact that, from an income tax perspective, contributions in kind were transferred at historical prices, the income deriving from the difference between the value of the contribution in kind counted towards a contribution paid by a partner and the value of the contribution in kind recorded in the books of account (of the appellant) was not included in the tax base. This meant that the income deriving from the contribution in kind represented non-taxable income, in accordance with Paragraph 17d(1)(a) of the Law on Income Tax.

15 In the grounds for the judgment under appeal, the Administrative Court cited the judgment by the Court of 12 December 2019, *Slovenské elektrárne*, C-376/18, ECLI:EU:C:2019:1068, from which it results that Directive [2009/72/EC] (Third Energy Directive) must be interpreted as not precluding national legislation that establishes a special levy on the revenue, with respect to activities performed both nationally and abroad, of undertakings operating, on the basis of an authorisation issued by a public authority, in various regulated activity sectors, including undertakings that hold an authorisation for supplying electricity issued by the competent national regulatory authority.

16 When considering the allegation regarding the conflict between the decisions by the financial administration authorities that are under appeal and Directive 2009/133, the Administrative Court emphasised the exclusive competence of the Member States with regard to public finance measures, which in its opinion included the introduction of a special levy. The Administrative Court added that it had made such an assessment for the precise reason that the aim of the special levy was not to preclude the avoidance of taxation and double taxation, but to consolidate public finances. Given the discrepancy between the aim pursued by this measure and the objectives of Directive 2009/133, the Administrative Court therefore believed that the transposition of that directive by the Slovak Republic did not justify the conclusion that the Law on the Special Levy should be interpreted in accordance with Directive 2009/133 with respect to national transactions as well.

17 The appellant brought an appeal on a point of law against the judgment of the Administrative Court. The allegations contained in that appeal are identical in type and in substance to the allegations made by the appellant in the proceedings relating to the appeal lodged with Respondent 2, as well as those lodged in the proceedings before the Administrative Court.

18 In particular, the appellant refers to the judgment by the Najvyšší súd Slovenskej republiky (Supreme Court of the Slovak Republic) [case number] […] of 31 July 2019, in which that court, in the context of appeal proceedings, upheld the judgment by the Krajský súd v Bratislave (Regional Court of Bratislava) [case number] […] of 14 October 2015 annulling a decision by the financial administration authority concerning the imposition of a special levy on capital

gains resulting from the transfer of assets from SPP, a.s. to eustream, a.s., in which SPP, a.s. was a shareholder, for the purpose of meeting the requirements arising under the Third Gas Directive (2009/73/EC).

19 In the aforementioned judgment, the Najvyšší súd (Supreme Court) took the view that, 'in the case under examination, Directive [2009/133] has direct effect in relation to the rights that are set out sufficiently clearly and unconditionally therein, whereby in the light of its objective – the non-taxation of selected transactions – it is binding on all entities. In this regard, Article 4 in conjunction with Article 9 of Directive [2009/133], which provides that a merger, division or partial division, or a transfer of assets, shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes, is sufficiently unambiguous. The Directive defines "capital gains" as the difference between the real values of the assets and liabilities transferred and their values for tax purposes. Furthermore, in Article 4(2)(a) and (b) it defines "real value of the assets and liabilities transferred" as "value for tax purposes"' (paragraph 100). The Najvyšší súd (Supreme Court) furthermore stated in that judgment: 'Given that the transaction that was carried out was also tax neutral in the light of the national provisions (Paragraph 17d of the Law on Income Tax) and that the special levy has the character of a direct tax and falls within the scope of the directive in question [Directive 2009/133], it must be concluded that the contribution made, which was recorded as a write-off of negative goodwill in the amount of EUR 1 720 998 422.05, so as to comply with the objective of tax neutrality was not the basis for calculating the special levy pursuant to Paragraph 5(3) of the Law on the Special Levy. In accordance with the legal assessment by the Regional Court, the Najvyšší súd (Supreme Court) therefore found it necessary to adopt a pro-EU interpretation in this case and, taking into account the circumstances of the case, to give priority – with regard to the transaction under examination – to EU law, and specifically the aim of tax neutrality pursued under Directive [2009/133]. The fact that the respondents did not act in line with the above and did not give priority to EU law means that the decisions appealed against are flawed in such a way as to render them incompatible with the law'. (paragraph 109).

20 A point that should be emphasised is that in the above case, the Najvyšší súd (Supreme Court) gave priority to the effects of Directive 2009/133 over the application of the national Law on the Special Levy, without referring the case to the Court with a request [for a preliminary ruling] concerning the interpretation of Directive 2009/133.

The grounds for the question referred for a preliminary ruling

21 In a judgment of 12 December 2019, *Slovenské elektrárne*, C-376/18, ECLI:EU:C:2019:1068, the Court interpreted Article 3(1)-(3) and (10) of Directive 2009/72/EC of the European Parliament and of the Council ('**Directive 2009/72**') and concluded, in line with the appellant's claims, that the special levy

established by that Law has the character of a general tax measure, and, in particular, of a direct tax on the total revenue of undertakings in the economic sectors referred to in that Law. The Court found that that levy **(i)** pursues, in accordance with the explanatory memorandum to the Law on the Special Levy, a budgetary objective, with a view to reducing the government deficit and addressing the economic crisis, **(ii)** applies to undertakings operating in regulated activity sectors, that is, not only in the energy sector but also in a number of other economic sectors and, **(iii)** does not apply to the supply of electricity as such but taxes the comprehensive income of the regulated entity concerned. For the above reasons, the Court, in the context of a reference for a preliminary ruling, concluded that Directive 2009/72 and, in particular, Article 3(1) to (3) and (10) thereof, must be interpreted as not precluding national legislation that establishes a special levy on the revenue, with respect to activities performed both nationally and abroad, of undertakings operating, on the basis of an authorisation issued by a public authority, in various regulated activity sectors, including undertakings that hold an authorisation for supplying electricity issued by the competent national regulatory authority.

22 Article 4(1) of Directive 2009/133 provides that a merger, division or partial division **shall not give rise to any taxation of capital gains** calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. According to Article 9 of Directive 2009/133, Articles 4, 5 and 6 shall apply to transfers of assets. If, therefore, the special levy can be regarded, in the light of the Court's case-law, as a form of direct tax and potentially a tax category, the fundamental question in the case at hand is whether it is compatible with the objectives pursued by Directive 2009/133 for a special levy to be imposed on a regulated entity on the basis of the Law on the Special Levy, including with regard to the part of the economic result taking the form of income achieved from 'unregulated' activity, which in this case means capital gains resulting from a transaction taking the form of a transfer of assets to subsidiaries, which complies with the conditions and defining characteristics of a transfer of assets pursuant to Article 2(d) of Directive 2009/133, in a situation where on the one hand this type of income is not subject to taxation pursuant to Directive 2009/133, but where it on the other hand results, *inter alia* from the substance of the Law on the Special Levy and the aforementioned judgment by the Court in case C-376/18 (*Slovenské elektrárne*), that the special levy is payable on the overall economic result.

23 A further key question is therefore whether the requirement for neutrality within the meaning of Directive 2009/133 means that the transactions in question cannot be subject either to income tax (which in the case at hand is ensured by the provisions of national law) or to any other payment with the same effects as income tax (which should be understood to mean the special levy), or in any other way result in the taxation of capital gains, and whether the above may also apply to exclusively national transactions (transfers of assets), i.e. those that are carried out between Slovak companies without a cross-border element, as in the present case.

24 As regards the Court's case-law, in paragraphs 28 and 29 of the judgment of 18 September 2019, *AQ and DN*, C-662/18 and C-672/18, ECLI:EU:C:2019:750, the Court found that: '…it must be noted that the Court **has found requests** for preliminary rulings to be **admissible in cases in which, although the facts of the main proceedings were outside the direct scope of EU law, the provisions of EU law had been made applicable by national legislation, which, in dealing with situations confined in all respects within a single Member State, had followed the same approach as that provided for by EU law** (judgment of 22 March 2018, *Jacob and Lassus*, C-327/16 and C-421/16, EU:C:2018:210, paragraph 33 and the case-law cited). In addition, the Court **has held that** such requests **are admissible** also **in cases where the provision of EU law of which an interpretation is requested is to apply, in the context of national law, in situations different from those provided for by the corresponding EU law provision** (see, to that effect, judgments of 11 October 2001, *Adam*, C-267/99, EU:C:2001:534, paragraphs 27 to 29, and of 7 November 2018, *C and A*, C-257/17, EU:C:2018:876, paragraph 33 and the case-law cited).'

25 However, in the judgment of 27 April 2023, *Banca A (Application of the Merger Directive in a domestic situation)*, C-827/21, ECLI:EU:C:2023:355, the Court concluded that, 'EU law does not require a national court to interpret, in accordance with 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, a provision of national legislation applicable to a purely domestic merger of two undertakings, each having their registered office in the same Member State, as that operation does not come within the scope of that directive. The Court does not have jurisdiction to answer the questions referred regarding the interpretation of Directive 2009/133, as the facts of the dispute in the main proceedings do not come within its scope and, moreover, domestic law has not made it applicable to those facts directly and unconditionally.'

26 In the opinion of the referring court, it results from the Court's judgment in the *AQ and DN* case that if the national provisions concerning transfers of assets are, as regards the non-taxable nature of capital gains resulting from such transfers, identical to the wording of Article 4(1) of Directive 2009/133, the effects of that directive may also be invoked in the case of transactions with a purely national character. On the basis of the *Banca A* judgment, it can be concluded that it is necessary to emphasise the obligation incumbent upon the national court assessing a purely national operation to consider the existence of national provisions and give priority to them if these provisions differ from the provisions of the Directive or if the transaction, because of its character, is not even covered by the Directive's scope.

27 For these reasons, in the present case the referring court, *inter alia* after taking into account the aforementioned judgments by the Court, also finds it necessary to obtain an answer to the question whether it is possible in any case to invoke the

effects of Article 4(1) in conjunction with Article 9 of Directive 2009/133 (in the event that the Court answers the first question in the affirmative) in relation to a transaction carried out between companies established in Slovakia (i.e. in the absence of a cross-border element), given that the profit from this transaction is subject, in accordance with domestic law, to a payment with the effects of a direct tax (special levy), but is not subject to income tax (Paragraph 17d of the Law on Income Tax).

28 The ambiguities regarding the interpretation of Community law arising in this manner prompted the Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) to refer the above questions for a preliminary ruling.

29 The Najvyšší správny súd Slovenskej republiky (Supreme Administrative Court of the Slovak Republic) notes that in the case at hand it is acting as a court of cassation against whose rulings there is no judicial remedy pursuant to Paragraph 438(1) of the správny súdny poriadok (Code of Judicial and Administrative Procedure).

30 [reference to Article 267(3) TFEU] […]

[formal and procedural aspects of the staying of the proceedings] […]

31 […]

32 […]

33 [issues arising under national law pertaining to the right to judicial protection] […]

34 […]

[information on legal remedies] […]