EU Court of Justice, 22 March 2018*

Joined cases C-327/16 and C-421/16

Marc Jacob v Ministre des Finances et des Comptes publics (C-327/16), and Ministre des Finances et des Comptes publics v Marc Lassus (C-421/16)

First Chamber: *R. Silva de Lapuerta, President of the Chamber, K. Lenaerts, Presiddent of the Court, acting as Judge of the First Chamber, C. G. Fernlund (Rapporteur), A. Arabadjiev and E. Regan, Judges*

Advocate General: *M. Wathelet*

1. These requests for a preliminary ruling concern the interpretation of Article 8 of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1), as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden (OJ 1994 C 241, p. 21), as adjusted by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995 (OJ 1995 L 1, p. 1) ('the Merger Directive'), and Article 49 TFEU.

2. The requests have been made in the course of proceedings between, in the first case, Mr Marc Jacob and the ministre des Finances et des Comptes publics (Minister for Finance and Public Accounts, France) ('the tax authorities') and, in the second case, the tax authorities and Mr Marc Lassus, in relation to the tax authorities' decisions to tax the capital gains resulting from an exchange of securities upon the subsequent transfer of the securities received.

Legal context

European Union law

3. The first, fourth and eighth recitals of the Merger Directive state:

> '... mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level;
> …
> … the common tax system ought to avoid the imposition of tax in connection with mergers, divisions, transfers of assets or exchanges of shares, while at the same time safeguarding the financial interests of the State of the transferring or acquired company;
> …
> … the allotment to the shareholders of the transferring company of securities of the receiving or acquiring company would not in itself give rise to any taxation in the hands of such shareholders.'

4. According to Article 1 of that directive, 'each Member State shall apply this Directive to mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved'.

5. Article 2 of the Merger Directive states:

> 'For the purposes of this Directive:
> …
> d. "exchange of shares" shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal

* Language of the case: French.

value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;
…
g. "acquired company" shall mean the company in which a holding is acquired by another company by means of an exchange of securities;
h. "acquiring company" shall mean the company which acquires a holding by means of an exchange of securities;
…'

6. Article 3 of the Merger Directive provides:

'For the purposes of this Directive, "company from a Member State" shall mean any company which:
a. takes one of the forms listed in the Annex hereto;
b. according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
c. moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
…
– impôt sur les sociétés in France,…
– impôt sur le revenu des collectivités in Luxembourg,
…
or to any other tax which may be substituted for any of the above taxes.'

7. Under Article 8(1) and (2) of the Merger Directive:

'1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
2. The Member States shall make the application of paragraph 1 conditional upon the shareholder's not attributing to the securities received a value for tax purposes higher than the securities exchanged had immediately before the merger, division or exchange.
The application of paragraph 1 shall not prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition.
…'

Treaty law

8. Article 18 of the Convention signed in Brussels on 10 March 1964 between France and Belgium for the avoidance of double taxation and to establish mutual administrative and legal rules of assistance in the field of income tax provides as follows:

'Unless otherwise provided by the foregoing articles of this Convention, the income of residents of one of the Contracting States shall be taxable only in that State.'

9. Article 13(3) and (4) of the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income signed at London on 22 May 1968 ('the France-United Kingdom Convention') states:

'3. Gains from the alienation of any property other than that referred to in paragraphs 1 and 2 shall be taxable only in the Contracting State in which the alienator is resident.
4. Notwithstanding the provisions of paragraph 3, gains derived by an individual who is a resident of a Contracting State from the alienation of more than 25 per cent of the shares held, alone or together with related persons, directly or indirectly, in a company which is a resident of the other Contracting State may be taxed in that other State. The provisions of this paragraph shall only apply if:
a. the individual is a national of the other Contracting State without also being a national of the first-mentioned Contracting State; and
b. the individual has been a resident of the other Contracting State at any time in a five-year period immediately preceding the alienation of the shares.

> The provisions of this paragraph shall also apply to gains from the alienation of other rights in such company which, for the purpose of capital gains taxation, are subjected to the same treatment as gains from the alienation of shares by the laws of that other Contracting State.'

French law

10. Under Article 92 B(II)(1) of the code général des impôts (General Tax Code) ('the CGI'), in the version applicable to capital gains the taxation of which was deferred as at 1 January 2000:

> 'As from 1 January 1992 or 1 January 1991 in the case of transfers of securities to a company liable to corporation tax, the taxation of a capital gain that arises on an exchange of securities arising out of a public offering, merger, division, takeover of a mutual fund by an investment company with variable share capital carried out in accordance with the rules in force, or a transfer of securities to a company subject to corporation tax, may be deferred until the securities received upon the exchange are transferred or repurchased …'

11. Article 160(I) and (I ter) of the CGI, in the version applicable at the time of the facts in the main proceedings, provides:

> 'I. … The taxation of the capital gain thus arising shall be subject to the sole condition that the rights held directly or indirectly in company profits by the transferor or the transferor's spouse, their ascendants and descendants, must together have exceeded 25% of those profits at some time during the previous five years. However, where the transfer is made for the benefit of one of the persons referred to in this paragraph, the capital gain shall be exempt provided that all or part of those rights in the company are not resold to a third party within five years. Otherwise, the capital gain shall be taxed in the name of the first transferor in respect of the year of resale of the rights in the company to the third party.
> …
> Capital losses sustained in the course of a year may be offset only against capital gains of the same kind arising during the same year or the following five years.
> …
> I ter. … 4. On an exchange of rights in the company arising out of a merger, division or transfer of shares to a company liable to corporation tax, the taxation of the capital gain arising as from 1 January 1991 may be deferred under the conditions laid down in paragraph II of Article 92 B ...'

12. Under Article 164 B(I)(f) of the CGI, in the version applicable in 1999, 'the capital gains referred to in Article 160 resulting from the transfer of rights relating to companies having their registered office in France' are considered to be income from French sources.

13. Article 244 *bis* B of the CGI, in the version applicable on the date of transfer of the securities in 1999, provided:

> 'The proceeds of the transfers of rights in a company referred to in Article 160, carried out by natural persons whose tax residence, for the purposes of Article 4 B, is not in France, or by legal persons or bodies, regardless of their form, whose registered office is outside France, shall be determined and taxed in accordance with Article 160.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

Case C-327/16

14. On 23 December 1996, Mr Jacob, a person resident for tax purposes in France, transferred the securities he owned in a company incorporated under French law to another such company, in exchange for securities in the latter. In accordance with the tax legislation applicable at the time of the facts, the taxation of the capital gain made upon the exchange of those securities was deferred.

15. On 1 October 2004, Mr Jacob moved his residence for tax purposes from France to Belgium.

16. On 21 December 2007, Mr Jacob transferred all the securities he received upon the exchange of securities in question. Following that transfer, the capital gain that was subject to deferred taxation was taxed, in respect of 2007, together with default interest and a 10% surcharge.

17. By judgment of 8 June 2012, the tribunal administratif de Montreuil (Administrative Court, Montreuil, France) granted the discharge of the additional assessments to income tax. On 28 May 2015, the cour adminis-

trative d'appel de Versailles (Administrative Court of Appeal, Versailles, France) set aside that judgment and reinstated all of Mr Jacob's assessments that had been discharged.

18. On 1 October 2015, Mr Jacob brought an application for review before the Conseil d'État (Council of State, France), alleging that the national legislation at issue in the main proceedings, which is intended to transpose into French law Article 8 of the Merger Directive, misconstrued the objectives pursued by Article 8. Mr Jacob submits in that regard that, in accordance with Article 8, the chargeable event for the purposes of capital gains tax is the subsequent transfer of securities received and not the exchange of securities, the latter being only an interim transaction that is neutral for tax purposes.

19. The referring court notes, in essence, that the interpretation of the national legislation in question depends on the interpretation of Article 8 of the Merger Directive.

20. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Must Article 8 of [the Merger Directive] be interpreted as meaning that it prohibits, in the event of an exchange of shares falling within the scope of [the Merger Directive], a mechanism for deferred taxation which provides, by way of derogation from the rule that the chargeable event for capital gains tax purposes occurs during the year in which the gain arises, that the capital gain on the exchange is established and settled on the exchange of the shares, and taxed in the year in which the event putting an end to the deferred taxation occurs, which may, for instance, be the transfer of the shares that were received at the time of the exchange?
> 2. Must Article 8 of [the Merger Directive] be interpreted as meaning that it prohibits, in the event of an exchange of shares falling within the scope of the directive, the capital gain on the exchange of the shares – supposing it to be taxable – from being taxed by the State in which the taxpayer was resident at the time of the exchange, when the taxpayer, at the time the shares received on that exchange are transferred (at which time the capital gain on the exchange is actually taxed), has moved his residence for tax purposes to another Member State?'

Case C-421/16

21. Mr Lassus, a United Kingdom tax resident since 1997, transferred on 7 December 1999 securities he held in a French company to a Luxembourg company in exchange for securities in the latter. Upon that exchange, a capital gain was established, the taxation of which was deferred in accordance with the legislation in force at the time.

22. It is apparent from the file before the Court that, following that exchange, Mr Lassus acquired other securities in that Luxembourg company. In December 2002, Mr Lassus transferred 45% of the securities he held in that company.

23. Taking the view that 45% of the securities which Mr Lassus had received upon that exchange had been transferred, the tax authorities taxed the corresponding proportion of the capital gain that was subject to deferred taxation, as established for the year 1999. In consequence, the tax authorities imposed additional assessments to income tax on Mr Lassus in respect of 2002.

24. Mr Lassus challenged those assessments and brought an action before the tribunal administratif de Paris (Administrative Court, Paris, France), which was dismissed. On appeal, the cour administrative d'appel de Paris (Administrative Court of Appeal, Paris, France) set aside the decision of the lower court and therefore granted a discharge to Mr Lassus in respect of those assessments. The tax authorities thereafter lodged before the Conseil d'État (Council of State) an application for review against that decision.

25. The referring court states that, under the legislation at issue in the main proceedings and Article 13(4)(a) and (b) of the France-United Kingdom Convention, the capital gain on the exchange of securities obtained in 1999 by Mr Lassus, resident in the United Kingdom for tax purposes, could be taxed in France.

26. Furthermore, that court considers that the only effect of the national legislation at issue is to allow – by way of derogation from the rule that the chargeable event for the purposes of capital gains tax occurs during the year in which the gain arises – the capital gain on an exchange of securities to be established in the year in which it arises, and taxed in the year in which the event putting an end to the deferred taxation occurs, namely the year in which the transfer of the securities received at the time of the exchange occurs.

27. In this context, the fact that the capital gain on the subsequent transfer of the securities received in exchange is taxable in a Member State other than the French Republic has, according to that court, no effect on

the power of the latter Member State to tax the capital gain resulting from the exchange at issue in the main proceedings.

28. However, Mr Lassus questions that interpretation. He submits, principally, that the tax deferral mechanism established by the national legislation is incompatible with the provisions of Article 8 of the Merger Directive. He takes the view that that article establishes as a chargeable event giving rise to taxation the subsequent transfer of the securities received in exchange and not the exchange of securities, the latter corresponding to an interim transaction that is neutral for tax purposes. Moreover, he claims that, in the present case, at the date of the transfer of the securities received in exchange, the French Republic had lost its fiscal competence over the relevant capital gain, as the transfer fell within the United Kingdom's fiscal competence.

29. In addition, if the transfer were taxable in France, then, since national legislation makes it possible for taxpayers who are resident there to offset the capital loss on the transfer against capital gains of the same kind, the refusal by the tax authorities to offset the capital loss generated by the transfer of the securities in 2002 against the capital gain on the exchange of securities, the taxation of which was deferred, constitutes an obstacle to the freedom of establishment.

30. In those circumstances, the Conseil d'État (Council of State) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

> '1. Must Article 8 of [the Merger Directive] be interpreted as meaning that it prohibits, in the event of an exchange of shares falling within the scope of [the Merger Directive], a mechanism for deferred taxation which provides, by way of derogation from the rule that the chargeable event for capital gains tax purposes occurs during the year in which the gain arises, that the capital gain on the exchange is established and settled on the exchange of the shares, and taxed in the year in which the event putting an end to the deferred taxation occurs, which may, for instance, be the transfer of the shares that were received at the time of the exchange?
> 2. Assuming that it is taxable, may the capital gain on the exchange of securities be taxed by the State with powers of taxation at the time of the exchange, although the transfer of the securities received on that exchange falls within the fiscal competence of another Member State?
> 3. If the answer to the previous questions is that the directive does not preclude the capital gain resulting from an exchange of securities from being taxed at the time at which the securities received at the time of that exchange are subsequently transferred, even if those two transactions do not fall within the fiscal competence of the same Member State, may the Member State in which the capital gain on the exchange was subject to deferred taxation tax the deferred capital gain at the time of the transfer, subject to the applicable provisions of the bilateral Tax Convention, irrespective of the outcome of the transfer when it results in a capital loss? That question is asked in respect of both [the Merger Directive] and the freedom of establishment guaranteed by Article 43 of the [EC Treaty], now Article 49 [TFEU], since a taxpayer whose tax residence is in France at the time at which the securities are exchanged and at the time at which they are transferred may benefit from a tax credit derived from the capital loss on the transfer.
> 4. If the answer to Question 3 is that account must be taken of the capital loss on the transfer of the securities received at the time of the exchange, must the Member State in which the capital gain on the exchange was derived offset the capital loss on the transfer against the capital gain or, if the transfer does not fall within its fiscal competence, must that Member State forego the taxation of the capital gain on the exchange?
> 5. If the answer to Question 4 is that the capital loss on the transfer may be offset against the capital gain on the exchange, what purchase price must be used for the securities transferred in order to calculate the capital loss on that transfer? In particular, should the purchase price per unit for the securities transferred be the total value of the securities in the company that were received upon the exchange, as indicated on the capital gains tax return, divided by the number of securities received at the time of the exchange, or should a weighted average purchase price be used, also taking into account transactions occurring after the exchange, such as further acquisitions or free allotments of securities in the same company?'

31. By decision of the President of the Court of 10 November 2017, Cases C-327/16 and C-421/16 were joined for the purposes of the oral procedure and the judgment.

Consideration of the questions referred

Admissibility

32. As the Advocate General pointed out in point 46 of his Opinion, it is clear from Article 1 of the Merger Directive that it applies to cross-border mergers, divisions, transfers of assets and exchanges of shares in

which companies from two or more different Member States are involved. The facts giving rise to the main proceedings in Case C-327/16 concern an exchange of securities involving two companies established in a single Member State, namely in France.

33. In that regard, 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 15 November 2016, Ullens de Schooten, C-268/15, EU:C:2016:874, paragraph 53 and the case-law cited).

34. In those circumstances, it is clearly in the interest of the European Union 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 (judgment of 14 March 2013, *Allianz Hungária Biztosító and Others*, C-32/11, EU:C:2013:160, paragraph 20 and the case-law cited).

35. In the present case, it should be noted, in the first place, that the questions referred concern the interpretation of provisions of EU law, namely those of the Merger Directive.

36. In the second place, in response to a request for clarification from the Court of 21 July 2016, the referring court stated that the legislation at issue in the main proceedings, adopted to implement the Merger Directive, is to apply in the same circumstances to exchanges of securities, whether cross-border or purely domestic, where the taxpayer holding the securities is resident for tax purposes in France at the time of the exchange.

37. Since the national legislation at issue in the main proceedings follows, in dealing with situations where the exchange of securities is purely domestic, the same approach as that provided for in the Merger Directive, it must be held that the questions referred by the referring court in Case C-327/16 are admissible.

38. As regards Case C-421/16, the Austrian Government takes the view, in essence, that a situation where the shareholder of the acquired company is resident for tax purposes in a Member State other than that of the acquired company or the acquiring company does not fall within the scope of the Merger Directive. In the main proceedings, Mr Lassus, at the time of the exchange of the securities in question, had his tax residence in the United Kingdom, while the acquired company and the acquiring company were established in France and Luxembourg respectively.

39. In that respect, it must be noted that no provision of the Merger Directive provides for such a limitation of its scope.

40. As has been stated in paragraph 32 of this judgment, the Merger Directive is intended to apply where the exchange of securities, for the purposes of Article 2 of that directive, takes place between two or more companies of different Member States that fulfil the conditions set out in Article 3 of the Merger Directive.

41. Therefore, for the purposes of establishing the scope of the Merger Directive, it is irrelevant that the holder of the securities in question has its residence for tax purposes in a Member State other than that of the companies concerned by the exchange of securities.

42. In the present case, it is common ground, first, that the transaction at issue in the main proceedings concerns two companies from two different Member States and, second, that the companies concerned fulfil the conditions set out in Article 3 of that directive.

43. In those circumstances, it cannot be held that the Merger Directive is only to be applied where the shareholder of the acquired company is resident for tax purposes in the same Member State as that of the acquired company or the acquiring company. Accordingly, it is necessary to answer the questions referred by the referring court in Case C-421/16.

Substance

The first questions

44. By its first questions in Cases C-327/16 and C-421/16, the referring court asks, in essence, whether Article 8 of the Merger Directive must be interpreted as meaning that it precludes legislation of a Member State pursuant to which the capital gain resulting from an exchange of securities is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs: in this case, the transfer of the securities received in exchange.

45. As a preliminary point, it must be noted that, in both cases, it has not been argued that the taxpayers concerned have attributed to the securities received in exchange a value for tax purposes higher than that which the securities exchanged had immediately before the exchange in question. Therefore, Article 8(1) of the Merger Directive is applicable to the exchange in question.

46. Under that provision, on an exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company is not, of itself, to give rise to any taxation of the income, profits or capital gains of that shareholder.

47. By imposing that fiscal neutrality requirement with regard to such a shareholder, the Merger Directive aims – as is stated in the first and fourth recitals – to ensure that an exchange of securities concerning companies from different Member States is not hampered by particular restrictions, disadvantages or distortions arising from the tax provisions of the Member States (judgment of 11 December 2008, *A.T.*, C-285/07, EU:C:2008:705, paragraph 21).

48. However, it must be pointed out that the Merger Directive aims, according to its fourth recital, to safeguard the financial interests of the State of the transferring or acquired company. Among those financial interests is the power to tax the capital gain in respect of securities existing before the exchange of securities.

49. Thus, the second subparagraph of Article 8(2) of the Merger Directive provides that the application of Article 8(1) is not to prevent the Member States from taxing the gain arising out of the subsequent transfer of securities received in the same way as the gain arising out of the transfer of securities existing before the acquisition (see, to that effect, judgment of 11 December 2008, *A.T.*, C-285/07, EU:C:2008:705, paragraph 35).

50. It is apparent that, although Article 8(1) of the Merger Directive, by providing that an exchange of securities cannot by itself give rise to the taxation of the capital gain resulting from that transaction, ensures the tax neutrality of such a transaction, the purpose of that fiscal neutrality is not however to avoid such a capital gain from being taxed by the Member States with fiscal competence in respect of that gain, but only to prohibit them from considering that exchange as the chargeable event for the purposes of taxation.

51. By contrast, neither Article 8 of the Merger Directive nor any other article of that directive contains provisions on the appropriate fiscal measures for the purposes of implementing Article 8.

52. Member States therefore have, subject to compliance with EU law, a certain degree of latitude with regard to that implementation (see, to that effect, judgments of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraphs 41 to 43, and of 23 November 2017, *A*, C-292/16, EU:C:2017:888, paragraph 22).

53. As regards the measure provided for in the legislation at issue in the main proceedings, it involves, first, the establishment of the capital gain resulting from the exchange of securities upon that transaction and, second, the deferral of the taxation of that exchange to the date of the subsequent transfer of the securities received in exchange.

54. Such a measure, in so far as it leads to the chargeable event for the taxation of that capital gain being deferred until the year in which the event putting an end to the deferral of taxation occurs, namely the transfer of securities received in exchange, ensures, as the Advocate General observed in points 59 and 60 of his Opinion, that the exchange of securities in itself does not give rise to any taxation of that capital gain. That measure therefore respects the principle of fiscal neutrality as set out Article 8(1) of the Merger Directive.

55. That conclusion cannot be called into question by the mere fact that the capital gain resulting from the exchange of securities is established when that transaction occurs. In that regard, it must be pointed out that such establishment is merely a technique allowing the Member State with fiscal competence in respect of the securities existing before the exchange, but which, under Article 8(1) of the Merger Directive, has been prevented from exercising that competence at that time, to preserve its fiscal competence and exercise it at a later date, namely on the date of the transfer of the securities received in exchange in accordance with the second subparagraph of Article 8(2) of that directive.

56. In those circumstances, the answer to the first questions in Cases C-327/16 and C-421/16 is that Article 8 of the Merger Directive must be interpreted as meaning that it does not preclude legislation of a Member State pursuant to which the capital gain resulting from an exchange of securities falling within the scope of that directive is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs: in this case, the transfer of the securities received in exchange.

The second questions

57. By its second questions in Cases C-327/16 and C-421/16, the referring court asks, in essence, whether Article 8 of the Merger Directive must be interpreted as meaning that it precludes legislation of a Member State that provides for the taxation of the capital gain relating to an exchange of securities, in a case where taxation of the gain has been deferred, upon a subsequent transfer of the securities received in exchange, even though that transfer does not fall within the fiscal competence of that Member State.

58. As is apparent from paragraphs 49 and 50 of this judgment, it follows from the second subparagraph of Article 8(2) of the Merger Directive that the requirement of fiscal neutrality provided for upon an exchange of securities under Article 8(1) does not prevent Member States from taxing the capital gain resulting from the subsequent transfer of securities received in exchange in the same way as the capital gain resulting from the transfer of securities existing before the acquisition.

59. The second subparagraph of Article 8(2) thus recognises the right of Member States which have fiscal competence for the capital gain relating to an exchange of securities but which, pursuant to Article 8(1), have been prevented from exercising that competence when that exchange occurred, to exercise that competence on the date of the subsequent transfer of the securities received in exchange.

60. However, as the Advocate General stated in point 68 of his Opinion, the Merger Directive does not harmonise the criteria for allocating fiscal competence between Member States. Thus, it does not regulate the allocation of the power of taxation of such a capital gain.

61. In the absence of harmonisation at Union level, Member States retain the power to define, by treaty or unilaterally, in compliance with EU law, the criteria for allocating their powers of taxation, with a view to eliminating double taxation (see, by analogy, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 45 and 46 and the case-law cited).

62. In the present case, the referring court takes the view that, under national and treaty law, capital gains resulting from the exchanges of securities concerned fall within the fiscal competence of the French Republic.

63. In those circumstances, and since the Merger Directive, as follows from paragraph 56 of this judgment, does not preclude the taxation of the capital gain resulting from the exchange of securities from being deferred until the subsequent transfer of the securities received in exchange, that directive does not prevent the Member State concerned from taxing that gain upon that transfer.

64. As follows from points 69 to 71 of the Advocate General's Opinion, the mere fact that the transfer of the securities received in exchange falls within the fiscal competence of a Member State other than the one with fiscal competence for the capital gain resulting from the exchange of securities cannot deprive the latter of these two Member States of its right to exercise fiscal competence in respect of a capital gain arising within the ambit of its fiscal competence.

65. That finding is also consistent with the principle of fiscal territoriality linked to a temporal component, as recognised by the Court, which seeks to preserve the allocation of powers of taxation between the Member States and pursuant to which a Member State has the right to tax the capital gain arising within the ambit of its fiscal competence (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 45 and 46 and the case-law cited).

66. Consequently, the answer to the second questions referred in Cases C-327/16 and C-421/16 is that Article 8 of the Merger Directive must be interpreted as meaning that it does not preclude legislation of a Member State that provides for the taxation of the capital gain relating to an exchange of securities, in a case where taxation of the gain has been deferred, upon a subsequent transfer of the securities received in exchange, even though that transfer does not fall within the fiscal competence of that Member State.

The third to fifth questions in Case C-421/16

67. As a preliminary point, it must be noted, as is apparent from the file before the Court, that, at the date of the exchange of securities at issue in the main proceedings, Mr Lassus had his tax residence in the United Kingdom. However, under the France-United Kingdom Convention, he was treated as a taxpayer holding securities who is resident in France, meaning that the capital gains resulting from that exchange of securities fell within the fiscal competence of that Member State.

68. It is also apparent from the case file that, under the legislation at issue in the main proceedings, capital losses suffered in the course of a year are to be offset against capital gains of the same kind arising during the

same year or the following five years. In the main proceedings it is common ground that the capital loss concerned was incurred within that period of five years.

69. At the hearing, the French Government explained that the offset of any capital loss incurred upon the subsequent transfer of the securities received in exchange against the capital gain that was subject to deferred taxation is not permitted when the taxpayer holding those securities is not tax resident in France at the time of that transfer.

70. Thus, by its third to fifth questions in Case C-421/16, which it is appropriate to examine together, the referring court asks, in essence, whether the Merger Directive and Article 49 TFEU must be interpreted as precluding legislation of a Member State which, in a situation where the subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, provides for taxation of the capital gain that is subject to tax deferral upon that transfer without taking into account any capital loss occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of that transfer. In addition, the referring court wishes to know, where appropriate, what are the detailed rules for offsetting and calculating that capital loss.

71. It must be recalled that operations covered by the Merger Directive are a particular method of exercise of the freedom of establishment, important for the proper functioning of the internal market, and are therefore economic activities in respect of which the Member States are required to ensure that freedom (judgment of 23 November 2017, *A*, C-292/16, EU:C:2017:888, paragraph 23 and the case-law cited).

72. However, as the Advocate General observed in points 78 and 100 to 101 of his Opinion, the Merger Directive governs neither the question relating to the possible offset of any capital loss resulting from the subsequent transfer of the securities received in exchange nor the matter of the detailed rules for such offset and how it would be calculated. The questions relating to such offset therefore fall within the ambit of the national law of the Member State of origin, in accordance with EU law, in this case Article 49 TFEU in particular.

73. Consequently, it is necessary to examine those questions only in the light of Article 49 TFEU.

74. In that regard, it must be recalled that all measures which prohibit, impede or render less attractive the exercise of freedom of establishment within the meaning of Article 49 TFEU must be considered to be restrictions of that freedom (judgment of 23 November 2017, *A*, C-292/16, EU:C:2017:888, paragraph 25 and the case-law cited).

75. In the present case, it must be noted that, at the time of the subsequent transfer of the securities received in exchange, Mr Lassus was a non-resident taxpayer holding securities, meaning that he could not offset any capital loss incurred upon that transfer against the capital gain resulting from the exchange that was the subject of a tax deferral, whereas if he had been a resident taxpayer holding securities, he would have been able to offset.

76. Such a difference in treatment, depending upon whether or not, at the time of the transfer of the securities received in exchange, the taxpayer holding securities is tax resident in the Member State concerned, is liable to impede corporate restructuring transactions covered by the Merger Directive and render them less attractive to non-resident taxpayers holding securities and, consequently, constitutes an obstacle to the freedom of establishment.

77. Such an obstacle is permissible only if it relates to situations which are not objectively comparable or if it can be justified by overriding reasons in the public interest recognised by EU law. In addition, in such a case, that obstacle must be appropriate for ensuring the attainment of the objective in question and must not go beyond what is necessary to attain that objective (judgment of 23 November 2017, *A*, C-292/16, EU:C:2017:888, paragraph 28 and the case-law cited).

78. As regards the comparability of the situations concerned, it must be observed that the legislation at issue in the main proceedings seeks to tax a capital gain resulting from an exchange of securities that arose when Mr Lassus was treated as a taxpayer resident for tax purposes in France. With regard to such taxation, which is deferred until the subsequent transfer of the securities received in exchange, the situation of a taxpayer holding securities who is not resident at the time of the transfer, such as Mr Lassus, is objectively comparable to that of a taxpayer holding securities who is resident at the time of that transfer.

79. As to the question of whether the obstacle in question may be justified by overriding reasons in the public interest recognised by EU law, the French Government maintains that the overriding public-interest reason relating to the allocation of fiscal competence between the Member States can justify such an obstacle.

80. In that regard, it must be noted that preserving the allocation of fiscal competence between Member States is an objective recognised by the Court (see, to that effect, judgment of 29 November 2011, *National Grid Indus*, C-371/10, EU:C:2011:785, paragraph 45).

81. However, in circumstances such as those at issue in the main proceedings, as the Advocate General observed in point 93 of his Opinion, that objective cannot justify such an obstacle, since only the fiscal competence of the French Republic is at issue.

82. In that regard, it must be pointed out that the circumstances at issue in the main proceedings are different from those in the cases that gave rise to the Court's case-law relating to the exit taxation of capital gains, such as the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785). The case that gave rise to that judgment related to the deferral of the collection of tax, namely a tax debt which had been definitively determined by the date when the taxpayer, due to his transfer of residence, had ceased to be subject to tax in the Member State of origin, and not, as in the main proceedings, to the deferral of taxation. It was in those circumstances that the Court held, in paragraph 61 of the judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785), that a possible omission by the host Member State to take account of decreases in value does not impose any obligation on the Member State of origin to revalue, at the time of the definitive transfer of the new shares, a tax debt which was definitively determined on the date when the taxpayer, because of his transfer of residence, ceased to be subject to tax in the Member State of origin.

83. The consequence of the deferral of taxation of the capital gain at issue in the main proceedings until the subsequent transfer of the securities received in exchange is that that capital gain, although it was established at the time of the exchange of securities, is taxed only on the date of that subsequent transfer. This implies that the Member State in question exercises its fiscal competence in respect of that capital gain at the time when the capital loss at issue arises. Therefore, as the European Commission has pointed out, the taking into account of such a capital loss accordingly forms part of the obligation of the Member State seeking to exercise its fiscal competence in respect of that same capital gain, which actually becomes taxable on the date of that transfer.

84. Consequently, Article 49 TFEU precludes legislation of a Member State which, in a situation where the subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, provides for taxation of the capital gain that is subject to tax deferral upon that transfer without taking into account any capital loss occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of the transfer.

85. As regards the detailed rules relating to the offset and calculation of the capital loss at issue in the main proceedings, as is clear from paragraph 72 of the present judgment, EU law does not provide such detailed rules; it is thus for the Member States, in compliance with EU law and, in the present case, Article 49 TFEU in particular, to provide such detailed rules.

86. Having regard to the findings set out above, the answer to the third to fifth questions in Case C-421/16 is that Article 49 TFEU must be interpreted as meaning that it precludes legislation of a Member State which, in a situation where the subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, provides for taxation of the capital gain that is subject to tax deferral upon that transfer without taking into account any capital loss occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of the transfer. It is for the Member States, in compliance with EU law and, in the present case, the freedom of establishment in particular, to provide detailed rules for offsetting and calculating that capital loss.

Costs

87. …

On those grounds,

the Court (First Chamber)

hereby rules:

1. Article 8 of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, as adjusted by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995, must be interpreted as meaning

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that it does not preclude legislation of a Member State pursuant to which the capital gain resulting from an exchange of securities falling within the scope of that directive is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs: in this case, the transfer of the securities received in exchange.

2. Article 8 of the Directive 90/434, as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, as adjusted by Decision 95/1, must be interpreted as meaning that it does not preclude legislation of a Member State that provides for the taxation of the capital gain relating to an exchange of securities, in a case where taxation of the gain has been deferred, upon a subsequent transfer of the securities received in exchange, even though that transfer does not fall within the fiscal competence of that Member State.

3. Article 49 TFEU must be interpreted as meaning that it precludes legislation of a Member State which, in a situation where the subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, provides for taxation of the capital gain that is subject to tax deferral upon that transfer without taking into account any capital loss occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of the transfer. It is for the Member States, in compliance with EU law and, in the present case, the freedom of establishment in particular, to provide detailed rules for offsetting and calculating that capital loss.