JUDGMENT OF THE COURT (First Chamber)

12 February 2009 *

In Case C-138/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Hof van beroep te Antwerpen (Belgium), made by decision of 27 February 2007, received at the Court on 9 March 2007, in the proceedings

Belgische Staat

v

Cobelfret NV,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, M. Ilešič, A. Tizzano, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

* Language of the case: Dutch.

Advocate General: E. Sharpston,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 5 March 2008,

after considering the observations submitted on behalf of:

— Cobelfret NV, by A. Huyghe and M. Isenbaert, advocaten,

— the Belgian Government, by C. Pochet, acting as Agent, assisted by J. Werbrouck, advocaat,

— the Commission of the European Communities, by R. Lyal, W. Wils and W. Roels, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 8 May 2008, gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 4(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6).

2 The reference has been made in the course of proceedings between the Belgische Staat (Belgian State) and the company Cobelfret NV ('Cobelfret') relating to the determination of that company's taxable profits for the purposes of corporation tax in respect of the tax years 1992 to 1998.

Legal framework

Community legislation

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

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

5 Article 4(1) and (2) of Directive 90/435 provides:

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

— refrain from taxing such profits, or

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

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

National legislation

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

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

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

9 The functioning of the DBI system can be succinctly described as follows. First, the dividend distributed by the subsidiary must be included in the basis of assessment of the

parent company. Second, that dividend is deducted from that basis of assessment, but only in so far as, for the tax period in question, a profit remains after deduction of other exempted profits.

10 Article 202 of the ITC 1992 states:

'1. The following shall also be deducted from the profits for the tax period, to the extent to which they are included:

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

…'

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

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

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

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

…'

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

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

The dispute in the main proceedings and the question referred for preliminary ruling

14 Cobelfret, a company established in Belgium, received dividends on its shareholdings in companies established in Community territory in the course of the tax years 1992 to 1998, while suffering losses in the course of several of those years.

15 Under Belgian legislation, Cobelfret was unable to profit from the ADBI for the tax years in the course of which it suffered losses, and was unable to carry the unused part of that deduction forward to the following year in cases where the ADBI which it could have claimed exceeded its taxable profits.

16 Taking the view, consequently, that the dividends received were not entirely exempted from taxation, Cobelfret lodged objections in respect of the notices of assessment to corporation tax for the tax years 1992 to 1998.

17 Following rejection of its objections, Cobelfret brought the matter before the Rechtbank van eerste aanleg (Court of First Instance), Antwerp, which, by decision of 16 December 2005, held, inter alia, that the restriction of the ADBI to the amount of the profits made during the tax period and which remained after application of Article 199 of the ITC 1992 resulted in partial taxation of the distributed profits in regard to Cobelfret, an outcome which was incompatible with Article 4(1) of Directive 90/435.

18 The Belgische Staat appealed this judgment to the Hof van beroep te Antwerpen (Court of Appeal, Antwerp). That court held that, in order to determine the true nature of Cobelfret's taxable profits with regard to the tax periods at issue, it was necessary to obtain a ruling on the question of the direct effect of Directive 90/435 and on that of the possible incompatibility of Article 205(2) of the ITC 1992 with that directive.

19 In those circumstances, the Hof van beroep te Antwerpen decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a set of rules such as the [DBI system], under which relevant dividends are, first, added to the basis of assessment of the parent company and, subsequently, the amount of those received dividends is, pursuant to Article 205(2) of the [ITC 1992], deducted from the basis of assessment 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 [Directive 90/435], inasmuch as the result of such a restriction on deductibility from definitively taxed income is that a parent company will, in a subsequent tax period, be taxed on the dividends received in the case where it had no, or had inadequate, taxable profits over the tax period in which the dividends were received, or at least that the fiscal losses relating to the tax period are wrongly used up and are, as a result, no longer transferable in the amount of received dividends, which, in the absence of fiscal losses, ought in any case to have been exempted in the amount of 95%?'

The question referred for a preliminary ruling

Admissibility

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

21 It must be noted in that regard that the referring court has omitted to indicate the origin of the dividends received by Cobelfret and the percentage of shares held by the latter in the companies distributing the dividends.

22 Cobelfret submits to the Court, without being challenged by the Belgian Government in that regard, that it received dividends from its subsidiaries established in the United Kingdom and that its holdings in those companies meet the conditions laid down in Article 3 of Directive 90/435.

23 If it is for the national court, and not the Court of Justice, to determine whether those facts are correct (Case 104/77 *Oehlschläger* [1978] ECR 791, paragraph 4), it is also for the national court alone, within the framework of the cooperation between the Court of Justice and national courts and tribunals established by Article 234 EC, to determine, in the light of the particular circumstances of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, to that effect, Case C-17/03 *VEMW and Others* [2005] ECR I-4983, paragraph 34 and the case-law cited).

24 The presumption of relevance which attaches to questions referred by national courts for a preliminary ruling can be rebutted only in exceptional cases, in particular where it is quite obvious that the interpretation of Community law sought bears no relation to the actual facts of the main action or to its purpose (see Case C-500/06 *Corporación Dermoestética* [2008] ECR I-5785, paragraph 23 and the case-law cited).

25 In the present case, as the admissibility of the reference for a preliminary ruling has, moreover, not been contested by Cobelfret, the Belgian Government or the

Commission of the European Communities, there are no obvious grounds on which to take the view that the interpretation of Community law requested by the national court is irrelevant for its purposes.

Substance

26 The reference for a preliminary ruling concerns, first, the interpretation of Article 4(1) of Directive 90/435. Second, the referring court considers it necessary to determine whether that provision is capable of having a direct effect. Those two aspects must be examined separately.

The scope of Article 4(1) of Directive 90/435

27 By its question, the referring court asks in essence whether Article 4(1) of Directive 90/435 is to be interpreted as precluding legislation of a Member State which provides that the dividends received by the parent company are included in the latter's basis of assessment, to be subsequently deducted in the amount of 95%, to the extent to which the parent company has, for the tax period in question, a positive profit balance after other exempted profits have been deducted.

28 As is particularly apparent from the third recital in the preamble to Directive 90/435, the aim of the directive is to eliminate, by introducing a common system of taxation, any disadvantage to cooperation between companies of different Member States, as

compared with cooperation between companies of the same Member State, and thereby to facilitate the grouping together of companies at Community level (see Case C-27/07 *Banque Fédérative du Crédit Mutuel* [2008] ECR I-2067, paragraph 23 and the case-law cited).

29 In order to ensure the neutrality, from the tax point of view, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State, Directive 90/435 aims to avoid, in economic terms, double taxation of profits, in other words, to avoid taxation of distributed profits, first, in the hands of the subsidiary and, then, in the hands of the parent company (see, to that effect, *Banque Fédérative du Crédit Mutuel*, paragraphs 24 and 27).

30 To that end, Article 4(1) of Directive 90/435 provides that, where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State in which the parent company is established must either refrain from taxing such profits or authorise the parent company to deduct from the amount of tax payable that fraction of the corporation tax paid by the subsidiary which relates to those profits and if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, up to the limit of the amount of the corresponding domestic tax (*Banque Fédérative du Crédit Mutuel*, paragraph 25).

31 The Court has already held that Article 4(1) of Directive 90/435 expressly leaves it open to Member States to choose between the exemption system and the imputation system, which, in the case of shareholders receiving those dividends, do not necessarily lead to the same result (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraphs 43 and 44).

32 It follows from the observations submitted to the Court by the Belgian Government that the system for which the Kingdom of Belgium has opted is that which is set out in the first indent of Article 4(1) of Directive 90/435. According to that Government, the ADBI guarantees that no tax is levied on the parent company in respect of the dividends received by it by reason of its shareholding in its subsidiary.

33 It should be pointed out that the obligation on a Member State which has chosen the system set out in the first indent of Article 4(1) of Directive 90/435 to refrain from taxing the profits of the parent company which it receives by virtue of its association with its subsidiary is not subordinated to any condition and is expressly subject only to Articles 4(2) and (3) and 1(2) of that directive.

34 The first indent of Article 4(1) of the directive does not lay down, in particular, any condition that there must be other taxable profits in order for the dividends received by the parent company not to be subject to taxation.

35 However, the effect of the DBI system, which provides that dividends received by the parent company are to be added to its basis of assessment and that subsequently an amount corresponding to 95% of those dividends is deducted from that basis only if there are taxable profits in the hands of the parent company, is that the parent company can benefit in full from that advantage only on condition that it has not suffered negative results for the same tax period with regard to its other taxable income.

36 As has been noted by the Advocate General at point 23 of her Opinion, Member States cannot unilaterally introduce restrictive measures such as a requirement that the

parent company have taxable profits and thus impose conditions on the possibility of benefiting from the advantages provided for in Directive 90/435.

37 Furthermore, when the parent company does not make other taxable profits in the tax period concerned, legislation such as that at issue in the main proceedings has the effect of reducing the losses of the parent company up to the amount of the dividends received.

38 In that respect, the Belgian Government acknowledges that the restriction of the ADBI affects the losses of the parent company. However, in its view, the first indent of Article 4(1) of Directive 90/435 does not imply that such effects on losses must be prohibited.

39 It is evident from the file submitted to the Court that, in principle, Belgian tax legislation allows losses to be carried forward to subsequent tax years. Consequently, the reduction of losses to the parent company which could benefit from being thus carried forward up to the amount of the dividends received has an effect on the basis of assessment of that company during the tax year which follows that in which those dividends were received in so far as its profits exceed the losses which can be carried forward. Following the reduction in the losses which can be carried forward, that basis of assessment is increased.

40 It follows that, even if the dividends received by the parent company are not subject to corporation tax for the tax year in the course of which those dividends were distributed, that reduction of losses of the parent company may have the effect that the parent company is subject indirectly to taxation on those dividends in subsequent tax years when its results are positive.

41 Such an effect of the restriction on the ADBI is not compatible with the terms or the objective and scheme of Directive 90/435.

42 First, contrary to the assertions of the Belgian Government, the use in the first indent of Article 4(1) of the Directive 90/435 of the words ‘refrain from taxing’ instead of the verb ‘exempt’ cannot give rise to the inference that the directive allows the restriction of the ADBI to have such an effect on the losses of the parent company.

43 As the Advocate General has indicated in point 28 of her Opinion, there is nothing in the scheme or purpose of Directive 90/435 to suggest that there is any significant difference between the concepts of ‘refraining from taxing’ and ‘exempting’ the profits received by the parent company, as the Court has used the concept of ‘exempting’ interchangeably with that of ‘refrain[ing] from taxing’ within the meaning of Article 4(1) (see, inter alia, Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 53; *Test Claimants in the FII Group Litigation*, paragraphs 44 and 102; and *Banque Fédérative du Crédit Mutuel*, paragraph 44).

44 Second, the Belgian Government argues that the DBI system is compatible with Directive 90/435 because, by subjecting the dividends received from subsidiaries established in Belgium and those received from subsidiaries established in other Member States to the same tax treatment, that system manages to achieve the objective laid down in the third recital in the preamble to Directive 90/435 of eliminating any penalisation of cooperation between companies of different Member States as compared with cooperation between companies of the same Member State.

45 As follows from paragraphs 39 and 40 of the present judgment, when the parent company does not make other taxable profits in the period during which the dividends

are received, the DBI system does not allow the objective of preventing economic double taxation, as set out in the first indent of Article 4(1) of Directive 90/435, to be fully attained.

46 Accordingly, even though, in applying that system to the dividends distributed by both resident subsidiaries and those established in other Member States, the Kingdom of Belgium seeks to eliminate all penalisation of cooperation between companies of different Member States as compared with cooperation between companies of the same Member State, that does not justify the application of a system which is not compatible with the system for preventing economic double taxation set out in the first indent of Article 4(1) of Directive 90/435.

47 Third, as the Belgian Government does not claim that the system chosen is the imputation system set out in the second indent of Article 4(1) of Directive 90/435, it cannot rely on the fact that the restriction of the ADBI leads, at the very least, to the same result as that imputation system and that there is no indication that the other system, which is set out in the first indent of Article 4(1), would necessarily lead to a more favourable result than that set out in the second indent.

48 On the one hand, as has been pointed out in paragraph 31 of the present judgment, the choice between the exemption system and the imputation system does not necessarily lead to the same result for the company receiving the dividends.

49 On the other hand, it follows from the Court's case-law that a Member State which has failed to transpose the provisions of a directive into national law cannot rely, as against Community citizens, upon limitations that might have been laid down on the basis of those provisions (see Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 28 and the case-law cited).

50 Likewise, a Member State which has opted, when transposing a directive, for one of the alternative systems provided for by that directive cannot rely on the effects or restrictions which might have arisen from the implementation of the other system.

51 Fourth, it should be pointed out that the references made by the Belgian Government to Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) and the model convention drawn up by the Organisation for Economic Cooperation and Development (OECD) are irrelevant for the purposes of interpreting the first indent of Article 4(1) of Directive 90/435.

52 Contrary to the assertions of the Belgian Government, the conclusion cannot be drawn from Directive 90/434 and, in particular, from Article 6 thereof, that the first indent of Article 4(1) of Directive 90/435 requires only that dividends which a parent company established in Belgium receives from its subsidiaries established in other Member States be treated in the same way as dividends distributed by the subsidiaries of that company established in Belgium, without prohibiting the effects on losses resulting from the limitation of the ADBI.

53 Article 6 of Directive 90/434 provides that, to the extent that, if the mergers, divisions, transfers of assets and exchanges of shares in which companies from two or more Member States are involved 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 must extend those provisions to cover the take-over of such losses by the receiving company's permanent establishments situated within its territory. Such an article has therefore a different substantive content to that of the first indent of Article 4(1) of Directive 90/435. In addition, it makes no reference whatsoever to that provision.

54 The Belgian Government also cannot rely on the absence, in the model convention drawn up by the OECD, of precise rules governing the arrangements under which the exemption system is to be implemented, with the result that it is for the Member States to establish those rules.

55 Suffice it to indicate in this regard that, in the absence of an express indication to the contrary, a Community act such as Directive 90/435 must be interpreted in the context of the sources of Community law and of the Community legal order itself (see, to that effect, Case 12/73 *Muras* [1973] ECR 963, paragraph 7).

56 It is only in the absence of unifying or harmonising Community measures that it is for the Member States, which 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, to take the measures necessary to that end by applying, in particular, the apportionment criteria followed in international tax practice, including the model conventions drawn up by the OECD (see, to that effect, Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 49 and the case-law cited). That is not the situation in the present case.

57 In view of the foregoing, the answer to the question referred is that the first indent of Article 4(1) of Directive 90/435 must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that dividends received by a parent company are to be included in its basis of assessment in order subsequently to be deducted from that basis in the amount of 95%, in so far as, for the tax period in question, the parent company has a positive profit balance after deduction of other exempted profits.

The direct effect of Article 4(1) of Directive 90/435

58 According to settled case-law of the Court, whenever the provisions of a directive appear, so far as their subject-matter is concerned, to be unconditional and sufficiently precise, they may be relied on before the national courts by individuals against the State where the latter has failed to implement the directive in domestic law by the end of the period prescribed or where it has failed to implement the directive correctly (see, inter alia, Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 11; Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 25; and Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraph 103).

59 The Belgian Government contend that the choice left to the Member States by Article 4(1) of Directive 90/435 in regard to the precise rules for the tax treatment of profits distributed to a parent company by its subsidiaries, as well as the lack of precision with regard to those rules and their scope, result in that provision not being unconditional or, at least, not being sufficiently precise to have direct effect.

60 According to the Belgian Government, that provision can at most be considered unconditional and sufficiently precise with regard to the minimum result which is guaranteed by the implementation of each practical arrangement which it authorises.

61 In this regard, it is consistent case-law of the Court that the right given to Member States to choose among several possible means of achieving the result required by a directive does not preclude the possibility for individuals to enforce before the national

courts rights the content of which can be determined with sufficient precision on the basis of the provisions of the directive alone (see, inter alia, *Francovich and Others,* paragraph 17, and Case C-226/07 *Flughafen Köln/Bonn* [2008] ECR I-5999, paragraph 30).

62 In the present case, however, it is not necessary to consider whether, notwithstanding the choice left to the Member States by Article 4(1) of Directive 90/435, it is possible to identify the minimum rights accorded to individuals under that provision.

63 In so far as it appears from the file that the Kingdom of Belgium opted for the system set out in the first indent of Article 4(1) of Directive 90/435, it is sufficient to establish whether that provision is unconditional and sufficiently precise to be capable of being relied on before national courts.

64 The obligation to refrain from taxing profits which a subsidiary distributes to its parent company, set out in the first indent of Article 4(1), is worded in unequivocal terms and is not subject to any condition. Likewise, its implementation or effects are not subject to the intervention of any other act on the part of the Community institutions or the Member States.

65 It follows that the first indent of Article 4(1) of Directive 90/435 is unconditional and sufficiently precise to be capable of being relied on before national courts.

The request for the judgment to be limited in time

66 In its written observations, the Belgian Government requested the Court, should it interpret Article 4(1) of Directive 90/435 as precluding national legislation such as the DBI system, to limit the temporal effects of its judgment.

67 In support of its request, the Belgian Government invoked the legitimate expectation which it was entitled to entertain on the following grounds: the Commission had implicitly approved the DBI system; the imprecise scope of Article 4(1); the lack of relevant case-law; and the impact which the judgment would have on Belgian public finances if that system were held to be incompatible with Directive 90/435.

68 According to settled case-law, it is only exceptionally that the Court may, in application of the general principle of legal certainty inherent in the Community legal order, be moved to restrict for any person concerned the opportunity of relying on a provision which it has interpreted with a view to calling in question legal relationships established in good faith. Two essential criteria must be fulfilled before such a limitation can be imposed, namely that those concerned should have acted in good faith and that there should be a risk of serious difficulties (see Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 56 and the case-law cited).

69 Without it being necessary to examine the arguments of the Belgian Government concerning legitimate expectation, it need merely be pointed out that, as stated by the

Advocate General at point 36 of her Opinion, the Belgian Government has made no attempt in its written observations or in the course of the hearing to demonstrate that there is a risk of serious economic repercussions.

70 It is therefore not appropriate to limit in time the effects of the present judgment.

Costs

71 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

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

The first indent of Article 4(1) of Directive 90/435 is unconditional and sufficiently precise to be capable of being relied on before national courts.

[Signatures]