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Preface

The European Court of Justice (ECJ) has had to deal with more and more cases concerning direct taxation in the past years. This growing amount of case law is driven by the increased willingness of national courts to approach the ECJ through preliminary rulings as well as by the fact that the European Commission seems to be more and more willing to initiate infringement procedures against EU Member States. Furthermore, in addition to the provisions on the fundamental freedoms, the provisions on State aid have recently gained more relevance and have triggered additional case law pertinent to direct taxation. As all these cases are of great interest for academics as well as practitioners, they need to be analysed carefully.

From 10 to 12 November 2011 the conference "Recent and Pending Cases at the ECJ on Direct Taxation" took place in Vienna. A great number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the ECJ were presented by experts of the respective countries. The cases involved interpretation issues on the fundamental freedoms, the Merger and the Parent-Subsidiary Directives as well as the provisions on State aid. The national reporters provided insights into the national as well as the European background of the cases. These presentations were the basis for further lively discussions among the international participants. In particular, at the heart of the discussions at the conference were the several pending cases related to exit taxes on companies. Possible consequences of these cases, the future ECJ decisions and future trends in the ECJ case law were discussed and analysed in detail. The results of the conference are published in this book.

The conference would not have been possible without the support of "PricewaterhouseCoopers" and the City of Vienna to whom we would like to express our thanks. In addition, we would like to warmly thank the authors who contributed to the conference by presenting cases from their countries and getting actively involved in the discussions. Furthermore, they supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for its co-operation and the quick realization of this book's publication. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to Renée Pestuka for the smooth organization of the conference, to Margaret Nettinga, who edited and polished the texts of the authors, and to Karoline Spies, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

Michael Lang — *Pasquale Pistone* — *Josef Schuch* — *Claus Staringer* — *Alfred Storck*

Content

Belgium I: Preliminary Rulings Filed by Belgian Courts

Luc De Broe[1]

[1] The author wishes to thank Ellen Vandingenen and Thomas Gernay, assistants at the Institute of Tax Law of KU Leuven (Belgium), for their valuable work in the preparation of this article.

Book value of chips production machine:	1,000
Fair market value of chips production machine:	1,500
Unrealized profit on machine:	500
Remaining life span of machine:	10 years
Residual value of machine:	nil
Taxable base before depreciation of machine:	600
Corporate tax rate:	30%

Exemption method:

Taxation in exit state (NL) after emigration during a period of ten years:

Worldwide income: 600 -/- (1,000 : 10)	500
Exemption: 600 -/- (1,500 : 10)	450 -/-
Taxable base	50
Taxes due: 50 x 30% =	15

Taxation in host state (UK) after emigration during a period of ten years:

Taxation on worldwide income: 600 -/- (1,500 : 10)] x 30% =	135

Tax Exemption method:

Taxation in exit state (NL) after emigration during a period of ten years:

Taxation on worldwide income: [600 -/- (1,000 : 10)] x 30% =	150
Tax exemption: [600 -/- (1,500 : 10)] x 30% =	135 -/-
Taxes due: [(1,500 -/- 1,000) : 10] x 30% =	15

Taxation in host state (UK) after emigration during a period of ten years:

Taxation on worldwide income: 600 -/- (1,500 : 10)] x 30% =	135

From this example it is clear that, under a residence-based compartmentalization system, the transfer of the BV's place of effective management does create any additional tax burden for the corporation. If it had remained a tax resident of the Netherlands, it would also have paid an amount of 150 every year. In this way, the interests of the exit state, the Netherlands, *and* the corporation, the BV, are satisfied in a proportional way. As indicated, this system can be applied not only by the Netherlands, but it can be introduced widely throughout Europe and even beyond. Its introduction will strengthen the establishment of the internal market.

Portugal: The *Foggia* (C-126/10) and *Amorim* (C-38/11) Cases

Ana Paula Dourado

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I. The *Foggia* case (C-126/10): Interpretation of "valid commercial reasons" in the Merger Directive

I.1. The facts and issues

Last year, Foggia was pending and the facts of the case were described in detail in the Portuguese report published in the "ECJ- Recent Developments in Direct Taxation 2010".[1] The Court of Justice of the European Union (hereinafter, the ECJ) decided the case on 10 November 2011, without an Opinion of the Advocate General as it was not considered to be necessary. As had been argued in the aforementioned report, even though the facts concerned a purely domestic situation, the ECJ was competent to decide on the interpretation of the expression "valid commercial reasons", under ex Art. 11 (1)(a) of the Merger Directive, because the domestic legislation uses an EU law concept.[2] Even though the issue of competence was clear, it is doubtful whether the meaning of "valid commercial reasons" itself was clarified by the ECJ to a satisfactory extent. The fact that the ECJ dedicates 15 paragraphs to the analysis of the "jurisdiction of the Court and the admissibility of the reference for a preliminary ruling" and 22 to the "questions referred to the Court" leads me to the conclusion that the case could or even should have been discussed by the Advocate General.

In the next paragraphs I select the facts that are a condition for the reader to understand the subsequent analysis and commentaries to the case, since the detailed facts can be revisited in the above-mentioned Portuguese report.

It should be recalled that in 2003 three Portuguese holding corporations of a Portuguese bank merged by incorporation into a fourth Portuguese holding company (Foggia, SGPS, SA). The corporations involved in the reorganization were all incorporated under the legal form of a holding company ("*Sociedade Gestora de Participações Sociais*" or "*SGPS*"), meaning that the activities pursued by those companies are limited by definition to the holding of shareholdings in other corporations. The merger by incorporation benefited from the special tax neutrality established under Portuguese tax law and framed on the basis of the EU Merger Directive, where one of the conditions is that the reorganization is based on "valid commercial reasons". Moreover, Portuguese tax law allows, within a merger by incorporation, losses of the incorporated corporation to be carried-forward and deducted by the incorporating corporation as long as the merger has "valid commercial reasons".

Whereas the taxpayer can automatically benefit from the special tax neutrality regime if it complies with the legal conditions and declares it in its accounts and tax returns, the carry-forward of losses by the incorporating company requires a

[1] Ana Paula Dourado/José Almeida Fernandes, Portugal: Pending Cases and Other Infringement Procedures, in Lang/Pistone/Schuch/Staringer/Storck (eds.) *ECJ – Recent Developments in Direct Taxation 2010* (2011) pp. 205-206.

[2] Ana Paula Dourado/José Almeida Fernandes, Portugal, in Lang/Pistone/Schuch/Staringer/Storck (eds.) *ECJ – Recent Developments in Direct Taxation 2010*, pp. 206-207.

prior authorization by the Ministry of Finance following a special request made by the taxpayer. Both regimes and conditions apply in a non-discriminatory manner to domestic and EU cross-border situations.

According to the facts, one of the holding companies incorporated into Foggia had losses of circa EUR 3.5 million that it could carry-forward. Foggia duly made the request for the transfer of losses and to be granted the right to deduct the losses of the incorporated corporation and it provided evidence that the restructuring benefited from the application of the special tax neutrality regime. The Ministry of Finance denied the authorization of the transfer of losses, arguing that the merger was not based on "valid commercial reasons" for the incorporating corporation.

I.2. Analysis

I.2.1. The jurisdiction of the ECJ and the admissibility of the reference for a preliminary ruling

In the Portuguese report of 2010, it was stated that even if the *Foggia* case dealt with a purely domestic reorganization, the ECJ was competent to judge it. In fact, the ECJ has consistently maintained since the *Leur-Bloem* case[3] that it considered itself competent to rule on the merely domestic issues where the case involved the interpretation of a concept in an EU law instrument that might be relevant for cross-border situations and where a uniform interpretation was required across the European Union.

The ECJ in *Foggia* confirms that case law in its paragraphs 19-21: the ECJ holds that as it is undisputed that the main proceedings concern a provision of national law that applies within a purely internal context, it results from the documents before the Court that that provision as well as other merger corporate taxation rules apply identically to national and cross-border restructuring situations.[4] The Court therefore concluded that it has jurisdiction to answer the questions referred by the Portuguese Supreme Administrative Court on the interpretation of (ex) Art. 11 (1) (a) of the Merger Directive.

According to the ECJ, "the rule that enables the benefit of that taxation system to be refused when there are no valid commercial reasons, set out in Article 11 (1) (a) of Directive 90/434, is to be applied also in purely internal situations". Quoting *Leur-Bloem*, *Andersen og Jensen* and *Zwijnenburg*,[5] the ECJ added that it is settled case law that, "where, in regulating purely internal situations, domestic legislation

[3] ECJ 17 July 1997, C-28/95, *Leur-Bloem* [1997] ECR I-4161, paras. 16-34.
[4] ECJ 10 November 2011, C-126/10, *Foggia*, paras. 19-20.
[5] ECJ 17 July 1997, C-28/95, *Leur-Bloem* [1997] ECR I-4161; 15 January 2002, C-43/00 *Andersen og Jenen* [2002] ECR I-379, para. 18; 20 May 2010,C-352/08, *Modehuis A. Zwijnenburg* [2010] ECR I 4303. On the latter case, see Dennis Weber, The Netherlands II: The Zwijnenburg, X and Passenheim van-Schoot Cases, in Lang/Pistone/Schuch/Staringer (eds.) *ECJ – Recent Developments in Direct Taxation 2008* (2008) pp.305-308.

adopts the same solutions as those adopted in EU Law in order, in particular, to avoid discrimination against nationals of the Member State in question or any distortion of competition, it is clearly in the European Union's interest that, in order to forestall future differences of interpretation, provisions or concepts taken from EU Law should be interpreted uniformly, irrespective of the circumstances in which they are to apply".[6]

The tricky problem in the *Foggia* case concerned the fact that the Portuguese legislation used the expression "valid commercial reasons" in the transfer of losses provision, whereas the Merger Directive uses it in an anti-abuse provision which may be used to justify denial of the tax neutrality regime. It is contended here that the anti-abuse provision is also applicable to the restriction of the transfer of losses (foreseen in Art. 6 of the Merger Directive), since, according to ex Art. 11 (1) (a) "a Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares: (a) has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that the operation is not carried out for valid economic reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives." Art. 6 is found in Chapter II and therefore it is covered by ex Art. 11 (1) (a) of the Merger Directive.

However, it can still be claimed that since Art. 6 of the Directive does not require that a Member State allow the transfer of losses of a transferring company to the receiving company, it is not an unconditional and precise rule and in that respect Art. 11 (1) (a) is not applicable. In fact, Art. 6 only requires a non-discriminatory treatment in case a Member State "would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes" and therefore only has partial direct effect. In that case, the Member State has to extend the takeover of losses to a cross-border situation where the receiving company's permanent establishment is situated within its territory. Thus, Art. 6 contains an option for the Member States[7] and once the option is exercised, the provision has direct effect, because the former cannot be exercised in a discriminatory manner.

The issue is then whether, once the Member State has exercised its option to allow for the transfer of losses and has done it without discriminating against cross-

[6] ECJ 10 November 2011, C-126/10, *Foggia*, para. 21.
[7] Ana Paula Dourado, The relationship between primary and secondary EU law in tax law: the legitimacy of different interpretation criteria applied to EU and national legal sources, in Dennis Weber (ed.), *Traditional and Alternative Routes to European Tax Integration* (2010) pp. 171 et seq.; Georg Kofler, The Relationship between the Fundamental Freedoms and Directives in the Area of Direct Taxation, *Diritto e Pratica Tributaria Internazionale* 2009, n. 2, pp. 474-475.

border restructurings, it has discretion to add other conditions. It could then be argued that the Portuguese legislation could foresee that the transfer of losses is to be refused both in domestic and cross-border situations if there are no valid commercial reasons and that would be a national law condition and accordingly a concept of domestic law, out of the scope of the ECJ's jurisdiction.

In this line of reasoning, the Portuguese government claimed "that the reference for a preliminary ruling is inadmissible because there is no connection between the interpretation requested of Article 11 (1) (a) of Directive 90/434, the wording of which is reproduced in Article 67 (10) of the CIRC, and the subject-matter of the main proceedings, which concerns Article 69 (2) of that code, relating to the transferability of the tax losses referred to in Article 6 of that directive".[8]

What the Portuguese government did not add is that the requirement on "valid commercial reasons" was introduced upon the implementation of the Merger Directive into Portuguese tax law and covers both the entitlement to the special tax neutrality regime for reorganizations and for the transfer of losses.

The ECJ indirectly mentions this coincidence, since it is aware that the condition of "valid commercial reasons" is used in the Portuguese legislation both for the purposes of the transfer of losses and for the purpose of the tax neutrality regime. In fact, the ECJ begins by arguing that "it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case, both the need of a preliminary ruling in order to enable it to deliver judgment and the relevance of the question which it submits to the Court".[9]And it adds, that "[i]n the present case it cannot be validly claimed that the interpretation of Directive 90/434 has no connection with the fact or subject-matter of the dispute in the main proceedings or that the problem is hypothetical, since the national court's reference is intended precisely to permit that court to answer a question concerning the compatibility of the Ministry of Finance's position regarding the concept of 'valid commercial reasons' with the same concept referred to in Article 11 (1) (a) of that directive".[10] It results from the quoted paragraphs that the ECJ contends that the concept used in the losses provision in the Portuguese CIRC is the same as in Art. 11 (1) (a) of the Directive.

It would not make sense if the ECJ were to interpret the meaning of valid commercial reasons for the purposes of the special tax neutrality regime and the national authorities were to interpret the meaning of the same expression for the purposes of the transfer of losses issues, because, if they came to different conclusions the coherence of the mergers neutrality system would be jeopardized. Assuming that the ECJ concludes that there are no valid commercial reasons for a certain restructuring (an EU concept subject to interpretation by the ECJ) and the Portuguese authorities conclude that there are valid commercial reasons for the carry-forward of losses in an identical restructuring (arguably a national concept as long as it is not applied in a discriminatory manner), a puzzling result would be achieved: the carry-forward of losses would be admissible in a cross-border operation, whereas there would be no deferral to tax the resulting capital gains, because there had been no valid commercial reasons for the operation .

In *Foggia*, it was the other way round. The transaction benefited from the special tax neutrality regime for reorganizations but that did not imply being granted authorization for the transfer of losses, as the latter arguably had more additional and stringent requirements. However, if the procedure for being granted the neutrality regime had different requirements from the one regarding the transfer of losses, the material requirement is the same: the "valid commercial reasons", which fulfil an anti-abuse purpose. Moreover, the transfer of losses assures equally a tax neutrality regime, and the reason for not being adopted in some states is that it may encourage abusive practices (restructuring purely motivated by tax reasons) to a greater extent than the tax-neutral regime deferring taxation of the capital gains.

I.2.2. The meaning of "valid commercial reasons"

The ECJ is very often criticized for its (at least, relative) inconsistency regarding the analysis of the abuse principle and for being vague and for refraining from deepening the concept of abuse.[11]

One example is the relationship between *Halifax* and *Part Service*, where it was contended that the ECJ in *Part Service* did not clarify the meaning of abuse in *Halifax*.[12]

In *Foggia*, to some extent surprisingly, the ECJ goes deeper and clarifies the meaning of "tax evasion or avoidance as [the] principal objective or as one of [the] principal objectives" of the restructuring operation and of "valid commercial reason".

Firstly, it clarifies the concept negatively: Referring to its previous case law, namely to *Leur-Bloem*, the ECJ confirmed that "with regard to 'valid commercial reasons'... the concept involves more than the attainment of a purely fiscal advantage".[13] The Court seems to go beyond *Leur-Bloem* by concluding that "predomi-

8 ECJ 10 November 2011, C-126/10, *Foggia*, para. 24.
9 ECJ 10 November 2011, C-126/10, *Foggia*, para. 25.
10 ECJ 10 November 2011, C-126/10, *Foggia*, para. 27.

11 See, e.g. Anthony Arnull, What is a General Principle of EU Law,in Rita de la Feria/Stefan Vogenauer (eds.) *Prohibition of Abuse of Law, A New General Principle of EU* Law?(2011) pp. 7-23; Judith Freedman, The Anatomy of Tax Avoidance Counteraction, in Rita de la Feria/Stefan Vogenauer (eds.) *Prohibition of Abuse of Law*, pp. 365 et seq.; Pasquale Pistone, Abuse of Law in the Context of Indirect Taxation, in Rita de la Feria/Stefan Vogenauer (eds.) *Prohibition of Abuse of Law*, pp. 391-393; Frans Vanistendael, Cadbury Schweppes and Abuse from an EU Tax Law Perspective, in Rita de la Feria/Stefan Vogenauer (eds.) *Prohibition of Abuse of Law*, pp. 407-425.
12 ECJ 21 February 2006, C-255/02, *Halifax* [2006] ECR I-1609; 21 February 2006, C-425/06, Part Service [2008] ECR I-897, para. 62; Pasquale Pistone in Rita de la Feria/Stefan Vogenauer (eds.) *Prohibition of Abuse of Law*, pp. 391-393.
13 ECJ 17 July 1997, C-28/95, *Leur-Bloem* [1997] ECR I-4161, para. 47; 10 November 2011, C-126/10, *Foggia*, para. 34.

nant" fiscal reasons can also indicate that there are no valid commercial reasons. According to the ECJ in *Foggia*, a "merger operation based on several objectives, which may also include tax considerations, can constitute a valid commercial reason provided, however, that those considerations are not predominant in the context of the proposed transaction".[14] The Court does not positively define "valid commercial reasons" but opts to negatively grant its boundaries. "Predominant" implies a quantitative assessment where there can be commercial reasons and still these will not impede an anti-abuse measure if the tax reasons prevail.

The Court seems to use an illogical grammatical structure, by identifying "purely" with "predominant", since, after making a cross-reference to *Leur-Bloem* and mentioning the "purely fiscal advantage" criterion, it concludes, by using the word "consequently" that tax considerations cannot be "predominant". It would be hard to accept that "pure" and "predominant" are synonyms, and the ECJ, like any other court, cannot misuse grammatical logical rules.

Trying to harmonize *Leur-Bloem* ("purely fiscal advantage") with *Foggia* ("predominant tax considerations") implies that an operation that is exclusively based on fiscal reasons (fiscal advantages) does not have valid commercial reasons (*Leur-Bloem*) and the same happens in respect of operations that do not have them predominantly (*Foggia*). It is contended here that it would have been clearer if the ECJ had expressly mentioned that ex Art. 11 (1) (a) allows a Member State to refuse to apply the benefits foreseen in the Merger Directive where tax evasion or tax avoidance has as the "principal objective [of the restructuring operation] or as one of its principal objectives tax evasion or tax avoidance" and in that case the operation is not considered to be "carried out for valid commercial reasons". The ECJ moreover confirms that irrebutable presumptions of tax avoidance or tax evasion are not acceptable, because they are disproportionate, and therefore "the competent national authorities may not confine themselves to applying predetermined general criteria but must subject each particular case to a general examination of the operation in question".[15]

Secondly, the ECJ examines, in a positive manner, the meaning of "valid commercial reasons" taking into account the facts submitted by the national court. In the Portuguese Supreme Court judgment, it had been argued by the Portuguese Ministry of Finance that the incorporated corporation had developed almost no activity as a holding; that it had no financial holdings and its net value was almost irrelevant when compared to that of the incorporating corporation; and that the positive effects of the merger were insignificant from the perspective of the incorporating corporation. Notwithstanding this, the Ministry of Finance conceded that the restructuring in itself (the merger by incorporation of the Portuguese banks' three holding companies into *Foggia*) had a positive effect in terms of the overall cost structure of the group (as it would allow reduction of the administrative and managing costs).

[14] ECJ 10 November 2011, C-126/10, *Foggia*, para. 35.
[15] ECJ 10 November 2011, C-126/10, *Foggia*, para. 37.

In its judgment, the ECJ takes for granted that the acquired company was no longer carrying out any management activity, no longer had financial holdings and that the acquiring company intended to take over the losses of the acquired company,[16] but it considers that these aspects are not decisive for concluding that there are no valid commercial reasons.[17] Essentially it considers that the savings in terms of overall cost structure of the group cannot constitute a "valid commercial reason". In fact, the ECJ finds that the fact that "the losses are very substantial and that their origin has not been clearly determined may constitute an indicator of tax evasion or avoidance".[18] And it adds that the saving made by the group in terms of cost structure is quite marginal[19] and "is inherent in any operation of merger by acquisition as this implies, by definition, a simplification of the structure of the group".[20]

The refusal by the Portuguese tax administration to allow the transfer of losses also seems to be based on the fact that the incorporating company would have no "valid commercial reasons" for merging by incorporation with a company that has nothing more than losses as its "asset". This interpretation was to some extent confirmed by the ECJ, since, according to it, the fact that the group as a whole has savings in terms of cost structure is not relevant, but in this case, the interpretation covers both the neutrality regime *stricto sensu* (deferral of tax on capital gains) and the transfer of losses.

It is doubtful whether there is evidence in the case that the incorporated corporation was somehow stripped of any assets prior to the reorganization or that the existing losses were somehow disputed or arose from questionable transactions. As was written in the last year's Portuguese report,[21] in the *Leur-Bloem* case[22] the ECJ had ruled on this pattern of issues concerning the substance requirements for the purposes of complying with the "valid commercial reasons" threshold: Absent any abusive practices being found, it resulted from *Leur-Bloem* and *Kofoed* that the fact that the incorporated corporation's "assets" are merely its losses cannot in itself mean that its merger by incorporation in another corporation has no "valid commercial reasons".[23]

Even if it is understood that the ECJ applied a more restrictive concept of valid commercial reasons in *Foggia*[24] than in *Leur-Bloem*, the national court must verify whether "the constituent elements of the presumption of tax evasion or avoidance

[16] ECJ 10 November 2011, C-126/10, *Foggia*, para. 38.
[17] ECJ 10 November 2011, C-126/10, *Foggia*, para. 39.
[18] ECJ 10 November 2011, C-126/10, *Foggia*, para. 42.
[19] ECJ 10 November 2011, C-126/10, *Foggia*, para. 47.
[20] ECJ 10 November 2011, C-126/10, *Foggia*, para. 48.
[21] Ana Paula Dourado/José Almeida Fernandes, Portugal, in Lang/Pistone/Schuch/Staringer/Storck (eds.) *ECJ – Recent Developments in Direct Taxation 2010*, p. 207.
[22] ECJ 17 July 1997, C-28/95, *Leur-Bloem* [1997] ECR I-4161, paras. 50-51.
[23] ECJ 17 July 1997, C-28/95, *Leur-Bloem* [1997] ECR I-4161, paras. 50-51; 5 July 2007, C-321/05, *Markus Kofoed* [2007] ECR I-5795, para. 38.
[24] ECJ 10 November 2011, C-126/10, *Foggia*, paras. 47-48.

... are present in the context of that [concrete] dispute":[25] i.e., it has to check whether the acquired company did not carry out any activity on the date of the merger operation, did not have any financial holdings and transferred to the acquiring company only substantial tax losses of undetermined origin. In other words, it follows from the judgment that there is still work to be done by the referring court and that it is not clear whether the contributing company in *Foggia* is entitled or not to the transfer of losses. Moreover, the ECJ does not accept that the "technical discretion" argument, raised by the domestic courts, is applied by the Portuguese tax courts to the interpretation of abuse in the Merger Directive.[26]

The issue regarding the origin of the losses has to be discussed by the Portuguese referring court, so that the taxpayer is granted the opportunity to demonstrate that despite the great amount of losses there is no tax avoidance or tax evasion purpose in the concrete case.

II. The *Amorim Energia BV* case (C-38/2011)

II.1. The facts

Amorim Energia BV (hereinafter: Amorim BV) is a Netherlands company that acquired 14.268% of shares of Galp Energia SGPS SA (a company incorporated in Portugal and resident therein for tax purposes), on 7 December 2005. Since 18 September 2006 and until 5 January 2007, Amorim Energia BV held shares in Galp Energia SGPS SA (hereinafter: Galp SA) in an amount that, although varying, always exceeded the 20% threshold. Galp SA paid dividends on 27 July 2006 and on 29 September 2006 to Amorim BV, tax on which was withheld at source. On 20 November 2006 Amorim BV claimed reimbursement of the withheld tax on the basis of discriminatory treatment. Moreover, it claimed that the dividends paid after 27 January 2007 should not be subject to withholding tax.

As described, the facts are related to domestic legislation that was in force in 2006, and according to which Amorim BV would have benefited from exemption from withholding tax if the acquisition value was not less than 20% and the holding had been maintained for an uninterrupted period of two years (conditions that corresponded to the Parent-Subsidiary Directive regime). In contrast, if the shareholder were resident in Portugal, as long as the acquisition value was not less than either 10% or EUR 20,000,000.00 and the holding had been maintained for an uninterrupted period of one year, the dividends would neither have been subject to withholding tax nor to subsequent taxation (Arts. 46 (1) and 90 (1) c) of the CIRC).

[25] ECJ 10 November 2011, C-126/10, *Foggia*, para. 52.

[26] See Ana Paula Dourado/José Almeida Fernandes, Portugal, in Lang/Pistone/Schuch/Staringer/Storck (eds.) ECJ – Recent Developments in Direct Taxation 2010, p. 206. A critical analysis of the "technical discretion" argument in Ana Paula Dourado, *O Princípio da Legalidade Fiscal, Tipicidade, conceitos jurídicos indeterminados e margem de livre apreciação* (2007) Título III, Secção II.

Moreover, in a domestic situation, it was foreseen that the tax withheld due to the fact that the minimum period of holding had not been achieved at the time of the distribution of dividends was reimbursed within three months after the annual tax return had been delivered. In the case of an EU situation – as was the case of Amorim BV in the Netherlands, receiving dividends from Portugal – the reimbursement would occur within three months after the taxpayer delivered the required proof to the tax administration.

II.2. Analysis

The case raises two sets of relevant facts: on the one hand, the different conditions for the exemption of the withholding tax which are more onerous in respect of outbound dividends in an EU situation; and, on the other hand, the different conditions for reimbursement which are also more onerous in the latter situation.

Regarding the withholding tax, it is Acte Clair that the Portuguese regime is discriminatory.[27] It was already argued in the Portuguese Report of 2010 that the ECJ should decide a case of outbound dividends (*Secilpar*) by reasoned order, and the ECJ did so. The facts in *Secilpar* in respect of the withholding tax are similar to *Amorim BV*.[28]

In *Amorim BV*, it has to be taken into account whether Art. 24 para. 3 of the Portuguese-Netherlands tax treaty will justify the Portuguese discriminatory regime, since it is foreseen in the bilateral treaty that in the case of portfolio investment (as defined in the Netherlands tax law) the Netherlands must allow a deduction from the Netherlands tax so computed for dividends that may be taxed in Portugal. The amount must be equal to the tax paid in Portugal on the items but may not exceed the amount of the reduction which would be allowed if the items of income or capital so included were the sole items of income or capital that are exempt from the Netherlands tax under Netherlands law. It has therefore to be verified if the Netherlands credit is able to neutralize the discriminatory treatment caused by the Portuguese withholding tax, in line with the ECJ decision in the *Commission vs. Spain* case.[29]

[27] See Ana Paula Dourado/José Almeida Fernandes, Portugal, in Lang/Pistone/Schuch/Staringer/Storck (eds.) *ECJ – Recent Developments in Direct Taxation 2010*, p. 209; ECJ 14 December 2006, C-170/05, *Denkavit Internationaal BV and Denkavit France SARL* [2006] ECR I-11949; 12 December 2006, C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, para. 36; 8 November 2007, C-379/05 *Amurta* [2007] ECR I-9569, para. 16; 19 November 2009,C-540/07 *Commission vs. Italy* [2009] ECR I-0000, para. 28; 3 June 2010, C-487/08, *Commission vs. Spain*; 22 November 2010, C-199/10, *Secilpar*, Sociedade Unipessoal SL (order).

[28] Ana Paula Dourado/José Almeida Fernandes, Portugal, in Lang/Pistone/Schuch/Staringer/Storck (eds.) *ECJ – Recent Developments in Direct Taxation 2010*, p. 209.

[29] ECJ 3 June 2010, C-487/08, *Commission vs. Spain*.

In fact, according to the ECJ in the latter case:

"As regards the second point, it is true that the Court has held that the possibility cannot be excluded that a Member State might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation with another Member State (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 71; *Amurta*, paragraph 79; and *Commission v Italy*, paragraph 36)... However, it is necessary for that purpose that application of such a convention should allow the effects of the difference in treatment under national legislation to be compensated for. Thus, the Court has held that the difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation (see, *Commission v Italy*, cited above, paragraph 37) ... In order to attain the objective of neutralisation, the application of the method of deduction relied on by the Kingdom of Spain should therefore enable the tax on dividends levied by that Member State to be deducted in its entirety from the tax due in the Member State of residence of the recipient company, so that if the dividends received by that company were ultimately taxed more heavily than the dividends paid to companies resident in Spain, that heavier tax burden could no longer be attributed to the Kingdom of Spain, but to the State of residence of the company receiving dividends which exercised its power to impose taxes".[30]

The ECJ notified the Portuguese court and invited the latter to clarify why it is not satisfied with *Amurta* (paras. 24-40) and *Secilpar* (paras. 30-38).[31] The Portuguese court maintained the referral and clarified that the relevant issue concerned the different conditions for reimbursement of the withheld tax. It has then to be asked whether the assessment of those different and more onerous conditions for an EU situation in comparison to a domestic situation is separate from the withholding tax issue and corresponding discriminatory treatment. It is contended here that the autonomy of the reimbursement conditions will occur in the case of holdings amounting to 20% or more, since in a domestic situation the right to reimbursement will be reached after one year, whereas in an EU situation that right will be achieved after two years. More precisely, the autonomy will occur in case the Netherlands does not neutralize the discriminatory tax withheld in Portugal, because if the Netherlands does neutralize the Portuguese withholding tax there is no right to reimbursement in Portugal.

The next step leads us to ask whether there is comparability between a resident and non-resident in respect of the withholding mechanism and corresponding reimbursement deadlines. In *Truck Center*,[32] the ECJ concluded that residents and non-residents were not comparable also because the withholding tax in the former and the latter situations was a mechanism aimed at different purposes. However, the *Truck Center* reasoning is not applicable to *Secilpar*, because in respect of outbound dividend cases, the ECJ has consistently held that when exercising its competence, the source Member State could not discriminate against non-residents (who are comparable to residents).[33] Moreover, this is an issue where the more onerous conditions are not a consequence of the application of different methods aimed at eliminating or reducing juridical double taxation (credit vs. exemption[34]), but they directly result from one single mechanism – the deadline for reimbursement of an amount unduly withheld. It is therefore contended that residents and non-residents are in a comparable situation, and that the conditions concerning reimbursement of non-residents are discriminatory, there being no valid justification (and no proportionate) similar to what the ECJ decided in *Futura*.[35]

30 ECJ 3 June 2010, C-487/08, *Commission vs. Spain*, paras. 58-60.
31 STA, 2. Secção, Case 482/10, 1 June 2011, especially paras. 3 and 4.
32 ECJ 22 December 2008, C-282/07, *Truck Center* [2008] ECR I-10767.

33 See footnote 28 above.
34 ECJ 12 December 2006, C-446/04, *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para. 36.
35 ECJ 15 May 1997, C-250/95, *Futura Participations and Singer* [1997] ECR I-2471, para. 26.