



CONFEDERATION
FISCALE
EUROPEENNE

**Opinion Statement ECJ-TF 4/2015
on the judgment of the European Court of Justice
in Case C-386/14, *Groupe Steria SCA*,
on the French “intégration fiscale”**

Prepared by the CFE ECJ Task Force

Submitted to the European Institutions in January 2016

The CFE (Confédération Fiscale Européenne) is the umbrella organisation representing the tax profession in Europe. Our members are 27 professional organisations from 21 European countries with more than 200,000 individual members. Our functions are to safeguard the professional interests of tax advisers, to assure the quality of tax services provided by tax advisers, to exchange information about national tax laws and professional law and to contribute to the coordination of tax law in Europe.

The CFE is registered in the EU Transparency Register (no. 3543183647-05).

This is an Opinion Statement prepared by the CFE ECJ Task Force¹ on Case C-386/14, in which the 2nd Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment on 2 September 2015,² following the opinion of Advocate General Kokott of 11 June 2015.³ The judgment, which has also been the object of an ECJ press release,⁴ is a further interpretation of the freedom of establishment in the context of the French “*intégration fiscale*” and clarifies that taxpayers can claim some benefits of group taxation regime even if EU law would not allow them the full benefit of such regime. It also confirms that an option granted to Member States in secondary EU legislation cannot justify a breach of the fundamental freedoms.

I. Background and Issues

1. Groupe Steria SCA (henceforth Steria) is a French company with holdings in France and also in other EU Member States. For French corporate tax purposes, it requested to be treated, together with its at least 95%-owned French subsidiaries, as one single company under Art. 223 A of the French General Tax Code (“CGI”).

The general French tax rules on dividends which parent companies receive from their subsidiaries provided for a deduction of such dividends from the income of the parent, except for 5% of the dividends. Making this 5% taxable was stated to be intended to claw back the tax deduction given for costs and expenses related to the holding. However, if companies were treated as a single company under Art. 223 A CGI, the exception was not applied and the dividends were completely untaxed.

One condition of Art. 223 A CGI was that all companies must be subject to (French) corporation tax. This requirement was not met by the non-French EU subsidiaries of Steria so that French law required 5% of their dividends to be included in Steria's taxable profits. Without claiming a general extension of the fiscal unity to the non-French subsidiaries, Steria challenged the exclusion of these dividends from the tax exemption. The Administrative Tribunal of Montreuil found against Steria,⁵ but on appeal the Administrative Tribunal of Appeal of Versailles⁶ asked the ECJ whether this exclusion was compatible with the freedom of establishment under Art. 43 EC (now Art. 49 TFEU).

2. The Commission supported Steria's case, but the four governments which participated in the Court procedure (France, Germany, the Netherlands, United Kingdom) argued that there was no incompatibility with EU law. They also referred to Art. 4(2) of the Parent-Subsidiary Directive,⁷ according to which Member States “retain the option of providing that any charges relating to the holding [...] may not be deducted from the taxable profits of the parent company” up to – If the legislation uses a fixed amount – 5% of the profits distributed by that subsidiary.
3. In her Opinion, Advocate General *Kokott*⁸ made an in-depth assessment of the legal situation. The legislation was in her view a clear restriction of an intra-EU establishment, without a valid justification. With reference to judgments of the Court she dismissed the argument based on the Directive, saying that a

¹ Members of the Task Force are: Alfredo Garcia Prats, Daniel Gutmann, Werner Haslehner, Volker Heydt, Eric Kemmeren, Georg Kofler (Chair), Michael Lang, Franck Le Mentec, João Félix Pinto Nogueira, Pasquale Pistone, Albert Rädler†, Stella Raventos-Calvo, Isabelle Richelle and Rupert Shiers. Although the Opinion Statement has been drafted by the ECJ Task Force, its content does not necessarily reflect the position of all members of the group.

² EU:C:2015:524.

³ EU:C:2015:392.

⁴ Court of Justice of the European Union, Press Release No 92/15 (Luxembourg, 2 September 2015).

⁵ Of 4 October 2012.

⁶ CAA Versailles, 29 July 2014, Case 12VE0369, *Sté Groupe Steria*.

⁷ Directive 90/435/EEC, as amended by Directive 2003/123/EC.

⁸ Opinion of AG *Kokott*, 11 June 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:392.

Directive cannot overrule the Treaty. She also rejected a possible justification by reference to the allocation of taxing rights as here no other tax jurisdiction was involved at all. Moreover, she did not accept that there was any “fiscal cohesion” justification.

II. The Judgment of the Court

4. The Court’s Second Chamber starts by stating that the exclusion of dividends, other than national ones, from the full exemption is liable to make it less attractive for a parent company to make use of the freedom of establishment under the EU Treaties.⁹ The Court then goes on to consider the potential reasons for a difference in treatment to be compatible with the Treaty: (1) an objectively non-comparable situation, or (2) overriding reasons in the general interest, and concludes that neither applies in the present case.
5. First, the Court does not see an objective difference in the situation of parent companies according to whether they receive dividends from subsidiaries which are included or not included in the French “intégration fiscale”.¹⁰ Thus French parent companies with French subsidiaries within the “intégration fiscale” are comparable to French parent companies with subsidiaries located in another Member State (meeting the same requirements as French subsidiaries would need to meet to be included in the French “intégration fiscale” regime). This comparability exists insofar as in both cases (1) both parent companies bear costs and expenses related to shareholdings in their subsidiaries, and (2) there is a risk of potential economic double taxation of profits.¹¹
6. Second, the Court further examines whether an overriding reason of public interest could justify such a difference in treatment:¹²
 - With reference to its judgment in *X Holding*,¹³ in which the exclusion of a cross-border fiscal unity had been accepted in order to preserve the competence of different taxing jurisdictions,¹⁴ the Court considered that in the present case there was no issue of allocation of taxing rights because “[t]he difference in treatment concerns only incoming dividends, received by resident parent companies, so that what is concerned is the fiscal sovereignty of one and the same Member State”.¹⁵ Hence, the Court clearly distinguishes its judgment in *X Holding*,¹⁶ stating that that judgment only concerned the residence requirement as a condition for access to the fiscal unity itself (given the benefits that entailed). Hence, “as regards tax advantages other than the transfer of losses within the tax-integrated group, a separate assessment must be therefore made”.¹⁷
 - Also, the Court rejects the national governments’ argument based on fiscal cohesion, saying that there is no direct link between the tax exemption and a particular tax levy, since the French rules at issue do not entail any tax disadvantage for the parent company of the tax-integrated group that would offset the tax advantage (full exemption from tax on dividends) conferred on it.¹⁸

⁹ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, paras. 14-19.

¹⁰ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 22.

¹¹ The Court refers to its judgments in *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, C-436/08 and C-437/08, EU:C:2011:61, para. 113, and *Santander Asset Management SGIIC and Others*, C-338/11 to C-347/11, EU:C:2012:286, para. 42.

¹² ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, paras. 23-39.

¹³ ECJ, 25 February 2010, C-337/08, *X Holding*, EU:C:2010:89.

¹⁴ ECJ, 25 February 2010, C-337/08, *X Holding*, EU:C:2010:89, paras. 31 to 33.

¹⁵ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 29, referring to the judgment in *Papillon*, C-418/07, EU:C:2008:659, paras. 39 and 40.

¹⁶ ECJ, 25 February 2010, C-337/08, *X Holding*, EU:C:2010:89.

¹⁷ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 28, explicitly referring to the Opinion of AG Kokott, 11 June 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:392, para. 34.

¹⁸ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, paras. 30-36.

Whereas in *Papillon*¹⁹ the risk of double use of losses in French law meant fiscal cohesion was relevant, the Court held that in *Groupe Steria* no similar risk exists.

- Finally, the Court did not accept the argument based on Art. 4(2) of the Parent-Subsidiary-Directive, as “[i]t is evident from settled case-law that the decision which Article 4(2) of Directive 90/435 leaves in the hands of the Member States may be exercised only in compliance with the fundamental provisions of the Treaty, in this instance Article 49 TFEU”.²⁰

III. Comments

7. Most notably, *Groupe Steria* brings clarity to *X Holding*.²¹ While *X Holding* has evidently been interpreted as “immunizing” all aspects of group taxation regimes from scrutiny under the freedoms,²² the Court sent the clear message in *Groupe Steria* that it cannot “be inferred from the judgment in *X Holding* [...] that any difference in treatment between companies belonging to a tax-integrated group, on the one hand, and companies not belonging to such a group, on the other, is compatible with Article 49 TFEU”.²³ Indeed, it makes clear that *X Holding* only concerned the residence condition for joining a fiscal unity in so far as the fiscal unity allows cross-border loss utilization (and perhaps the neutrality of intra-group transactions²⁴). For other “tax advantages [...] within the tax-integrated group, a separate assessment must be therefore made”.²⁵ This finding is also confirmed by the recent decision in *Finanzamt Linz* concerning the goodwill amortization that was considered an (integral) part of the Austrian group taxation regime.²⁶
8. Undoubtedly, following *Groupe Steria*, Member States will have to review the various beneficial features of their group taxation regimes, even if they consider such benefits are intrinsically connected with the essence of the regime. Discrimination may, of course, be eliminated either by extending advantages to cross-border situations or by abandoning them for internal situations. Clearly, the first alternative would be more in line with the expectations of the taxpayers.²⁷
9. Within the French tax system, *Groupe Steria* may also have consequences for the additional contribution (of 3%) to the corporate income tax which applies to dividend distributions, except for intra-group dividends (Art. 235 ter ZCA, CGI). Indeed, *Groupe Steria* provides strong arguments in favor of not applying this contribution in the event the distribution is made to a 95%-parent company established in the European Union or the European Economic Area and which could have been allowed to form an integrated group, had it been established in France.

¹⁹ ECJ, 27 November 2008, C-418/07, *Papillon*, EU:C:2008:659.

²⁰ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 39, with reference to the judgments in *Bosal*, C-168/01, EU:C:2003:479, para. 26, *Keller Holding*, C-471/04, EU:C:2006:143, para. 45, and *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, para. 46.

²¹ ECJ, 25 February 2010, C-337/08, *X Holding*, EU:C:2010:89.

²² This approach becomes visible in the submissions by the French, Netherlands and United Kingdom Governments, which argued “that the neutralisation of the add-back of the proportion of costs and expenses is indissociable from the tax integration scheme, which is justified by the need to safeguard the allocation of the power to impose taxes between the Member States”; see ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 24.

²³ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 27.

²⁴ Many group taxation regimes indeed provide for a completely neutral tax treatment of intra-group transactions, as a derogation to the ordinary tax treatment of transactions between different (but perhaps related) taxpayers. It is unclear, however, if the Court reads *X Holding* as dealing only with cross-border losses or also with the neutralization of transactions, as both items are mentioned in para. 25 of the present judgment, whereas only losses are mentioned in paras. 26, 27 and 28.

²⁵ ECJ, 2 September 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:524, para. 28, explicitly referring to the Opinion of AG Kokott, 11 June 2015, Case C-386/14, *Groupe Steria SCA*, EU:C:2015:392, para. 34.

²⁶ ECJ, 6 October 2015, Case C-66/14, *Finanzamt Linz*, EU:C:2015:661.

²⁷ As a consequence of *Groupe Steria*, the French legislation has been amended to eliminate any discrimination; the choice of the French Parliament has been to tax intra-group dividends on 1% of their amount and to levy the tax not only to dividends from the French subsidiaries that belong to the tax group but also to EU subsidiaries that would qualify to be part of the group had they been incorporated under French law.

10. Finally, *Groupe Steria* further confirms previous case law on the relationship between the fundamental freedoms and secondary EU law. With regard to the Parent-Subsidiary Directive, the Court had already confirmed that (1) the “non-regulation” or exclusion of a situation in the Directive does not imply that such situation is likewise excluded from the freedom’s impact,²⁸ and (2) Member States have to exercise the general options offered in the Directive in compliance with the fundamental freedoms.²⁹ *Groupe Steria* repeats this.

IV. The Statement

11. The *Confédération Fiscale Européenne* welcomes the Court's clarification that cross-border company structures may not automatically be excluded from all the benefits of group taxation regimes but rather, in general, a case by case assessment has to be made. This resolves concerns arising from the *X Holding* case which, it is now clear, only addresses cross-border loss relief and perhaps tax neutral intra-group transactions.

²⁸ ECJ, 18 June 2009, C-303/07, *Aberdeen*, EU:C:2009:377, para. 28; ECJ, 8 November 2007, C-379/05, *Amurta*, EU:C:2007:655, paras. 18-24; ECJ, 12 December 2006, C-374/04, *ACT Group Litigation*, EU:C:2006:773, paras. 53-54.

²⁹ ECJ, 18 September 2003, C-168/01, *Bosal*, EU:C:2003:479, paras. 21-28, ECJ, 23 February 2006, C-471/04, *Keller Holding*, EU:C:2006:143, para. 45; ECJ, 12 February 2006, C-446/04, *FII Group Litigation*, EU:C:2006:774, para. 46.