Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

26 October 2017*

(Refernce for a preliminary ruling — Corporation tax — Directive 90/435/EEC — Articles 1(2) and 4(2) — Parent companies and subsidiaries of different Member States — Common system of taxation — Deductibility from the taxable profits of the parent company — Domestic provisions seeking to abolish the double taxation of profits distributed by subsidiaries — No account taken of the existence of a link between the interest on loans and the financing of the holding that gave rise to the payment of dividends)

In Case C‑39/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp, Belgium), made by decision of 8 January 2016, received at the Court on 25 January 2016, in the proceedings

Argenta Spaarbank NV

v

Belgische Staat,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, A. Tizzano (Rapporteur), Vice-President of the Court, E. Levits, A. Borg Barthet and M. Berger, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 30 March 2017,

after considering the observations submitted on behalf of:

– Argenta Spaarbank NV, by B. De Cock and K. Van Duyse, advocaten,

– the Belgian Government, by J.-C. Halleux, P. Cottin and M. Jacobs, acting as Agents,

– the European Commission, by W. Roels, acting as Agent,

after hearing the Opinion of the Advocate General at the sitting on 27 April 2017,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 1(2) and 4(2) 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 request has been made in proceedings brought by Argenta Spaarbank NV against the Belgische Staat (Belgian State) in relation to the lawfulness of a tax assessment sent to that company in respect of corporation tax for the tax years 2000 and 2001.

Legal context

EU law

3 The third recital of Directive 90/435 states:

'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'.

4 Article 1 of that directive provides:

'1. Each Member State shall apply this Directive:

– to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.

2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.'

5 Under Article 3 of that directive:

'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).

2. By way of derogation from paragraph 1, Member States shall have the option of:

– replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,

– not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.'

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

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

– refrain from taxing such profits, or

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

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

Belgian law

7 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').

8 Following the codification of the legislation on income tax that took place in 1992, the provisions relevant to the DBI system were brought together in the form of Articles 202, 204 and 205 of the 1992 Income Tax Code, coordinated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992 (supplement to the *Belgisch Staatsblad* of 30 July 1992) ('the 1992 ITC'), as implemented by the Royal Decree of 27 August 1993 for the implementation of the 1992 Income Tax Code (*Belgisch Staatsblad* of 13 September 1993, p. 20096).

9 In accordance with 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 ('the DBI deduction').

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

11 In that context, the Law of 20 December 1995 containing fiscal, financial and various provisions (*Belgisch Staatsblad* of 23 December 1995, p. 34578) inserted Article 198(10) into the 1992 ITC. In the version applicable to the main proceedings, this provides that:

'Business expenses shall not include:

…

(10) Without prejudice to the application of Article 55 [of the 1992 ITC], interest, up to an amount equal to the amount of the dividends that may be deducted pursuant to Articles 202 to 204 [of the 1992 ITC], derived from shares acquired by a company that has not held those shares for an uninterrupted period of at least one year at the time of their transfer.

However, the [previous subparagraph] shall not apply to shares held in related companies or shares in companies with which there is a shareholding link, even if they are cash investments, and shall not apply to other shares in the form of financial fixed assets.'

12 Article 202 of the version of the 1992 ITC applicable in the main proceedings is worded as follows:

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

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

…

2. The income referred to in paragraph 1(1) and 1(2) shall be deductible only to the extent that, at the date of declaration or payment of that income, the recipient company has a holding in the capital of the company making the distribution of not less than 5% or of a value of at least [BEF 50 million (approximately EUR 1 240 000)].

However, that condition shall not apply to income:

(1) obtained through credit institutions mentioned in Article 56(1) …'

13 Article 204 of the version of the 1992 ITC applicable in the main proceedings provides:

'The income deductible under Paragraph 1(1), (3) and (4) of Article 202 shall be 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 or, with regard to the income mentioned in Paragraph 1(4) and (5) of Article 202, decreased by the interest credited to the seller in cases where the securities were acquired during the tax period.'

14 Article 106(5) of the version of the Royal Decree of 27 August 1993 for the implementation of the 1992 Income Tax Code that is applicable in the main proceedings provides:

'The levying of advance tax on income from investments 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 is not, or has not been, held for an uninterrupted period of at least one year.

For the purposes of the application of the first and second subparagraphs, "subsidiary" and "parent company" shall mean subsidiaries and parent companies within the meaning of Directive [90/435].'

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

15 Argenta Spaarbank is a credit institution authorised under Belgian law which, during the financial years 1999 and 2000 (tax years 2000 and 2001), received dividends from holdings in companies incorporated in Belgium and in other EU Member States that it had, in certain cases, held for less than one year and, in other cases, for more than one year at the time when those dividends were paid out.

16 Pursuant to Articles 202 and 204 of the 1992 ITC in the version applicable in the main proceedings, Argenta Spaarbank benefited, as a parent company, from the DBI deduction amounting to 95% of those dividends.

17 In addition, in the light of its status as a credit institution, it also paid interest amounting to BEF 11 702 186 712 (approximately EUR 290 090 000) and BEF 13 322 033 492 (approximately EUR 330 245 000) in the course of those financial years, which was listed in the income statement of the company under the heading 'Interest and similar expenses'.

18 As is clear from the order for reference, that interest was not paid in respect of loans for the purchase of holdings in a subsidiary. Instead, that interest related to savings accounts, current accounts, term deposits and other investment products held by Argenta Spaarbank on behalf of its clients in its capacity as a credit institution and could, therefore, have been subject to a deduction as business expenses.

19 However, Article 198(10) of the 1992 ITC provides for non-deductibility of all interest paid up to an amount equal to the amount of the dividends capable of being deducted pursuant to Articles 202 to 204 of the 1992 ITC derived from shares acquired by a parent company that has held those shares for an uninterrupted period of less than one year at the time of their transfer, without requiring the existence of a causal connection between such interest and the dividends that benefited from the DBI deduction.

20 Argenta Spaarbank received dividends amounting to BEF 3 059 292 (approximately EUR 75 838) in the financial year 1999 (tax year 2000) and BEF 11 960 419 (approximately EUR 296 490) in the financial year 2000 (tax year 2001) from holdings which it had held for less than one year at the time when the dividends were paid out.

21 Thus, pursuant to Article 198(10) of the 1992 ITC, the tax authorities sent two amended tax assessments to Argenta Spaarbank for the tax years 2000 and 2001, noting that interest in the respective amounts of EUR 75 837.87 and EUR 296 491.04 had been added to the 'non-deductible expenses' and could not, therefore, be deducted from the taxable profits of that parent company.

22 By decision of 4 May 2004, the regional director of the Nationale Controlecentrum I van de administratie voor de ondernemings- en inkomensfiscaliteit (National Control Centre I of the tax authority for businesses and income, Belgium) rejected the complaints lodged by Argenta Spaarbank against those tax assessments.

23 On 3 August 2004, Argenta Spaarbank challenged that decision before the referring court, the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp, Belgium), seeking annulment of those tax assessments, submitting, inter alia, that Article 198(10) of the 1992 ITC was incompatible with Article 4(2) of Directive 90/435, since that latter provision, in its view, only allowed Member States to consider interest with a causal connection to dividends that benefited from a DBI deduction as non-deductible.

24 In those circumstances, the rechtbank van eerste aanleg te Antwerpen (Court of First Instance, Antwerp) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Does Article 198(10) of [the 1992 ITC], in the version which was in force for the 2000 and 2001 tax years, infringe Article 4(2) of [Directive 90/435], in so far as that article [of the 1992 ITC] provides that interest may not be regarded as a business expense up to an amount corresponding to the amount of the dividends qualifying for exemption under Articles 202 to 204 of [the 1992 ITC] where those dividends are derived from shares which, at the time of their transfer, had not been held for an uninterrupted period of at least one year, in which connection no distinction is made according to whether those interest payments relate to the holding from which the dividends qualifying for exemption were derived (or the financing thereof) or not?

(2) Is Article 198(10) of [the 1992 ITC], in the version which was in force for the 2000 and 2001 tax years, a provision for the prevention of tax evasion and abuses within the meaning of Article 1(2) of [Directive 90/435] and, if so, does Article 198(10) of [the 1992 ITC] go beyond what is necessary for the prevention of such tax evasion or abuses when it provides that interest is not to be regarded as a business expense up to an amount corresponding to the amount of the dividends qualifying for exemption under Articles 202 to 204 [of the 1992 ITC], where those dividends are derived from shares that, at the time of their transfer, had not been held for an uninterrupted period of at least one year, in which connection no distinction is made about whether those interest payments relate to the holding from which the dividends qualifying for exemption were derived (or the financing thereof) or not?’

Consideration of the questions referred

Admissibility

25 The Belgian Government contends that the present request for a preliminary ruling is inadmissible. In support of that plea of inadmissibility, the Belgian Government points out that Article 198(10) of the 1992 ITC authorises the Belgian tax authorities to reject, as non-deductible expenses, all interest paid by a parent company during the relevant tax year up to the amount of the dividends received from holdings in the capital of a subsidiary which have been held for less than one year and which benefit from the DBI deduction.

26 In such circumstances, that government submits that that article is indeed similar to Article 4(2) of Directive 90/435, in that it provides a means of combating the abusive practice of borrowing in order to reduce the parent company’s basis of assessment by generating deductible interest for the purpose of acquiring holdings in subsidiaries, which pay out dividends that are also deductible.

27 However, according to the Belgian Government, in so far as Article 198(10) of the 1992 ITC has the indirect effect of neutralising the deduction, under Article 202 to 204 of the 1992 ITC, of dividends from short-term holdings, that article must be held to be covered by Article 3(2) of Directive 90/435, which allows Member States not to apply the profit-reducing scheme established by that directive to companies ‘which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies’. According to the Belgian Government, the consequence of that provision is that, in the circumstances to which it relates, Member States are not required to comply with Directive 90/435. Thus, it is of the opinion that Member States can not only refuse to grant the advantages set out in Article 4(1) of that directive, but also hold such charges to be non-deductible in circumstances that do not correspond to the provisions of Article 4(2) of that directive, or even to make use of a provision designed to prevent fraud or abuse within the meaning of Article 1(2) of that same directive that goes beyond what is necessary to prevent fraud or abuse.

28 To that extent, the Belgian Government is of the opinion that Article 198(10) of the ITR 1992 relates to a situation that falls outside the scope of application of Directive 90/435.

29 In that regard, it should be noted that the second indent of Article 3(2) of Directive 90/435 provides each Member State with the ‘option’, by way of derogation from paragraph 1 of that article, of ‘not applying’ that directive to companies of that Member State that do not maintain for an uninterrupted period of at least two years a holding qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.

30 According to its actual terms, that provision does not establish a general exception to the application of Directive 90/435, but merely provides an option for Member States, which is for those which wish to make use of it to implement in their national law. In that regard, it is necessary to note that, according to settled case-law of the Court, the provisions of a directive must be implemented with unquestionable binding force and with the specificity, precision and clarity necessary to satisfy the requirements of legal certainty (see judgment of 15 October 2015, *Commission* v *Germany*, C-137/14, EU:C:2015:683, paragraph 51 and the case-law cited).

31 On this point, it must be noted that the referring court provides a different interpretation of the scheme in the 1992 ITC and, in particular, of Article 198(10) thereof to that presented to the Court by the Belgian Government.

32 That court states that the Belgian legislature initially transposed Directive 90/435 into national law by applying that directive in its entirety to national parent companies, without expressly requiring a company to hold for any minimum period the shares granting it the quality of parent company of the subsidiary that is the issuer of the shares and allowing it to seek the deduction of the dividends generated by those shares.

33 Thus, according to that court, the Kingdom of Belgium did not exercise the option granted to Member States by the first part of the second indent of Article 3(2) of Directive 90/435 when it adopted the 1992 ITC.

34 However, analysing in detail the preparatory documents, the object and the purpose of Article 198(10) of the 1992 ITC, the referring court takes the view that that provision implements in Belgian law Article 4(2) of Directive 90/435, since it seeks to prevent national parent companies from carrying out a double tax deduction through the acquisition, via deductible external financing, of shares in subsidiaries which also pay out dividends that are deductible.

35 Consequently, the reason why Article 198(10) of the 1992 ITC provides no link between the acquisition of such shares and the financing of that transaction arises from the Belgian legislature’s desire, not to neutralise the deduction of dividends resulting from short-term holdings by using the authorisation set out in the first part of the second indent of Article 3(2) of Directive 90/435, but to overcome the difficulty, from a practical point of view, for the tax authorities to check specifically the relationship between the financing of a transaction and the asset acquired, in the context of the implementation of the derogating rule envisaged by Article 4(2) of that directive.

36 It is on the basis of that interpretation of Article 198(10) of the 1992 ITC that the referring court deemed it necessary, for the purposes of resolving the dispute before it, to submit the present request for a preliminary ruling.

37 According to settled case-law of the Court, in the context of the cooperation between the Court and the national courts provided for by Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, 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 (judgments of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 16, and of 21 December 2016, *Vervloet and Others*, C-76/15, EU:C:2016:975, paragraph 56 and the case-law cited).

38 In addition, it should be noted that it is not for the Court, in the context of a request for a preliminary ruling, to give a ruling on the interpretation of provisions of domestic law and to decide whether the interpretation given by the national court of those provisions is correct. The Court must take account, under the division of jurisdiction between the European Union Courts and the national courts, of the factual and legislative context in which the questions put to it are set, as described in the order for reference (judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 48 and the case-law cited).

39 It follows from the foregoing that, in order to assess the objection to admissibility raised by the Belgian Government, it is appropriate to refer solely to the interpretation of Article 198(10) of the 1992 ITC provided by the referring court, as set out, in essence, in paragraphs 32 to 35 of the present judgment.

40 Having regard to that interpretation, and bearing in mind the case-law set out in paragraph 30 of the present judgment, it is appropriate to find that a provision such as Article 198(10) of the 1992 ITC comes within the scope of application of Directive 90/435, since its content cannot be understood as capable of coming within the optional derogation, set out in the first part of the second indent of Article 3(2) of that directive, either directly or, more importantly, indirectly, as the Belgian Government maintains.

41 Consequently, the present request for a preliminary ruling must be declared admissible.

Substance

The first question

42 By its first question, the referring court asks, in essence, whether Article 4(2) of Directive 90/435 precludes a provision of national law, such as Article 198(10) of the 1992 ITC, pursuant to which interest paid by a parent company under a loan is not deductible from the taxable profits of that parent company up to an amount equal to that of the dividends, which already benefit from tax deductibility, that are received from holdings of that parent company in the capital of its subsidiary companies that have been held for a period of less than one year, even if such interest does not relate to the financing of such holdings.

43 In order to provide a useful answer to that question, it is necessary, according to settled case-law of the Court, to take account of the wording of Article 4(2) of Directive 90/435, as well as of the objectives and scheme of that directive (see, to that effect, judgments of 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, paragraph 22; of 1 October 2009, *Gaz de France — Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 26, and of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 24).

44 At the outset, it must be stated that the wording of Article 4(2) of Directive 90/435 is clear and unequivocal, so as to mean that that provision allows a Member State to preclude a parent company from deducting from its taxable profit only ‘charges relating to the holding’ of that parent company in the capital of its subsidiary.

45 It thus follows from the actual wording of that provision that it does not allow Member States to preclude parent companies from deducting interest paid in respect of all the loans of a parent company up to an amount equal to that of the profit generated by its holdings in its subsidiaries.

46 Such a literal interpretation is borne out by the background of Directive 90/435 and the objective which it pursues.

47 In that regard, it must be recalled that Directive 90/435, as its third recital indicates, seeks, by the introduction of a common system of taxation, to eliminate 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 EU level. That directive thus seeks to ensure the neutrality, in fiscal terms, of the distribution of profits by a subsidiary established in one Member State to its parent company established in another Member State (judgments of 1 October 2009, *Gaz de France — Berliner Investissement*, C-247/08, EU:C:2009:600 paragraph 27, and of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 25).

48 Thus, the objective of that directive is to prevent double taxation of profits distributed by subsidiary companies to parent companies, through the mechanisms laid down in Article 4(1) and Article 5(1) of that directive, by ensuring that distributed profits are not taxed once at the subsidiary level and again at the parent-company level (see, to that effect, judgments of 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, paragraph 27; of 12 February 2009, *Cobelfret*, C-138/07, EU:C:2009:82, paragraph 29; of 1 October 2009, *Gaz de France — Berliner Investissement*, C-247/08, EU:C:2009:600, paragraph 57, and of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 36).

49 With particular regard to Article 4(1) of Directive 90/435, that provision provides that, where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State of the parent company is required either to refrain from taxing such profits or to 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 (judgments of 12 December 2006, *Test Claimants in the FII Group Litigation*, C-446/04, EU:C:2006:774, paragraph 102; of 3 April 2008, *Banque Fédérative du Crédit Mutuel*, C-27/07, EU:C:2008:195, paragraph 25, and of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 37).

50 It is therefore by way of derogation that Article 4(2) of Directive 90/435 grants Member States the option of providing that charges relating to the holding and losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company.

51 In that context, first, it should be pointed out that that provision must be interpreted strictly and therefore, according to settled case-law of the Court, cannot be given an interpretation going beyond its actual words (see, to that effect, judgments of 17 October 1996, *Denkavit and Others*, C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 27, and of 25 September 2003, *Océ Van der Grinten*, C-58/01, EU:C:2003:495, paragraph 86).

52 Second, it must be held that the rule established in Article 4(2) of Directive 90/435 would negate the effectiveness of the rule set out in Article 4(1) of that directive if that first rule had to be interpreted as allowing Member States to preclude the deduction, from the taxable profits of a parent company, of all interest charged in respect of loans up to an amount equal to the amount of dividends, which benefit from a tax exoneration, that the parent company receives from its holding in the capital of a subsidiary, without that non-deductibility being limited to interest charges relating to the financing of that holding which pays out those dividends. Such an interpretation would equate to allowing those

Member States to increase indirectly the taxable profits of a parent company, thereby affecting the neutrality, from the tax point of view, of the distribution of dividends paid by a subsidiary located in one Member State to its parent company established another Member State.

53 Finally, only a literal interpretation of the rule in Article 4(2) of Directive 90/435, set out in paragraphs 44 and 45 of the present judgment, is compatible with the specific objective referred to in that provision in the context of the scheme of Directive 90/435.

54 The option granted to Member States by that provision seeks to prevent a parent company from benefiting from a double tax advantage arising, first, from profits that are tax-exempt pursuant to the first indent of Article 4(1) of Directive 90/435 and, second, from the tax reduction by means of the deduction by virtue of charges relating to holding losses resulting from the distribution of such profits (see, to that effect, judgment of 22 December 2008, *Les Vergers du Vieux Tauves*, C-48/07, EU:C:2008:758, paragraph 42).

55 From that point of view, Article 4(2) of Directive 90/435 must necessarily be interpreted as allowing Member States only to prevent a parent company from benefiting from the double tax advantage referred to in the preceding paragraph. Permitting Member States to refuse to allow parent companies to deduct interest that is not linked to the acquisition of holdings on which tax-free dividends have been paid out would manifestly go beyond what is necessary to achieve such an objective.

56 It follows that a domestic provision, such as Article 198(10) of the 1992 ITC, that excludes, generally and automatically, tax deductibility, as business expenses or charges, of interest relating to loans taken out by a parent company up to an amount equal to the amount of dividends paid out by a holding of that parent company in the capital of a subsidiary, that already benefit from tax deductibility, even if the payment of that interest does not relate to the financing of the acquisition of that holding, is not a compliant implementation of the derogating rule set out in Article 4(2) of Directive 90/435.

57 Having regard to all of the foregoing considerations, the answer to the first question is that Article 4(2) of Directive 90/435 must be interpreted as precluding a provision of domestic law, such as Article 198(10) of the 1992 ITC, pursuant to which interest paid by a parent company under a loan is not deductible from the taxable profits of that parent company up to an amount equal to that of the dividends, which already benefit from tax deductibility, that are received from the holdings of that parent company in the capital of its subsidiary companies that have been held for a period of less than one year, even if such interest does not relate to the financing of such holdings.

The second question

58 By its second question, the referring court asks, in essence, whether Article 1(2) of Directive 90/435 must be interpreted as allowing Member States to apply a domestic provision, such as Article 198(10) of the 1992 ITC.

59 In that regard, it must be noted that Article 1(2) of Directive 90/435 provides that that directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud and abuse.

60 As the Advocate General has observed in point 51 of her Opinion, Article 1(2) of Directive 90/435 reflects the general EU law principle that abuse of rights is prohibited (judgment of 5 July 2007, *Kofoed*, C-321/05, EU:C:2007:408, paragraph 38), and that EU law therefore cannot be relied on for abusive or fraudulent ends (see, inter alia, to that effect, judgments of 21 February 2006, *Halifax and Others*, C-255/02, EU:C:2006:121, paragraph 69, and of 28 July 2016, *Kratzer*, C-423/15, EU:C:2016:604, paragraph 37).

61 Nonetheless, it must be noted that, as the Advocate General also made clear in point 52 of her Opinion, Article 1(2) of Directive 90/435 is a provision of principle, the content of which is explained in detail in other provisions of that directive, inter alia in Article 4(2), in that it seeks in particular to counteract abuse by parent companies resulting from a double tax deduction (see, by analogy, judgment of 17 October 1996, *Denkavit and Others*, C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 31).

62 It is apparent from the answer given to the first question that a domestic provision, such as Article 198(10) of the 1992 ITC, is contrary to Article 4(2) of Directive 90/435 in that it goes beyond the measures that the EU legislature held to be appropriate to avoid the abuse by parent companies resulting from the possibility of carrying out a double tax deduction.

63 Having regard to the foregoing considerations, the answer to the second question is that Article 1(2) of Directive 90/435 must be interpreted as not authorising Member States to apply a domestic provision, such as Article 198(10) of the 1992 ITC, to the extent that that provision goes beyond what is necessary for the prevention of fraud and abuse.

Costs

64 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 (Fifth Chamber) hereby rules:

1. **Article 4(2) 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 a provision of domestic law, such as Article 198(10) of the 1992 Income Tax Code, coordinated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992, pursuant to which interest paid by a parent company under a loan is not deductible from the taxable profits of that parent company up to an amount equal to that of the dividends, which already benefit from tax deductibility, that are received from the holdings of that parent company in the capital of its subsidiary companies that have been held for a period of less than one year, even if such interest does not relate to the financing of such holdings.**

2. **Article 1(2) of Directive 90/435 must be interpreted as not authorising Member States to apply a domestic provision, such as Article 198(10) of the 1992 Income Tax Code, coordinated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992, to the extent that that provision goes beyond what is necessary for the prevention of fraud and abuse.**

[Signatures]