VAKSTUDIE

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domestic and foreign non-profit organizations; the effect of the condition of reciprocity established in the law as prerequisite for granting the exemption to foreign non-profits; the function of domestic non-profits as carrying out State responsibilities; and the severe budgetary impact that an extension of the exemption may have, given the hard economic situation of the country, were all rejected by the Court.

No Opinion of the Advocate General was issued on this case.

Following the judgment, Greece has amended its legislation to grant the same tax treatment to non-profit organizations established in other EU/EEA countries, abolishing the condition of reciprocity.

Court of Justice of the European Union, 4 May 2017, no. C-98/16

ARRÊT DE LA COUR (septième chambre)

4 mai 2017[1]

«Manquement d'État – Fiscalité – Libre circulation des capitaux – Article 63 TFUE – Article 40 de l'accord EEE – Droits de succession – Legs en faveur d'organismes sans but lucratif – Application d'un taux préférentiel aux organismes qui existent ou sont légalement constitués en Grèce ainsi qu'aux organismes étrangers similaires sous réserve de réciprocité – Différence de traitement – Restriction – Justification»

Dans l'affaire C-98/16,

ayant pour objet un recours en manquement au titre de l'article 258 TFUE, introduit le 17 février 2016,

Commission européenne, représentée par MM. W. Roels et D. Triantafyllou, en qualité d'agents, partie requérante,

contre

République hellénique, représentée par Mmes M. Tassopoulou et V. Karra, en qualité d'agents, partie défenderesse,

LA COUR (septième chambre),

composée de Mme A. Prechal, président de chambre, MM. A. Rosas (rapporteur) et E. Jarašiūnas, juges,

avocat général: Mme J. Kokott,

greffier: M. A. Calot Escobar,

vu la procédure écrite,

vu la décision prise, l'avocat général entendu, de juger l'affaire sans conclusions,

rend le présent

Arrêt

1. Par sa requête, la Commission européenne demande à la Cour de constater que, en adoptant et en maintenant en vigueur une législation qui prévoit un taux préférentiel des droits de succession pour les legs effectués en faveur d'organismes sans but lucratif qui sont établis dans d'autres États membres de l'Union européenne ou de l'Espace économique européen (EEE) sous réserve de réciprocité, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 63 TFUE et de l'article 40 de l'accord sur l'Espace économique européen, du 2 mai 1992 (*JO* 1994, L 1, p. 3, ci-après l' 'accord EEE').

Le cadre juridique

2. L'article 25, paragraphe 3, du code grec des droits de succession prévoit:

'Les acquisitions sont soumises à une imposition distincte, conformément aux dispositions du paragraphe 5 de l'article 29, dès lors que les bénéficiaires sont:

[…]

les personnes morales sans but lucratif, qui existent ou sont légalement constituées en Grèce, ainsi que les personnes morales étrangères similaires sous réserve de réciprocité et les biens visés à l'article 96 de la loi d'urgence no 2039/1939 (FEK A' 455), dès lors qu'ils poursuivent de manière avérée

1 Langue de procédure: le grec.

réserve de réciprocité, la République hellénique a manqué aux obligations qui lui incombent en vertu de l'article 63 TFUE et de l'article 40 de l'accord sur l'Espace économique européen, du 2 mai 1992.

2) La République hellénique est condamnée aux dépens.

[Signatures]

Comments

Analysis

Background

This is not the first time that provisions of the Greek Inheritance Tax Code (Law 2961/2001) have been the subject of a judgment of the CJ. Only recently, by Law 4474/2017 (Published in the OJ of the Hellenic Republic Folio A, n. 80 of 7 June 2017), did the Hellenic Republic comply with the judgment of the Court in case CJ 26 May 2016, C-244/15 *Commission v Greece*, where it was found that the provisions of the Inheritance Tax Code providing for a tax exemption from inheritance tax on the acquisition of a first residential property only for heirs who are Greek residents was in breach of the free movement of capital (for a commentary on this case, see K. Perrou, *Commission v Greece. Greek inheritance tax exemption is discriminatory, Court of Justice, H&I* 2016/8.16). In the subject case C-98/16, a different provision is under scrutiny: the provision concerning the tax rate applicable to bequests on non-profit organizations. Under the Greek Inheritance Tax Code, non-profit organizations are subject to a special tax treatment: they are taxed at a flat rate of 0.5%; this is a final taxation.

This tax treatment is reserved (i) for non-profit organizations that exist or are formed in Greece, and (ii) for similar foreign non-profits, under the condition of reciprocity (Article 25(3)(b) in combination with Article 29(5)(b) of the Inheritance Tax Code). The provision does not further distinguish between the foreign non-profits between EU/EEA ones and third-country ones. Furthermore, it does not contain any differentiation according to the residence of such non-profits; the reference to 'existence' or 'formation' in Greece refers to the fact that a non-profit is legitimately present or lawfully formed in Greece, according to the Greek legislation.

In its correspondence with the Greek Government, the Commission maintained that the Greek legislation has the effect of reducing the value of the property bequeathed to the foreign comparable non-profit entities that are established in another EU/EEA State that does not grant a reciprocal preferential tax treatment to Greek non-profit organisations. According to the Commission, such a reduction in the value of an inheritance entails a restriction on the free movement of capital, which cannot be justified and is contrary to Article 63 TFEU and Article 40 EEA Agreement (See European Commission - Press release of 26 March 2015 'Taxation: Commission refers Greece to Court regarding the inheritance tax treatment of bequests to non-profit organizations', IP/15/4674, available at https://europa.eu/rapid/press-release_IP-15-4674_EN.htm).

A number of issues arise from this case. First of all, it is interesting that the Commission, although invoking Article 63 in its entirety, it has limited the infringement procedure to non-profit organizations that are resident in the EU (and EEA) countries, without any reference to non-profits in third countries. A second issue that is worthy of mention is the question of comparability and how this is established in the present case. A third issue that is dealt with is the concept of restriction in the present case.

Furthermore, the issue of whether reciprocity in the tax treatment of Greek non-profits in the foreign country can be a prerequisite for the application of the lower tax rate for bequests to foreign non-profits is discussed. Another issue concerns the argument put forward by the Greek Government that the Greek non-profits perform social policy functions that would otherwise be performed by the State. One last issue that is worth discussing is the request by the Greek Government that the Court should review its position on the argument that is often invoked by governments regarding the loss of tax revenue and adapt its position to the current economic situation.

These issues will be discussed in the following sections.

The scope of the infringement procedure: are third countries covered?

According to established case law of the Court, inheritances are covered by the free movement of capital, given that they are included in the definition of capital movements found in the nomenclature of Annex I of the (now repealed) Capital Movements Directive (Council Directive 88/361/EEC of 24 June 1988 for the implementation of Art. 67 of the Treaty, OJ L 178, p. 5) (see para. 26 of the judgment, with further references to case law). Not surprisingly, the present case was judged according to the free movement of capital. As mentioned above, the infringement procedure, and hence the decision as well, specifically addresses the case of non-profits established in other EU/EEA States. It does not deal with the case of non-profits established in third countries. However, the free movement of capital and Article 63 TFEU that was found applicable in this case apply not only to capital movements within the EU but also to capital movements between EU Member States and third States. The silence raises some questions: is the judgment automatically applicable to third-country non-profit organizations, as well, or should different considerations apply in the latter case?

As far as the application of the free movement of capital vis-à-vis third countries is concerned, Article 64(1) TFEU provides that any restrictions that existed on 31 December 1993 under national or Union law that were adopted in respect of, inter alia, the movement of capital to or from third countries, shall continue to apply and they are not abolished according to Article 63 TFEU. The provision under scrutiny, Article 25(3)(b) of the Greek Inheritance Tax Code, is identical, as far as its personal scope of application is concerned, to the provision of Article 25(1)(b) of the legislative decree 118/1973, on inheritance tax; this latter piece of legislation was codified, according to the special procedure provided for in Article 76(6) of the Greek Constitution, into Law 2961/2001, which is the currently in force Inheritance Tax Code. The procedure for the Codification, according to the Greek Constitution, takes into account and codifies into one piece of legislation existing provisions that may be found in multiple laws; if the codifying provisions has an identical wording with the codified one, this means that the provision continues to apply as it stood before the Codification; differences in the wording adopted during the Codification have the meaning that the codified provision is repealed and replaced by the new one (see in detail J. Photopoulos, Inheritance & Gift Taxation (Φορολογία Κληρονομιών, Δωρεών &Γονικών Παροχών) (2013), at p. 933-934 (in Greek)). Until 2010, the provisions before and after the 2001 Codification were identical; in 2010 the final tax of 0.5% was introduced for this category of taxpayers (by Law 3842/2010) but the personal scope of application of the provision was not altered and the condition of reciprocity for foreign non-profit organizations was also maintained. Therefore, the reciprocity condition which can be seen as a restriction to the free movement of capital can be maintained vis-à-vis third countries, according to Article 64(1) TFEU, as it is a restriction that existed on 31 December 1993.

The issue of comparability: when the applicable legislation treats domestic and foreign non-profits similarly

The issue of comparability of the foreign non-profit with a domestic non-profit was another issue that was discussed in the Court's judgment. Although the Greek Government argued that the foreign non-profits are not comparable with the domestic one, it did not bring any evidence forward on how and why the two are not comparable. It was therefore easy for the Court to conclude that since the Greek inheritance tax legislation treats both domestic and EU/EEA non-profits in the same way in all aspects but one, the tax rate, comparability is already established by domestic legislation.

Indeed, it is an established approach in the Court's case law that comparability is established where national legislation places the domestic and the cross-border cases on the same footing in all aspects but the granting of a tax advantage. This has been the case since the 1986 *Avoir Fiscal* judgment of the Court (28 January 1986, Case 270/83), although from a host State perspective, rather than a home State perspective, which applies to the present case; see para. 20 of the *Avoir Fiscal* judgment, where it was stated, in broad lines, that since the rules at issue place a purely domestic case and a cross-border case on the same footing for the purposes of profit taxation, those rules cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation. In the present case, the Court only referred to the judgment in the *Welte* case (CJ 17 October 2013, C-181/12 *Welte*, paragraph 51), with further references to the case law of the Court); (see paragraph 40 of the judgment) the *Welte* reasoning is applied here by analogy, as in that case the difference in the treatment did not concern the applicable tax rate but the application of a tax-free allowance. As explained, this reflects and reaffirms a well-established standard by which to judge comparability.

Restriction or discrimination?

On the issue of whether the Greek legislation creates a restriction of the free movement of capital, the Commission argued that a measure that results in diminishing the value of the bequests to EU/EEA non-profits, as compared to bequests to Greek non-profits, which are not running this risk, constitutes a restriction. It is true that, so far, the Court has had the chance, in multiple cases, to rule that a measure that results in lowering the value of the inheritance in cross-border cases constitutes a restriction of the free movement of capital (the judgment refers to *Mattner* (ECJ 22 April 2010, C-510/08 and *Commission v Greece* (C-244/15, para. 30). More specifically, the effect of denying the application of a lower tax rate, resulting in diminishing the value of the inheritance (or gift) in the cross-border case, has also been dealt by the Court in previous cases (*Welte* (C-181/12), *Commission v Spain* (C-127/12) and *Commission v Greece* (C-244/15), see para. 31 of the judgment).

In this environment, it was already difficult for the Greek government to argue that there is no restriction. The Court acknowledged summarily that there is a restriction, (paras. 34-35) in the sense that a Greek resident would be dissuaded from naming as heir a non-profit that is established in another EU/EEA country, where there is no reciprocity in the tax treatment. This part is not very well founded though, as it can only be understood as presuming that the Greek resident is dissuaded because the taxation in Greece would allow less money to flow to the non-profit and therefore lower the impact of the bequest. This is not very convincing.

In that regard, the Greek Government put forward a three-prong argument (para.17). First, it argued that it is not evident that a person's will can and will be affected by the applicable tax regime of the non-profit organization to which the bequest is made. Indeed, this is not an investment decision where the tax regime would be crucial to the determination of the return of the investment, creating an obstacle that constitutes restriction; it appears to be a far-fetched assumption. Second, it argued that the applicable tax rate is not an element that plays a role in the selection of the heir by the testator. Indeed, in the selection of a non-profit, to which a person wishes to make a bequest by way of inheritance, other considerations play the significant role, such as, for example, the aim and purpose of the non-profit or its area of activity, but not the applicable tax rate on the bequests. Third, the heir is in any case free to accept or deny the bequest, and hence not be burdened with the tax. This part of the argument put forward by the Greek government, however, does not seem very convincing.

These arguments were not discussed by the Court. It seems that there was no need to discuss them, as the case was in effect decided on the basis of discrimination (in paras. 36 et sec. the Court discusses the possible justifications of discrimination under Art. 65(1)(a) TFEU in conjunction with Art. 65(3) TFEU) rather than that of the restriction. Indeed, despite the acknowledgment by the Court that there is a restriction of the free movement of capital, the analysis of the Court focused on the issue of discrimination (compare the comments by V. Dafnomilis, in V.I. Dafnomilis, *European Commission v. Hellenic Republic (Case C-98/16): The Third Act of the Greek Tax Tragedy in Europe*, 57 Eur. Taxn. 9 (2017), Journals IBFD, at section 4.2). The result of the combined effect of Articles 65(1)(a) and 65(3) TFEU, is that any discrimination cannot be arbitrary and that it can only be justified in cases where there is lack of comparability of the two cases or because of an overriding reason in the public interest (see para. 37 of the judgment).

The condition of reciprocity: can it justify exceptions to the principle of non-discrimination?

The Greek Government tried to defend the reciprocity condition by pointing to the adverse economic effects that extending the preferential tax regime to all EUU/EEA non-profits would have. It linked it with the loss of tax revenue as possible justification of the different treatment.

In particular, the Greek government argued that it would suffer an unjustified loss of revenue if it were to expand the lower tax rate to all EU/EEA non-profits that are established in States that do not provide a corresponding tax treatment to Greek non-profits. It supported that maintaining the condition of reciprocity was important in order to avoid this unjustified loss of revenue (see para. 46 of the judgment).

The Commission, on the other hand, submitted that the condition of reciprocity is not accepted under EU law, as a valid reason for a State not to honour its treaty obligations (see para. 46 of the judgment). The Commission refers, in particular, to the *Avoir Fiscal* case in order to support that the rights conferred by Article 63 TFEU are unconditional and cannot be made conditional upon a reciprocal tax treatment in another Member State. In the words of the Court (see para. 26 of the *Avoir Fiscal* judgment (Case 270/83)) 'the rights conferred by Article 52 of the Treaty are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State. In particular, that article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States.'

The Court did not discuss the condition of reciprocity as a stand-alone argument. This corresponds to the way the Greek Government put forward the relevant argument (see, however, a different explanation by V. Dafnomilis, ibid, at section 4.3): since it was linked with the loss of revenue, the Court, accordingly, only mentioned it in its analysis of the loss of revenue as a possible justification (see para. 46 of the judgment).

Performing State functions: does it justify discrimination?

Another argument put forward by the Greek government was that the EU/EEA non-profits are not comparable to Greek non-profits, as the Greek ones perform certain functions in the Greek society that is of increased importance when one takes into account the dire economic situation of the Greek State, that has resulted in a drastic limitation of the welfare state. The Commission pointed out that according to the Court's case law, the fact that certain domestic bodies perform State functions that relieve the State from its obligation cannot justify the granting of tax benefits in a discriminatory way, only to those bodies (see the judgment in the case CJ 10 February 2011, C-25/10 *Missionswerk Werner*, para. 31).

The Court assessed this argument in the context of comparability (see paras. 41–44 of the judgment). It referred to the cases of *Persche* (ECJ 27 January 2009, C-318/07 *Persche*) and *Missionswerk Werner Heukelbach* (CJ 10 February 2011, C-25/10) to point out that the fact that some organizations relieve the State from certain of its obligations, while it can justify the granting of certain advantages to those organizations, it cannot justify discrimination against similar organizations that are established in other EU Member States (see paras. 43 and 44 of the judgment with further references to paras. 44-46 of the *Persche*case and paras. 30-31 of the *Missionswerk Werner Heukelbach* case).

Loss of tax revenue as a justification: should it be revised under the current economic circumstances in Greece?

The Greek government submitted that the risk of loss of revenue is an overriding reason in the public interest that is capable of justifying the different treatment between Greek non-profits and similar EU/EEA non-profits that are not covered by the condition of reciprocity. In addition, the Greek government, apparently aware of the position of the Court on the loss of revenue as a possible justification, submitted that it is time that the Court revised its position, under the recent negative economic developments that affect all EU Member States (see paras. 23-24 of the judgment).

The Court, however, only referred to its established case law, according to which the need to prevent the reduction of tax revenues is neither among the objectives stated in Article 65 TFEU nor an overriding reason in the public interest capable of justifying a restriction on a freedom instituted by the Treaty (see para. 47 of the judgment with further references to the court's case law; see, indicatively, the judgments in the cases *Missionswerk Werner*, at para. 31 and *Persche*, at para. 46). Therefore, the changing economic circumstances and possible financial difficulties of the States cannot justify a deviation from the treaties and the protection of the fundamental freedoms.

Concluding remarks- latest developments

This case is another one in the line of cases that deal with the taxation of cross-border donations and charities. The development of this line of case law shows the creation of an EU/EEA wide area where, in principle, any measure that affects the value of the donation or bequest to the non-profit organization is seen as a restriction to the free movement of capital that has to be justified by an overriding reason in the public interest. It has to be pointed out, however, that the cases of third countries is not automatically the same as that of EU/EEA non-profits.

Following the Court's judgment and in order to comply with it, the Greek Parliament adopted legislation (Article 25(3)(b) of the Greek Inheritance Tax Code which was amended by article 15 of Law 4484/2017 (published in the OJ, Folio A, n. 110, 01-08-2017)) that assimilates, from now on, the tax treatment of Greek non-profits with similar non-profits established in other EU/EEA countries; the condition of reciprocity is still maintained but it only applies to similar non-profits established in third countries.

Katerina Perrou

Statement by Commissioner Vestager on changes made by Cyprus to national legislation on tax treatment of financing companies (H&I 2017/275)

Vestager welcomes that the Cypriot authorities have introduced changes to their national legislation to make it more stringent as regards the tax treatment of financing companies.

European Commission, 21 July 2017, no. STATEMENT/17/2110

European Commission · Statement

Statement by Commissioner Vestager on changes made by Cyprus to national legislation on tax treatment of financing companies

Brussels, 21 July 2017

Commissioner Margrethe Vestager, in charge of competition policy, said:

"I welcome that the Cypriot authorities have introduced changes to their national legislation to make itmore stringent as regards the tax treatment of financing companies.

Financing companies provide financial services intra-group and their profit is the remuneration for theirfinancing activities. This remuneration has to be in line with the arm's length principle.

This issue has been one of our key areas of focus since we started looking into the tax ruling practicesof Member States. The Working Paper we published as part of this review in June 2016 indicated concerns that some tax rulings for financing companies endorse very low margins and a low taxable base.

My services have been in constructive contact with the Cypriot authorities on the issue. I welcome thechanges to the Cypriot legislation, which aim to address concerns raised. They also follow similar changes introduced by Luxembourg in January 2017 to their national legislation.

These are very positive developments. In order to achieve that all companies pay their fair share oftax, we also need Member States to be on board and review their national rules and practice.

At the same time, the Commission cannot prejudge any case-by-case assessment of tax rulings underEU State aid rules and we will of course stay vigilant in monitoring the implementation of the amendments."