ANTON VAN ZANTBEEK: BELGIAN STOCK EXCHANGE TRANSACTIONS' TAX DID NOT BREACH EU LAW

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Part I

Introduction

In *Anton van Zantbeek VOF v Ministerraad ("Anton van Zantbeek"),* [2] the Court of Justice of the European Union ("CJEU") held that Belgian rules which imposed new taxes on certain stock exchange transactions, that were ordered or concluded by a Belgian resident via a professional intermediary established in another EU / EEA Member State, were not in breach of the freedom to provide services contained in Article 56 TFEU or Article 36 of the European Economic Area ("EEA") Agreement, in situations where certain conditions were complied with.

Background

Anton van Zantbeek is a Belgian company. It carried out some Belgian stock exchange transactions using a non-resident professional intermediary (perhaps, with the intention of avoiding Belgian taxes because the orders were executed outside Belgium). However, Belgium changed its legislation to ensure that such transactions could be taxed by the Belgian tax authorities.

Under the new Belgian rules, transactions conducted through a non-resident, professional intermediary were deemed to be concluded or executed in Belgium, and were also taxed. This applied to situations where the purchase or sale order was issued to a non-resident professional intermediary by a Belgian resident issuer of an order,

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2 *Anton van Zantbeek VOF v Ministerraad ("Anton van Zantbeek"),* C-725/18, ECLI:EU:C:2020:54.

namely by 'a natural person who has his habitual residence in Belgium' or by a 'legal person on behalf of a registered office or an establishment of that legal person in Belgium' (see paragraph 10 of *Anton van Zantbeek*). In such instances, the issuer of the order became liable for the tax, instead of the non-resident intermediary, and had to pay the tax within two months of the transaction in question unless he established that it had already been paid, by the intermediary or his liable representative in Belgium.

Anton van Zantbeek argued that this type of tax treatment was contrary to the freedom to provide services and the free movement of capital contained in the Treaty on the Functioning of the European Union ("TFEU") and the European Economic Area ("EEA") Agreement. Consequently, the matter was referred to the CJEU for a preliminary ruling.

Which Fundamental Freedom was applicable?

The Court accepted that the Belgian rules at issue could affect both the free movement of capital and the freedom to provide services. Accordingly, in line with its settled case law, it investigated whether one of the freedoms was a predominant freedom and determined that the freedom to provide services was the key freedom at play in this case. It explained that the tax at issue only applied if a professional intermediary was involved in the transaction. Moreover, when a Belgian resident used a non-resident supplier of financial intermediation services, he became liable to pay that tax. This was not the case if he engaged a Belgian resident intermediary. Therefore, the Court decided that the case related to freedom to provide services and not the free movement of capital.

Restriction on the Freedom to Provide Services

The Court highlighted, in paragraph 23 of *Anton van Zantbeek*, that –

> "Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided …
>
> Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom".

The Court explained, in paragraph 26, that –

> "it should be observed that resident issuers of an order who, as recipients of financial intermediation services, decide to use the services of a resident intermediary to carry out their stock exchange transactions are in a situation

> comparable to those who prefer to use the services of a non-resident intermediary".

The Court pointed out, in paragraph 27, that although residents pay the same taxes whether they use a Belgian intermediary or a non-resident intermediary, when they chose the latter option, the Belgian legislation at issue resulted in a difference in treatment because –

> "it also has the effect of imposing additional liability and obligations on such issuers of an order who decide to use a non-resident intermediary".

The Court concluded, in paragraph 29, that this difference in tax treatment was –

> "liable to dissuade them from using the services of non-resident service providers, while making it more difficult for the latter to offer their services in that Member State. Such national legislation therefore constitutes a restriction on the freedom to provide services".

Justification

Belgium argued that its rules were necessary to combat tax avoidance, to ensure fiscal supervision and the effective collection of taxes.

The purpose of the Belgian rules

The Court noted that the objective of the national rules at issue was to prevent unfair competition between resident and non-resident professional intermediaries. The Court indicated that resident intermediaries were obliged to withhold taxes when transactions were conducted on the Belgian stock exchange, whereas non-resident intermediaries were not obliged to do so on transactions executed on behalf of Belgian residents. The new rules were also needed to ensure the effectiveness of fiscal supervision and effective collection of taxes. Consequently, the Court accepted that the Belgian rules constituted general interests which Belgium was entitled to protect and, thus, justified a restriction on the freedom to provide services.

Proportionality

Finally, having determined that a possible justification existed for the Belgian rules at issue, the Court investigated whether the Belgian rules at issue complied with the principle of proportionality.

The Court highlighted, first, in paragraph 38, that the rules at issue were necessary because –

> "the information necessary for the establishment and supervision of a tax … which is levied on each stock exchange transaction, cannot be obtained by

> administrative cooperation alone and by the automatic and compulsory exchange of information in the field of taxation provided for, in particular, by Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation".

Second, the Court pointed out, in paragraphs 39-41, that the national legislation –

> "although having the effect of making the Belgian issuer of an order liable to the TOB if the professional intermediary is established abroad, nevertheless limits the burden resulting from that liability to what is necessary in order to attain the objectives pursued ...
>
> the issuer of an order is exempt from payment of that tax and from the declaration obligations linked to that tax if he establishes that the tax has already been paid …
>
> [also] … a resident issuer of an order may agree with the non-resident professional intermediary engaged by him that the latter wishes to provide that resident issuer of an order with a bank statement in respect of the transactions showing payment of the TOB, as intermediaries established in Belgium are obliged to do. The referring court also notes that a non-resident professional intermediary is able to appoint a representative for the purposes of carrying out those formalities".

In relation to the appointment of a fiscal representative in Belgium, the Court highlighted, in paragraph 42, that the Belgian legislation –

> "allows, without obliging them to do so, non-resident intermediaries to have a representative established in Belgium approved for the purpose of fulfilling, on their behalf, the declaration obligations linked to the payment of that tax and who will be responsible for it".

This removed the need for the non-resident professional intermediary to provide an order statement of the transactions and the payment of the tax. The Court concluded, that such legislative options –

> "allows them to adopt … the solution which appears to them to be the least restrictive … [and] limits the restriction on the freedom to provide services resulting from the national legislation at issue … to what is necessary in order to achieve the objectives which it pursues, so that that legislation, which thus offers those issuers of an order and the professional intermediaries options, both as regards the declaration obligations relating to the TOB and its payment, does not appear to go beyond what is necessary to achieve these objectives".

The Court's Conclusion

Accordingly, the Court concluded that the Belgian rules at issue were compatible with the principle of proportionality and justified by the general interests submitted by the Belgian authorities. The Court also held that the same reasoning applied in relation to Article 36 of the EEA Agreement.

Part II

Analysis

The Court's judgment in *Anton van Zantbeek* follows the Court's previous jurisprudence. It begins with a determination on whether the free movement of capital or the freedom to provide (or receive) services both apply to the situation at hand or whether one freedom was the predominant one. The Court concluded that the predominant freedom at stake in this case was the freedom to provide (or receive) services.

Next, the Court investigated whether there was a restriction on the freedom to provide (or receive) services. In coming to its decision, it conducted a comparability analysis and decided that the situation of a Belgian resident using a Belgian intermediary was comparable to that of a Belgian resident using a non-resident intermediary. The Court highlighted that in the latter situation, the Belgian resident was placed in a disadvantageous situation. Thus, the Court applied the equal treatment principle, in relation to an origin Member State rule, which impacted on a Belgian resident exercising its right to acquire intermediation services in another Member State, while being penalised in the process. This restriction on the freedom to provide (or receive) services had to be justified.

Lastly, the Court conducted a proportionality assessment of the Belgian rules at issue and determined that such rules were in compliance with the principle of proportionality when the purpose of the national rules was taken into consideration.

Predominant Freedom

The Court accepted that the Belgian tax rules at issue could affect both the free movement of capital and the freedom to provide services. In such circumstances, the Court investigates whether one of the freedoms in question is the predominant freedom at play in this case. It concluded that the tax rules at issue mainly concerned services provided by professional intermediaries, whether located in Belgium or in another EU/EEA Member State, since the tax at issue only applied if a professional intermediary was involved in the transaction. The Court also observed that if the professional intermediary was located outside Belgium, it was the Belgian resident

who ordered the intermediation transaction that was liable for the tax, not the non-resident intermediary. The Court concluded, in paragraph 21, that –

> "Such an effect predominantly concerns the freedom to provide services, whereas its effect on the free movement of capital is merely an inevitable consequence of the possible restriction imposed on the provision of services".

The Court had made a similar determination in its earlier *Fidium Finanz* case.[3]

Fidium Finanz

Fidium Finanz was finance company, established in Switzerland. It made small loans to people established outside Switzerland, but mostly to German residents. It conducted this business over the internet from its office in Switzerland. Fidium Finanz was not authorised to carry on a banking business or provide financial services in Germany and it was not authorised in Switzerland because its clients were not Swiss residents.

The Court noted, in paragraph 25 of *Fidium Finanz*, that –

> "Contrary to the chapter of the Treaty concerning the free movement of capital, the chapter regulating the freedom to provide services does not contain any provision which enables service providers in non-member countries and established outside the European Union to rely on those provisions … the objective of the latter chapter is to secure the right to provide services for nationals of Member States. Therefore, Article 49 EC et seq. cannot be relied on by a company established in a non-member country".

Thus, the Court was faced with a problem: loans fell within the free movement of capital, which applied to third countries, such as Switzerland, but freedom to provide financial services did not apply to third countries. Accordingly, the Court had to determine what was the relationship between the overlapping freedoms at issue in this case.

The Court highlighted, in paragraph 28 of *Fidium Finanz*, that –

> "although closely linked, those provisions were designed to regulate different situations and they each have their own field of application".

The Court pointed out, in paragraph 34, that –

> "Where a national measure relates to the freedom to provide services and the free movement of capital at the same time, it is necessary to consider to what

3 *Fidium Finanz AG v Bundesanstalt für Finanzdienstleistungsaufsicht ("Fidium Finanz"),* C-452/04, ECLI:EU:C:2006:631. See my comments on Capital vs Services in Tom O'Shea, "Thin Cap GLO and Third Country Rights: Which Freedom Applies?" Tax Notes International, 23 April 2007, 371-375.

> extent the exercise of those fundamental liberties is affected and whether, in the circumstances of the main proceedings, one of those prevails over the other … The Court will in principle examine the measure in dispute in relation to only one of those two freedoms if it appears, in the circumstances of the case, that one of them is entirely secondary in relation to the other and may be considered together with it."

Based on its established case law relating to services, the Court held that the business of a credit institution consisting of granting credit, constituted a service within the meaning of Article 49 EC (freedom to provide services, at that time). The Court accepted, in paragraph 40 of *Fidium Finanz*, that the activity of granting credit on a commercial basis constitutes a provision of services. However, the Court also accepted that the provision of loans fell within the free movement of capital as defined in Annex I of Directive 88/361.

The Court explained, in paragraph 48, that –

> "As regards the free movement of capital within the meaning of Article 56 EC et seq., it is possible that by making financial services offered by companies which are established outside the European Economic Area less accessible for clients established in Germany, the rules effectively make those clients less inclined to have recourse to those services and, therefore, reduce cross-border financial traffic relating to those services. However, that is merely an unavoidable consequence of the restriction on the freedom to provide services".

The Court concluded, in paragraph 49, that –

> "the predominant consideration is freedom to provide services rather than the free movement of capital. Since the rules in dispute impede access to the German financial market for companies established in non-member countries, they affect primarily the freedom to provide services. Given that the restrictive effects of those rules on the free movement of capital are merely an inevitable consequence of the restriction imposed on the provision of services, it is not necessary to consider whether the rules are compatible with Article 56 EC".

Restriction on the Freedom to Provide Services

Anton van Zantbeek argued that the Belgian rules at issue disadvantaged transactions that involved the use of a foreign professional intermediary by a Belgian resident. Such residents, according to the Court, were in a comparable situation to other residents who used a Belgian professional intermediary. The Court indicated, in paragraph 27 of *Anton van Zantbeek,* that –

> "Although, admittedly, the national legislation at issue in the main proceedings has the effect of making resident issuers of an order subject to identical taxation irrespective of where those intermediaries are established, it also has the effect of imposing additional liability and obligations on such issuers of an order who decide to use a non-resident intermediary."

The Court determined that this difference in tax treatment constituted a restriction on the freedom to provide services. It stressed that the Belgian rules were liable to dissuade Belgian residents from using the services of non-resident service providers, while making it more difficult for the latter to offer their services in Belgium.

Justification and Proportionality

The justification/proportionality segment of the Court's judgment in *Anton van Zantbeek* brought into play the significance of the purpose of the Belgian tax rules at issue, which endeavoured to ensure a level playing field between the use of resident and non-resident professional intermediaries. The Belgian tax rules were necessary to ensure taxes were collected on all stock exchange transactions involving the use of a professional intermediary by a Belgian resident. The Court accepted that the need to ensure the effective collection of tax, the need to ensure the effectiveness of fiscal supervision and the need to combat tax avoidance were "overriding reasons in the public interest" that could justify a restriction on the freedom to provide services.

On the issue of proportionality, the Court highlighted that the rules which made the Belgian resident (the issuer of an order using the services of a non-resident professional intermediary) responsible for the tax on the transaction were likely to ensure that the stock exchange transaction in question did not escape taxation. Placing the burden on the resident, rather than the non-resident intermediary, also improved the effectiveness of fiscal supervision and made it more difficult for the Belgian resident to circumvent the tax. Therefore, the Court concluded that the Belgian rules were appropriate for achieving their objectives.

On the issue of whether the Belgian rules went beyond what was necessary to achieve their objectives, the Court pointed out that administrative cooperation and automatic exchange of information between the Member States (contained in Council Directive 2011/16/EU, as amended by Council Directive 2014/107/EU) might not be appropriate in this instance because the tax was charged on individual stock exchange transactions. The Court also noted, in paragraph 39, that the Belgian legislation –

> "although having the effect of making the Belgian issuer of an order liable to the TOB if the professional intermediary is established abroad, nevertheless limits the burden resulting from that liability to what is necessary in order to attain the objectives pursued".

The Court explained that the Belgian resident (issuer of the order) did not have to pay the tax where he established that the tax had already been paid by producing a banking record, such as a bank statement showing the transactions in question and the payment of the relevant taxes. Non-resident professional intermediaries could also appoint a representative in Belgium for the purposes of these taxes. Consequently, the Court concluded that such a choice of options ensured that the restriction on the freedom to provide services was limited to what was necessary to achieve the objectives of the Belgian legislation and, accordingly, did not go beyond what was necessary to achieve the objectives.

Therefore, the Belgian rules at issue were justified and in keeping with the principle of proportionality. Consequently, they were not in breach of the freedom to provide services in the TFEU nor in the EEA Agreement.