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EC Court of Justice, 1 October 2009*

Case C-247/08

Gaz de France - Berliner Investissement SA v Bundeszentralamt für Steuern

First Chamber: *P. Jann, President of the Chamber, M. Ilesic, A. Tizzano, E. Levits (Rapporteur) and J.-J. Kasel, Judges*

Advocate General: *J. Mazák*

1. This reference for a preliminary ruling concerns the interpretation of Article 2(a) 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), read in conjunction with point (f) of the annex thereto, and the validity of that provision in the light of Articles 43 EC, 48 EC, 56 EC and 58 EC.

2. The reference was made in proceedings between Gaz de France – Berliner Investissement SA, a company established in France with the legal form of a 'société par actions simplifiée' (SAS) until 2002, and the Bundeszentralamt für Steuern (Federal Tax Office) regarding the taxation of profits distributed to that company during the tax year 1999 by Gaz de France Deutschland GmbH, a company established in Germany.

Legal context

Community law

3. Article 2 of Directive 90/435 states the following:

> '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:
> …
> – impôt sur les sociétés in France,
> …
> or to any other tax which may be substituted for any of the above taxes.'

4. Under Article 5(1) of Directive 90/435, profits which a subsidiary distributes to its parent company are at least where the latter holds a minimum of 25 % of the capital of the subsidiary, to be exempt from withholding tax.

5. Point (f) of the annex to Directive 90/435, entitled 'List of companies referred to in Article 2(a)', lists the following companies:

> 'companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", and industrial and commercial public establishments and undertakings.'

6. According to the fourth recital in the preamble to Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435 (OJ 2003 L 7, p. 41):

> 'Article 2 of Directive 90/435 … defines the companies falling within its scope. The Annex contains a list of companies to which the Directive applies. Certain forms of companies are not included in the list in the Annex, even though they are resident for tax purposes in a Member State and are subject to corporation tax there. The scope of Directive 90/435 … should therefore be extended to other entities which can carry out cross-border activities in the Community and which meet all the conditions laid down in that Directive.'

* Language of the case: German.

7. Article 1(6) of Directive 2003/123 provides for the annex to Directive 90/435 to be replaced by the text in the annex to Directive 2003/123. Following that amendment, point (f) of the annex to Directive 90/435 states the following:

> 'companies under French law known as "société anonyme", "société en commandite par actions", "société à responsabilité limitée", "sociétés par actions simplifiées", "sociétés d'assurances mutuelles", "caisses d'épargne et de prévoyance", "sociétés civiles" which are automatically subject to corporation tax, "cooperatives", "unions de cooperatives", industrial and commercial public establishments and undertakings, and other companies constituted under French law subject to French corporate tax.'

8. Under Article 2 of Directive 2003/123, the directive was to be transposed into the law of the Member States by 1 January 2005 at the latest.

National law

9. Paragraph 44d of the Law on income tax (Einkommensteuergesetz), in the version applicable to the main proceedings ('EStG 1999'), states the following:

> '1. On application, investment income tax shall not be charged on investment income within the meaning of Paragraph 20(1)(1) … accruing to a parent company where neither that company's registered office nor its administration is located in the national territory, and deriving from the distribution of the profits of a capital company with unlimited liability to tax within the meaning of Paragraph 1(1)(1) of the Law on corporation tax, or from the refunding of corporation tax.
> 2. A parent company within the meaning of subparagraph 1 is a company which meets the conditions laid down in Article 2 of Directive [90/435], set out in Annex 7 to this law, and which, at the time when, in accordance with Paragraph 44(1), second sentence, the investment income tax becomes payable, can prove that it has a direct shareholding of at least 25% in the nominal capital of the capital company with unlimited liability to tax. It must also be shown that that shareholding has been maintained for an uninterrupted period of 12 months. …'

10. Annex 7 to the EStG 1999 provides:

> 'A company shall be considered a company for the purposes of Article 2 of Directive [90/435], if
> 1. it takes one of the following forms:
> …
> – companies under French law known as:
> société anonyme, société en commandite par actions, société à responsabilité limitée and industrial and commercial public establishments and undertakings;
> …
> 2. is considered according to the tax laws of a Member State 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 and
> 3. is subject to one of the following taxes, without the possibility of election or exemption therefrom:
> …
> – impôt sur les sociétés (corporation tax) in France
> …
> or to any tax which may be substituted for one of the above taxes.

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

11. On 16 June 1999 Gaz de France Deutschland GmbH, which is wholly owned by Gaz de France – Berliner Investissement SA ('the applicant in the main proceedings'), distributed to its parent company profits in the amount of DEM 980 387, withholding investment income tax in the amount of DEM 49 019.35 and a solidarity surcharge in the amount of DEM 2 696.06 which were paid to the competent tax office.

12. On 16 August 1999 the applicant in the main proceedings applied to the Bundesamt für Finanzen (since 1 January 2006 the Bundeszentralamt für Steuern ('the defendant in the main proceedings')) for a reimbursement of the investment income tax and the solidarity surcharge.

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13. By a decision of 6 September 1999 the defendant in the main proceedings rejected the reimbursement application on the ground that the applicant in the main proceedings was not a parent company within the meaning of Paragraph 44d(2) of the EStG 1999 in conjunction with Article 2 of Directive 90/435.

14. Since its objection against that decision was dismissed, the defendant in the main proceedings brought an action before the Finanzgericht Köln (Financial Court, Cologne). That court considers that, according to the wording of Directive 90/435, the applicant in the main proceedings is not entitled to reimbursement of the investment income tax, given that, in the year in which the profit distribution was effected, it was not one of the forms of company listed in Article 2(a) of Directive 90/435 in conjunction with point (f) in the annex thereto.

15. However, the Finanzgericht Köln is unsure whether it should restrict itself to a literal interpretation of the provisions of Directive 90/435. In its view, regard must be had to the purpose of the directive and the fact that (i) when the directive came into force the legal form of the 'société par actions simplifiée' did not yet exist under French law and (ii) Directive 2003/123 included that form of company in the annex to Directive 90/435.

16. According to the Finanzgericht Köln, in the case before it the question thus arises as to whether Article 2(a) of Directive 90/435, read in conjunction with point (f) of the annex thereto, may be interpreted by analogy so as to close an involuntary gap in the law by regarding a French company in the form of a 'société par actions simplifiée' as a 'company of a Member State' within the meaning of Directive 90/435 even before 2005 and, if not, whether Article 2(a) of that directive, read in conjunction with point (f) in the annex thereto, infringes Articles 43 EC and 48 EC or Articles 56 EC and 58 EC.

17. Accordingly, the Finanzgericht Köln decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

> '1. Must Article 2(a) [of Directive 90/435] in conjunction with point (f) of the annex to [that] Directive … be interpreted as meaning that for the purposes of the directive a French company taking the legal form of a "société par actions simplifiée" may be regarded even for the years prior to 2005 as a "company of a Member State" with the result that in respect of a profit distribution effected by its Germany subsidiary in 1999 the former company is entitled to an exemption from withholding tax in accordance with Article 5(1) of Directive 90/435 …?
> 2. In the event that Question 1 is answered in the negative:
> Does Article 2(a) [of Directive 90/435] in conjunction with point (f) of the annex to [that] Directive … infringe Articles 43 EC and 48 EC or Article 56(1) EC and Article 58(1)(a) and (3) EC in that, together with Article 5(1) of Directive [90/435], in the event of a profit distribution by a German subsidiary it lays down an exemption from withholding tax for French parent companies taking the legal form of a "société anonyme", "société en commandite par actions" or "société à responsabilité limitée", but not for French parent companies taking the legal form of a "société par actions simplifiée"?'

The questions referred

Admissibility

18. The Italian Government calls into question the admissibility of the reference for a preliminary ruling on the ground that it does not give any information regarding the structure or legal regime of the 'société par actions simplifiée' or of the other types of companies with which it is compared. Without such information it is not possible to assess the basis of the referring court's initial hypothesis, namely that a 'société par actions simplifiée' has characteristics that are analogous to those of the companies under French law which have always been granted exemption from withholding tax on dividends under Article 5(1) of Directive 90/435. Consequently, it is not possible to assess the relevance of the reference for a preliminary ruling in resolving the case in the main proceedings.

19. In this regard, it must be noted that, although in the light of the division of responsibilities in the preliminary ruling procedure, the referring court alone can determine the subject-matter of the questions it proposes to refer to the Court, the Court has also stated that, in exceptional circumstances, it can examine the conditions in which the case was referred to it by the national court, in order to assess whether it has jurisdiction (see, inter alia, Case C-62/06 ZF *Zefeser* [2007] ECR I-11995, paragraph 14).

20. Such is the case where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 64). The need to provide an interpretation of Community law which will be of use to the national court means that the national court must define the factual and legislative context of the questions it is asking or, at the very least, explain the factual circumstances on which those questions are based (see, inter alia, Case C-237/04 *Enirisorse* [2006] ECR I-2843, paragraph 17 and the case-law cited).

21. The information provided in the order for reference must not only enable the Court to give useful answers but must also give the governments of the Member States and the other interested parties the opportunity to submit observations pursuant to Article 23 of the Statute of the Court of Justice. It is the Court's duty to ensure that that opportunity is safeguarded, bearing in mind that under that provision only the orders for reference are notified to the interested parties (see, inter alia, *Enirisorse*, paragraph 18 and the case-law cited).

22. It must be noted, in the present case, that the order for reference adequately sets out the factual and legislative context of the case in the main proceedings and the reasons why the referring court considered that it needed an answer to the questions referred, and thus enables the Court to provide useful answers to those questions. It is also apparent from the observations submitted by the German, Italian and United Kingdom Governments and by the Commission of the European Communities that the information contained in the order for reference enabled them to state their views effectively on the questions referred to the Court.

23. Accordingly, the lack of a detailed description in the order for reference of the rules regarding 'sociétés par actions simplifiées' or the rules relating to other companies under French law cannot render the reference inadmissible, since the interpretation of national law does not fall within the jurisdiction of the Court in any event.

24. It follows from the above that it is necessary to answer the questions referred for a preliminary ruling.

Substance

The first question

25. By its first question the national court essentially asks whether Article 2(a) of Directive 90/435, read in conjunction with point (f) of the annex thereto, must be interpreted as meaning that a French company in the form of a 'société par actions simplifiée' may be regarded as a 'company of a Member State' within the meaning of that directive even before it was amended by Directive 2003/123.

26. To answer that question, it is necessary to take account of the wording of the provision whose interpretation is sought, as well as the objectives and the scheme of Directive 90/435 (see, to that effect, Joined Cases C-283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I-5063, paragraphs 24 and 26; Case C-375/98 *Epson Europe* [2000] ECR I-4243, paragraphs 22 and 24; and Case C-27/07 *Banque Fédérative du Crédit Mutuel* [2008] ECR I-2067, paragraph 22).

27. In that regard, it should be borne in mind that, as is in particular apparent from the third recital in its preamble, Directive 90/435 aims, by introducing 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 Community level (*Denkavit and Others*, paragraph 22; *Epson Europe*, paragraph 20; Case C-294/99 *Athinaïki Zythopaiia* [2001] ECR I-6797, paragraph 25; Case C-58/01 *Océ van der Grinten* [2003] ECR I-9809, paragraph 45; and *Banque Fédérative du Crédit Mutuel*, paragraph 23). Directive 90/435 thus seeks 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 (*Banque Fédérative du Crédit Mutuel*, paragraph 24).

28. As is apparent from Article 1 thereof, Directive 90/435 relates to distributions of profits received by companies of a Member State from their subsidiaries established in other Member States.

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29. Article 2 of Directive 90/435 establishes the conditions which a company has to satisfy to be regarded as a company of a Member State within the meaning of that directive and thus defines its scope. As pointed out by the Advocate General in point 27 of his Opinion, those conditions are cumulative.
30. In accordance with Article 2(a) of Directive 90/435, 'company of a Member State' means any company which takes one of the forms listed in the annex to that directive.

31. The annex to Directive 90/435 uses two different techniques to indicate the companies which fall within its scope. Thus, although general wording is used in points (k) and (l) of that annex, referring respectively to 'commercial companies or civil law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law' and 'companies incorporated under the law of the United Kingdom', elsewhere in that annex the legal forms used are expressly indicated.

32. The latter technique, which is used in the majority of the points of the annex to Directive 90/435, in particular in point (f) in relation to companies under French law, whereby the legal forms covered by that directive are listed without a clause enabling its application to other companies constituted in accordance with the law of the respective Member States (with the exception, as regards French law, of public establishments and undertakings), implies that those legal forms are listed exhaustively.

33. Thus, it is apparent from both the wording and the scheme of Article 2(a) of Directive 90/435 and of point (f) of the annex thereto that, for a company under French law which is not an industrial and commercial public establishment or undertaking to be able to be regarded as a company of a Member State within the meaning of that directive, it must take one of the forms listed exhaustively in point (f) of the annex and, in particular, be constituted as a 'société anonyme', 'société en commandite par actions', or 'société à responsabilité limitée'.

34. Such a conclusion cannot be called into question by the arguments of the applicant in the main proceedings and of the Commission that the list of companies in point (f) of the Annex to Directive 90/435 is provided merely by way of example and for the sole purpose of preventing problems which may arise from disputes regarding classification, where a company is treated for tax purposes by a Member State as a capital company, subject to corporation tax, whereas another Member State may regard that company as a partnership which is not subject to corporate tax, since certain Member States wished, when adopting Directive 90/435, to exclude partnerships from the scope of that directive.

35. It is true that the interpretation defended by the applicant in the main proceedings and by the Commission could meet the objectives of Directive 90/435, as highlighted in the third recital in the preamble thereto, since it would imply an extension of the scope of that directive to a larger number of companies and would thus contribute to removing the disadvantage affecting cooperation between companies of different Member States in comparison with cooperation between companies of the same Member State and would facilitate the grouping together of companies at Community level.

36. However, as pointed out by the Advocate General in point 31 of his Opinion, Directive 90/435 does not seek to introduce a common system for all companies of the Member States nor for all holdings.

37. For holdings which do not fall within the scope of Directive 90/435, it is for the Member States to determine whether, and to what extent, economic double taxation of dividends is to be avoided and, for that purpose, to establish, either unilaterally or through conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation (see Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 54, and *Amurta*, paragraph 24).

38. Directive 90/435 thus restricts the powers of the Member States regarding the taxation of profits distributed by companies established in their territory to companies established in another Member State which fall within the scope of that directive. Accordingly, the fundamental principle of legal certainty precludes the list of companies in point (f) of the annex to the directive from being interpreted as merely an indicative list, when such an interpretation does not follow from the wording or scheme of Directive 90/435.

39. The interpretation put forward by the applicant in the main proceedings and the Commission can also not be deduced from any wishes expressed by certain Member States upon the adoption of Directive 90/435 to exclude only partnerships from the scope of that directive. Expressions of intent on the part of Member States in the Council of the European Union have no legal status if they are not actually expressed in the legislation. Legislation is addressed to

those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains (*Denkavit and Others*, paragraph 29).

40. The interpretation that the 'société par actions simplifiée' cannot be regarded as covered by Directive 90/435 with effect from its introduction into French law is, in addition, confirmed by the legislative developments and, in particular, by Directive 2003/123.

41. First, Directive 2003/123 states in the fourth recital in its preamble that the annex to Directive 90/435 contains a list of companies to which the directive applies and that certain forms of companies are not included in the list in the annex, even though they are resident for tax purposes in a Member State and are subject to corporation tax there. That recital also states that the scope of Directive 90/435 should therefore be extended to other entities which can carry out cross-border activities in the Community and which meet all the conditions laid down in the directive.

42. Second, Article 1(6) of Directive 2003/123 provides for the replacement of the annex to Directive 90/435 by the text in the annex to Directive 2003/123. Since the amendment of the annex to Directive 90/435 by Directive 2003/123, point (f) of that annex includes the 'société par actions simplifiée' among the companies listed and, in order to take account of the evolution of national law, contains a provision stating that other companies constituted under French law and subject to corporation tax in France fall within the scope of Directive 90/435.

43. Finally, it should be noted that, contrary to what the applicant in the main proceedings and the Commission claim, since the legal forms under French law covered by Directive 90/435 are exhaustively listed in point (f) of the Annex thereto, the extension of the scope of that directive by analogy to other forms of company, such as for example the 'société par actions simplifiée' under French law, even if they were comparable, would not be admissible.

44. In the light of the above, the answer to the first question is that Article 2(a) of Directive 90/435, in conjunction with point (f) of the annex thereto, must be interpreted as meaning that a company under French law in the form of a 'société par actions simplifiée' cannot be considered to be a 'company of a Member State' within the meaning of that directive before that directive was amended by Directive 2003/123.

The second question

45. By its second question, the referring court questions the validity of Article 2(a) of Directive 90/435, read in conjunction with point (f) of the annex thereto and Article 5(1) of the directive, in the light of Articles 43 EC and 48 EC or Articles 56(1) EC and 58(1)(a) and (3) EC, in so far as they produce an exemption from withholding tax in the event of a profit distribution by a subsidiary governed by German law to a parent company governed by French law taking the legal form of a 'société anonyme', 'société en commandite par actions', 'société à responsabilité limitée', but no such exemption where a parent company governed by French law is a 'société par actions simplifiée'.

46. The applicant in the main proceedings submits, in that regard, that the exclusion of the 'société par actions simplifiée' from the scope of Directive 90/435 leads to an arbitrary disadvantageous treatment of the latter as compared with a 'société anonyme' or 'société à responsabilité limitée' under French law or as compared with the legal forms of share companies or limited liability companies in other Member States listed in that directive. The 'société par actions simplifiée' is put at a disadvantage, particularly since German law does not set out the detailed procedural rules, outside the scope of Directive 90/435, enabling a claim to be made that investment income tax is being applied contrary to Community law.

47. By contrast, neither the German, Italian or United Kingdom Governments nor the Commission see any reason to question the validity of Directive 90/435. First, the fundamental freedoms do not preclude the application of withholding tax as such, and do not preclude double taxation resulting from the parallel exercise of tax competences by two Member States. Second, the Community legislature has wide discretion in relation to the harmonisation and approximation of legislation. Restricting the scope of the harmonisation and approximation of legislation to certain fields thus cannot, in itself, be unlawful.

48. The Italian Government points out that, since the 'société par actions simplifiée' was created after the entry into force of Directive 90/435, that directive cannot be regarded as invalid by reason of the failure to take account of that legal form of company given that defects which give rise to the invalidity of a measure have to exist at the date on which the measure came into being. At the very most, it is possible to question whether Directive 2003/123 should actually

include the 'société par actions simplifiée' on the list in the annex to Directive 90/435 retroactively. However, it was entirely for the Community legislature to decide whether or not to supplement the annex to Directive 90/435, and to restrict in time the effects of including that legal form of company in the annex by providing that its inclusion does not have retroactive effect.

49. In that regard, the assessment of the validity of a measure which the Court is called upon to undertake on a reference for a preliminary ruling must normally be based on the situation which existed at the time that measure was adopted (Joined Cases C-248/95 and C-249/95 SAM *Schiffahrt and Stapf* [1997] ECR I-4475, paragraph 46).

50. Even if the validity of a measure might, in certain cases, be assessed by reference to new factors which arose after its adoption (*SAM Schiffahrt and Stapf*, paragraph 47), such an assessment does not have to be made in the present case.

51. Although the 'société par actions simplifiée' was introduced into French law only after the adoption of Directive 90/435, it follows from the answer to the first question that, as regards companies under French law, the scope of the directive was determined by listing the legal forms of company covered by the directive and there was no clause enabling the directive to be applied to other companies constituted under French law.

52. The Court has consistently held that the Community institutions are free to introduce harmonisation gradually or in stages. It is generally difficult to implement such measures because they require the competent Community institutions to draw up, on the basis of diverse and complex national provisions, common rules in harmony with the aims laid down by the EC Treaty and approved by a qualified majority of the Members of the Council, or even, as is the case in fiscal matters, their unanimous agreement (see, to that effect, Case 37/83 *Rewe-Zentrale* [1984] ECR 1229, paragraph 20; Case C-233/94 Germany v *Parliament and Council* [1997] ECR I-2405, paragraph 43; and Case C-166/98 *Socridis* [1999] ECR I-3791, paragraph 26).

53. It must none the less be ascertained whether restricting the scope of Directive 90/435 to exclude, from the outset, other companies which might be created in accordance with national law, as is the case with Article 2(a) of Directive 90/435 and point (f) of the annex thereto, may be regarded as invalid in the light of the articles of the Treaty which guarantee the freedom of establishment or the free movement of capital.

54. In accordance with settled case-law, freedom of establishment for nationals of one Member State on the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State of establishment. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of a Member State established in the territory of another Member State (see, inter alia, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 22; and Case C-253/03 *CLT-UFA* [2006] ECR I-1831, paragraph 13).

55. It is also settled case-law that, even though, according to their wording, the provisions of the EC Treaty concerning freedom of establishment aim to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, inter alia, Case C-264/96 *ICI* [21998] ECR I-4695, paragraph 21; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 42; C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33; and Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 19).

56. As pointed out in paragraph 27 of this judgment, the aim of Directive 90/435 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 (*Banque Fédérative du Crédit Mutuel*, paragraph 23, and Case C-138/07 *Cobelfret* [2009] ECR I-0000, paragraph 28).

57. 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 economic 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 *Banque Fédérative du Crédit Mutuel*, paragraphs 24 and 27, and *Cobelfret*, paragraph 29).

58. To that effect, Article 5(1) of Directive 90/435 requires the Member States to exempt from withholding tax profits distributed by a subsidiary to its parent company where the latter holds a minimum of 25% of the capital of the subsidiary.

59. However, although under Directive 90/435 that obligation is placed on the Member States only as regards profit distributions accruing to companies which may be regarded as such within the meaning of the directive, it is sufficient to point out that the directive does not authorise a Member State to treat profits distributed to companies in other Member States which do not fall within the scope of the directive less favourably than profits distributed to comparable companies established in its territory.

60. The Court has already held that, in respect of shareholdings which are not covered by Directive 90/435, 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. However, that does not of itself allow them to impose measures that are contrary to the freedoms of movement guaranteed by the Treaty (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 54; *Amurta*, paragraph 24; and Case C-303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I-0000, paragraph 28).

61. Consequently, a restriction of the scope of Directive 90/435 which excludes from the outset other companies which may be created under national law, as is the case with Article 2(a) of Directive 90/435 and point (f) of the annex thereto, is not apt to create a restriction on the freedom of establishment.

62. The conclusion reached in the preceding paragraph is also valid as regards provisions concerning the free movement of capital.

63. In the light of the above, the answer to the second question is that examination of the question has not revealed any factor of such a kind as to affect the validity of Article 2(a) of Directive 90/435, read in conjunction with point (f) of the annex thereto and Article 5(1) of that directive.

Costs

64. ...

On those grounds,

the Court (First Chamber)

hereby rules:

1. Article 2(a) 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, read in conjunction with point (f) of the annex to that directive, must be interpreted as meaning that a company under French law in the form of a 'société par actions simplifiée' cannot be considered to be a 'company of a Member State' within the meaning of that directive before that directive was amended by Council Directive 2003/123/EC of 22 December 2003.

2. Examination of the question has not revealed any factor of such a kind as to affect the validity of Article 2(a) of Directive 90/435 read in conjunction with point (f) of the annex thereto and Article 5(1) of that directive.