Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 26 October 2016[1]

Case C-448/15

Belgische Staat
v
Wereldhave Belgium Comm. VA,
Wereldhave International NV,
Wereldhave NV
(Request for a preliminary ruling

from the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium))

(Parent companies and subsidiaries of different Member States — Common system of taxation applicable — Corporation tax — Application of Directive 90/435/EEC — Exemption from corporation tax — Free movement of capital)

1. Once again, the Court of Justice has before it a case in which dividends distributed by a subsidiary (in this case, a Belgian company) to its (Netherlands) parent company are subject to a withholding tax levied at source by the tax authorities of the Kingdom of Belgium, in respect of tax on income from investments.

2. The first of the questions on which the referring court seeks a preliminary ruling relates to the interpretation of Directive 90/435/EEC.[2] In view of the particular status of the parent company in the Netherlands, it is necessary first of all to establish whether it should be treated as falling under 'companies of a Member State' to which the directive applies (Article 2).

3. If that is the case, then the question arises whether the withholding at source is compatible with Article 5 of Directive 90/435, which in principle exempts the profits distributed by a subsidiary to its parent company from such a withholding tax.

4. If, on the other hand, Directive 90/435 is not applicable in this case, then the referring court asks whether the Belgian legislation which renders the dividends in question subject to tax is consistent with Articles 49 and 63 TFEU.

[1] — Original language: Spanish.

[2] — Council Directive 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), which was replaced by Council Directive 2011/96/EU of 30 November 2011 (OJ 2011 L 345, p. 8).

I – Legal framework

A – *EU law*

Directive 90/435

5. The first recital states:

‘Whereas the grouping together of companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas it is therefore necessary to introduce with respect to such grouping together of companies of different Member States, tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level.’

6. The third recital reads as follows:

‘Whereas 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; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies.’

7. Article 2 provides:

‘For the purposes of this Directive “company of a Member State” shall mean any company which:

(a) takes one of the forms listed in the Annex hereto;

(b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

…

— vennootschapsbelasting in the Netherlands,

…’

8. By virtue of Article 3(1):

‘For the purposes of applying this Directive,

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions;

(b) "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).'

9. Article 5(1) stipulates:

'Profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax.'

10. Annex: List of companies referred to in Article 2(a).

'(a) companies under Belgian law known as "société anonyme"/"naamloze vennootschap", "société en commandite par actions"/"commanditaire vennootschap op aandelen", "société privée à responsabilité limitée"/"besloten vennootschap met beperkte aansprakelijkheid" and those public law bodies that operate under private law;

…

(j) companies under Dutch law known as: "naamloze vennootschap", "besloten vennootschap met beperkte aansprakelijkheid";

…'

B – *Belgian law*

Wetboek van de inkomstenbelastingen 1992[3]

11. Under Article 266:

'The King may, under the conditions and within the limits which He shall specify, refrain, totally or partially, from levying withholding tax on investment income in respect of income from capital and movable property and miscellaneous income, provided that it is income received by parties whose identity can be established or by collective investment undertakings governed by foreign law with jointly held assets managed by a management company on behalf of the participants where their shares are not the subject of a public issue in Belgium and are not traded in Belgium, or income from bearer securities or dematerialised securities which falls into one of the following categories:1. income from securities issued before 1 December 1962 that is statutorily exempt from tax on movable property or taxes *in rem* or is taxable at a rate of less than 15%;

2. income from certificates from Belgian collective investment undertakings;

3. discounts relating to bonds, saving certificates and other loan securities issued with effect from 1 December 1962.

In no circumstances may He waive the levying of withholding tax on investment income in respect of income from securities representing loans for which the interest is capitalised … or securities on which no periodic interest is payable, which are issued … at a discount equivalent to the capitalised interest up to the due date of the security.

[3] — Income Tax Code 1992 ('ITC 1992').

The second paragraph shall not apply to securities arising from the splitting of linear bonds issued by the Belgian State.'

Koninklijk Besluit van 27 augustus 1993 tot uitvoering van het Wetboek van de inkomstenbelastingen 1992[4]

12. Article 106(5) provides:

'The levying of withholding tax on investment income shall be waived in full in respect of dividends paid by a Belgian subsidiary to a parent company of another Member State of the European Economic Community.

However, the waiver shall not apply if the shares held by the parent company in respect of which the dividends are being paid do not represent a holding of at least 25% of the capital of the subsidiary and that minimum 25% holding has not been, or was not, held for an uninterrupted period of at least one year.

For the purposes of the application of the first and second paragraphs, "subsidiary" and "parent company" shall mean subsidiaries and parent companies within the meaning 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.'

C – Convention between the Belgian and Netherlands Governments for the avoidance of double taxation with respect to taxes on income and capital and the regulation of other taxation matters[5]

13. Article 10 states:

'1. Dividends paid by a company which is a resident of one Contracting State to a resident of the other Contracting State shall be taxed in that other State.

2. However, such dividends may also be taxed in the Contracting State of which the company paying the dividends is a resident, in accordance with the legislation of that State, but the tax so charged may not exceed … 5% of the total amount of the dividends, if the recipient of the dividends is a company which directly holds at least 25% of the capital of the company paying the dividends …'

II – Facts of the main proceedings and questions referred for a preliminary ruling

14. Wereldhave Belgium is a commanditaire vennootschap op aandelen/société en commandite par actions (limited partnership with a share capital) governed by Belgian law, in which the Netherlands-law companies Wereldhave International and Wereldhave are shareholders (holding 35% and 45%, respectively), Wereldhave Belgium being their subsidiary.

[4] — Royal Decree of 27 August 1993 implementing the Income Tax Code 1992 ('RD/ITC 1992').

[5] — Signed in Brussels on 19 October 1970 ('the double tax convention').

15. Wereldhave International and Wereldhave are collective investment undertakings,[6] incorporated as public limited companies,[7] which distribute their profits directly to their shareholders and which, under Netherlands law, are liable to corporation tax (vennootschapsbelasting, in the Netherlands), but are subject to a 'zero rate' of tax.

16. In 1999 and 2000 Wereldhave Belgium distributed profits to Wereldhave International and Wereldhave and paid withholding tax on that investment income at the rate of 5%.[8]

17. The two companies each applied to the Belgian tax authorities seeking exemption from the withholding tax levied on the dividends paid. They did so on the basis of Article 5(1) of Directive 90/435 and Article 106(5) of RD/ITC 1992, which was the measure that transposed the directive into Belgian law.

18. When the Belgian authorities failed to deliver a decision within six months, Wereldhave Belgium, Wereldhave International and Wereldhave brought an action before the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels, Belgium).

19. On 20 November 2012, the rechtbank van eerste aanleg te Brussel (Court of First Instance, Brussels) delivered two judgments in which it held that the dividends distributed by Wereldhave Belgium in the 1999 and 2000 tax years to the Netherlands companies Wereldhave International and Wereldhave should not have been subject to withholding tax on investment income and ordered the Belgische Staat (Belgian State) to repay the amounts paid, with interest.

20. The Belgian State lodged appeals against the two judgments in the Hof van beroep te Brussel (Court of Appeal, Brussels, Belgium), arguing, essentially, that the recipients of the dividends were Netherlands CIUs which were not eligible for the exemption from withholding tax on investment income since they did not meet the conditions set out in Article 2(c) of Directive 90/435, in conjunction with Article 106(5) of RD/ITC 1992, as they were subject to a zero rate of tax in the Netherlands.

21. In the Hof van beroep te Brussel (Court of Appeal, Brussels), Wereldhave Belgium, Wereldhave International and Wereldhave maintained that CIUs taking the legal form of a public limited company are, as a rule, liable to Netherlands corporation tax (Article 1 of the Netherlands Law on corporation tax, 1969), which, they claim, means that the withholding tax in question is not applicable. In support of this, they cited Article 266 of the ITC 1992, Article 106(5) of RD/ITC 1992 and Article 5 of Directive 90/435, arguing that the fact of being subject to tax ('taxability') to which Directive 90/435 refers does not require actual payment of tax.

22. In the event that Directive 90/435 is not applicable, they argue in the alternative that Articles 49 and 63 TFEU preclude the provisions of Belgian law relied on, as follows, in their view, from the order of the Court of Justice of 12 July 2012, *Tate & Lyle Investments* (C‑384/11, EU:C:2012:463).

23. In those circumstances, the Hof van beroep te Brussel (Court of Appeal, Brussels) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is 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 to be construed as precluding a national rule that does not waive Belgian withholding tax on investment income in

[6] 'CIU.'

[7] 'Naamloze vennootschap.'

[8] The rate under the double tax convention.

respect of dividend payments made by a Belgian subsidiary to a parent company established in the Netherlands that fulfils the condition of a minimum participating interest and the holding of such an interest, on the ground that the Netherlands parent company is a fiscal investment undertaking that is required to distribute all its profits to its shareholders and, subject to that proviso, is eligible for the zero rate of corporation tax?

(2) If the answer to the first question is in the negative, are Articles 49 (ex Article 43 EC) and 63 (ex Article 56 EC) of the Treaty on the Functioning of the European Union (in the version in force since the amendment and renumbering by the Treaty of Lisbon) to be construed as precluding a national rule that does not waive Belgian withholding tax on investment income in respect of dividend payments made by a Belgian subsidiary to a parent company established in the Netherlands that fulfils the condition of a minimum participating interest and the holding of such an interest, on the ground that the Netherlands parent company is a fiscal investment undertaking that is required to pay all its profits to its shareholders and, subject to that proviso, is eligible for the zero rate of corporation tax?'

III – Summary of the observations of the parties

A – *The first question referred for a preliminary ruling*

24. Wereldhave Belgium, Wereldhave International and Wereldhave submit that the Netherlands companies are subject to corporation tax in the Netherlands and that, even though they pay a zero rate of tax because they are CIUs which distribute their dividends to shareholders, they meet the condition set out in Article 2(c) of Directive 90/435. In support of their argument they cite several scholarly works[9] from which they infer that 'taxability' does not require actual levying of the tax. They argue that it is a subjective condition which relates to the company rather than to the profits obtained or their tax treatment and that taxability is therefore unaffected by a total or partial exemption from tax. They further note that Dutch commentators treat CIUs not as exempt from corporation tax but as fully taxable, albeit at a zero rate.[10]

25. These companies submit that the fact that the preparatory documents for Directive 90/435 indicate that Netherlands CIUs fell outside its scope is immaterial: statements made by the Council have no legal force if, as in this case, they were not incorporated into the legislation adopted.[11]

26. Wereldhave Belgium, Wereldhave International and Wereldhave therefore maintain that Directive 90/435 is to be construed as precluding a provision of national law such as the one at issue here.

27. The Belgian, Czech, French and Italian Governments and the Commission all essentially agree that Directive 90/435 is not applicable to this dispute, since:

— Article 2(c) requires not merely that the company be subject to tax, but that it actually be taxed, as the Court of Justice held in its judgment in *Aberdeen Property Fininvest Alpha.*[12]

[9] — De Broe, L., and De Boeck, R., 'De moeder-dochterriichtlijn: Europese fiscale piecemeal engineering op weg naar harmonie', Peeters, B. (ed.), *Europees Belastingrecht*, Larcier, Ghent, 2005, p. 362; Jansen, T., and De Vos, P., *Handboek internationaal en Europees belastingrecht*, Intersentia, Antwerp, 2008, p. 269; Lagae, J.P., 'Les revenus d'actions et de parts de sociétés belges et étrangères', *Le régime fiscal des sociétés en Belgique*, Ed. du Jeune Barreau, Brussels, 1990, p. 116; Van Crombrugge, S., *Beginselen van de vennootschapsbelasting*, Kluwer, Antwerp, 2008, p. 54; and Van Crombrugge, S., *Beginselen van de vennootschapsbelasting*, Kluwer, Antwerp, 1997, p. 48.

[10] — Marres, O.C.R., and Wattel, P.J., *Dividendbelasting*, Kluwer, Deventer, 2011, pp. 216 and 217.

[11] — In support, they cite the judgment of 17 October 1996, *Denkavit and Others* (C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 29).

[12] — Judgment of 18 June 2009 (C-303/07, EU:C:2009:377).

— The purpose of Directive 90/435 is to eliminate double taxation, which necessarily implies that tax is actually levied. To allow an exemption from a withholding tax where there is no actual tax charge in the country of residence would not serve this purpose and may constitute a means of avoiding tax altogether. Directive 90/435 does not set out to cover all dividend distributions by subsidiaries to parent companies, but only the cases for which it specifically provides, and these do not include situations where there is no tax in either jurisdiction.

28. The Italian Government and the Commission also emphasise that the absence of an exemption (from corporation tax) to which Article 2(c) of Directive 90/435 refers must be permanent in nature and must not relate to a specific tax year or to a specific event which prevents the tax liability from arising.

29. As for the requirement under this article that taxability must be ‘without the possibility of an option’, the Italian Government points out that the order for reference does not specify whether the zero rate of tax applicable to the two Netherlands CIUs originates from a decision taken by their governing bodies or from the constitutive documents of the companies. The Italian Government asserts that the outcome is the same in either case, because there is no difference between exemption and taxation at a zero rate. The Commission argues that setting up a CIU entails a deliberate decision to use that legal scheme and to comply with its requirements.

30. The Commission further observes that the preparatory documents for Directive 90/435 contain a statement to the effect that Netherlands CIUs are excluded from its scope. Even though this statement has no legal force in itself, it demonstrates the intention of the EU legislature: it not only explicitly excludes CIUs but also excludes any other company which is subject to corporation tax but is nevertheless permanently exempted from payment. The failure to make express reference to CIUs in the final text is understandable, because once they are exempt, they then fall outside the scope of Directive 90/435 by virtue of Article 2(c).

B – *The second question referred for a preliminary ruling*

31. The French Government has not submitted observations on this section of the reference. The Italian and Czech Governments and the Commission have done so, arguing that the second question is inadmissible since the order for reference does not set out the national legal framework or explain what constitutes the difference in treatment between CIUs that are resident in Belgium and non-resident CIUs.

32. Wereldhave Belgium, Wereldhave International and Wereldhave, on the other hand, focus on analysing the Belgian legislation, concluding that there is a difference in treatment between resident and non-resident companies, as a result of which the latter cannot avoid a series of charges to tax. They argue that the discriminatory treatment of non-resident companies is in breach of the right to free movement of capital and the freedom of establishment.

33. The Belgian Government argues that the order in *Tate & Lyle Investments,*[13] which is referred to in the order for reference, and the judgment in *Aberdeen Property Fininvest Alpha*[14] cannot be applied to this case. Having examined the Belgian tax legislation, it maintains that, in Belgium, non-resident companies are not treated less favourably than resident companies. It submits that the comparison of the taxes applicable to Belgian and Netherlands companies has to be made in the context of the tax regime applicable to Belgian CIUs, which receive special treatment, rather than that applicable to Belgian companies governed by the general tax rules.

[13] — Order of 12 July 2012 (C-384/11, EU:C:2012:463).

[14] — Judgment of 18 June 2009 (C-303/07, EU:C:2009:377).

34. The Italian Government and the Commission argue, in the alternative, that if it were established that there is discrimination against CIUs that are not resident in Belgium, then the case-law contained in the order in *Tate & Lyle Investments*[15] would be applicable. In that scenario, there would be a breach of the free movement of capital, although it would be necessary to assess whether the restrictions imposed may be justified by overriding reasons in the public interest and, even then, whether they are appropriate to ensure attainment of the stated purpose and do not go beyond what is absolutely necessary to achieve it.

IV – Procedure before the Court of Justice

35. The order for reference was received at the Court Registry on 19 August 2015.

36. Wereldhave Belgium, Wereldhave International, Wereldhave, the Belgian, Czech, French and Italian Governments and the European Commission have submitted written observations. No hearing was held.

V – Assessment

A – *The first question referred for a preliminary ruling*

37. Directive 90/435 is intended to avoid double taxation on the distribution of dividends between subsidiaries and parent companies with residence in different Member States, which is deemed to hinder the creation of undertakings or the grouping together of companies on a Community scale. According to the first and third recitals of the directive,[16] read together, in order to facilitate this grouping together of companies, it is necessary to remove 'restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States' which discriminate against or 'disadvantage' relationships between parent companies and subsidiaries which are not resident in the same Member State.

38. To that end, two particular types of action are to be taken under Directive 90/435. First, the State of the parent company must either refrain from taxing profits received from its subsidiary, 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'.[17] Secondly, the directive exempts profits or dividends distributed by a subsidiary to its parent company from withholding tax, provided certain conditions are met.[18] The second of these provisions is at the heart of the dispute in the main proceedings.

39. This 'common system'[19] does not apply in every case or to all parent/subsidiary relationships. The scope of Directive 90/435 is limited by the definition (in Article 2) of which 'compan[ies] of a Member State' it affects. Specifically, it lays down a series of mandatory conditions which must be met in order to qualify for that designation, which include the company being 'subject to one of the following taxes, without the possibility of an option or of being exempt: … vennootschapsbelasting in the Netherlands …' (Article 2(c)).

[15] — Order of 12 July 2012 (C-384/11, EU:C:2012:463).

[16] — Set out in points 5 and 6 of this Opinion.

[17] — Article 4.

[18] — Article 5. In this case it is not disputed that the requirements set out in this article are met.

[19] — As it is designated in the final sentence of the third recital of Directive 90/435.

40. The dispute arises because the parent companies in the main proceedings pay corporation tax (vennootschapsbelasting) at a zero rate in the Netherlands. Does this mean that they are 'exempt' from payment of the tax in their State of residence? If so, the application of Article 2(c) of Directive 90/435 would automatically mean that the system established in that directive does not affect this case, since that provision requires not only that the company be subject to corporation tax but also that it not be exempt.[20]

41. The argument put by the appellants in the main proceedings is that the mere fact that they are taxable persons is enough to satisfy the requirement in question. Taxability does not necessarily require actual levying of the tax and it still exists even if there is also an exemption or taxation at a reduced rate.

42. The appellants' approach might have been a valid one if Article 2(c) of Directive 90/435 had mentioned only taxability. That is not the case though: the provision introduces a positive requirement (being subject to tax) and a further negative one (not being able to rely on an exemption), which must both be met at the same time. It is significant that the arguments made by the appellants focus on taxability, almost completely to the exclusion of exemption.[21] Exemption implies that, despite the fact that the taxable event has occurred (in other words, taxability), no payment of the relevant tax is required as the legislature has deemed fit to release a particular class of companies from the obligation to pay the tax.

43. As I see it, when Netherlands tax law makes certain bodies (in this case CIUs) subject to corporation tax and then immediately provides, *in abstracto*, that they should pay at a zero rate, it is in fact granting them an exemption from the tax burden. By doing so, it is removing them from the scope of Directive 90/435.

44. I fail to see that there are any solid grounds for disputing this assessment. By definition, a 'zero rate' of corporation tax is equivalent to a complete absence of tax, in other words, a full exemption. Where this outcome has been achieved by means of an express legal provision, which establishes permanently and in advance that it is the case for a certain class of bodies, irrespective of the profits received, I think it is incontrovertible that this is a true exemption from the tax, within the meaning of Article 2(c) of Directive 90/435.

45. A further line of reasoning confirms that the Netherlands companies involved in this case fall outside the scope of Directive 90/435. As I have already mentioned, that directive seeks to prevent two Member States both levying the same type of tax (on the profits of companies) in the context of the relationships between parent companies and subsidiaries. As the other participants in the proceedings have argued, it is precisely in order to achieve this aim that Directive 90/435 does not

[20] — The difference between being 'subject to' and 'exempt from' the principal tax liability (namely the payment of the tax) is, in essence, that in cases where a company is not subject to a tax, the chargeable event does not occur, whereas in cases of exemption it does. In cases of exemption, the principal tax liability has, in theory, arisen, but the taxable person is, by law, partially or completely excused from payment and, ultimately, cannot be required to pay. While accepting this distinction may not present problems of terminology or legal theory in some jurisdictions, the same clarity of concept is not present in others. One of the parties refers, in its observations, to being subject to tax (or taxable) as 'subjective taxability' and to the lack of exemption as 'objective taxability'. Others use the terms 'abstract taxability' and 'concrete taxability'. Or they link a lack of exemption with the notion of 'actual' by using phrases such as 'actual taxation' or 'actually subject to'.

[21] — They emphasise that, when the rules for the calculation of tax, including reductions in the basis of assessment and allowances, are applied in a particular tax year the final amount payable could be zero (or a negative amount) but that this has no effect on taxability. However, I do not think that when the directive mentions exemption it is referring to the calculation of the amount of tax owed in each tax year, but rather to the general rules governing that concept under the corporation tax legislation.

apply to bodies that are not subject to, or are exempt from, the tax. Both an absence of taxability and a total exemption of their income (in this case investment income) remove the risk that a company to which either of these scenarios applies will be charged corporation tax twice, so that the need to apply the common system under the directive disappears.[22]

46. The Commission's observations recount how, at the meeting of the Council on 11 June 1990, prior to the adoption of Directive 90/435, several statements, intended to be included in the minutes, were prepared at the request of different governments, which expressly excluded certain classes of entity (including Netherlands CIUs) from the scope of the directive.[23] Although these statements are not binding, they are still of interest from an interpretative point of view. Although the proposals did not form part of the final text, this was not because their content was rejected but because of the certainty that the wording of Article 2(c), in so far as it related to exemption from tax, itself covered those exclusions.

47. In conclusion, Directive 90/435 is not applicable to a situation of the kind that is at issue in the main proceedings, in view of the fact that the parent companies cannot be considered 'companies of a Member State' within the meaning of Article 2(c) of the directive. It is therefore not necessary to assess whether there is a conflict between the directive and the Belgian legislation introducing withholding at source of corporation tax (at the rate of 5%) on dividends distributed by the subsidiary to its parent companies.

B – *The second question referred for a preliminary ruling*

48. The answer to the first question does not, however, foreshadow the answer to the second. As the Court has already held, for example in the judgment in *Aberdeen Property Fininvest Alpha*,[24] in situations not covered by Directive 90/435 (where 'it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or by conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation'), measures that are contrary to the freedoms of movement guaranteed by the Treaty must not be introduced. The referring court's second question concerns precisely this issue.

49. The Italian and Czech Governments and the Commission submit that the second question may be inadmissible, since the factual and legislative context of the dispute is not sufficiently well described by the referring court. The French Government does not even address this question in its observations.

50. The order for reference is indeed flawed in this way. First, it does not explain how the Belgian tax legislation is supposed to lead to non-resident companies being treated less favourably than resident companies such that a fundamental freedom guaranteed by the TFEU is infringed. Then, more importantly, it fails to explain in any detail the national or treaty-based rules which would be relevant when assessing whether there is any infringement of these freedoms.

[22] — The Czech Government expressed this vividly in its observations: for double taxation to exist, it is an essential precondition that there be actual taxation. To allow an exemption from withholding tax where there is no actual taxation in the country of residence would not serve the purpose of preventing double taxation.

[23] — In so far as it related to Netherlands companies, the statement was to the following effect: 'The Council and the Commission agree that Netherlands investment companies, within the meaning of Article 28 of the Law on corporation tax, 1969, do not fall within the scope of this directive'. The minutes contain similar statements from the Council and the Commission: (a) in respect of certain German investment companies; (b) in respect of Spanish companies eligible under the 'tax transparency' scheme; and (c) in respect of Portuguese companies which 'are in principle subject to corporation tax but also exempt from it and the profits of which are deemed to be those of their members'.

[24] — Judgment of 18 June 2009 (C‑303/07, EU:C:2009:377, paragraph 28).

51. These omissions are particularly significant when considered in the light of the method that the Court of Justice frequently uses when tackling references for preliminary rulings in similar cases relating to the scope of direct taxation. The method is to proceed in stages or steps, seeking first of all to identify the relevant freedom and the possible restriction which might have occurred. The second step is for the Court to compare the situations at issue to see if they have been treated differently, which requires a detailed examination of the domestic legislation giving rise to this. Lastly, the Court will investigate any possible justifications based on overriding reasons in the public interest and the proportionality of the national legislation restricting the relevant freedom.

52. For each of these stages it is essential for the Court of Justice to have adequate information, provided by the referring court, concerning the applicable national law. This is not the case here. For example, in order to evaluate whether there is any unequal corporation tax treatment in the main proceedings, the comparison should not be between companies that are resident in Belgium and those that are not, speaking generally, but between Netherlands CIUs and their Belgian equivalents (investment companies), yet the order for reference contains no specific mention of the legal regime applying to the latter.

53. Nor does the order contain any legislative references which might indicate with any clarity whether or not Belgian tax legislation provides for mechanisms which would mitigate the imposition of a series of tax charges, or shift the tax charge, exclusively with regard to CIU-type companies that are resident in Belgium and not with regard to other companies. Furthermore, the referring court does not take into consideration the double tax convention between Belgium and the Netherlands, the provisions of which[25] may, where relevant, cancel out or mitigate the negative effects on Netherlands companies that supposedly result from the restriction on the free movement of capital (Article 56 TFEU) produced by the Belgian tax legislation.[26] Finally, the order for reference makes no reference to any possible justifications, based on overriding reasons in the public interest, or to the lack of proportionality of the alleged restriction.

54. Particularly notable is the fact that the order for reference lacks information, which cannot simply be supplied by referring to the submissions of the parties, concerning the tax rules applicable to Belgian investment companies at the relevant time, as opposed to those governing Netherlands CIUs, despite the fact that this is the fundamental issue in the case. Very different perspectives on this point emerge from the observations of the Belgian Government and those of the appellants and the Court of Justice is unable to settle this dispute given that it is for the national court alone to identify, interpret and apply domestic law.

55. Specifically, the Belgian Government submits that, under the Belgian tax rules applying to resident investment companies (which are different from the general rules), the withholding tax was a ‘final tax, since it could not be offset against tax payable by those companies and was not refundable’.[27] In support of this approach it relies on Article 123 of RD/ITC 1992, in conjunction with Article 143(1) and (2) of the Law of 4 December 1990. It goes on to state that, although the problem at issue is

[25] — The submissions of the Belgian Government refer to Article 10 of the double tax convention, which is set out in point 13 of this Opinion. Under this convention provision, the double taxation caused by the Belgian withholding is mitigated by setting a maximum rate of 5% of ‘the total amount of the dividends, if the recipient of the dividends is a company which directly holds at least 25% of the capital of the company paying the dividends’. However, the appellants in the main proceedings do not accept that the application of the convention can compensate for the difference in treatment that results from the Belgian legislation, since the amount withheld at source (5%) becomes a final tax, which CIUs cannot offset in the Netherlands.

[26] — Even though the referring court (which in this respect follows the proposed question for referral put forward by the parties, without adding its own reasoning) mentions both Articles 49 and 56 TFEU, I think that the appropriate context for the analysis is the free movement of capital. Nevertheless, I am prepared to accept that the freedom of establishment might, theoretically, be affected, if the restriction were to affect the ability of the shareholder to have a definite influence over the decisions of the company and to determine its activities. If the shareholder lacks that ability (which does not appear to be the case here since Wereldhave International and Wereldhave have holdings of 35% and 45% respectively in Wereldhave Belgium), Article 56 TFEU alone would be applicable (see, in this regard, judgment of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 38).

[27] — Point 41 of its written observations.

similar to that which gave rise to the judgment of 25 October 2012, *Commission* v *Belgium*,[28] the tax rules on which the Court ruled in that instance, which concerned investment companies with no permanent establishment in Belgium, were different from those applied to the dividends distributed by Wereldhave Belgium to its parent company, since the former rules allowed for the amount withheld to be offset or refunded, but this was not permitted under the latter.

56. If these assertions on the part of the Belgian Government were to be borne out by the facts (which is something that the referring court must ascertain), this would establish that investment companies resident in Belgium were not able to neutralise the tax burden relating to the withholding tax paid on their investment income. In other words, it would demonstrate that Netherlands CIUs and Belgian investment companies receive the same tax treatment in Belgium with respect to the withholding for corporation tax. The tax is not waived for either the former or the latter, because it is final and not refundable, which means that there is no discrimination against the former.

57. If this were to be the case, there would, I should stress, be no doubt that the national legislation making the withholding tax applicable to investment companies is compatible with Articles 49 and 56 TFEU. The Court of Justice has already held, specifically in relation to the Kingdom of Belgium,[29] that the State in which the company making the distribution is resident cannot be required 'to ensure that profits distributed to a non-resident shareholder are not liable to a series of charges to tax or to economic double taxation, either by exempting those profits from tax at the level of the company making the distribution or by granting the shareholder a tax advantage equal to the tax paid on those profits by the company making the distribution'. It went on to say that such a requirement would mean that 'that State would have to abandon its right to tax a profit generated by an economic activity carried on in its territory'.[30]

58. It could, however, be the case that the legislation applied in this case to the investment companies was not precisely the same as the version given by the Kingdom of Belgium in its observations. Had the referring court considered this legislation, an analysis of its provisions might, hypothetically, have led to a finding that the legislative parameters in force in the 2009 and 2010 tax years do not differ from those considered by the Court of Justice in the order of 12 July 2012, *Tate & Lyle Investments*[31] or in the judgment of 25 October 2012, *Commission* v *Belgium*,[32] both of which predate the order for reference and relate specifically to the Belgian tax rules governing corporation tax.

59. Under these conditions, the Court of Justice cannot be expected to resolve the dispute (between Wereldhave and the Belgian Government) as to what is actually the domestic legal framework to be used to compare the tax rules applicable to Netherlands CIUs and Belgian investment companies. This is a task which falls to the referring court and the Court of Justice cannot take over this task or provide a satisfactory preliminary ruling on the basis of conjecture.

60. In view of these circumstances, I think that there is no alternative but to hold that the second question referred for a preliminary ruling is inadmissible, since it does not meet the minimum requirements set out in Article 94 of the Rules of Procedure of the Court of Justice.

[28] — C-387/11, EU:C:2012:670. In that judgment the Court held that 'by maintaining different rules for the taxation of income from capital and movable property according to whether it is earned by resident investment companies or non-resident investment companies with no permanent establishment in Belgium, the Kingdom of Belgium [had] failed to fulfil its obligations under Article 49 TFEU …'.

[29] — Judgment of 25 October 2012, *Commission* v *Belgium* (C-387/11, EU:C:2012:670, paragraph 78), citing the judgments of 12 December 2006, *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 59); of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2011:670, paragraph 83); and of 20 October 2011, *Commission* v *Germany* (C-284/09, EU:C:2011:670, paragraph 80).

[30] — The same reasoning appears in the order of the Court of Justice of 12 July 2012, *Tate & Lyle Investments* (C-384/11, EU:C:2012:463, paragraph 30), again in relation to the tax rules concerning withholding tax on dividends distributed by a subsidiary resident in Belgium to its non-resident parent company.

[31] — C-384/11, EU:C:2012:463, paragraphs 3 to 9.

[32] — C-387/11, EU:C:2012:670.

61. If the Court decides, nevertheless, to look at the substance of the question and finds that the tax treatment accorded to Netherlands CIUs was less favourable in terms of withholding tax on dividends than that enjoyed by Belgian investment companies, I fear that I cannot do much more than to repeat in very general terms the previous case-law in this area, or to refer specifically to the order of 12 July 2012, *Tate & Lyle Investments* (C-384/11, EU:C:2012:463),[33] with such adjustments as may be necessary to suit the circumstances under consideration.

62. In effect, just as in *Tate & Lyle Investments*,[34] the Belgian Government has clearly chosen to exercise its power of taxation over dividends distributed by resident companies to companies resident in other Member States. Consequently, non-resident companies in receipt of those dividends find themselves in a situation equivalent to that of resident companies as regards the risk of a series of charges to tax on dividends distributed, so that in this respect they must receive the same treatment as that received by resident companies.[35]

63. In the same vein, the Court of Justice should make the referring court aware that a less favourable treatment would be liable to deter companies established in another Member State from investing in Belgium and thus constitutes a restriction on the free movement of capital prohibited, in principle, by Article 63 TFEU.[36]

64. Since the possibility cannot be excluded that a Member State might ensure compliance with its Treaty obligations by concluding a convention with another Member State for the purposes of avoiding double taxation, the application of which allows the effects of the difference in treatment under national legislation to be compensated for,[37] the referring court would have to assess the effect of the double tax convention between Belgium and the Netherlands, which I have mentioned previously, and decide whether it ensures that non-resident companies are treated in the same way as resident companies under Belgian law.

65. Finally, in accordance with the existing decisions in this area, the Court of Justice should remind the referring court that if, despite the mitigation of the tax by virtue of the double tax convention, it believes that non-resident companies are still treated less favourably, it should consider whether there are overriding reasons in the public interest which justify such rules.[38] Even if such reasons did exist, it would be necessary, finally, to consider whether the national measures restricting the free movement of capital are appropriate for the purpose of attaining the objective which they pursue and do not go beyond what is necessary in order to attain it, as indicated in the judgment of 25 October 2012, *Commission* v *Belgium*.[39]

[33] — Incidentally, I would also mention that the Court replied to the referring court by way of an order, rather than a judgment, taking the view that the case involved a ‘question referred to the Court for a preliminary ruling [which was] identical to a question on which the Court has already ruled, or [that] the reply to such a question may be clearly deduced from existing case-law’ (paragraph 17 of the order).

[34] — Order of 12 July 2012 (C-384/11, EU:C:2012:463).

[35] — Ibid., paragraph 33.

[36] — Ibid., paragraph 35.

[37] — Ibid., paragraphs 36 and 37.

[38] — Ibid., paragraph 45.

[39] — C-387/11, EU:C:2012:670, paragraph 74.

VI – Conclusion

66. In the light of the foregoing considerations, I suggest that the Court declare the second question referred by the Hof van beroep te Brussel (Court of Appeal, Brussels) inadmissible and reply as follows to the first question:

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 is not applicable to a dispute concerning withholding tax levied in Belgium on the profits distributed by a subsidiary to its parent company where the latter is a Netherlands collective investment undertaking that makes use of the zero rate of corporation tax.