

OPINION OF ADVOCATE GENERAL

SHARPSTON

delivered on 8 May 2008¹

1. 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 States² ('the Parent/Subsidiary Directive' or 'the Directive') provides that, where a parent company resident in one Member State receives a dividend from a subsidiary resident in another Member State, the Member State of the parent company must either refrain from taxing the dividend or authorise the parent company to deduct from the amount of tax payable thereon tax paid by the subsidiary on the profits thereby distributed.

2. In the present case the Hof van beroep te Antwerpen (Court of Appeal, Antwerp), Belgium, has asked the Court essentially whether Article 4 of the Directive precludes national legislation under which such dividends are first included in the basis of assessment of the parent company and subsequently deducted therefrom only in so far as the parent company has taxable profits.

The Parent/Subsidiary Directive

3. The Parent/Subsidiary Directive seeks to eliminate the tax disadvantage suffered by companies from different Member States, by comparison with companies of the same Member State, where they seek to cooperate by forming groups of parent companies and subsidiaries.³ It does this in two ways.

4. First, Article 4(1) provides that, where a parent company⁴ receives distributed profits from a subsidiary, the Member State of the parent company must either 'refrain from taxing such profits' (the exemption method) or 'tax such profits while authorising the parent company to deduct from the amount of

¹ — Original language: English.

² — OJ 1990 L 225, p. 6. The Directive has subsequently been amended but the main proceedings concern the original version only.

³ — See the third recital in the preamble: 'the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; ... cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; ... it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies'.

⁴ — 'Parent company' and 'subsidiary' are defined in Article 3 of the Directive. The definition incorporates the requirement that the parent company and the subsidiary be resident for tax purposes in different Member States.

tax due that fraction of the corporation tax paid by the subsidiary which relates to those profits ... up to the limit of the amount of the corresponding domestic tax' (the credit or imputation method).

made, the unused portion of the ADBI cannot be carried forward.

5. Second, Article 5(1) requires Member States to exempt from withholding tax profits which a subsidiary distributes to its parent company.

The main proceedings and the question referred

7. Again, the order for reference is economical with information. In so far as relevant, however, the following facts may be deduced from the written observations.

National legislation

6. Although the order for reference is laconic as to the relevant national rules, it appears to be common ground that the Belgian legislation⁵ operates, in so far as relevant, as follows. First, dividends received from subsidiaries within the meaning of the Directive are included in the basis of assessment of the parent company. Second, 95% of the amount of such dividends is deducted from the parent company's taxable profits.⁶ That deduction is known as the 'aftrek van definitief belaste inkomsten' (deduction of definitively taxed income; ADBI'). Third, the ADBI is limited to the amount of profits for the taxable period concerned. The ADBI cannot therefore be used in a year where no profits are made; moreover, where the ADBI exceeds profits

8. In each year from 1992 to 1998 Cobelfret NV ('Cobelfret'), a Belgian company, received dividends from its holdings in companies in both Belgium and the United Kingdom. It is common ground that, with regard to its holdings in the Belgian companies, Cobelfret is a parent company, and those companies are its subsidiaries, within the meaning of the Directive.

9. In 1994, 1995 and 1997, Cobelfret suffered losses and was hence unable to use the ADBI for those years. In 1996 the ADBI to which Cobelfret was entitled exceeded its taxable profits by EUR 277 432. It was unable to carry that unused portion forward to the following year, when it made a loss. Cobelfret takes the view that Belgium therefore does not genuinely exempt dividends since tax losses which

5 — Articles 202, 204 and 205 of the Wetboek van de inkomstenbelastingen (Income Tax Code) 1992.

6 — Article 4(2) of the Directive in effect authorises Member States which have opted for the exemption method to limit the exemption to 95% of dividends received.

can be carried forward are reduced in such a way that, in the following year, the taxable profit is artificially increased by the amount of dividends which should have been exempted.

dividends, which, in the absence of fiscal losses, ought in any case to have been exempted up to 95%?’

10. Cobelfret successfully argued before the *Rechtbank van eerste aanleg* (Court of First Instance), Antwerp, that so limiting the ADBI was contrary to Article 4(1) of the Directive. The Belgian tax authorities appealed to the *Hof van beroep te Antwerpen*, which has referred the following question to the Court:

11. Written observations have been submitted by Cobelfret, Belgium and the Commission, all of which were also represented at the hearing.

Direct effect

‘Is a set of rules such as the Belgian system of definitive taxed income, under which relevant dividends are, first, added to the taxable basis of the parent company and, subsequently, the amount of those received dividends is, pursuant to Article 205(2) of the Belgian Income Tax Code, deducted from the taxable basis of the parent company (in the amount of 95%) only in so far as the parent company has taxable profits, compatible with Article 4 of [the Parent/Subsidiary Directive], inasmuch as the result of such a limitation on deduction of definitively taxed income is that a parent company will, in a subsequent taxable period, be taxed on the dividends received in the case where it had no, or had inadequate, taxable profits over the taxable period in which the dividends were received, or at least that the fiscal losses relating to the taxable period are wrongly used up and are, as a result, no longer transferable up to the amount of received

12. The question referred does not refer to the direct effect of Article 4(1) of the Directive. However, it is stated in the order for reference that the referring court considers that ‘it is necessary to obtain a conclusive answer as to the direct effect of the [D]irective’, and all the parties make submissions on this point. I will accordingly make the following brief observations.

13. It is clear from settled case-law that wherever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and suffi-

ciently precise, they may, in the absence of implementing measures adopted within the prescribed period, be relied on against any national provision which is incompatible with the directive or in so far as they define rights which individuals are able to assert against the State.⁷ A Community provision is unconditional where it lays down an obligation which is not qualified by any condition and is not made subject, in its implementation or effects, to the adoption of any measure either by the Community institutions or by the Member States.⁸ It is sufficiently precise to be relied on by an individual and applied by the courts where it lays down an obligation in unequivocal terms.⁹

14. I agree with Cobelfret and the Commission that Article 4(1) of the Directive satisfies both of those criteria. The obligation which it lays down, namely either to refrain from taxing distributed profits received by a parent company from its subsidiary or to tax such profits while authorising the parent company to deduct from the amount of tax due tax paid by the subsidiary which relates to those profits, is laid down in unequivocal terms and is not qualified by any condition or made subject, in its implementation or effects, to the adoption of any measure either by the Community institutions or by the Member States.

7 — See for example Case C-363/05 *JP Morgan Fleming Claverhouse Investment Trust and The Association of Investment Trust Companies* [2007] ECR I-5517, paragraph 58, and the case-law there cited.

8 — Case C-389/95 *Klattner* [1997] ECR I-2719, paragraph 33.

9 — *Ibid.*

15. Belgium asserts that Article 4(1) cannot have direct effect since it offers Member States a choice of methods for achieving the desired result.

16. As Cobelfret points out, however, the Court has held that 'the right of a State to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone'.¹⁰

17. I accordingly consider that Article 4(1) of the Directive has direct effect.

Compatibility with Article 4(1)

18. Cobelfret and the Commission submit that the Belgian rules are contrary to the

10 — Joined Cases C-6/90 and C-9/90 *Francovich* [1991] ECR I-5357, paragraph 17; Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraph 17.

Directive; the Belgian Government takes the opposite position.

19. I agree with the former view.

20. Article 4(1) of the Directive requires Member States either to refrain from taxing the dividend or to authorise the parent company to deduct from the amount of tax due thereon tax paid by the subsidiary on the profits thereby distributed. To my mind, the Belgian rules do not properly implement either of those two methods.

21. The effect of those rules is that dividends received from a subsidiary are always included in the parent company's basis of assessment but not always deducted therefrom, since no deduction is operated where the parent has no taxable profits for the same period. In such a case, accounting for the dividends in the basis of assessment will lead to higher tax overall, since it will reduce the amount of the loss which can be carried forward. In consequence, tax will be levied in the next year in which a taxable profit is made on an additional amount corresponding to a part or all of the amounts of the dividends.

22. The Belgian system accordingly does not provide for the systematic exemption of dividends. Rather, it provides for their exemption solely where there are other taxable profits. Belgium thus subjects the exemption of dividends from tax to a condition not envisaged by the Directive. It is thus not a true exemption system.

23. The Court has already ruled that, since the purpose of the Directive is to facilitate the tax arrangements governing cross-border cooperation, Member States cannot unilaterally introduce restrictive measures such as a requirement that a minimum holding period must already have been completed when the profits in respect of which the tax advantage is sought are distributed.¹¹ I see no reason for not applying the same principle with regard to what is in effect a requirement that the parent company have taxable profits.

24. Nor is the Belgian system an imputation system, which would provide that tax paid by the subsidiary is deducted from the tax payable by the parent company.

¹¹ — Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit* [1996] ECR I-5063, paragraph 26.

25. Belgium argues, first, that limiting the ADBI leads to at least the same result as the imputation method. It submits that, if the imputation method satisfies Article 4(1), the limited ADBI must also do so, since there is no reason why 'refrain[ing] from taxing' distributed profits must lead to a more generous result than the imputation method.

26. I am not persuaded by Belgium's submissions on this point. Moreover, if limiting the ADBI does lead to a result that is at least as favourable to the taxpayer as what he would get under the imputation method, it is settled case-law that a Member State may not rely on how it might have implemented a directive had it chosen to do so in a particular way.¹² Belgium does not purport to have opted to implement Article 4(1) of the Directive by the imputation method. It is therefore to my mind irrelevant whether and to what extent the alternative method which it has chosen operates no less favourably than the imputation method would have operated.

27. Belgium submits, second, that it does not follow from the wording of Article 4(1) of the Directive, which requires Member States to 'refrain from taxing' dividends, that Member States are required to grant an 'exemption' and that such an 'exemption' requires that dividends received can have no effect on the amount of losses to be carried forward. The

recitals in the preamble to the Directive and the text of Article 4(1) refer simply to 'refrain[ing] from taxing' such profits and not to 'exempting'.

28. I cannot accept that argument. There is nothing in the scheme or purpose of the Directive to suggest that there is any significant difference between the concepts of 'refraining from taxing' and 'exempting from tax'. As Cobelfret points out, the preamble to a directive recently amending the Parent/Subsidiary Directive in effect describes Article 4(1) as requiring that 'double taxation should be eliminated either by exemption or tax credit'.¹³ The Court has, moreover, used the concept of 'exempting' interchangeably with that of 'refrain[ing] from taxing' within the meaning of Article 4(1).¹⁴

29. Belgium considers, third, that its legislation is in accordance with the objective of Article 4(1), in particular the elimination of the disadvantage in cross-border parent/subsidiary relations in comparison with such relations in a domestic context.¹⁵ Limiting the

12 — *Francovich*, cited in footnote 10, paragraph 21, and Case C-184/04 *Uludenkaupungin kaupunki* [2006] I-3039, paragraph 28.

13 — Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2004 L 7, p. 41), recital 10. See also point 17 of the Explanatory Memorandum to the Proposal for this directive (COM(2003) 462 final).

14 — Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 102; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 53.

15 — See the third recital in the preamble, set out in footnote 3 above.

ADBI does not disadvantage the creation of parent/subsidiary relations, in particular cross-border relations, as is decisively illustrated by the way the Belgian market works in practice and by the fact that application of the limited ADBI treats equally domestic and cross-border parent/subsidiary relations. Limiting the ADBI does not therefore conflict with the objective of Article 4(1).

arising from cross-border reconstructions, however, Belgium notes that that directive simply requires that Member States treat such losses in the same way as losses arising from reconstructions within a single Member State.¹⁷ Belgium appears to be arguing that, by analogy, Article 4(1) of the Parent/Subsidiary Directive likewise permits a Member State to apply a system such as the ADBI rules to dividends received by a parent company from a subsidiary in another Member State provided that it applies the same system to dividends received from a domestic subsidiary. That is not, however, what Article 4(1) says; and I do not see how a provision of an entirely separate instrument is relevant.

30. Again, I am not persuaded. Even if Belgium's assertions are correct, the fact that a Member State's incorrect transposition of a provision of a directive does not conflict with the objectives of that directive cannot in itself render that transposition correct.

31. Belgium refers, next, to Council Directive 90/434/EEC on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States,¹⁶ which essentially requires Member States to ensure that such reconstructions do not result in the taxation of capital gains and exempted reserves. With regard to losses

32. Belgium refers, finally, to the Model Convention with respect to taxes on income and on capital, published by the Organisation for Economic Cooperation and Development ('OECD').¹⁸ Chapter V, entitled 'Methods for elimination of double taxation', provides for both the exemption method (Article 23A) and the credit method (Article 23B). Belgium

16 — Directive of 23 July 1990 (OJ 1990 L 225, p. 1).

17 — Article 6 provides: 'To the extent that, if the operations referred to in Article 1 were effected between companies from the Member State of the transferring company, the Member State would apply provisions allowing the receiving company to take over the losses of the transferring company which had not yet been exhausted for tax purposes, it shall extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory.'

18 — The Model Convention was originally published in 1963. Since then it has been regularly updated. The articles as they read on 28 January 2003 may be found at <http://www.oecd.org/dataoecd/52/34/1914467.pdf>.

asserts that the Model Convention does not give detailed rules on how the exemption method has to be implemented, so that it is for the contracting States to determine.

that Article 4(1) of the Directive precludes national legislation such as the ADBI system, limit the effects of that ruling in time. It relies in this context on (i) the legal certainty which the Commission created by allegedly approving (albeit implicitly) the ADBI system, (ii) the imprecise scope of Article 4(1), (iii) the lack of any case-law on the point and (iv) the budgetary impact if the Belgian rules are found to be incompatible.

33. It is settled case-law that, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation, by applying, in particular, the apportionment criteria followed in international tax practice, including the model conventions drawn up by the OECD.¹⁹ I do not, however, see how that can be relevant to the present case, where what is at issue is the interpretation of a harmonising Community measure.

Limitation in time

34. Belgium concludes its written observations with a request that the Court, if it rules

35. It is clear from the Court's case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling — such a limitation will be imposed only in very specific circumstances, namely where (a) there is a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and (b) it appears that both individuals and national authorities have been led into adopting practices which did not comply with Community law by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission may even have contributed.²⁰

¹⁹ — Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 49 and the cases there cited.

²⁰ — See most recently Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraphs 57 and 58.

36. In the present case, whatever the merits of its other arguments, Belgium has made no attempt in its written or oral observations to demonstrate that there is such a risk of serious economic repercussions.

37. It is accordingly in my view not appropriate for the Court, if it rules that Article 4(1) of the Directive precludes national legislation such as the ADBI system, to limit the effects of that ruling in time.

Conclusion

38. For the reasons set out above, I am of the view that the question referred by the Hof van beroep te Antwerpen, Belgium, should be answered as follows:

Article 4 of Council Directive 90/435/EEC precludes national legislation under which dividends received by a parent company in one Member State from a subsidiary in another Member State are, first, added to the taxable basis of the parent company and, subsequently, deducted from that taxable basis (in the amount of 95%) only in so far as the parent company has taxable profits.