ORDER OF THE COURT (Fifth Chamber)

4 June 2009 (*)

(First subparagraph of Article 104(3) of the Rules of Procedure – Articles 43 EC and 56 EC – Directive 90/435/EEC – Article 4(1) – National legislation designed to prevent double taxation of distributed profits – Deduction of the amount of dividends received from a parent company's basis of assessment only in so far as it has made taxable profits)

In Joined Cases C-439/07 and C-499/07,

REFERENCES for a preliminary ruling under Article 234 EC from the Hof van beroep te Brussel (Belgium) (C-439/07) and the Rechtbank van eerste aanleg te Brugge (Belgium) (C-499/07), made by decisions of 13 September and 5 November 2007, received at the Court respectively on 24 September and 16 November 2007, in the proceedings

Belgische Staat (C-439/07)

v

KBC Bank NV,

and

Beleggen, Risicokapitaal, Beheer NV (C-499/07)

v

Belgische Staat,

THE COURT (Fifth Chamber),

composed of M. Ilešič, President of the Chamber, A. Borg Barthet and E. Levits (Rapporteur), Judges,

Advocate General: V. Trstenjak,

Registrar: R. Grass,

the Court proposing to give its decision by reasoned order in accordance with the first subparagraph of Article 104(3) of its Rules of Procedure,

after hearing the Advocate General,

makes the following

Order

1 These references for a preliminary ruling relate to the interpretation of Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), and of Articles 43 EC and 56 EC.

2 The references were made in the course of proceedings between the Belgische Staat and KBC Bank NV ('KBC') (C-439/07) and between Beleggen, Risicokapitaal, Beheer NV ('BRB') and the Belgische Staat (C-499/07) relating to the determination of the companies' taxable profits for the purposes of corporation tax in respect of the tax years 2000 and 2001, as regards KBC, and 2003 and 2004, as regards BRB.

Legal framework

Community legislation

3 As set out in the third recital in the preamble to Directive 90/435, the directive seeks, in particular, to eliminate the fiscal disadvantages incurred by groups of companies from different Member States in comparison with groups of companies from the same Member State.

4 Under Article 3(1)(a) of Directive 90/435, the status of parent company is to be attributed to any company of a Member State which fulfils certain conditions set out in Article 2 of that directive and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions.

5 Article 4(1) and (2) of that directive provides:

'1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:

– refrain from taxing such profits, or

– tax such profits while authorising the parent company to deduct from the amount of tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.'

National legislation

6 Directive 90/435 was transposed into Belgian law by the Law of 23 October 1991 (*Belgisch Staatsblad* of 15 November 1991, p. 25619), which amended the existing system of definitively taxed income ('the DBI system') and fixed at 95% the amount of dividends received which could be deducted from the parent company's basis of assessment.

7 Following the codification which took place in 1992, the provisions relevant to the DBI system were brought together in Articles 202, 204 and 205 of the Income Tax Code, coordinated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992 ('the ITC 1992'; supplement to the *Belgisch Staatsblad* of 30 July 1992), as implemented by the Royal Decree for the implementation of the Income Tax Code 1992 ('the Royal Decree implementing the ITC 1992'; *Belgisch Staatsblad* of 13 September 1993).

8 Under those provisions, a company may deduct from its profits 95% of the dividends received from its subsidiaries, within the meaning of Directive 90/435, in respect of its definitively taxed income (this deduction is hereinafter referred to as 'the DBI deduction').

9 The functioning of the DBI system can be succinctly described as follows. First, the dividend distributed by the subsidiary must be included in the parent company's basis of assessment. Second, that dividend is to be deducted from that basis of assessment, but only in so far as, for the tax period in question, a profit remains after deduction of other exempted profits.

10 Thus, Article 202 of the ITC 1992 states:

'(1) The following shall also be deducted from the profits for the tax period, in so far as they are included in it:

(1) Dividends, with the exception of income which is received on the transfer to a company of its own listed or unlisted shares or during the complete or partial distribution of the assets of a company;

…

(2) Income referred to in paragraph 1(1) … is deductible only to the extent that, at the date of declaration or payment, the recipient company has a holding in the capital of the company making the distribution of not less than 5[%] or of a value of at least [EUR] 1 200 000.'

11 The first paragraph of Article 204 of the ITC 1992 is worded as follows:

'The income deductible under Article 202(1)(1) … is deemed to be found in the profits for the tax period up to 95[%] of the amount collected or received, which may be increased by real or notional equalisation tax …'

12 Article 205(2) of the ITC 1992 states:

'The deduction provided for under Article 202 shall be limited to the amount of profit remaining in the relevant taxable period after the application of Article 199, less:

1. dispositions which are not deductible as business expenses, save for dispositions deducted from profits under Articles 199 and 200;

…

8. taxes referred to in Article 198(1), (4), (8) and (9).'

13 Article 77 of the Royal Decree implementing the ITC 1992 provides:

'The amounts referred to in Articles 202 to 205 of the [ITC] 1992 which are deductible as definitively taxed income … shall be deducted in the amount of the profits remaining after application of Article 76; that deduction is to be made having regard to the origin of the profits and, as a matter of priority, from the profits which contain those amounts.'

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

Case C-439/07

14 KBC, a company established in Belgium, received, in the course of the tax year 2000, dividends on its shareholdings in companies established in Belgium, in other Member States and in Switzerland in a total amount of EUR 261 571 848.56. According to KBC, of those dividends EUR 254 225 662.61 met the requirements for deduction under Articles 202 and 203 of the ITC 1992 and could be made the subject of the DBI system. That sum is made up of dividends received from KBC's subsidiaries established in Belgium (EUR 157 024 873.74), in other Member States (EUR 96 887 457.38) and in Switzerland (EUR 313 331.49).

15 KBC considered that, under Article 204 of the ITC 1992, since the DBI system could be applied to a sum of EUR 241 514 379.48, namely 95% of the dividends, it should be deducted from its profits for the tax year concerned.

16 Under Articles 205(2) of the ITC 1992 and 77 of the Royal Decree implementing the ITC 1992, the DBI deduction was limited to the profits remaining after its application, namely EUR 156 116 633.08, from which was also deducted a sum of EUR 13 137 553.78 corresponding to expenditure excluded from the DBI deduction under Article 205(2), point 1 and point 8 of the ITC 1992.

17 Consequently, from total dividends received and eligible for the DBI deduction of EUR 241 514 379.48, only EUR 142 979 079.30 could be deducted from KBC's taxable profits.

18 Since it considered that a transferable loss equivalent to the non-deductible amount of EUR 98 535 300.18 in respect of definitively taxed income had been wrongly disallowed, KBC set out, in its tax return dated 28 September 2000 for the 2000 tax year, a reservation as regards the compatibility of Articles 205(2) of the ITC 1992 and 77 of the Royal Decree implementing the ITC 1992 with Directive 90/435 and with freedom of establishment.

19 Since the tax authorities did not accept KBC's position, KBC filed an objection against the notice of assessment for the tax year 2000. That objection having been rejected, KBC brought proceedings before the Rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels).

20 In its tax return of 27 July 2001 relating to the 2001 tax year, KBC also stated the same reservation as that referred to in paragraph 18 of the present order.

21 KBC claimed, in particular, that it was entitled to set off against the profits of the 2001 tax year the loss of EUR 98 535 300.18 suffered in the course of the preceding tax year which, in its view, it had to be permissible to carry forward. It submitted that the taxable profits for the 2001 tax year had been fully absorbed by the loss carried forward and claimed that the remaining unused loss, a sum of EUR 53 219 495.46, should be treated as a loss which could be carried forward to the 2002 tax year.

22 Since the tax authorities did not accept that reasoning, KBC lodged an objection against the notice of

assessment issued for the year 2001. That objection having been rejected, KBC brought further proceedings before the Rechtbank van eerste aanleg te Brussel.

23 By a judgment of 25 April 2003, that court upheld KBC's claims and annulled the contested notices of assessment.

24 Since the Belgische Staat considered that KBC had no loss which could be carried forward either for the 2000 or the 2001 tax year and that the tax authorities had acted in accordance with Belgian and Community law, it appealed against that judgment to the Hof van beroep te Brussel (Court of Appeal, Brussels) which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must … Directive 90/435 …, in particular Article 4(1), first indent, thereof, be construed as precluding a situation in which a Member State applies the exemption relating to distributed profits received by a company of that State from its subsidiary in another Member State, except when the subsidiary is liquidated, by first including in full the distributed profits in the taxable basis and then deducting 95% of those profits from the taxable basis but limiting the deduction to the amount of profits made in the taxable period in which the distribution of profits took place (after certain statutorily defined deductions) (Article 205(2) [of the ITC 1992] in conjunction with Article 77 [of the Royal Decree implementing the ITC 1992]), in view of the fact that the result of such a limitation of the deduction of distributed profits is that, if the parent company had no or insufficient taxable profits during the taxable period in which the distributed profits were received, it would in a subsequent taxable period be taxed on those distributed profits which it had received, or at least that the losses of that taxable period would be offset by means of distributed profits, 95% of which must remain untaxed pursuant to Article 4(1), first indent, in conjunction with Article 4(2), of Directive 90/435 and that consequently those losses, in the amount of the distributed profits received, could no longer be carried forward to a subsequent taxable period?

2. If … Directive 90/435 … is to be construed as meaning that the Belgian rule is contrary to Article 4(1), first indent, of [that directive] with regard to distributed profits received by a Belgian parent company from a subsidiary established within the EU, must it then be determined that that provision of the Directive is also incompatible with the application of the Belgian rule to distributed profits received by a Belgian parent company from a Belgian subsidiary where, as in the present case, the Belgian legislature, in transposing the Directive into Belgian law, has chosen to apply the same treatment to purely internal situations and to those governed by the Directive and has therefore aligned the Belgian legislation with the Directive also for purely internal situations?

3. If Directive 90/435 … must be taken to mean that the Belgian rule is contrary to Article 4(1), first indent, of [that directive] with regard to distributed profits received by a Belgian parent company from a subsidiary established in the EU and the *Leur-Bloem* judgment of the Court of Justice (Case C-28/95 *Leur-Bloem* [1995] ECR I-4161) is extended to cover distributed profits received from a subsidiary established in Belgium, is it then contrary to Article 56(1) EC for Belgium to continue to apply the legislative provision in question, unchanged, to dividends originating from subsidiaries established in non-member countries, on the ground that the latter dividends are then treated less favourably than domestic dividends or EU dividends?

4. Does Article 43 EC preclude the application of a legislative rule of a Member State under which,

for the purposes of assessment to corporation tax, the exemption of the distributed profits received during a taxable period by a company from its subsidiary established in another Member State is limited in the first Member State to the amount of the profit made in the taxable period during which the profits were distributed (after certain statutorily defined deductions), whereas a full exemption of the distributed profits would be possible if that company had set up a permanent establishment in that other Member State?'

Case C-499/07

25 In the course of the 2003 tax year, BRB, a company established in Belgium, received from a company also established in Belgium a dividend of EUR 445 000, from which EUR 422 750 was deductible under the DBI system in accordance with Article 204 of the ITC 1992.

26 BRB's taxable profit for the 2003 tax year was insufficient for the dividends received to be deducted in full. In its tax return for that year BRB therefore entered a loss to be carried forward of EUR 123 300.86 consisting of a loss for the taxable period of EUR 103 194.38, corresponding to the amount of the dividends which could not be deducted under the DBI system, and a loss of EUR 20 106.48 carried forward from the tax year 2002.

27 In an amendment notice dated 20 April 2004, the tax authorities stated that they did not accept that the loss could be carried forward since definitively taxed income could never give rise to a loss which could be carried forward. In the tax authorities' view, such income must be limited to the profit of the relevant taxable period, in this case EUR 319 555.62, less disallowed expenses of EUR 187.50. Consequently, the definitively taxed income had to be limited to EUR 319 368.12 and BRB's taxable profit was therefore EUR 187.50, without giving rise to any loss which could be carried forward. BRB disagreed with those amendments.

28 In its return for the tax year 2004, BRB carried forward a loss of EUR 123 300.86, which the tax authorities declined to take into account in an amendment notice dated 11 February 2005. BRB disagreed with that amendment also.

29 The tax authorities having finalised notices of assessment for the tax years 2003 and 2004 in accordance with the stated amendments, BRB lodged objections to those assessments which were rejected by the tax authorities.

30 BRB therefore appealed to the Rechtbank van eerste aanleg te Brugge (Court of First Instance, Bruges) which decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must … Directive 90/435 …, in particular Article 4(1) thereof, be construed as precluding a situation in which a Member State applies the exemption relating to distributed profits which are received by a company of that State from its subsidiary in another Member State, except when the subsidiary is liquidated, by first including in full the distributed profits in the taxable basis and then deducting 95% of those profits from the taxable basis but limiting the deduction to the amount of profits made in the taxable period in which the distribution of profits took place (after certain statutorily defined deductions) (Article 205(2) [of the ITC 1992] in conjunction with Article 77 [of the Royal Decree implementing the ITC 1992]), with the result that, if the profits made in the relevant taxable period are smaller than the amount of the aforementioned distributed profits, this does not give rise to a transferable loss?

2. If so, must … Directive 90/435 …, in particular Article 4(1) thereof, then be construed as obliging this Member State to make the distribution of profits which a company of this Member State receives from its subsidiary of another Member State deductible in full from the amount of profits made in the taxable period and to make any resulting loss transferable to a later taxable period?

3. If … Directive 90/435 … must be construed as meaning that the Belgian rule is contrary to Article 4(1) with regard to distributed profits received by the Belgian parent company from a subsidiary established in the EU, must it then be determined that the aforementioned provision of the Directive is also incompatible with the application of the Belgian rule to distributed profits received by a Belgian parent company from a Belgian subsidiary where, as in the present case, the Belgian legislature, in transposing the Directive into Belgian law, has chosen to apply the same treatment to purely internal situations and to those governed by the Directive and has therefore aligned the Belgian legislation with the Directive also for purely internal situations?

4. Does Article 43 EC preclude the application of a legislative rule of a Member State under which, for the purposes of assessment to corporation tax, the exemption of the distributed profits received during a taxable period by a company from its subsidiary established in another Member State is limited in the first Member State to the amount of the profit made in the taxable period during which the profits were distributed (after certain statutorily defined deductions), whereas a full exemption of the distributed profits would be possible if that company had set up a permanent establishment in that other Member State?'

31 Cases C-439/07 and C-499/07 were, by order of the President of the Court of 15 April 2008, joined for the purposes of the written and oral procedure and the judgment.

The questions referred

32 Under the first subparagraph of Article 104(3) of the Rules of Procedure, where a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, or where the answer to such a question may be clearly deduced from existing case-law, the Court may, after hearing the Advocate General, at any time give its decision by reasoned order.

Article 4(1) of Directive 90/435

The first question in each case

33 By their first question in each case, the referring courts are asking, in essence, whether the first indent of Article 4(1) of Directive 90/435 must be interpreted as precluding legislation of a Member State which, for the purposes of the exemption of dividends received by a parent company established in that State from a subsidiary established in another Member State, requires such dividends to be included in the parent company's basis of assessment, in order subsequently to be deducted in the amount of 95%, in so far as the parent company has, for the tax period in question, a positive profit balance after deduction of other exempted profits, and as a result of which:

– if the parent company had no or insufficient taxable profits during the taxable period in which those distributions were made, it is to be taxed in respect of a later taxable period on the distributed profits received (Case C-439/07),

or

– the losses of that taxable period are to be offset against distributed profits and cannot be carried forward, up to the amount of those distributions, to a subsequent taxable period (Cases C-439/07 and C-499/07).

34 That question is, in essence, similar to that referred to the Court in Case C-138/07 *Cobelfret* [2009] ECR I-0000. Likewise, the disputes in the main proceedings and that which gave rise to the judgment in *Cobelfret* concern the application of the same national legislation. Therefore, the Court's reply in that judgment is fully applicable to the first question referred in the main proceedings.

35 In *Cobelfret*, the Court held that the first indent of Article 4(1) of Directive 90/435 must be interpreted as precluding legislation of a Member State which provides that dividends received by a parent company are to be included in its basis of assessment in order subsequently to be deducted from that basis in the amount of 95%, in so far as, for the tax period in question, the parent company has a positive profit balance after deduction of other exempted profits.

36 The Court pointed out, first, that the obligation on a Member State which has chosen the system set out in the first indent of Article 4(1) of Directive 90/435 to refrain from taxing the profits which the parent company receives by virtue of its association with its subsidiary is not coupled with any condition and is expressly subject only to Articles 4(2) and (3) and 1(2) of that directive, and that, second, the first indent of Article 4(1) of the directive does not lay down, in particular, any condition that there must be other taxable profits in order for the dividends received by the parent company not to be subject to taxation (*Cobelfret*, paragraphs 33 and 34).

37 The Court also decided that the effect of a system, which provides that dividends received by the parent company are to be added to its basis of assessment and that subsequently an amount corresponding to 95% of those dividends is to be deducted from that basis only in so far as there are taxable profits in the hands of the parent company, is that the parent company can benefit in full from that advantage only on condition that it has not suffered negative results for the same tax period with regard to its other taxable income (*Cobelfret*, paragraph 35).

38 Member States cannot unilaterally introduce restrictive measures such as a requirement that the parent company have taxable profits and thus impose conditions on the possibility of benefiting from the advantages provided for in Directive 90/435 (*Cobelfret*, paragraph 36).

39 The Court then noted that since it was evident from the file submitted to it that, in principle, Belgian tax legislation allows losses to be carried forward to subsequent tax years, the reduction in the parent company's losses which could thus be carried forward up to the amount of the dividends received has an effect on the basis of assessment of that company during the tax year which follows that in which those dividends were received, a basis which, following the reduction in the losses which can be carried forward, is increased (*Cobelfret*, paragraph 39).

40 The Court held, accordingly, that, even if the dividends received by the parent company are not subject to corporation tax for the tax year in the course of which they were distributed, that reduction in the parent company's losses may mean that the parent company will be subject indirectly to taxation on those dividends in subsequent tax years when its results are positive and that such an effect of the restriction on the DBI deduction is not compatible with the terms or the objective and scheme of Directive 90/435 (*Cobelfret*, paragraphs 40 and 41).

41 The Court ruled, first, that the use in the first indent of Article 4(1) of Directive 90/435 of the words

'refrain from taxing' instead of the verb 'exempt' cannot give rise to the inference that the directive allows the restriction of the DBI deduction to have such an effect on the losses of the parent company, since there is nothing in the scheme or purpose of Directive 90/435 to suggest that there is any significant difference between the concepts of 'refraining from taxing' and 'exempting' the profits received by the parent company, as the Court has used the concept of 'exempting' interchangeably with that of 'refrain[ing] from taxing' within the meaning of Article 4(1) (*Cobelfret*, paragraphs 42 and 43).

42 Then, after noting that when the parent company does not make other taxable profits in the period during which the dividends are received, the DBI system does not allow the objective of preventing economic double taxation, as set out in the first indent of Article 4(1) of Directive 90/435, to be fully attained, the Court held that even though, in applying that system to the dividends distributed by both resident subsidiaries and those established in other Member States, the Kingdom of Belgium seeks to eliminate all penalisation of cooperation between companies of different Member States as compared with cooperation between companies of the same Member State, that does not justify the application of a system which is not compatible with the system for preventing economic double taxation set out in the first indent of Article 4(1) (*Cobelfret*, paragraphs 45 and 46).

43 Finally, as regards the argument that the restriction of the DBI deduction leads, at the very least, to the same result as that of the imputation system provided for in the second indent of Article 4(1) of Directive 90/435, and that there is no indication that the system set out in the first indent had to lead to a more favourable result than that set out in the second indent, the Court pointed out, first, that the choice between the exemption system and the imputation system does not necessarily lead to the same result for the company receiving the dividends and, second, that a Member State which has opted, when transposing a directive, for one of the alternative systems provided for by that directive cannot rely on the effects or restrictions which might have arisen from the implementation of the other system (*Cobelfret*, paragraphs 48 and 50).

44 Consequently, having regard to the foregoing, the reply to the first question in Joined Cases C-439/07 and C-499/07 is that the first indent of Article 4(1) of Directive 90/435 must be interpreted as precluding legislation of a Member State which, for the purposes of the exemption of dividends received by a parent company established in that State from a subsidiary established in another Member State, requires such dividends to be included in the parent company's basis of assessment, in order subsequently to be deducted in the amount of 95%, in so far as the parent company has, for the tax period in question, a positive profit balance after deduction of other exempted profits, and as a result of which:

– if the parent company had no or insufficient taxable profits during the taxable period in which those distributions were made, it is to be taxed in respect of a later taxable period on the distributed profits received,

  or

– the losses of that taxable period are to be offset against distributed profits and cannot be carried forward, up to the amount of those distributions, to a subsequent taxable period.

The second question in Case C-499/07

45 By its second question in Case C-499/07, the referring court asks, in essence, whether the first indent of Article 4(1) of Directive 90/435 is to be interpreted as meaning that a Member State must necessarily

permit profits distributed to a parent company established in that State by its subsidiary established in another Member State to be deducted in full from the parent company's profits in the taxable period and any resulting loss to be carried forward to a later taxable period.

46 It must be observed that it is for each Member State to organise, in compliance with Community law, its system for taxing distributed profits and to define, for that purpose, the tax base and rate applicable to the recipient shareholder (see, to that effect, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 50; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 47; and Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 30).

47 As regards distributions of profits covered by Directive 90/435, Article 4(1) thereof provides that, where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State in which the parent company is established must either refrain from taxing such profits or authorise the parent company to deduct from the amount of tax payable that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, up to the limit of the amount of the corresponding domestic tax (Case C-27/07 *Banque Fédérative du Crédit Mutuel* [2008] ECR I-2067, paragraph 25, and *Cobelfret*, paragraph 30), expressly leaving it open to Member States to choose between the exemption system and the imputation system (see *Test Claimants in the FII Group Litigation*, paragraph 44, and *Cobelfret*, paragraph 31).

48 The first indent of Article 4(1) of Directive 90/435 is unconditional and sufficiently precise to be capable of being relied on before national courts (*Cobelfret*, paragraph 65), without however prescribing the manner in which Member States which have chosen the exemption system must implement it.

49 Indeed, according to the actual wording of the third paragraph of Article 249 EC, Member States may choose the form and methods for implementing directives which best ensure the result to be achieved by those directives (see, to that effect, Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 51; Case C-321/05 *Kofoed* [2007] ECR I-5795, paragraph 43; and Case C-491/06 *Danske Svineproducenter* [2008] ECR I-3339, paragraph 27).

50 Accordingly, Member States are free to determine, in the light of the requirements of their domestic legal systems, the detailed arrangements for ensuring that the result prescribed by the first indent of Article 4(1) of Directive 90/435 is attained (see by analogy, as regards Article 3(2) of Directive 90/435, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavitand Others* [1996] ECR I-5063, paragraph 33).

51 Moreover, pursuant to Article 4(2) of Directive 90/435, each Member State is to retain the option of providing that any charges relating to the holding in the subsidiary may not be deducted from the taxable profits of the parent company, subject to the qualification that where, in such a case, the management costs relating to the holding are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary (*Banque Fédérative du Crédit Mutuel*, paragraph 28).

52 It should also be borne in mind that Article 4(2) of Directive 90/435 allows a Member State to set the management costs which are not deductible at a fixed amount which may not exceed 5% of the profits distributed by the subsidiary, without distinguishing between a situation in which that Member State

has opted for the exemption method and one in which it has opted for the imputation method (*Banque Fédérative du Crédit Mutuel*, paragraph 45).

53 Consequently, the reply to the second question in Case C‑499/07 is that the first indent of Article 4(1) of Directive 90/435, read in combination with Article 4(2) thereof, is to be interpreted as meaning that it does not oblige Member States necessarily to permit profits distributed to a parent company established in that State by its subsidiary established in another Member State to be deducted in full from the parent company's profits in the taxable period and any resulting loss to be carried forward to a later taxable period. It is for the Member States to determine, in the light both of the requirements of their domestic legal system and the option provided for in Article 4(2), the detailed arrangements for ensuring that the result prescribed by the first indent of Article 4(1) is attained.

54 However, where a Member State has chosen the exemption system provided for in the first indent of Article 4(1) of Directive 90/435 and, in principle, the legislation of that Member State allows losses to be carried forward to subsequent taxable periods, that provision precludes legislation of a Member State which reduces, to the amount of the dividends received, the losses of the parent company which may be carried forward.

The second question in Case C‑439/07 and the third question in Case C‑499/07

55 By the second question in Case C-439/07 and the third question in Case C-499/07, the referring courts are asking, in essence, whether, where a Member State's legislature decided, in transposing Directive 90/435, to apply the same treatment to purely internal situations and to those governed by that directive, the first indent of Article 4(1) thereof is to be construed as precluding the application of legislation such as that in issue in the main proceedings to those internal situations.

56 According to Article 1 of Directive 90/435, the latter applies to distributions of profits received by companies of one Member State from their subsidiaries with a seat in other Member States. In addition, Article 2 of Directive 90/435 defines its scope in relation to the forms of companies listed in the annex thereto, while Article 3(1) lays down the minimum holding necessary to enable one company to be considered a parent company and another company to be considered its subsidiary within the meaning of that directive (*Cobelfret*, paragraph 20).

57 Consequently, the first indent of Article 4(1) of Directive 90/435 does not govern situations which do not satisfy those conditions and, in particular, that in which the dividend-distributing company has its seat in the same Member State as the recipient company. It follows that the said provision cannot by itself preclude the application of national legislation to such purely internal situations.

58 As the referring courts state, the Belgian legislature decided, when it transposed Directive 90/435, to apply the same treatment to purely internal situations and to those governed by the directive.

59 It follows from the Court's case-law that, where domestic legislation adopts for purely internal situations the same solutions as those adopted by Community law, it is for the national court alone, in the context of the division of judicial functions between national courts and the Court of Justice under Article 234 EC, to assess the precise scope of that reference to Community law, the jurisdiction of the Court of Justice being confined to the examination of provisions of that law (Joined Cases C‑297/88 and C‑197/89 *Dzodzi* [1990] ECR I‑3763, paragraphs 41 and 42; Case C‑88/91 *Federconsorzi* [1992] ECR I‑4035, paragraph 10; and *Leur-Bloem*, paragraphs 32 and 33). The consideration of the limits which the national legislature may have placed on the application of Community law to purely internal

national situations is a matter for domestic law and, consequently, falls within the exclusive jurisdiction of the Member State concerned (*Dzodzi*, paragraph 42; C-73/89 *Fournier* [1992] ECR I-5621, paragraph 23; *Leur-Bloem*, paragraph 33; and Case C-48/07 *Les Vergers du Vieux Tauves* [2008] ECR I-0000, paragraph 27).

60 In the light of the foregoing, the reply to the second question in Case C-439/07 and to the third question in Case C-499/07 is that, where domestic legislation adopts for purely internal situations the same solutions as those adopted in Community law, it is for the national court alone, in the context of the division of judicial functions between national courts and the Court of Justice under Article 234 EC, to assess the precise scope of that reference to Community law, the consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations being a matter for the law of the Member State concerned and, consequently, falling within the exclusive jurisdiction of the courts of that Member State.

Article 56 EC (the third question in Case C-439/07)

61 By its third question in Case C-439/07, the referring court asks whether, if the first indent of Article 4(1) of Directive 90/435 precludes the application of national legislation, such as that in issue in the main proceedings, to situations in which parent companies and their subsidiaries are established in different Member States as well as to situations in which those companies have their seats in the same Member State, Article 56(1) EC precludes the application of that national legislation also to dividends from subsidiaries established in non-member States.

62 As was noted both in paragraph 20 of the judgment in *Cobelfret* and in paragraph 56 of the present order, according to Article 1 of Directive 90/435 that directive applies to distributions of profits received by companies of one Member State from their subsidiaries with a seat in other Member States.

63 Consequently, the first indent of Article 4(1) of Directive 90/435 does not govern situations which do not satisfy those conditions and, in particular, the situation where the dividend-distributing company has its seat in the same Member State as the recipient company (see paragraph 57 of the present order) or the situation where the distributing company has its seat in a non-member State.

64 Moreover, the measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, cover those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other Member States (see Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 44; Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 24; Case C-101/05 *A* [2007] ECR I-11531, paragraph 40; and Case C-201/05 *The Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I-2875, paragraph 53).

65 Article 56(1) EC gave effect to the liberalisation of capital between the Member States and between Member States and third countries. To that end, it provides, in the chapter of the EC Treaty entitled 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member States and third countries are prohibited (Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 19; *van Hilten-van der Heijden*, paragraph 37; *A*, paragraph 20; and *The Test Claimants in the CFC and Dividend Group Litigation*, paragraph 90).

66 In addition, the Court has already held that, as regards the movement of capital between Member States and third countries, Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question (*A*, paragraph 27, and *The Test Claimants in the CFC and Dividend Group Litigation*, paragraph 91).

67 If, by virtue of the application of the national legislation, dividends from a company established in a non-member State are treated less favourably than dividends from a company with its seat in Belgium, it is for the national court to determine at the outset whether Article 56 EC is applicable.

68 In that regard, in order to determine whether national legislation falls within the scope of one or other of the freedoms of movement, it is clear from what is now well established case-law that the purpose of the legislation concerned must be taken into consideration (see Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, and the case-law cited).

69 The Court has held also that national legislation, the application of which does not depend on the extent of the holding which the company receiving the dividend has in the company paying it, may fall within the purview both of Article 43 EC on freedom of establishment and of Article 56 EC on the free movement of capital (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 36, and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 71).

70 However, to the extent to which the holdings in question confer on their owner a definite influence over the decisions of the companies concerned and allow it to determine their activities, it is the provisions of the Treaty relating to freedom of establishment which apply (*Test Claimants in the FII Group Litigation*, paragraph 81).

71 Consequently, it is for the referring court to determine, in the light of the purpose of the national legislation and the facts of the case before it, whether Article 56 EC may be invoked. If so, it is for that court to determine whether that article precludes the different treatment of dividends from subsidiaries established in a non-member State compared to dividends from subsidiaries with their seat in Belgium.

72 To that end, it must be noted, first, that is clear from the Court's case-law that the extent to which the Member States are authorised to apply certain restrictive provisions on the movement of capital cannot be determined without taking account of the fact that movement of capital to or from third countries takes place in a different legal context from that which occurs within the European Community. Accordingly, because of the degree of legal integration that exists between Community Member States, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, such as Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries (*Test Claimants in the FII Group Litigation*, paragraph 170, and *The Test Claimants in the CFC and Dividend Group Litigation*, paragraph 92).

73 Secondly, it may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States (*A*, paragraphs 36 and 37, and *The Test Claimants in the CFC and Dividend*

Group Litigation, paragraph 93).

74 In view of the foregoing, the answer to the third question in Case C-439/07 is that, where, by virtue of the national legislation of a Member State, dividends from a company established in a non-member State are treated less favourably than dividends from a company with its seat in that Member State, it is for the national court, taking account both of the purpose of the national legislation and of the facts of the case before it, to determine whether Article 56 EC is applicable and, if so, whether it precludes that different treatment.

Article 43 EC (the fourth questions in Cases C-439/07 and C-499/07)

75 By their fourth questions in Cases C-439/07 and C-499/07, the referring courts are asking, in essence, whether Article 43 EC precludes a Member State's legislation, such as that in issue in the main proceedings, which provides that a parent company established in a Member State which receives profits distributed by its subsidiary established in another Member State may deduct them from its taxable income only to the extent of its profits for the taxable period during which the profits were distributed, whereas the latter profits could be fully exempted if the parent company had set up a permanent establishment in that other Member State.

76 According to settled case-law, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the State where such establishment is effected. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (see, in particular, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 22; and Case C-253/03 *CLT-UFA* [2006] ECR I-1831, paragraph 13).

77 As regards treatment in the host Member State, the Court has held that since the second sentence of the first paragraph of Article 43 EC expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions (see *Commission* v *France*, paragraph 22; *CLT-UFA*, paragraph 14; and Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 40).

78 The freedom to choose the appropriate legal form in which to pursue activities in another Member State thus, in particular, serves to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities there under the same conditions as those which apply to subsidiaries (*CLT-UFA*, paragraph 15).

79 It is also settled case-law that even though, according to their wording, the provisions of the Treaty concerning freedom of establishment aim to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, in particular, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 42; Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33; and Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 19).

80 Thus, as regards the obligations of the Member State of origin, the Court observed that, as Community law currently stands, the fiscal autonomy enjoyed by the Member States means that they are at liberty to determine the conditions and the level of taxation for different types of establishments chosen by national companies or partnerships operating abroad, on condition that those companies or partnerships are not treated in a manner that is discriminatory in comparison with comparable national establishments (*Columbus Container Services*, paragraphs 51 and 53).

81 In the main proceedings, there is no indication whatsoever in the files submitted to the Court of Justice by the referring courts that a parent company established in Belgium is treated less favourably when the profits received are distributed by a subsidiary established in another Member State than when such profits are distributed by a comparable subsidiary which is also established in Belgium. Likewise, it has not been alleged that such a parent company is treated less favourably when it receives income from permanent establishments in another Member State compared to income received from a comparable permanent establishment established in Belgium.

82 Accordingly, the reply to the fourth questions in Cases C-439/07 and C-499/07 is that Article 43 EC does not preclude a Member State’s legislation which provides that a parent company established in a Member State which receives profits distributed by its subsidiary established in another Member State may deduct them from its taxable income only to the extent of its profits for the taxable period during which the profits were distributed, whereas the latter profits could be fully exempted if the parent company had set up a permanent establishment in that other Member State, provided that entities set up in another Member State are not treated in a manner that is discriminatory in comparison with the treatment of profits from comparable national entities.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the respective actions pending before the national courts, the decisions on costs are a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

1. **The first indent of Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States must be interpreted as precluding legislation of a Member State which, for the purposes of the exemption of dividends received by a parent company established in that State from a subsidiary established in another Member State, requires such dividends to be included in the parent company’s basis of assessment, in order subsequently to be deducted in the amount of 95%, in so far as the parent company has, for the tax period in question, a positive profit balance after deduction of other exempted profits, and as a result of which:**

   – **if the parent company had no or insufficient taxable profits during the taxable period in which those distributions were made, it is to be taxed in respect of a later taxable period on the distributed profits received,**

   or

– **the losses of that taxable period are to be offset against distributed profits and cannot be carried forward, up to the amount of those distributions, to a subsequent taxable period.**

2. **The first indent of Article 4(1) of Directive 90/435, read in combination with Article 4(2) thereof, is to be interpreted as meaning that it does not oblige Member States necessarily to permit profits distributed to a parent company established in that State by its subsidiary established in another Member State to be deducted in full from the parent company's profits in the taxable period and any resulting loss to be carried forward to a later taxable period. It is for the Member States to determine, in the light both of the requirements of their domestic legal system and the option provided for in Article 4(2), the detailed arrangements for ensuring that the result prescribed by the first indent of Article 4(1) is attained.**

   However, where a Member State has chosen the exemption system provided for in the first indent of Article 4(1) of Directive 90/435 and, in principle, the legislation of that Member State allows losses to be carried forward to subsequent taxable periods, that provision precludes legislation of a Member State which reduces, to the amount of the dividends received, the losses of the parent company which may be carried forward.

3. **Where domestic legislation adopts for purely internal situations the same solutions as those adopted in Community law, it is for the national court alone, in the context of the division of judicial functions between national courts and the Court of Justice under Article 234 EC, to assess the precise scope of that reference to Community law, the consideration of the limits which the national legislature may have placed on the application of Community law to purely internal situations being a matter for the law of the Member State concerned and, consequently, falling within the exclusive jurisdiction of the courts of that Member State.**

4. **Where, by virtue of the national legislation of a Member State, dividends from a company established in a non-member State are treated less favourably than dividends from a company with its seat in that Member State, it is for the national court, taking account both of the purpose of the national legislation and of the facts of the case before it, to determine whether Article 56 EC is applicable and, if so, whether it precludes that different treatment.**

5. **Article 43 EC does not preclude a Member State's legislation which provides that a parent company established in a Member State which receives profits distributed by its subsidiary established in another Member State may deduct them from its taxable income only to the extent of its profits for the taxable period during which the profits were distributed, whereas the latter profits could be fully exempted if the parent company had set up a permanent establishment in that other Member State, provided that entities set up in another Member State are not treated in a manner that is discriminatory in comparison with the treatment of profits from comparable national entities.**

[Signatures]

---

* Language of the case: Dutch.