OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 18 September 2008 [1]

I — Introduction

1. Interest paid by a company resident in Belgium to its parent company resident in another Member State is subject in Belgium to a withholding tax, *précompte mobilier*. Equivalent payments to recipients in Belgium, on the other hand, are exempt from withholding tax, but are subject to corporation tax in the hands of the recipient.

2. Where the loan has been granted by a company resident in Luxembourg, the withholding tax charged in Belgium is, under a double taxation convention, included in the basis of assessment for the corporation tax owed in Luxembourg, with the effect of reducing the tax. However, the double taxation is not completely eliminated.

3. By the present reference for a preliminary ruling the Cour d'appel de Liège (Court of Appeal, Liège) seeks clarification as to whether the provisions of the EC Treaty on free movement of capital preclude such national rules. The provisions in question should perhaps also be tested, however, against freedom of establishment.

II — Legal context

4. The provisions of the Belgian Income Tax Code of 1992 (Code des impôts sur les revenus coordonné en 1992, 'the CIR 92') apply to the facts of the main proceedings.

5. Article 266 of the CIR 92 authorises the King, in certain circumstances, to refrain wholly or partly from charging withholding tax on income from capital.

1 — Original language: German.

6. Article 267 of the CIR 92 regulates liability to the tax as follows:

'Allocation or payment of income, in cash or in kind, shall result in the withholding tax becoming due. The placing of income in an account opened in favour of the beneficiary shall in particular be considered to be an allocation, even if that account cannot be drawn on, provided that that situation results from an express or tacit agreement with the beneficiary. …'

7. Under Article 107(2)(9) of the Royal Decree implementing the CIR 92, withholding tax is not charged on certain income of professional investors. Article 105(3)(b) of the decree defines 'professional investors' as resident companies not referred to in paragraph 1 of the article. [2]

8. The Belgium–Luxembourg Convention for the prevention of double taxation of 17 September 1970 ('the DTC') provides:

'Article 11 Interest

(1) Interest originating in one Contracting State and allocated to a resident of the other Contracting State shall be taxable in that other State.

(2) However, that interest may be taxed in the Contracting State in which it originates and in accordance with the legislation of that State, but the tax so payable may not exceed 15% of the interest.

(3) By derogation from paragraph (2), interest may not be taxed in the Contracting State in which it originates where it is allocated to an undertaking from the other Contracting State.

The previous paragraph shall not apply in the case of:

1. …

2 — Paragraph 1 concerns certain financial services undertakings.

2. interest allocated by a company resident in one Contracting State to a company resident in the other Contracting State which holds directly or indirectly at least 25% of the shares carrying voting rights in the former company.

…

Article 23

(1) So far as concerns Luxembourg residents, double taxation shall be avoided in the following manner:

…

2. tax charged in Belgium in accordance with this agreement:

…

(b) on interest subject to the rules laid down in Article 11(2) shall be set off against the tax on that same income which is charged in Luxembourg. The amount thus set off may not however exceed either the fraction of the tax which corresponds proportionately to that income received from Belgium or an amount corresponding to the tax which is deducted at source in Luxembourg on equivalent income allocated to Belgian residents. That tax charged in Belgium can be set off against income taxable in Luxembourg to the extent only that it exceeds the tax which is deducted at source in Luxembourg on equivalent income allocated to Belgian residents.'

III — Facts and the question referred for a preliminary ruling

9. The Luxembourg company SA Wickler Finances held 48% of the capital of the Belgian company Truck Center SA (formerly Truck Restaurant Habay). On 25 February 1992 it granted Truck Center a loan of BEF 50 000 000. The holding and the rights under the loan subsequently passed to Cotralux and then to Socfin, companies incorporated under Luxembourg law. Truck Center entered the loan interest for the years 1994 to 1996 in its accounts, but did not pay it, and did not make a retention of withholding tax.

10. By decision of 11 December 1997 the Belgian tax authorities of their own motion assessed the withholding tax, applying the rates of 13.39% for 1994 and 1995 and 15% for 1996.

11. On an application by Truck Center, the Tribunal de première instance d'Arlon (Court of First Instance, Arlon) annulled the decision, since it considered that the national law was incompatible with Article 56 EC. The Cour d'appel de Liège, before which the case is now pending, has referred the following question to the Court for a preliminary ruling:

Do Articles 105(3)(b) and 107(2)(9) of the Royal Decree implementing the CIR 1992 adopted pursuant to Article 266 of the CIR 1992, read in conjunction with Article 23 of the Belgium–Luxembourg Double Taxation Convention, infringe Article 73[b] of the Treaty establishing the European Community (now Article 56 EC), providing for free movement of capital, in that, by limiting the waiver in respect of withholding tax provided for in Article 107(2)(9) exclusively to interest allocated to resident companies, they have, in particular, first, the effect of discouraging resident companies from borrowing capital from companies established in another Member State and, second, they constitute for companies established in another Member State an obstacle to investing capital, by way of loans, in companies having their seat in Belgium?

12. In the proceedings before the Court Truck Center, the Belgian, Netherlands, Portuguese and United Kingdom Governments and the Commission of the European Communities have made submissions. At the hearing the French Government also expressed an opinion.

IV — Legal assessment

13. In view of the formulation of the question referred, it must be pointed out that the Court has no jurisdiction, in proceedings for a preliminary ruling, to rule on the compatibility of a national measure with Community law, but can provide the referring court with all the elements of interpretation of Community law which will enable that court to determine the question of compatibility when deciding the case before it. [3]

14. The question referred should therefore be understood as asking whether Article 73b of the EC Treaty (now Article 56 EC) and Article 73d(1) of the EC Treaty (now Article 58 EC) preclude a national withholding tax on the payment of loan interest

3 — See inter alia Case C-124/99 *Borawitz* [2000] ECR I-7293, paragraph 17; Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 18; and Case C-439/06 *citiworks* [2008] ECR I-3913, paragraph 21.

to recipients resident in another Member State, if equivalent payments to companies in national territory are exempt from withholding tax but are subject to corporation tax in the hands of the recipient.

15. It should be noted as a preliminary observation that, according to consistent case-law, direct taxes fall within the competence of the Member States, but they must exercise that competence consistently with Community law. [4] In the absence of unifying or harmonising Community measures, the Member States also retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, in particular with a view to eliminating double taxation. [5]

4 — See inter alia Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16.

5 — See, to that effect, Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 57; *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 4, paragraph 52; and *Amurta*, cited in footnote 4, paragraph 17.

16. It is true that a common system of taxation for interest and royalty payments made between associated companies of different Member States has since been introduced by Council Directive 2003/49/EC. [6] However, the facts of the main proceedings concern periods of time before the entry into force of that directive. Belgium and Luxembourg were thus in principle free to agree in their DTC that interest paid by an undertaking resident in Belgium to an undertaking resident in Luxembourg could be taxed in Belgium at a rate of 15%.

17. Belgium has made use of that right by charging withholding tax at a rate of 15% in the case of interest payments to recipients resident in another Member State. Payments to taxable persons within the country, by contrast, are exempt from taxation at source. [7] It must therefore be examined whether such different treatment infringes the fundamental freedoms.

6 — Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States, OJ 2003 L 157, p. 49.

7 — Taxable persons within the country include branches of companies whose main seat is in another Member State, as the Belgian Government explains.

A — *Which fundamental freedom applies*

18. It is settled case-law that, when examining which fundamental freedom a rule of national law comes under, primarily the purpose of the legislation concerned must be taken into consideration. [8]

19. As well as the free movement of capital guaranteed by Article 73b(1) of the EC Treaty, to which the national court's question refers, the provisions could also come under Article 52 of the EC Treaty (now Article 43 EC) on freedom of establishment. That freedom applies in the case of a holding which gives its owner definite influence over the company's decisions and allows him to determine its activities. [9]

20. The provisions of the Belgian income tax code on withholding tax, as communicated by the referring court, admittedly do not apply only in cases in which the lender has a holding of a certain size in the borrower.

21. Those provisions, however, cannot be viewed in isolation from the DTC, which is also part of the national legal order of Belgium. [10] It follows from Article 11(3) of the DTC that cross-border payments of interest to undertakings between Belgium and Luxembourg are generally not to be subject to withholding tax. Withholding tax is permissible only on interest which a company resident in one Contracting State allocates to a company resident in the other Contracting State which holds, directly or indirectly, at least 25% of the voting shares in the former company.

22. As, moreover, is apparent from the order for reference, the companies which Truck Center entered in its accounts as recipients of the interest payments each held 48% of the capital of Truck Center, which gave those

8 — As summarised in Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 22, referring to *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 4, paragraphs 31 to 33; *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 4, paragraphs 37 and 38; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 36; and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34.

9 — Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22; *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 4, paragraph 39; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20; and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 69.

10 — See, to that effect, Case C-265/04 *Bouanich* [2006] ECR I-923, paragraph 51.

companies material influence on the management of Truck Center. Consequently, this is also from the factual point of view a case which falls within the scope of freedom of establishment.

23. The provisions must therefore be examined in the light of Article 52 of the EC Treaty on freedom of establishment, even though the granting of loans between associated companies is a process of the movement of capital. [11] If such provisions also have effects on the free movement of capital, that does not justify a separate examination of Article 73b et seq. of the EC Treaty, since those effects are to be regarded merely as the unavoidable consequence of a restriction of the freedom of establishment. [12] All the fundamental freedoms, moreover, follow essentially the same principles, if one disregards the effect of free movement of capital in relation to non-member countries. In the present case relations with non-member countries are not concerned, however. So the application of the rules on the free movement of capital would not lead to a different result. [13]

24. In its judgments on the tax treatment of 'loans in lieu of capital contributions', the Court has proceeded as suggested here. It assessed the national provisions in question exclusively in terms of freedom of establishment, since they applied only to loans between associated companies. [14]

25. The referring court has limited its question formally to the interpretation of the free movement of capital. But that does not prevent the Court from providing the national court with all the elements of interpretation of Community law which may be of use to it in ruling on the case before it, regardless of what the court has referred to in its questions. [15]

11 — See in particular point I(3) (long-term loans with a view to establishing or maintaining lasting economic links, as direct investments) of the nomenclature of capital movements in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam], OJ 1988 L 178, p. 5.

12 — *Oy AA*, cited in footnote 9, paragraph 24; *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 8, paragraph 33; and *Test Claimants in the Thin Cap Group Litigation*, cited in footnote 8, paragraph 34.

13 — The Court came to an equivalent conclusion on the relationship between freedom of establishment and the free movement of capital in, for example, Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 56.

14 — Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, paragraph 26; *Test Claimants in the Thin Cap Group Litigation*, cited in footnote 8, paragraph 25; and Case C-105/07 *Lammers & Van Cleeff* [2008] ECR I-173, paragraphs 16 and 17.

15 — See, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8; Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 44; Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, paragraph 29; and Case C-506/06 *Mayr* [2008] ECR I-1017, paragraph 43.

B — *Examination of freedom of establishment*

26. Truck Center takes the view that the provisions make it more difficult to take up loans from undertakings established in another Member State, in two ways. First, the provisions impose additional administrative burdens on the borrower who has to deduct the tax. Second, the withholding tax entails a financial disadvantage for the lender, because the interest he receives is reduced at the outset by the tax. The borrower may thus have to pay higher rates of interest to foreign providers of finance than to domestic ones who receive the interest without deduction. Furthermore, this is a case of a definitive tax at a flat rate. Foreign taxable persons cannot therefore deduct any operating expenditure, unlike domestic taxable persons.

27. The Commission identifies a further disadvantage in the fact that the withholding tax is payable immediately on the payment of the interest. Interest paid to domestic lenders, on the other hand, is not taken into account until they are assessed to corporation tax. That results in a cash-flow disadvantage for lenders in other Member States.

28. It must therefore first be examined below whether the charging of tax at source constitutes discrimination or a restriction of freedom of establishment, and if so whether that is justified. I shall then address the question of whether freedom of establishment is infringed by the financial disadvantages alleged by Truck Center resulting from the deduction of withholding tax.

1. The charging of tax at source

29. Freedom of establishment entails for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community the right to exercise their activity in other Member States through a subsidiary, branch or agency. [16]

30. It is settled case-law that in the case of companies their registered office for the purposes of Article 58 of the EC Treaty (now Article 48 EC) serves, in the same way as nationality in the case of natural persons, as the connecting factor with the legal system of

16 — See inter alia *Saint-Gobain*, cited in footnote 5, paragraph 35; Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 20; Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29; and Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 18.

a Member State.[17] If the Member State of residence could freely apply different treatment merely because the seat of a company was situated in another Member State, Article 52 of the EC Treaty would be deprived of all meaning. Freedom of establishment thus aims to guarantee the benefit of national treatment in the host Member State by prohibiting any discrimination based on the place in which companies have their seat.[18]

31. But freedom of establishment contains not only a prohibition of discrimination but also a prohibition of restriction. According to settled case-law, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be regarded as restrictions of that freedom.[19]

32. The obligation to deduct withholding tax depends on the seat of the parent company to which the interest is allocated. The tax is deducted only if the recipient is resident abroad, payments to recipients within the country being exempt from this withholding tax. Such a different tax treatment of interest payments depending on the seat of the parent company could constitute both discrimination and a restriction.

33. Whether there is discrimination should be considered first. A difference in treatment based on the seat of a company constitutes prohibited discrimination only if the companies affected are objectively in a comparable situation.[20]

17 — *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 8, paragraph 43 with further references; Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 22; and *Burda*, cited in footnote 9, paragraph 77. This finding is not affected in principle by the recent decisions on company law (compare in particular Case C-212/97 *Centros* [1999] ECR I-1459, Case C-208/00 *Überseering* [2002] ECR I-9919, and Case C-167/01 *Inspire Art* [2003] ECR I-10155). On this point see also the Opinion of Advocate General Poiares Maduro of 22 May 2008 in Case C-210/06 *Cartesio* [2008], case pending before the Court, point 22 et seq. In those cases the criterion for allocation was/is not called in question in principle; they concern rather the issue of what is to be regarded as the seat or how the seat can be transferred.

18 — See, to that effect, inter alia, *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 8, paragraph 43 with further references; *Denkavit Internationaal and Denkavit France*, cited in footnote 17, paragraph 22; and *Burda*, cited in footnote 9, paragraph 77.

19 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; Case C-442/02 *CaixaBank France* [2004] ECR I-8961, paragraph 11; *Columbus Container Services*, cited in footnote 13, paragraph 34; and Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 28. On the relationship between discrimination and restrictions, see also my Opinion of 4 September 2008 in Case C-222/07 *UTECA*, not yet published in the ECR, point 77.

20 — See, to that effect, Case C-279/93 *Schumacker* [1995] ECR I-225; *Test Claimants in Class IV of the ACT Group Litigation*, cited in footnote 8, paragraph 46; and *Denkavit Internationaal and Denkavit France*, cited in footnote 17, paragraphs 24 and 25.

34. In the present case the situation of recipients of interest within the country differs from the situation of those in another Member State with respect to the conditions for the charging and collecting of taxes. Companies within the country are subject directly to fiscal supervision in their State of residence. The tax authorities can assess them to tax and collect taxes by means of the exercise of public authority. That is not automatically possible in the case of companies resident in another Member State, where cooperation with the fiscal administration of the other Member State is necessary.

35. In *FKP Scipio Konzertproduktionen* [21] the Court therefore already acknowledged that the effective collection of income tax can justify the application of different procedures for charging tax to remuneration received by residents and non-residents. The tax provision at issue required the recipient of a service to deduct tax from the remuneration payable to a provider of services resident in another Member State. Deduction of tax at source did not apply to the remuneration of providers of services resident within the country.

36. The different conditions of charging tax in the case of non-residents and residents thus create an objective difference capable of justifying the charging of withholding tax solely on the income of a non-resident company.

37. As Advocate General Poiares Maduro has rightly pointed out recently, however, '[f]or a finding of non-discrimination, it is not sufficient to point out that … citizens and foreign nationals are not in the same situation. It is also necessary to demonstrate that the difference in their respective situations is capable of justifying the difference in treatment. In other words, the difference in treatment must relate and be proportionate to the difference in their respective situations.' [22]

38. It must therefore be examined whether the method of deducting tax at source on interest payments to recipients resident in another Member State is a proportionate response to the difficulties in collecting taxes that would occur if the Belgian tax authorities had to collect the tax directly from the foreign recipient of interest.

21 — Case C-290/04 *FKP Scorpio Konzertproduktionen* [2006] ECR I-9461, paragraphs 33 to 35.

22 — Opinion of 3 April 2008 in Case C-524/06 *Huber*, case pending before the Court, point 7.

39. The method of deducting tax at source must be regarded as a suitable means of taking account of the different situation of resident and foreign recipients of interest payments. However, it must be examined whether the different treatment on the basis of the seat of the recipient goes beyond what is necessary for that purpose. [23]

40. In *FKP Scorpio Konzertproduktionen* the Court emphasised in this connection that at the material time there were no Community instruments on mutual administrative assistance for the recovery of tax debts. [24]

41. In the tax years 1994 to 1996 at issue, Belgium was likewise unable to rely on Directive 76/308/EEC [25] to facilitate the recovery of taxes in another Member State, since it was only by Council Directive 2001/44/EC of 15 June 2001 that the scope of that directive was extended to direct taxation. [26]

42. However, there existed even then the Benelux Convention signed in Brussels on 5 September 1952 on mutual administrative assistance in the recovery of tax claims, [27] which the Belgian Government produced in reply to a question from the Court. It should therefore be considered whether charging the withholding tax in the hands of the Luxembourg recipient of the interest payment — calling if need be on the administrative assistance of the Luxembourg tax authorities — might not be a less intrusive measure than deducting tax at source.

43. While Truck Center and the Commission submit that that circumstance must be taken into account in examining the proportionality of the deduction of tax at source, the Belgian and Netherlands Governments take the view that the convention is of no relevance in the present context. The Belgian Government justifies its stance by the argument that the withholding tax is deducted from a taxable person within the country. There is therefore no need for administrative assistance.

23 — See, to that effect, *Test Claimants in the Thin Cap Group Litigation*, cited in footnote 8, paragraph 64; *Cadbury Schweppes and Cadbury Schweppes Overseas*, cited in footnote 4, paragraph 47; and *Lidl Belgium*, cited in footnote 16, paragraph 27.

24 — *FKP Scorpio Konzertproduktionen*, cited in footnote 21, paragraph 36.

25 — Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties, OJ 1976 L 73, p. 18.

26 — Council Directive 2001/44/EC of 15 June 2001 amending Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties, OJ 2001 L 175, p. 17.

27 — *Moniteur belge*, 6 July 1956 and 23 December 1956.

44. The Belgian Government overlooks here that the existence of the Benelux Convention could be precisely the reason for arranging the collection of withholding tax in such a way that it would not have to be deducted at source from the interest debtor but would be charged to the foreign recipient of the interest.

45. Despite the possibility of administrative assistance, however, it is by no means necessarily the case that collecting tax from the foreign parent company to which the interest is due in fact constitutes a less severe means than collection at source within the country from the subsidiary company. If the foreign recipient were the tax debtor of the withholding tax, it would have to make a tax declaration to the tax authorities of the Member State of the source of the income, despite not being resident there. The authorities of that State would have to register that company as a taxable person and supervise the making of the tax declaration and the payment of the tax. In a case of enforcement they would also have to turn to the authorities of the State of residence of the recipient of interest, by means of administrative assistance.

46. Altogether, this form of tax collection would probably give rise to substantially greater expense for the tax authorities, and for the group of companies, than taxation at source in the hands of the subsidiary company, which is liable to taxation within the country in any event. Especially in the case of one-off or small tax claims, the additional expense would be out of proportion to the administrative burden of deducting tax at source, as the Commission too suggests.

47. Those considerations show that creating a proportionate procedure for collecting taxes requires a complex assessment which the national legislature has to undertake when it exercises its competence to regulate direct taxation. [28] In a situation such as the present the legislature's margin of discretion [29] is in any event not obviously exceeded if the Member State introduces a withholding tax, even though it could rely on bilateral arrangements for administrative assistance for the enforcement of taxes abroad.

48. Finally, whether a possible cash-flow disadvantage, threatened in the Commission's view because the withholding tax is payable immediately, is relevant at all appears doubtful in the light of the recent case-law of the Court. Thus in its recent judgment in *Lidl Belgium* [30] the Court did not even mention this issue, although Advocate General Sharpston had reached a different conclusion from the Court's precisely because

28 — See the case-law cited in footnote 4.

29 — On the legislature's margin of discretion, see also my Opinions in UTECA, cited in footnote 19, point 60, and of 11 September 2008 in Case C-317/07 *Lahti Energia*, case pending before the Court, point 94, each with further references.

30 — Cited in footnote 16.

of the cash-flow disadvantage.[31] If cash-flow effects were now no longer relevant, that would however be a rejection of the earlier case-law, to which Advocate General Sharpston had expressly referred.[32]

49. In my view, a cash-flow disadvantage can indeed be of importance in assessing the proportionality of a national provision. In the present case, however, it is doubtful whether such a disadvantage actually occurs to an appreciable extent. The Belgian Government pointed out at the hearing that undertakings resident in the country, whose income from interest flows into the general basis of assessment to corporation tax, have to make regular advance payments of tax in the current tax year. In practice, therefore, the withholding tax deducted probably falls due only slightly earlier than the advance payments of corporation tax for the equivalent income from interest of domestic recipients. In any case, slight cash-flow disadvantages that nevertheless occur are compensated by the administrative simplification that can be achieved by deducting tax at source.

50. The charging of the withholding tax therefore does not constitute prohibited discrimination.

51. It remains to verify whether it infringes freedom of establishment. The different treatment of purely internal and cross-border situations admittedly makes it less attractive to set up a subsidiary in another Member State. However, the consequent restriction of freedom of establishment is justified for compelling reasons in the public interest. As stated above, it serves to ensure the effective collection of tax.

52. The interim conclusion must accordingly be that Articles 52 and 58 of the EC Treaty do not preclude the deduction of tax at source on payments of interest to non-resident companies on the ground that that involves an additional burden for the loan debtor company that does not affect it when paying interest to recipients within the country.

31 — Opinion in *Lidl Belgium*, cited in footnote 16, point 28 et seq.

32 — In footnote 24 to her Opinion in *Lidl Belgium* Advocate General Sharpston refers to Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraphs 44, 54 and 76; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 36 to 38; Case C-268/03 *De Baeck* [2004] ECR I-5961, paragraph 24; *Test Claimants in the FII Group Litigation*, cited in footnote 8, paragraphs 96 et seq. and 153 et seq.; and Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 29.

2. Financial disadvantages as a result of the deduction of withholding tax

53. Truck Center submits that the withholding tax creates a disadvantage for borrowing from its parent company in another Member State, from a financial point of view. In addition to the withholding tax of up to 15% payable in Belgium, the recipient of the interest has to pay corporation tax on it at its seat in Luxembourg. It submits that the cumulative taxation in Belgium and Luxembourg is higher than the taxation of corresponding payments to domestic recipients in Belgium. This is not disputed by the Belgian Government.

54. The Belgium–Luxembourg DTC does not eliminate that double taxation entirely, as Truck Centre, the Belgian Government and the Commission agree in explaining. Article 23(1)(2)(b) of the DTC allows the withholding tax to be set off only up to the amount of withholding tax on equivalent payments of interest from Luxembourg to Belgium. Since Luxembourg does not in fact deduct any withholding tax, setting off of the Belgian withholding tax in Luxembourg is consequently excluded. The Belgian withholding tax is merely deducted from the basis of assessment for corporation tax in Luxembourg.

55. Unlike Truck Center, the Member States which are taking part in the proceedings consider that taxation in Luxembourg must be disregarded when making the comparison. They simply compare the withholding tax due in Belgium on payments to foreign recipients with the taxation of domestic recipients.

56. That is correct. In *Kerckhaert and Morres* the Court held that the fundamental freedoms ultimately cannot provide a remedy where adverse consequences arise from the exercise in parallel by two Member States of their fiscal sovereignty. [33]

57. Instead the Court referred to conventions for preventing double taxation, as envisaged in Article 220 of the EC Treaty (now Article 293 EC). They, it said, are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems. [34]

33 — Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 20. See also *Columbus Container Services*, cited in footnote 13, paragraph 43.

34 — *Kerckhaert and Morres*, cited in footnote 33, paragraph 21, and *Columbus Container Services*, cited in footnote 13, paragraph 44.

58. Community law in its current state, said the Court, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the Community. It is for the Member States to take the measures necessary to prevent double taxation by applying, in particular, the apportionment criteria followed in international tax practice. [35]

59. With that aim in mind, Belgium and Luxembourg concluded the DTC, which does mitigate double taxation. The Contracting States cannot be criticised for stopping halfway and not completely eliminating double taxation in cases such as the present one. Since the Court, in the absence of Community law requirements for the allocation of fiscal sovereignty, appears to accept even the unlimited appropriation by two States of the same tax base, there can be no objection to an elimination of double taxation that is no more than partial. For future such cases, however, Directive 2003/49 will provide a remedy.

60. Nor do I reach a different conclusion, even taking account of *Denkavit* [36] and *Amurta*. [37] Those decisions concerned withholding taxes on dividends distributed to foreign companies. Distributions to recipients who were subject to corporation tax within the country, on the other hand, were exempt from the dividend tax, in order to avoid a multiple tax burden, as the dividends were subject again to corporation tax in the hands of the recipient.

61. The Court reasoned, in summary, that a Member State which decides to apply a system for avoiding economic double taxation of dividends must apply that system in the same way to all recipients of dividends which it subjects to its taxation. Recipients of dividends within the country and those resident in another Member State were in a comparable situation as regards economic double taxation. [38]

62. The factual and legal context of the present case differs, however, from the situation in those judgments. The systems at

35 — *Kerckhaert and Morres*, cited in footnote 33, paragraph 22, and *Columbus Container Services*, cited in footnote 13, paragraph 45.

36 — Cited in footnote 17.

37 — Cited in footnote 4.

38 — *Denkavit Internationaal and Denkavit France*, cited in footnote 17, paragraphs 35 to 37, and *Amurta*, cited in footnote 4, paragraphs 38 to 40.

issue in those cases for avoiding economic double taxation of dividends distributed to a recipient with liability to corporation tax exempted the dividends altogether from tax in the hands of the recipient, since the underlying income was already subject to corporation tax in the hands of the company paying the dividend.

63. That is not the aim pursued by the provisions on the withholding tax. Belgium likewise exempts payments of dividends to domestic recipients from withholding tax. But that is not intended to free income from interest definitively from tax. Nor is there any occasion to do so. Unlike dividends, the interest is not paid out of income of the paying company on which tax has already been paid. Rather, corporation tax becomes payable on the income from interest only in the hands of the recipient.

64. In the case of interest payments to recipients resident abroad, Belgium charges the proportion of tax on the income from interest that is due to it under the DTC at source because collecting the tax from recipients resident abroad is not automatically possible. Since taxing the income of domestic recipients does not produce those problems, there is no need to deduct tax at source in this case. Ultimately, the same tax is merely charged to different persons.

65. Consequently, only the taxation of the interest payments at source in Belgium on the one hand and the taxation of equivalent payments to taxable persons within the country on the other are to be included in the comparison.

66. It follows from the case-law on the taxation of providers of services with limited liability to tax that definitive taxation at a flat rate is permissible if in fact it is not higher than the tax on corresponding income of persons with unlimited liability to tax. [39]

67. In the tax years concerned, the withholding tax amounted to 13.39% or 15%, while corporation tax, according to the referring court, was from 28% to 39%, so that higher taxation of the cross-border interest payments is in general not to be expected.

39 — See, to that effect, Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 55.

As against the taxation of natural persons that was at issue in *Gerritse*,[40] the comparison is made even easier by the fact that corporation tax is levied at a fixed, non-progressive rate, and that no basic allowance for subsistence is to be taken into account.

68. However, there is still an unknown factor in the comparison, as the Commission rightly points out. Unlike in the case of assessment of corporation tax, no operating expenses can be deducted from the flat-rate withholding tax.

69. In its decisions on limited liability to tax the Court has admittedly regarded it as an unjustified difference in treatment if non-residents are not allowed to deduct operating expenses which have a direct economic connection to the taxable activity, while residents can deduct operating expenses.[41]

40 — Cited in footnote 39.

41 — *Gerritse*, cited in footnote 39, paragraph 27; *FKP Scorpio Konzertproduktionen*, cited in footnote 21, paragraphs 50 to 52; Case C-346/04 *Conijn* [2006] ECR I-6137, paragraph 26; and Case C-345/04 *Centro Equestre da Lezíria Grande* [2007] ECR I-1425, paragraph 24.

70. But in those cases the income was fully and entirely subject to tax at the place where the services were provided and was presumably exempt from tax, or largely relieved by set-off of the foreign tax, at the seat of the provider of the services. It was thus in accordance with the principle of fiscal symmetry to include operating expenses in the basis of assessment in the State which essentially taxes the income connected to them.[42] By contrast, Belgium and Luxembourg have agreed in the present case that — apart from the Belgian withholding tax of 15% — Luxembourg is to have the right to levy tax on the income from interest of Belgian origin. It would accordingly appear natural also to take the operating expenses into account in the context of taxation in Luxembourg.

71. Regardless of that, there is no indication in the order for reference that the deduction of operating expenses is contested in the main proceedings. In addition, there are scarcely likely to be significant operating expenses in connection with loan transactions between associated undertakings.

42 — On the principle of fiscal symmetry, see *Lidl Belgium*, cited in footnote 16, paragraph 33.

V — Conclusion

72. On the basis of the above considerations, I propose that the question referred by the Cour d'appel de Liège should be answered as follows:

Articles 52 and 58 of the EC Treaty do not preclude a national withholding tax on the payment of loan interest to recipients resident in another Member State, where equivalent payments to domestic companies are exempt from the withholding tax but are subject to corporation tax of at least the same amount in the hands of the recipient.