OPINION OF ADVOCATE GENERAL LA PERGOLA
delivered on 24 June 1999 *

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* Original language: Italian.

I — Subject-matter of the questions referred for a preliminary ruling

1. The three questions referred to the Court for a preliminary ruling in the present case concern the interpretation of Directive 88/361/EEC [1] and of Articles 6 and 52 of the EC Treaty (now, after amendment by the Treaty of Amsterdam, Articles 12 EC and 43 EC respectively). In particular, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands; hereinafter 'the Hoge Raad') is asking the Court to determine whether a tax provision making the grant of an exemption (up to a certain amount) from income tax to natural persons in respect of dividends distributed to shareholders subject to the condition that those dividends are paid by a company whose seat is in the Member State where the taxpayer is resident is compatible with the rules guaranteeing free movement of capital, non-discrimination on the ground of nationality and freedom of establishment. The questions referred by the national court are the following:

(1) Is Article 1(1) of Directive 88/361/EEC in conjunction with Heading I(2) in Annex I to that directive to be interpreted as meaning that a restriction arising from a provision of the income tax legislation of a Member State which exempts shareholders, up to a certain amount, from liability to income tax on dividends, but restricts that exemption to dividends paid in respect of shares in companies established in that Member State, has been prohibited since 1 July 1990 pursuant to Article 6(1) of that directive?

(2) If the answer to Question 1 is in the negative, are Articles 6 and/or 52 of the EC Treaty to be interpreted as meaning that a restriction of the kind referred to in that question is incompatible with one or both of those articles?

(3) Do the answers to the questions set out above differ depending on whether the person seeking the benefit of such an exemption is an ordinary shareholder or an employee (of a subsidiary company) who holds the shares in question in the context of an employees' savings plan ('werknemersspaarplan')?

1 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5; hereinafter: 'the Directive'). When the Treaty of Amsterdam came into force on 1 May 1999, Article 67 of the EC Treaty was repealed and Chapter 4 of Title III of Part Three of the EC Treaty on the movement of capital (which had been entirely revised following the insertion of Articles 73a to 73h by the Treaty on European Union, which entered into force on 1 January 1994 pursuant to Article 73a) was entirely re-numbered (now Articles 56 EC to 70 EC given that Articles 73a, 73e and 73h were repealed).

II — The relevant Community legislation

2. Article 1(1) of the Directive provides that: '[w]ithout prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this directive, capital movements shall be classified in accordance with the Nomenclature in Annex I'.[2] Heading I(2) of Annex I, entitled 'Nomenclature of the capital movements referred to in Article 1 of the directive' (hereinafter 'the Nomenclature'), specifies, amongst 'direct investments', 'participation in new or existing undertakings with a view to establishing or maintaining lasting economic links'. Pursuant to Article 6(1), the Directive entered into force on 1 July 1990. Lastly, I would recall that Article 6 of the Treaty lays down a general prohibition on discrimination on grounds of nationality, whereas Article 52 of the Treaty, in conjunction with Article 58 of the EC Treaty (now Article 48 EC) guarantees freedom of establishment for companies or firms, ensuring them the benefit of 'national treatment', in other words the application by the host Member State of the legislation in force for its own nationals.

2 — Since the Directive was adopted 'for the implementation of Article 67 of the Treaty', it is worthwhile recalling that paragraph 1 of that article (abolished by the Treaty of Amsterdam, see footnote 1) provided that: '[d]uring the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested'.

III — The national legislative framework

3. It appears from the case file that under Article 47b of the Wet op de Inkomstenbelasting 1964 ('the Income Tax Law')[3] natural persons are exempted, up to a specified amount, from income tax on dividends in respect of shares.[4] Article 47b(1) provides that: '[t]he dividend exemption shall apply to income from shares in companies treated as income for the purpose of determining aggregate income *from which a deduction for dividend tax has been made*...'.[5] Pursuant to Article 1(1) of the Wet op de Dividendbelasting 1965[6] ('the Dividend Tax Law'), the tax is charged, by deduction at source, only on dividends distributed by companies established in the Netherlands. Accordingly, the exemption provided for under Article 47b applies only to dividends distributed by companies established in the Netherlands. There is no indication whatsoever in the case file that the sum paid by

3 — Hereinafter 'Article 47b' or 'the provision at issue'; that article was introduced by the Wet van 24 juni 1981 tot invoering van een voorraad-aftrek en vermogensaftrek in de inkomstenbelasting en de vennootschapsbelasting alsmede invoering van een beperkte rentevrijstelling en een beperkte dividenvrijstelling in de inkomstenbelasting (Law of 24 June 1981 on the introduction of a deduction in respect of stocks and of a deduction in respect of capital on income tax and on company tax as well as a partial interest exemption and a partial dividend exemption from income tax; *Staatsblad* 387).

4 — In the version in force before 1997, at the time of the facts in the main proceedings.

5 — The italics are mine.

6 — *Staatsblad* 621.

way of dividend tax is deductible when income tax is assessed. The provision at issue does not distinguish between ordinary shareholders and shareholders who are employees of the company and acquired the shares in respect of which the dividend is paid in the context of an employees' savings plan.

4. It appears from the preparatory work for the introduction of Article 47b into the Netherlands legal system that that article was part of a series of measures which were 'intended to raise the level of undertakings' equity capital and to stimulate interest on the part of private individuals in Netherlands shares'. [7] A second justification came to light only at the last stage of the preparatory work, when the draft legislation was before the first chamber of Parliament (Eerste Kamer): the 'compensating' effect of the dividend exemption in respect of what essentially constitutes double taxation was also taken into consideration. As I have just pointed out, the Netherlands tax system provides for both a withholding tax on dividends and a tax on the income of natural persons in receipt of those dividends. [8]

IV — The facts and the main proceedings

5. In 1991, Mr Verkooijen resided in the Netherlands where he was employed by Fina Nederland BV, a Netherlands company indirectly controlled by Petrofina NV (hereinafter 'Petrofina'), a public limited liability company established in Belgium and quoted on the Brussels and Antwerp stock exchanges. Mr Verkooijen acquired shares in the Petrofina group in the context of a company savings plan open to all employees of that group. In 1991, those shares yielded dividends in the sum of approximately NLG 2 337. [9] It appears from the case file that those dividends were subject in Belgium to a deduction at source,

7 — Parliamentary documents II, 1980-1981, 16539, p. 10, paragraph 1. The legislative history shows, in particular, that the second chamber of Parliament (Tweede Kamer) took into consideration the fact that the 'exemption in respect of dividends makes it more attractive to invest in Netherlands stock. As a result of this measure in particular, the (share) issuing possibilities of Netherlands' companies will increase. Thanks to the exemption in respect of dividends, this measure will, moreover, deter investors from turning away from shares or not investing in shares'.

8 — In this regard, the Netherlands Staatssecretaris van Financiën had occasion to observe that 'the exemption in respect of dividends functions, for the benefit of small investors in particular, as a measure compensating for double taxation' (parliamentary documents I, 1981, 16539, No 3, p. 5, last sentence). The solution, consisting in a partial exemption from income tax, adopted by the Netherlands for resolving the economic effects of double taxation is just one of the methods applied in practice by the various tax systems for resolving the same problem. There are two general categories of such methods, depending on the tax (or the tax 'bracket') against which the 'compensation' is applied: corporation tax or the deduction at source which affects the dividends and income tax payable by shareholders on the dividends concerned. In the United Kingdom, for example, British taxpayers are granted — under certain conditions — tax credits in connection with dividends received from companies established in the same Member State (see Case C-397/98 *Metallgesellschaft and Others*, pending before the Court, OJ 1999 C 1, p. 7, and Case C-410/98, *Hoechst and Others*, pending before the Court, OJ 1999 C 1, p. 11). For a summary of the solutions adopted for mitigating the effects of double taxation and an examination of the issues involved, see S.-O. Lodin, *The imputation systems and cross-border dividends — the need for new solutions*, in *EC Tax Review*, 1998, p. 229, and K. Ståhl, *Dividend taxation in a free capital market*, in *EC Tax Review*, 1997, p. 227.

9 — Equivalent to approximately 1 060 euros.

but that no taxes were levied in the Netherlands other than, as we will see below, that assessed against Mr Verkooijen himself. Mr Verkooijen had included the dividends in question in his statement of income for the 1991 tax year. In assessing Mr Verkooijen's income tax, the tax office assessed his taxable income without applying the exemption under Article 47b in respect of the dividends paid by Petrofina. The tax authorities considered that Mr Verkooijen was not entitled to the benefit of that exemption inasmuch as it relates only to share dividends in respect of which the (Netherlands) dividend tax has already been levied. In substance, instead of assessing Mr Verkooijen on the basis of a taxable income of NLG 164 697, the tax authorities raised that amount to NLG 166 697. [10]

6. After unsuccessfully objecting to the assessment, Mr Verkooijen challenged before the Gerechtshof te 's-Gravenhage the tax authorities' decision confirming that assessment. By judgment of 10 April 1996, the Gerechtshof found in favour of Mr Verkooijen, reducing his taxable income by the sum of NLG 2 000 on the ground that the Netherlands tax legislation restricted the movement of capital and freedom of establishment. The Staatssecretaris van Financiën [11] applied for review of the judgment of the Gerechtshof to the Hoge Raad which referred the abovementioned questions to the Court for a preliminary ruling. I shall examine the substance of those questions by reference to the national legal framework outlined above. Where necessary, I will set out the arguments put forward in these proceedings by the defendant and by the governments of the Member States which have submitted observations in this case.

V — The substance

A — *Question 1*

7. By its first question, the national court is essentially asking whether a national provision which partially exempts natural persons from income tax on share dividends provided the dividends are paid in respect of a company established in the Member State concerned is compatible with the Directive.

10 — For married persons like Mr Verkooijen, the exemption in question is limited to an amount of NLG 2 000 (about 910 euros) in taxable income. Originally, the exemption in respect of dividends applied to an amount of NLG 500 (about 227 euros); by law of 6 September 1985 (*Staatsblad* 504) that amount was increased to NLG 1 000 (about 454 euros), or to NLG 2 000 in the case of married couples taxed jointly.

11 — The State Secretary for Finance (hereinafter 'the State Secretary').

(1) The Community legal order and direct taxation

8. Contrary to the position adopted by Mr Verkooijen, the United Kingdom Government and the Commission, the Italian Government submits by way of introduction that the provision in question does not restrict free movement of capital since direct taxation has not been harmonised at Community level: therefore, each Member State is free to determine its own arrangements for taxing income. I cannot share that view. The Court has consistently held that 'although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law'. [12]

9. Following essentially the same argument as the Italian Government, the Netherlands Government points out that, in 1975, the Commission had submitted a proposal for a Council directive concerning the harmonisation of systems of company taxation and of withholding taxes on dividends, [13] only to withdraw it in 1990. [14] The Commission justified the withdrawal of that proposal on the ground that the measures it proposed were outdated both in terms of general concept [15] and of specific detail. [16] Unlike the Netherlands Government, I believe that the very existence of that proposal and the concerns reiterated by the Commission when it was withdrawn in 1990 show the significance at Community level of the effects of direct taxation of the movement of capital. It is not by chance that, in withdrawing the proposal, the Commission acknowledged the need for the Council to adopt without delay two proposals for directives (already before it for examination) designed to harmonise certain aspects of the national taxation systems. [17]

10. According to the Netherlands Government, it is, moreover, legitimate for Member States to regard provisions such as those at issue as compatible with Article 1(1) of the Directive. When the Directive came into force, the Commission did

12 — Case C-246/89 *Commission* v *United Kingdom* [1991] ECR I-4585, paragraph 12; Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 19; Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 21; see also Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19; and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19.

13 — OJ 1975 C 253, p. 2 (hereinafter 'the proposal').

14 — See Notice of the Commission to the Parliament and the Council, document SEC(90) 601 final of 20 April-18 May 1990 (hereinafter 'the Notice').

15 — Namely, a centralised concept of fiscal harmonisation and of economic and monetary union, rather than an approach emphasising the coordination and approximation of national policies, taking into account also the principle of subsidiarity (see the Notice, p. 10).

16 — The 1975 proposal, which the Council and the European Parliament had not debated further, no longer satisfied the requirements of the Community in the nineties (*ibidem*).

17 — Those proposals are now Council Directives 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 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 255, p. 6); see the Notice, p. 13.

not warn the Netherlands Government that the provisions at issue might be inconsistent with Community law. That is all the more significant because the Kingdom of the Netherlands is not the only Member State to provide in its tax system for a mechanism mitigating the effects of double taxation, which is limited to 'internal relationships' in order to encourage investment in national securities. [18] However, that observation of the Kingdom of the Netherlands is irrelevant in the context of proceedings brought before the Court pursuant to subparagraph (a) of the first paragraph of Article 177 of the EC Treaty (now subparagraph (a) of the first paragraph of Article 234 EC) which relates exclusively to the interpretation of Community law. Decisions handed down by the Court pursuant to Article 177 of the Treaty are based on an 'objective' jurisdiction and it is not necessary to take into consideration the subjective circumstances (for example, good faith) of the subject required to apply the rule to be interpreted. The subjective element can, if need be, enter into account in proceedings brought before the Court for non-compliance with the Treaty or secondary legislation. [19]

(2) Does the possible restriction concern the movement of capital?

11. Referring to the rule in *Bachmann*, [20] the United Kingdom and French Governments argue that Article 67 of the Treaty is not relevant since it is secondary to the provisions guaranteeing other fundamental freedoms. In *Bachmann*, the Court stated that 'Article 67 does not prohibit restrictions which *do not relate* to the movement of capital but which result indirectly from restrictions on *other* fundamental freedoms'. [21] In other words, Article 67 comes into play only where a transfer of assets does not constitute a payment connected with trade in goods or services. [22] However, the Governments which have submitted observations in this case have not indicated which other fundamental freedoms are more directly restricted by the provision at issue. That aside, reasoning in accordance with the aforecited case-law, I believe that this is clearly a case where Article 67 is not of a residual nature. In acquiring the Petrofina shares, [23] Mr Verkooijen certainly did not effect a payment in consideration for a service. It was a genuine financial transaction undertaken for the purpose of investing a specific sum in the shares of a company established in another Member State: namely, a genuine cross-border movement of capital. In *Veronica*

18 — See to that effect D. Servais, *Un espace financier européen*, Office for Official Publications of the European Communities, Luxembourg, 1995, 3rd Edition, p. 57, point 3.1.3.; see also Lodin, cited above, and Ståhl, cited above.

19 — See Case 26/69 *Commission* v *France* [1970] ECR 565, in which the Court rejected as not sufficiently well-founded the Commission's infringement claim in proceedings under Article 169 of the EC Treaty (now Article 226 EC), holding that the error on the part of the Member State concerned was excusable in view of the 'equivocal nature' of the legal situation (paragraph 32).

20 — Case C-204/90 *Bachmann* [1992] ECR I-249.

21 — Paragraph 34 of the judgment (the italics are mine).

22 — See Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 13 and 14. Also see Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377 in which the Court held in interpreting Article 67 that 'movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service' (paragraph 21). Concerning the notion of subsidiarity under Article 67 as applied in the case-law of the Court, see the Opinion of Advocate General Tesauro in *Safir* (points 9 to 18).

23 — This transaction constitutes the very *premiss* for the receipt by Mr Verkooijen of the dividends at issue here (on this point, see point 13 below).

Omroep Organisatie, [24] where the national measure at issue restricted the *participation*, permitted under national legislation, by a broadcasting station in the capital of another broadcasting station established, or to be established, in another Member State, the Court considered as already decided the question whether the purchase of such participations constituted a movement of capital within the meaning of Article 67 and proceeded directly to examining the merits. The Court thus clearly established the relevance of that article for the purposes of the case before it. In any event, in the present case, it is for the national court to assess the relevance of the question referred for a preliminary ruling in connection with capital movements. [25]

(3) Does the national measure restrict the movement of capital?

12. All the governments which submitted observations deny the existence of any restriction whatsoever contrary to Article 1(1) of the Directive, essentially on the basis of two types of considerations:

(a) the link between the provision at issue (which only affects dividends) and free movement of capital is too *tenuous and indirect* for Article 47b to fall within the scope of the Directive;

(b) neither the acquisition of shares in companies established in a Member State other than the Netherlands nor the distribution of dividends as a result of participations in foreign companies is, *as such* and *per se, hindered or restricted* in the present case.

13. As regards point (a), there is a link between the Netherlands measure and movement of capital and that link is not so *indirect* as to exclude this case from the scope of the Directive. It is true that dividend payments are not directly classified as 'capital movements' under the Nomenclature. [26] However, the accrual of

24 — Case C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487.

25 — See Case 53/79 *Damiani* [1980] ECR 273, paragraph 5, in which the Court stated that 'it is not for this Court to pronounce on the expediency of the request for a preliminary ruling. As regards the division of jurisdiction between national courts and the Court of Justice under Article 177 of the Treaty it is for the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties, and which will have to give judgment in the case, to appreciate, with full knowledge of the matter before it, the relevance of the question of law raised by the dispute before it and the necessity for a preliminary ruling so as to enable it to give judgment'. See also, *inter alia*, Case 86/78 *Peureux* [1979] ECR 897, paragraph 6; C-127/92 *Enderby* [1993] ECR I-5535, paragraph 10; Case 125/94 *Aprile* [1995] ECR I-2919, paragraph 16; Joined Cases C-320/94, C-328/94, C-329/94 and C-337/94 to C-339/94 *RTI and Others* [1996] ECR I-6471, paragraphs 20 and 21.

26 — I do not believe that omission justifies the conclusions drawn by the Governments concerned. The Nomenclature is merely illustrative, not exhaustive: see Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 21, as well as the introduction to the Nomenclature itself ('[t]his Nomenclature is not an exhaustive list for the notion of capital movements').

a dividend *necessarily presupposes* 'participation in undertakings' or the 'acquisition of securities' and these most certainly are capital movements within the meaning of Article 67. [27] That is sufficient, in my view, to bring the provision at issue within the scope of the Directive. What is more, the movement of capital consisting in investment in shares in companies is often prompted by the intention of collecting the dividends to which the shareholder is entitled on the ground of that participation. The Court recently stated that, for a restriction or an obstacle to a particular transaction to be covered by Article 73b of the EC Treaty (now Article 56 EC), that transaction need only be 'inextricably linked' to a movement of capital, [28] that is to say constitute a prerequisite thereof. [29] The Court has also for a long time held that the concept of capital movement restrictions must be interpreted broadly. [30] Therefore, neither the nature nor the subject-matter of the national measure at issue is decisive for the purpose of applying Article 67. What is decisive is its possible effect on capital movements. I believe that such an approach is fully consistent with the wording of Article 1(1) of the Directive (in force at the material time) and of Article 73b of the Treaty (currently in force) which, by prohibiting without reserve all restrictions on the free movement of capital, 'enshrines' and, as it were, 'constitu-

27 — The Nomenclature provides for the case of '[p]articipation in new or existing undertakings with a view to establishing or maintaining lasting economic links' (Heading I(2), referred to in the first question) and '[a]cquisition by residents of foreign securities dealt in on a stock exchange' (Heading III(A)(2); Petrofina is a company quoted on the Brussels and Antwerp stock exchanges). Also see *Veronica*, referred to in paragraph 11 of this Opinion.

28 — See *Trummer and Mayer*, paragraph 24.

29 — See point 9 of my Opinion in *Trummer and Mayer*. Whereas that case related to a national measure concerning the prerequisite (the creation of a mortgage) of a capital movement (the liquidation of a real estate investment), in this case Article 47b involves the product of such a movement. In any event, in both cases the national measure in question concerns an operation (the creation of a mortgage) or a payment (the dividends) which is *inextricably linked* to a movement of capital.

30 — As long ago as Case 157/85 *Brugnoni and Ruffinengo* [1986] ECR 2013, the Court stated that, although not taking the form of exchange authorisations or affecting the acquisition of foreign securities, administrative obstacles such as the compulsory deposit of foreign securities with a bank nonetheless constitute a hindrance to the 'widest liberalisation' of capital movements (see paragraph 22). In Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, the Court ruled that a national provision requiring a bank to be established in a Member State in order for recipients of loans residing in the same Member State to obtain an interest rate subsidy from the State out of public funds was incompatible with Article 67 (see paragraph 10 of the judgment), underscoring the fact that, for Article 67 to apply, it is not necessary for a national rule directly to concern a capital movement as such and *per se* (in our case an investment in shares, in *Svensson* a bank loan) but that it need only involve one element having a close link to such a movement (in our case the dividends, in *Svensson* the bank, or rather the 'nationality' of the bank granting the loan).

tionalises' the principle already laid down in the Directive. [31]

14. As regards the contention that capital movements are neither *hindered* nor *restricted* (see paragraph 12(b) above), I would observe that, as the corresponding legislative history clearly shows, the purpose of Article 47b was to introduce 'preferential' tax treatment for those looking to the Netherlands stock market, thus encouraging them to invest their capital in the Netherlands. Considering its wording, the provision at issue is certainly direct and suitable for the required purpose. Not even the Netherlands Government denies that. If that is indeed the case, I would be inclined to define it as a measure based on a 'protectionist' policy. It can be argued that — insofar as it applies to the dividends distributed by Netherlands companies to taxpayers resident in the Netherlands — Article 47b does not *ipso facto prohibit* either investment in shares in companies established in another Member State or the distribution of dividends on such shares. I believe, however, that the possibility cannot be ruled out that such a measure is at least liable to *deter* or *discourage* taxpayers resident in the Netherlands from investing their capital abroad. Indeed, depending on where the capital is invested, the provision at issue can have a distorting effect on the relationship between the economic profitability of an investment and its return after tax to the investor. Contrary to the view of the governments which have submitted observations, that distorting effect is not so secondary as to have no impact on the legal analysis. [32] As the Commission observed a few years ago, [33] with the completion of the single market, the physical and technical obstacles to the exercise of the fundamental freedoms have been eliminated. As a result, differences between the taxation systems of the Member States are accentuated and exert considerable influence precisely on investment decisions. Moreover, I must add that dividend taxation is becoming an increasingly important factor in investment decisions as a result of the implementation of economic and monetary union (the next stage after 1992 in the progress towards a fully-integrated single market) and with the disappearance from 1 January 1999 of exchange risks within eleven Member States. It follows that the

31 — In the text I indicate the reasons, drawn from the Court's case-law, why I consider that the provision at issue produces a sufficiently *direct* effect on capital movements. It must be observed — using the analogies between the fundamental freedoms outlined in point 17, the list of which is certainly not exhaustive (see, for example, footnote 84, *in fine*) — that applying to capital movements the principles enunciated in Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, in respect of free movement of goods leads to the conclusion that even an *indirect* obstacle to capital movements *as such* is incompatible (see, *a contrario*, *Bachmann*, paragraph 34, and *supra*, point 11 of the Opinion) with Article 1(1) of the Directive (and, today, with Article 56 EC). Moreover, the Court held that a national rule limiting the grant of a tax benefit to publishers who have their books printed in the Member State concerned is incompatible with Article 30 of the EC Treaty (now, after amendment, Article 28 EC) (Case 18/84 *Commission* v *France* [1985] ECR 1339). See also the Opinion of Advocate General Cosmas (Case C-412/97 *ED* [1999] ECR I-3845), where it is stated that 'indirect' restrictions on free movement of goods and capital are in principle permissible (points 23 and 24).

32 — 'The link between free movement of capital and taxation is clear. Capital moves in response to two elements: the rate of remuneration and the rate of taxation', P. Julliard, *Lecture critique des articles 73 B, 73 C et 73 D du traité de la Communauté européene*, in A. Weber (ed.), *Währung und Wirtschaft, Festschrift für Prof. Dr. Hugo J. Hahn zum 70. Geburtstag*, Nomos Verlagsgesellschaft, Baden-Baden, 1997, p. 177, in particular p. 184 (the translation is my own). Also see the conclusions of the Report of the Committee of independent experts on company taxation, issued by the Commission on 18 March 1992, Office for Official Publications of the European Communities, Luxembourg, 1992 (hereinafter the 'Ruding Report'), also published in *European Taxation*, 1992, p. 105.

33 — See the Notice, p. 10.

obstacle in the form of tax treatment differences must be considered from that point of view. The shares of a growing number of large European companies are quoted on the stock exchange and can even be purchased via internet, regardless of the Member State in which the issuing company is established. In such a context, obstacles to free movement are greatly diminished and taxation differences based on the 'nationality' of the securities, which cannot fail to influence investment decisions, must be strictly controlled in the light of Community law.

15. Again on the basis of the elements of the national legislation emerging from the case file, there is a second aspect of Article 47b which is *relevant* for the purposes of Article 67 and Article 1(1) of the Directive. The 'geographical' limit of the exemption certainly has a restrictive and dissuasive effect *even* on companies established in other Member States in that it constitutes an obstacle to the *raising of capital*: those companies are *dissuaded* from placing their own shares in the Netherlands since their shares are less attractive to investors in view of the fact that the dividends paid to the shareholders of such companies receive less favourable tax treatment than dividends distributed by companies established in the Member State concerned. [34]

16. In view of the foregoing, I consider that Article 47b constitutes a restriction within the meaning of Article 1(1) of the Directive introduced by the Community legislature to ensure the *full* liberalisation of capital movements. [35] Moreover, the Court has consistently held that for a national measure to qualify as a restriction or an obstacle to a fundamental freedom it suffices that it 'discourage' or 'dissuade' the persons concerned from exercising a right

34 — According to Servais, op. cit. 'fiscal regimes designed to develop certain forms of investment, [inducing] the acquisition of national securities... are discriminatory vis à vis foreign securities' (see p. 57). The Court has already had occasion to consider a restriction producing *restrictive effects on two levels*: see Case C-410/96 *Ambry* [1998] ECR I-7875, paragraphs 28 and 29, concerning a national rule requiring a guarantor providing financial guarantees in favour of a bank or insurance company established in another Member State to enter into an additional agreement with a bank or an insurance company established on national territory. The Court observed that such a rule has a restrictive or dissuasive effect (a) on financial institutions established in other Member States since it prevents them from offering the required guarantees directly to residents of the Member State concerned *in the same way* as a guarantor established on national territory and (b) on residents of the Member State concerned who are discouraged from turning to financial institutions established in another Member State since the obligation for such financial institutions to enter into another guarantee agreement with a bank or an insurance company established in that Member State is likely to entail additional costs which are normally passed on to the consumer in the fee charged for issuing the guarantee.

35 — See *Bordessa*, paragraph 17. Chronologically, it must be observed that the facts of the case, involving a tax declaration for the 1991 fiscal year, are subsequent to the date of *full liberalisation* provided for in Article 6(1) of the Directive, namely 1 July 1990.

or an option which is a component of such a freedom. [36]

17. According to the governments which have submitted observations, and the United Kingdom Government in particular, the provision at issue complies with Article 1(1) of the Directive by virtue of a sort of *de minimis* rule: those governments contend that the measure in question has too tenuous an effect on capital movements. [37] I would like to make a few comments in that regard. The allegedly tenuous nature of the effects of the provision at issue clearly depends on the sum to be invested and on the resources of the investor. For a small investor who necessarily invests only limited sums, the exemption under Article 47b probably constitutes, contrary to the view of the United Kingdom Government, a significant factor in the decision as to where to invest his capital. [38] In any event, the argument put forward by the governments which submitted observations runs counter to the case-law since the Court has ruled that even national rules which merely constitute a 'hindrance' to capital movements are contrary to the directives for the implementation of Article 67. [39] I believe that that case-law can be placed on a par with the case-law concerning free movement of goods, [40] in which the Court has ruled that 'a national measure does not fall outside the scope of the prohibition in Article 30 merely because the hindrance to imports which it creates is *slight*'. [41] [42] There is similar case-law with regard to freedom of movement for persons [43] and freedom to provide services: [44] '[a]s the Court has decided on various occasions, the articles of the EEC Treaty concerning the free movement of goods, persons, services and *capital* are fundamental Community provi-

36 — See, for example, *Trummer and Mayer*, paragraph 26; *Ambry*, paragraphs 28 and 29; *Safir*, paragraph 30; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; *Svensson*, paragraph 10; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; *Bachmann*, paragraph 31.

37 — The United Kingdom Government stressed the following elements: (i) there are instances where an investment in foreign shares does not involve any capital movement whatsoever, if the shares are traded between Netherlands residents; (ii) given the low amount of the *de qua* exemption, it seems unlikely that that exemption would actually influence an investor's decision to acquire foreign securities since investors will often already hold shares yielding at least NLG 2000 and are generally more sensitive to the profitability outlook of companies in whose shares they intend to invest; and (iii) the exemption itself applies only to natural persons and not to legal persons, so that it makes no difference to the latter where the funds are invested.

38 — See the statement of the State Secretary cited in footnote 8.

39 — See *Brugnoni and Ruffinengo*, paragraph 22.

40 — The analogy is all the more fitting — and I see no reason for regarding restrictions on one fundamental freedom any differently from restrictions on another (see *Gebhard*, paragraph 37) — because both Article 30 of the Treaty (see *Dassonville*, paragraph 5) and Article 1(1) of the Directive (now Article 56 EC) do not merely require the elimination of national measures which are discriminatory in nature but prohibit *all restrictions*.

41 — Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 18.

42 — Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13.

43 — See, for example, *Kraus*, paragraph 32; in the context of freedom of establishment, see *Avoir Fiscal* (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 21) in which the Court stated that Article 52 [of the Treaty] prohibits all discrimination, 'even if only of a limited nature' regardless of '*the extent of the disadvantages... [suffered] as a result*'.

44 — 'Article 59 of the [EC] Treaty [now, after amendment, Article 49 EC] requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction', Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; to the same effect, see Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 43.

sions and *any restriction, even minor*, of that freedom is prohibited'. [45]

(4) Is the national measure applicable in a discriminatory manner?

18. The parties which submitted observations in this case focused their attention on whether or not free movement of capital is restricted. However, consideration must also be given to the compatibility of Article 47b with Community provisions on free movement of capital. That observation is inspired by the wording of Article 67(1) (fully implemented by Article 1(1) of the Directive) which requires Member States to abolish *any* 'discrimination based on... the *place* where such capital is invested'. The Directive brought about the 'maturity' of the single market in respect of capital movements as well. The very notion of fully-guaranteed free movement should mean that the national legislature cannot consider the place of origin or of destination of the capital — namely, the place where the capital is invested — as being a *legitimate basis for distinction* for the purposes of legislation in that area. More specifically: a rule of national law treating capital movements differently *solely on the ground of the place* where they are located should, I believe, be regarded as incompatible with the Treaty even without assessing how far the national measure restricts the freedom concerned. [46] Any discrimination automatically entails a restriction, unless of course the measures adopted by the national legislature are justified by a relevant ground for intervention under Community law. [47] In *Svensson and Gustavsson*, [48] the Court held that a national measure concerning tax credits on mortgage interest which introduced a distinction according to the Member State in which the lending bank was located was discriminatory (and, what is more, unjustified). That case concerns the movement of capital and is clearly similar to the case at hand. It makes no difference that in *Svensson and Gustavsson* the national measure provided for different treatment depending on the Member State *from which* the capital originated (restriction on imports) rather than the Member State *to which* the capital was transferred (restriction on exports) as in the present case. In view of the foregoing, there is no doubt that Article 47b constitutes a measure which is applicable in a discriminatory manner according to the place where the capital yielding a return for taxpayers of the Member State in question is invested and that, as a consequence, and on the same ground, the contested provision is incompatible with Article 1(1) of the Directive.

45 — Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8 (the italics are mine).

46 — See *Avoir Fiscal*, paragraph 21.

47 — Among those who argue that a 'distinction' in treatment per se on the *sole* ground of the place where capital is invested is unlawful, see A.P. Dourado, *Free movement of capital and capital income taxation within the European Union*, in *EC Tax Review*, 1994, p. 176, pp. 184 and 185 in particular; J.-H. Hauptmann, Comments on Article 73b in *Traité sur l'Union européene - Commentaire article par article*, under the direction of V. Constantinesco, J.-P. Jacqué, R. Kovar and D. Simon, Economica, Paris, 1995, p. 176, point 6; P. Julliard, Comments on Article 67, in *Traité instituant la CEE — Commentaire article par article*, under the direction of V. Contantinesco, J-P Jacqué, R. Kovar and D. Simon, Economica, Paris, 1992, p. 353, point 5(b); S. Mohamed, *Community rules on the Free Movement of Capital*, Stockholm University, 1997, pp. 36 to 38; Ståhl, op. cit., p. 232; W. Vermeend, *Tax policy in Europe*, in *EC Tax Review*, 1998, p. 151, in particular p. 152. The Ruding Report, op. cit., moreover, stresses the fact that discrimination on the sole ground of the place where capital is invested tends to fragment capital markets within the Community (see Section III, Chapters 4 and 10).

48 — See footnote 30.

That has significant consequences as regards the permissible justifications in this case: it is not possible to rely upon an imperative requirement in the general interest not contemplated by the Treaty in order to justify a difference in treatment that is in principle incompatible with Article 1(1) of the Directive (and with Article 67(1)). It is settled case-law that only express derogations (such as Articles 36, 48(3) and 56(1) of the EC Treaty (now, after amendment, Articles 30 EC, 39(3) EC and 46(1) EC respectively) and Article 66 of the EC Treaty (now Article 55 EC)) can bring such discrimination into line with Community law. [49]

(5) Is the national measure justified?

19. It must now be determined whether, in the light of the foregoing, Article 47b runs counter to the criteria set out in the case-law according to which, in order not to be contrary to Community law, in addition to being suitable and proportionate to the objective pursued by the authority which adopts them, measures of this type must be justified by express derogations, if they are applicable in a discriminatory manner, and also by overriding reasons in the general interest, if they are applicable in a non-discriminatory manner. [50]

20. Firstly, I would observe that none of the governments which submitted observations, much less the Netherlands Government, relied upon the derogating provisions set out in the Directive — the only ones in force at the material time [51] — to justify the difference of treatment introduced by the legislation in question. Strictly speaking, therefore, the obstacle to capital movements created by Article 47b should be regarded as neither justified nor justifiable *tout court*. The governments which submitted observations nevertheless maintain that the provision at issue warrants an exception for two sets of reasons, the first based on the Court's case-law on overriding reasons in the general interest and the second on a specific derogating provision which was expressly introduced into the EC

49 — See, most recently, *Royal Bank of Scotland*, paragraph 32; see also *Svensson and Gustavsson*, paragraph 15; *Schindler* (on Question 6); Case C-288/89 *Gouda* [1991] ECR I-4007, paragraph 11; Case C-353/89 *Commission* v *Netherlands Collectieve Antennevoorziening* [1991] ECR I-4069, paragraph 15; Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraphs 32 and 33. See *Bachmann*, however, where the Court held that a discriminatory national measure was justified by an overriding reason in the general interest not provided for in the Treaty.

50 — The Court has now extended the application of those principles, which were originally developed in the context of free movement of goods, to all the freedoms (see, for example, *Gebhard*, paragraph 37).

51 — Those derogating provisions include the protective measures which a Member State is authorised to take where short-term capital movements of exceptional magnitude impose severe strains on foreign-exchange markets and lead to serious disturbances in the conduct of that Member State's monetary and exchange rate policies (see Article 3(1)), as well as the right of Member States to take the requisite measures to prevent infringements of their laws and regulations, *inter alia* in the field of taxation and prudential supervision of financial institutions (see Article 4, first paragraph).

Treaty by the EU Treaty and came into force after the facts in the main proceedings, namely Article 73d(1)(a) of the EC Treaty (now, after amendment, Article 58(1)(a) EC).

(6) Overriding reasons in the general interest

21. The Member States which have submitted observations in these proceedings contend that the provision at issue must be regarded as objectively justified for two reasons: the intention to promote the economy of the country by encouraging investment of savings in shares of companies established in the Member State concerned, and the intention of mitigating the effects of the double taxation of share dividends distributed by *Netherlands companies* resulting from the levying both of dividend tax and of income tax borne by natural persons receiving the dividends. The second reason, they maintain, is strictly connected with the aim of preserving the cohesion of the Netherlands tax system. The exemption is limited to 'national' dividends because only the dividends distributed by companies established in the Netherlands are subject to the corresponding tax in that country. If the exemption were extended to the dividends distributed by companies established in other Member States, which are therefore not required to make a deduction at source on dividends for the Netherlands tax authorities, the cohesion of the tax system would be undermined and the Netherlands Government would be obliged to forego tax entirely on part of the dividends (of foreign origin) paid to shareholders resident for tax purposes in the Netherlands. 'Extending' the application of the exemption would mean foregoing all taxation on a portion of the income of natural persons and, the governments which have submitted observations maintain, there is no provision of Community law imposing such a result. In short, they rely on the *strict correlation* between the possibility of exempting dividends from income tax levied on natural persons and the application of dividend tax to those dividends.

22. The Court has repeatedly stated that aims of a purely economic nature, such as, certainly, the intention to promote the economy of a country, cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty. [52] Nor, in the absence of an express derogating provision, can such an aim justify a national measure which is applicable in a discriminatory manner. What is more, as Advocate General Elmer observed in *Svensson and Gustavsson*, '[n]ational provisions of law may give the immediate appearance of being justified from the strict point of view of the national economy but nevertheless be contrary to Community rules'. [53] Moreover, a national measure that is inspired by such an aim and simultaneously has the effect of restricting free movement

52 — See, for example, Case 216/84 *Commission* v *France* [1988] ECR 793, paragraph 12; C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23, and *Collectieve Antennevoorziening Gouda*, paragraph 14.

53 — See paragraph 28 of the Opinion.

must certainly be characterised as protectionist and is, therefore, contrary to the fundamental requirement of bringing about a single market. The Court has consistently held that protectionist measures are incompatible with the Treaty. [54] For the foregoing reasons, I am confident that the first justification put forward in connection with Article 47b by the governments which have submitted observations must be rejected as inadmissible.

23. It must now be determined whether the national governments were justified in putting forward the need to preserve the cohesion of the tax system concerned. Despite the discriminatory nature of the provision at issue (see paragraph 18 above), the substance of that justification must be examined in the light of certain case-law of the Court according to which even national measures applicable in a discriminatory manner (in this case, based on the place where the capital is invested) can be excepted — solely on the basis of that overriding reason in the general interest — on grounds not provided for in an express derogating clause. In two judgments of the same date concerning one and the same national measure which was found to be contrary to Articles 48 and 59 of the Treaty (now, after amendment, Articles 39 EC and 49 EC), the Court for the first time — in the case of a measure applicable in a discriminatory manner — accepted the justification, not contemplated by the Treaty, of the need to ensure the cohesion of the tax system. [55] That case-law, which because of its obscure reasoning runs counter to the line of decided cases concerning the four fundamental freedoms, seems to have been confirmed in other judgments of the Court concerning the fundamental freedoms. In *Svensson and Gustavsson* [56] and in *ICI*, [57] for example, the Court examined, ruling that they were contrary to the Treaty, national measures (in *ICI*, of a fiscal nature) applicable in a discriminatory manner [58] where a company's place of business (or rather, the Member State in which a company was established) was the discretionary criterion for the grant or withholding of advantages to certain parties. [59] In considering national measures of that kind the Court explicitly confirmed the general principle that overriding reasons in the general interest which are not recognised by the Treaty [60] cannot be relied upon to justify a difference in

54 — See the measures *encouraging* the public to buy goods produced in the Member State concerned; for example, Case C-243/89 *Commission* v *Denmark* [1993] ECR I-3353, paragraph 23, where the Court stated that the use of a 'buy Danish clause' in the context of a public works tender is contrary to Articles 30, 48 and 59 of the EC Treaty (now, after amendment, Articles 28 EC, 39 EC and 49 EC). The tax measures favouring national products over imports which the Court held to be contrary to Article 95 of the EC Treaty (now, after amendment, Article 90 EC) in view of their protectionist effects also come to mind (see, for example, Case 112/84 *Humblot* [1985] ECR 1367; Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567; Case C-113/94 *Casarin* [1995] ECR I-4203).

55 — See *Bachmann* and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

56 — Cited in footnote 30.

57 — Cited in footnote 12.

58 — For the Court's express findings: in *Svensson and Gustavsson*, see paragraph 12 on the 'services' aspect and, in *ICI*, see paragraph 24. It should be noted that concerning the 'capital' aspect, in *Svensson and Gustavsson* the Court does not make any express statement on the question whether or not the measure at issue is applicable in a discriminatory manner; in that respect, see point 18 of this Opinion.

59 — Regarding the facts of *Svensson and Gustavsson*, see footnote 30 and point 25 of this Opinion. In *ICI*, the United Kingdom legislature used the place of business of controlled companies as a criterion for applying different tax treatment to companies of a consortium established in the Member State concerned; in particular, that measure granted the advantage of group tax relief exclusively to companies controlling, solely or mainly, subsidiaries established on the national territory (see paragraph 23 of the judgment).

60 — The only exceptions in the case of freedom of establishment (*ICI*) are set out in Article 56(1) of the Treaty; the exceptions concerning freedom to provide services (*Svensson and Gustavsson*) are limited to the circumstances mentioned in Article 66 of the Treaty (now, after amendment, Article 55 EC) which refers back to Article 56 (now, after amendment, Article 46 EC).

treatment that is in principle contrary to Articles 52 and 59 of the Treaty [61] and cited on each occasion the rules in *Bachmann* and *Commission* v *Belgium*, but it nonetheless examined the substance — instead of dismissing it as inadmissible — of the justification based on the need to preserve the cohesion of the tax system in question. [62] The Court thus seems to have confirmed — once again with very succinct reasons — that the overriding reasons in the general interest which could be relied upon to justify national measures restricting the fundamental freedoms included one which was more 'overriding', so to speak, than the others because it could be validly relied upon even in the case of national legislation applicable in a discriminatory manner. [63]

24. In this case, the United Kingdom and Netherlands Governments are relying on the requirement based on the need to ensure the cohesion of the tax system concerned, less with reference to the 'positive' material scope of the disputed measure (namely, the cases to which that measure applies) than with reference to its 'negative' material scope (namely, the cases to which it *cannot* apply). In other words, it is precisely on the ground of the need to safeguard fiscal cohesion that, having provided for the exemption at issue, [64] the Netherlands legislature *did not extend* it to cover dividends distributed by a company established in another Member State.

25. According to the case-law of the Court, the need to preserve the cohesion of the tax system can only justify a restriction of a fundamental freedom where there is a *direct link* between tax relief (namely, a loss of tax revenue for the administration) and a tax levy. [65] Such a link exists, for example, where the deductibility of insurance contributions from taxable income is made subject to the condition that the insurer is *also* established in the Member State concerned so as to ensure that that Member State can effectively tax the capital paid out when the risk is realised, namely when the insurance policy is redeemed. [66] Such a tax system allows one and the same individual to defer, but not to avoid, taxation. Where, by contrast, policyholders are allowed to deduct contributions paid to a company established in another Member State, the tax authority of the Member State concerned would suffer a *loss of revenue* if the policyholder had returned

61 — See *Svensson and Gustavsson*, paragraph 15, and *ICI*, paragraph 28.

62 — See *Svensson and Gustavsson*, paragraph 18, and *ICI*, paragraph 29. However, it must be observed that in *ICI*, while on the one hand reiterating the general principle that overriding reasons in the general interest cannot be relied upon to justify national measures applicable in a discriminatory manner and on the other examining the merits of the argument based on the need to ensure the cohesion of the tax system, the Court nonetheless applied that principle correctly and rejected as inadmissible another reason put forward by the Member State concerned, namely the need to prevent a loss of tax revenue (see paragraph 28 of the judgment).

63 — To the same effect, see *Asscher* (freedom of establishment) and *Schumacker* (freedom of movement for workers) where the Court, recalling the *Bachmann* case, went on to consider the merits of the justification relating to the need to ensure fiscal cohesion (at paragraphs 58 to 60 and 39 to 42 respectively) after establishing that the national measure in question was discriminatory (at paragraphs 48 and 49, and 27 to 38 respectively).

64 — As both the Commission and Mr Verkooijen pointed out, the tax system applicable in the Netherlands prior to 1981, when Article 47b was adopted, was already distinguished by a certain degree of cohesion insofar as that system did not provide for exceptions eliminating or mitigating the economic consequences of the double taxation of dividends distributed to Netherlands taxpayers by companies established in the Netherlands.

65 — See *ICI*, paragraph 29; *Asscher*, paragraphs 58 to 60; *Svensson and Gustavsson*, paragraph 18; *Bachmann*, paragraphs 22 and 23, and *Commission* v *Belgium*, paragraphs 14 to 16.

66 — See *Bachmann* and *Commission* v *Belgium*.

to his Member State of origin at the time of repayment or settlement. The Court has held, therefore, that in such a tax system there is a link between the deductibility and the subsequent taxation, and that that link is *direct* since the two measures concern one and the same taxpayer at different moments in his life. By contrast, it cannot be maintained that there is a direct link between the grant of an interest rate subsidy to borrowers, on the one hand, and its financing by means of the profit tax on financial establishments, on the other, [67] since 'it is by no means certain that the ... credit institutions will generate taxable funds as a result of the interest rate subsidy scheme. There is in fact a basis of assessment only if the operations of the relevant credit institution as a whole produce a surplus, which is not necessarily the case since the result of operations may be negatively affected by other factors, for example losses on loans or exchange losses on holdings of securities'. [68]

26. According to the principles which can be inferred from the case-law of the Court, extending the exemption of dividends referred to in Article 47b to Mr Verkooijen would, I believe, have the effect of damaging the *link* between the possibility of exempting dividends from income tax and their subjection to dividend tax. The Kingdom of the Netherlands introduced the tax relief at issue solely on the premiss that its tax system could in any event have an impact on the income concerned by the exemption. That is true for dividends distributed by Netherlands companies, which are the only dividend subject to Netherlands dividend tax, the very *premiss* of the exemption. Applying the exemption to dividends distributed by a company established in another Member State would have an adverse effect on the revenue from the tax in question: on the one hand, the Member State which has adopted the system concerned would be unable to levy dividend tax while, on the other hand, it would be obliged to grant the taxpayer an exemption (even only partial) from the tax on income which is subject only to that tax, the only tax that can be levied in connection with one component of his income, namely dividends originating from abroad.

27. Moreover, in my view, the link between the exemption referred to in Article 47b and the levy of the dividend tax is *direct*. As is clear from the legislative history of the provision at issue by which the Netherlands legislature sought to mitigate the effects of double taxation, [69] from the economic point of view, the dividend tax and the income tax payable by natural persons referred to in the order for reference affect one and the same taxpayer (the recipient of the dividends). By contrast, in *Svensson and Gustavsson*, where the Court held that the cohesion of the Luxembourg tax system was not at risk, the tax credit and the tax (which were allegedly linked) did not

67 — See *Svensson and Gustavsson*, paragraph 18.

68 — See point 31 of the Opinion of Advocate General Elmer in *Svensson and Gustavsson*.

69 — See point 4 above.

concern one and the same taxpayer but different taxpayers,[70] namely borrowers and financial establishments.[71] That is not all. Whereas in circumstances such as those in *Bachmann*, several years can lapse between the deductibility of contributions and the levy of tax on social security benefits, in the present case, by contrast, the levy of dividend tax and the application of the exemption take place practically simultaneously, when taxable income is assessed for a given tax year.[72]

(7) Is the national measure suitable and proportionate?

28. According to case-law, for national measures which are liable to restrict or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty to qualify as being effectively justified by overriding reasons in the general interest, they must be suitable for securing the attainment of the objective which they pursue and they must not go beyond what is necessary in order to attain it.[73]

29. I do not believe that there are any doubts concerning the suitability of the provision at issue for mitigating, at least partially, the effects on the recipient shareholder of the double taxation of dividends in the Netherlands, and none of the parties which have submitted observations in this case has raised any in that regard. As regards the proportionality of the provision at issue to the aim pursued by the Netherlands legislature, it is for the national court, by reason of the division of jurisdiction provided for in Article 177 of the Treaty, to determine whether or not the restriction of a fundamental freedom arising from a national measure could have been avoided or reduced without jeopardising the aims pursued by that measure.[74] In this regard, the only alternative put forward in the

70 — See point 30 of the Opinion of Advocate General Elmer.

71 — More recently and, essentially, to the same effect, see *ICI*, paragraph 29, and points 26 to 28 of the Opinion of Advocate General Tesauro.

72 — Again from the perspective of the cohesion of its tax system, and in particular the need to avoid effects that were not intended by the national legislature, the Netherlands Government also pointed out that a general application of the exemption would have the effect of favouring shareholders of companies established in Member States where the tax rules offsetting the effects of double taxation of dividends apply at source, namely on dividend tax, over shareholders of Netherlands companies. According to the Netherlands Government, shareholders investing in shares of foreign companies would thus benefit more from the mitigation of double taxation than shareholders of Netherlands companies: that would go beyond the intended purpose of the exemption and would have the added effect, if I understand correctly, of hindering the second aim of the tax measure in question, namely supporting the national economy. The reasoning of the Netherlands Government is not convincing. Firstly, Community law does not prevent Member States from treating purely internal cases less favourably than those dealt with by the Treaty. Secondly, I would recall that the Court has already had occasion to rebut the argument that certain disadvantages (in this case, the fact of not benefiting from the exemption) can be justified because they are offset by advantages for the persons concerned in *another* Member State (in the situation outlined by the Netherlands, a 'reduction' applied to dividend tax, a measure unknown in the Netherlands tax system): see Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraphs 18 and 19, and *Avoir fiscal* (paragraph 21; see also point 7 of the Opinion of Advocate General Mancini).

73 — See, *inter alia*, *Gebhard*, paragraph 37, and *Kraus*, paragraph 32.

74 — Case 222/84 *Johnston* [1986] ECR 1651, paragraph 39.

course of these proceedings (by the Commission during the oral procedure because of its supposedly less restrictive effects on capital movements), namely the application of an exemption or tax credit in respect of dividends originating in another Member State, is not consistent — in this case and considering the relevant national provisions described in points 3 and 4 above — with the aim of preserving fiscal cohesion since, in the absence of any agreements with other States for that purpose,[75] such a measure clearly cannot fail to affect the Netherlands tax revenue without any consideration or readjustment.

(8) The derogation under Article 73d(1)(a)

30. Apart from the justifications based on overriding reasons in the general interest that emerge from the case-law of the Court, all the governments which have submitted observations argue that Article 47b must in any event be excepted under the derogation in Article 73d(1)(a) of the Treaty[76] since, even though that provision came into force only in 1994 (subsequent to the facts of this case), it essentially reproduces the earlier legislation.[77]

31. Although the questions referred for a preliminary ruling do not in this case concern the provisions introduced by the EU Treaty, the above-mentioned line of reasoning is nonetheless clearly relevant. Its interest derives from the fact that the governments which have submitted observations are not claiming that it is a 'new' derogation valid retroactively, but merely that it 'constitutionalises' in the Treaty a principle that was previously in force and which therefore applies to the facts of the main proceedings. The national court itself dwelt at some length on this point in the findings section of the order for reference.

75 — On this subject, see points 46 to 56 below, and paragraph 54 in particular.

76 — Article 73d of the Treaty provides:
'1. The provisions of Article 73b shall be without prejudice to the right of Member States:
(a) to apply the relevant provisions of their tax law which distinguish between tax-payers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;
(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions...
2. The provisions of this chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b'.
Article 73b(1) of the Treaty states: 'Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

77 — Regarding the troubled history of the Treaty's provisions on capital movements, see footnote 1 above; Article 73d(1)(a) introduces, in particular, a derogation (hereinafter referred to as 'the derogation') to the freedom in question, that was not explicitly provided for in the previously applicable provisions of the Treaty or in the directive.

The derogation is thus relied on to demonstrate that under the provisions previously in force, the Member States already had the power to apply tax rules discriminating between taxpayers in different situations based on the place where their capital was invested. Moreover, it would seem that the governments which have submitted observations rely on the specificity of tax legislation: in view of the nature of the subject matter concerned, that power is virtually unconditional. As a result, according to those governments, the derogation is not subject to the limitations laid down in Article 73d(3) of the Treaty, corresponding to the last sentence of Article 36 of the Treaty. That conclusion is essentially based on a literal interpretation of the article itself. [78] Thus, the power in question is unconditional: it is not subject to judicial review either as regards the merits of the overriding reasons in the general interest that purportedly justify different treatment based on the place where the capital is invested, or as regards the proportionality of the measure to the objectives pursued.

32. I can agree with that reasoning up to a point. On the one hand, I am convinced that the derogation does not constitute a step backwards in the *acquis communautaire*. It can reasonably be said to antedate the provisions in force before 1 January 1994. [79] It is true that, in its case-law, the Court has allowed Member States to maintain certain distinctions (based, for example, on the taxpayers' place of residence) in their *taxation rules*, provided such distinctions are based on *situations* that are not objectively comparable [80] or, in the case of rules applicable in a discriminatory manner, that they are justified by overriding reasons in the general interest. [81]

33. On the other hand, I reject the argument that different tax treatment based on the place where capital is invested — which

78 — The governments which submitted observations emphasise, in particular, the fact that Article 73d(3) mentions only 'measures' and 'procedures' and therefore refers solely to the literal wording of Article 73d(1)(b) and (2), whereas Article 73d(1)(a) refers to 'provisions'.

79 — With few exceptions, legal writers agree that Article 73d(1)(a) of the Treaty is not at all a step backwards, in seeming contradiction with the letter of Article 67(1) (prohibiting discrimination *based on the place where capital is invested*), but must be read in harmony with the pre-existing system as interpreted in case-law (see, *inter alia*, Dourado, op. cit., p. 180, 181 and 184; P. Farmer and R. Lyal, *EC Tax Law*, Clarendon Press, Oxford, 1994, p. 334; J-M. Hauptmann, 'Commentaire sur l'art. 73 D', in *Traité sur l'Union européene*, op. cit., p. 184; Lodin, op. cit., p. 231; Mohamed, op. cit., pp. 134 to 135; M. Peters, 'Capital movements and taxation in the EC', in *EC Tax Review*, 1998, p. 1, and especially pp. 10 and 11; Servais, op. cit. p. 64, note 58; R. Smits, 'Freedom of payments and capital movements under EMU' in A. Weber (ed.) *Währung und Wirtschaft*, op. cit., pp. 245, 262 and 263; Ståhl, op. cit., pp. 229 and 231; J.A. Usher, *The Law of Money and Financial Services in the European Community*, Clarendon Press, Oxford, 1994, p. 32 et seq.; S. van Thiel, 'The Prohibition of Income Tax Discrimination in the European Union: What Does it Mean?', in *European Taxation*, 1994, p. 303, and especially p. 309; P. Vigneron and P. Steinfeld, 'La Communauté européene et la libre circulation des capitaux: les nouvelles dispositions et leurs implications', in *CDE*, 1996, p. 401, especially pp. 411, 432 and 433).

80 — As regards the importance that the Court places on 'substance' in establishing whether or not two distinct situations are comparable, without going into distinctions of a more 'formal' nature (such as that between resident and non-resident) that are frequently found in national legislation, see *Schumacker*, paragraph 34 (where the reasoning would appear to hinge on the term 'situation', already employed in paragraphs 24 and 31), and points 35 to 38 of the Opinion of Advocate General Léger (see also the latter's Opinion in *Wielockx*, point 21); the term 'situation' is also used in Article 73d(1)(a) of the Treaty. See, moreover, *Royal Bank of Scotland*, paragraphs 27 to 31; *Asscher*, paragraph 42; *Wielockx*, paragraphs 18 to 22, and *Avoir fiscal*, paragraph 19.

81 — See the judgments in *Bachmann* and *Commission* v *Belgium*.

is permitted since the Treaty provides for the possibility of a derogation — must always be regarded as justified. Firstly, according to the case-law of the Court itself — to which I have just referred — any distinction [82] rooted in the tax legislation of a Member State must be based on objective factors [83], or in any event be justified, and must thus pass the proportionality test; otherwise, the assertion — which I believe constitutes the cornerstone of the observations submitted by the governments and which I support — that the derogation must be understood and applied in accordance with the case-law of the Court would be deprived of all meaning. It follows that the limitations set out in Article 73d(3) of the Treaty also apply to the derogation referred to in paragraph 1(a) of the same article which, contrary to the opinion of the governments which have submitted observations, must be read as a whole. [84] Secondly, to consider — as an absolute presumption — that all the situations covered by the derogation are justified *per se* would mean attributing to the derogation itself the specific capacity, not contemplated by the Treaty, of distinguishing — for reasons I cannot see — the cases concerned by this derogation from all other exceptional cases — set out *expressis verbis* in the Treaty — which are such as to justify restrictions of the fundamental freedoms.

34. If we apply to the present case the derogation set out in Article 73d(1)(a) of the Treaty and adopt the above-mentioned criteria for interpretation, the result is substantially comparable to the result obtained on the basis of the provisions previously in force. Considered as such, Article 47b provides for differentiated treatment based solely on the place where the Dutch taxpayer's capital is invested, and that provision does not avoid the prohibition under Article 73b of the Treaty. The fact that such difference in treatment, set out in a provision of tax law, may be justified by an overriding reason in the general interest recognised by the Court simply means that the national measure in question is liable — again, in principle, since it is not arbitrarily discriminatory in nature — to fall within the scope of the derogation. The discrimination introduced by the Netherlands tax legislation can be regarded as justified and effectively covered by the derogation only if it has satisfied *in concreto* the requirement of proportionality according to the canons of interpretation traditionally applied by the Court even before the new rules on the movement of capital came into force. [85]

82 — Including, therefore, the distinction based on the place where capital is invested.

83 — See *Schumacker*, paragraph 37.

84 — This is the view of all the writers who consider that the derogation is not 'new' but simply the expression of principles already established by the Court (see footnote 79 above); also see S. Kollia, in the 'Capital' chapter, in *Repertoire de droit communautaire*, Dalloz, Paris, volume I, paragraph 92. Considering the close structural similarity between Article 36 and Article 73d of the Treaty, the above reconstruction seems to accord with the case-law which draws analogies with the general system guaranteeing the fundamental freedoms (see *Gebhard*, paragraph 37).

85 — See *Bachmann*, paragraph 27, and *Commission* v *Belgium*, paragraph 20.

35. In conclusion, a measure limiting the benefit of an exemption from income tax solely to dividends distributed by companies established in the Member State concerned constitutes an obstacle contrary to Article 1(1) of the Directive. However, the refusal to apply that exemption also to dividends distributed by companies established in other Member States is in principle justified by the need to preserve the cohesion of the tax system in question. My opinion, based on the provisions of Community law in force at the material time, is not affected by the derogation contained in Article 73d(1)(a) of the Treaty. In adopting the derogating provision in question, the Community legislature was not introducing a new principle into the provisions on capital movements; on the contrary, it merely made explicit in the text of the Treaty a *pre-existing* rule which is thus part of the system I described in my analysis of the provision at issue.

B — *Question 2*

36. If the first question is answered in the negative, the Hoge Raad asks the Court whether Articles 6 and/or 52 of the Treaty preclude a national measure such as Article 47b.

37. I agree with the governments which have submitted observations. Article 6 of the Treaty, which enshrines the principle prohibiting discrimination on the ground of nationality, is not relevant here since it is a general rule designed to apply to situations governed by Community law which are not covered by any specific non-discrimination rules [86] such as, precisely, Article 52 of the Treaty which, in the case of undertakings, must be read in conjunction with Article 58. That provision grants freedom of establishment to nationals of another Member State, allowing them to set up and manage undertakings and companies under the conditions laid down for its own nationals by the law of the Member State of establishment.

38. As a preliminary point, the United Kingdom and Netherlands Governments submitted that Article 52 of the Treaty is not applicable to the present case since it is a general provision as opposed to the more specific rules on free movement of capital which must be applied by way of exception. As we have seen, those governments defend the provision at issue, maintaining that it is compatible with Community rules guaranteeing free movement of capital. If my understanding is correct, those governments argue that Article 52 of the Treaty does not preclude the provision at issue

86 — See, *inter alia*, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13; Case C-18/93 *Corsica Ferries* [1994] ECR I-1783, paragraph 19; Case C-1/93 *Halliburton Services* [1994] ECR I-1137, paragraph 12; and Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraphs 20 and 21.

which is consistent with Article 1(1) of the Directive. In my view, that argument is not relevant here. It is admittedly true that the second paragraph of Article 52 of the Treaty enshrines the principle of national treatment with regard to the establishment of undertakings in another Member State 'subject to the provisions of the chapter relating to capital';[87] however, that provision merely expresses the concern of the draftsmen of the Treaty not to superimpose provisions on freedom of establishment and free movement of capital, in other words, to avoid applying two sets of provisions to one and the same restriction. On the other hand, it is quite possible for one and the same provision of a Member State's legislation to contain several distinct aspects, all of which are relevant to the Treaty, as in the case of a national measure restricting more than one fundamental freedom simultaneously and to an equal degree. In *Svensson and Gustavsson*, the Court held that one and the same measure was contrary to both Article 59 and Article 67 of the Treaty. More recently, Advocate General Tesauro acknowledged that, in principle, 'it would... be possible for [two] sets of provisions to apply together, but only in relation to the provisions restricting simultaneously, although from different angles, [two distinct fundamental freedoms]', including movement of capital.[88] In that regard, I would point out that in *Veronica Omroep Organisatie*, where the Court held that the national measure at issue (see point 11 above) was compatible with both the provisions on freedom to provide services and those on free movement of capital, it simultaneously examined the case in the light of two distinct sets of rules and did not at all rule out the relevance of the 'services' aspect, despite the fact that the national measure was compatible with the Treaty from the 'capital' angle.

39. As regards the substance of Article 47b, I must first observe that, even from the — different — perspective of the provisions on freedom of establishment (for undertakings), that provision is applicable in a discriminatory manner (as Mr Verkooijen did not fail to point out), since it distinguishes between dividends distributed by Netherlands companies and those distributed by companies established in other Member States. Unless the distinction under Netherlands tax legislation is based on situations that are objectively not comparable or is justified by a relevant overriding reason in the general interest (see the end of point 32 above), this observation alone is sufficient for Article 47b to be regarded as contrary to Article 52 of the Treaty: 'Article 52 prohibits all discrimination, even if only of a limited nature'.[89]

40. Moreover, as for whether or not there is a restriction under Article 52 of the

87 — Correspondingly, in its present version, Article 73d(2) of the Treaty is worded analogously as regards capital movements: 'the provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty'.

88 — See point 17 of the Opinion in *Safir*.

89 — See *Avoir fiscal*, paragraph 21.

Treaty, it may seem, at first sight, that the provision at issue only 'indirectly' concerns the issuing companies: Article 47b is not, strictly speaking, part of the tax system for companies, since it affects the benefits enjoyed by shareholders who are natural persons (the exemption applies only in respect of income tax on natural persons, see point 3 above) after corporation tax has been assessed on the profit from company activities (which has given rise to the dividends distributed). However, as we shall see below, the tax regime applicable to dividends originating in another Member State cannot — under aspects *other* than those examined in the section on Question 1 — fail to *influence*[90] certain decisions which companies established on Community territory (including in the Netherlands, therefore) must take as regards their principal or secondary place of business.

41. There are many situations in which a national measure such as Article 47b restricts — to a greater or lesser extent — freedom of establishment:

(a) as Mr Verkooijen has observed, a company that has its principal place of business in another Member State and plans to set up a secondary place of business[91] in the Netherlands will be *dissuaded* from doing so in any form other than a company if it intends to turn to the capital market in that Member State in order to raise the capital needed to manage an undertaking.[92] The provision at issue essentially encourages preference to be given to establishment in the form of a subsidiary, which is legally independent of the parent company by which it is controlled, rather than the alternative of a branch, defined as part of a de facto whole or simply as a limb of the company, allowing a measure of decentralisation.[93] In *Centros*, the Court recently confirmed that freedom of establishment includes the right for a company to set up a secondary place of business in another Member State and to carry on its business in the form it considers most appropriate:[94] all restrictions on that freedom of choice must thus be regarded as contrary to Article 52 of the Treaty.

90 — See point 16 and the case-law of the Court cited in footnote 36.

91 — Article 52 of the Treaty does not merely guarantee freedom of establishment on a primary basis: under the first paragraph of Article 52 and the first paragraph of Article 58 of the Treaty, freedom of establishment includes the right of companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue their activities in another Member State through a branch or agency. On this substantive question, see Case C-334/94 *Commission* v *France* [1996] ECR I-1307, paragraph 19, and Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 21. On a more general level, see Case C-106/91 *Ramrath* [1992] ECR I-3351, paragraph 20; *Gebhard*, paragraph 24, and Case C-53/95 *Kemmler* [1996] ECR I-703, paragraph 10.

92 — The right of establishment includes the right to 'manage undertakings' (see the second paragraph of Article 52 of the Treaty and *Gebhard*, paragraph 23: 'the right of establishment... allows all types of self-employed activity to be taken up and *pursued* on the territory of any other Member State, undertakings to be formed and *operated*...'; the italics are mine).

93 — See point 15 of my Opinion in *Centros*.

94 — See paragraphs 20 to 22 of the judgment, and the case-law references to the same effect. Among these, see *Avoir fiscal* where the Court stated that 'the second sentence of the first paragraph of Article 52 expressly leaves traders free to choose the appropriate *legal form* in which to pursue their activities in another Member State' (paragraph 22; the italics are mine).

(b) a company established in the Netherlands whose shareholders (though not necessarily all of them) are natural persons resident there for tax purposes and which intends to set up a principal place of business in another Member State (by transferring its registered office and thus acquiring the status of a company of the host Member State) [95] will be *dissuaded* from doing so, since its Netherlands shareholders would automatically forgo the advantage provided for in Article 47b because their dividends would no longer be distributed by a 'Netherlands' company.

(c) I believe that Article 47b also plays a role in the case of a merger involving a company established in the Netherlands whose shareholders are natural persons resident in the Netherlands. As in the case under (b) above, those shareholders lose the advantage under the provision at issue (i) in the case of a merger by incorporation, where the incorporating company does not have its registered office in the Netherlands, and (ii) in the case of a true merger, where the ensuing, newly-formed company does not have its registered office in the Netherlands. [96] In both cases, the dividends paid to Netherlands taxpayers following such mergers will no longer originate from a company established in the Netherlands.

42. The aspects I have just indicated by way of example specifically concern Article 52 of the Treaty. In (a), (b) and (c), the exercise of the freedom of establishment which is restricted (discouraged or influenced) by the provision at issue concerns certain management decisions concerning undertakings in the form of a company (the form of the decentralisation of activities, the location of the registered office, merger with other undertakings, respectively) that do not involve (directly at least) capital movements within the meaning of Article 67 of the Directive, such as that effected by Mr Verkooijen when he acquired the Petrofina shares.

43. Moreover, as regards the view of the governments which have submitted observations that the effects of Article 47b on freedom of establishment are too tenuous, I would point out that the Court has consistently held that Article 52 of the Treaty prohibits 'any restriction, even minor, of that freedom' (see the end of point 17). [97]

44. Assuming that, under certain aspects, the provision at issue is inconsistent with Article 52 of the Treaty, we must now

95 — See, *a contrario*, Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, paragraphs 24 and 25, where the Court held that 'Articles 52 and 58 of the Treaty *cannot* be interpreted as conferring on *companies incorporated under the law of a Member State* a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State' (the italics are mine).

96 — These operations entail the 'transfer' of the company's registered office to another Member State (see situation (b)) and a different strategy in terms of the location of the management of the undertaking.

97 — The Ruding Report shows that, in the case of 48% of Community undertakings, tax considerations are nearly always crucial in deciding where to establish a production unit (see Chapter 10, Section II, on the impact of differences in taxation between the Member States); on the other hand, the percentages are 38% in the case of a sales point, 41% for a research and development centre, 57% for a coordination centre and 78% for a finance centre.

determine whether it can be regarded as justified, suitable for attaining the objective pursued by the legislature, and proportionate. Despite the various aspects under which Article 47b can be deemed incompatible with Treaty provisions on freedom of establishment, I believe that — as regards the determination and existence of a justification and the appropriateness and proportionality of the national measure — the line of reasoning followed in the section on Question 1 (see points 19 to 29) also applies here: the provision at issue is the same (within the same tax system) and the fact that it is also applicable in a discriminatory manner from the 'exercise of freedom of establishment' point of view has the consequences already described (see point 23) in respect of the determination of the causes which may justify that measure.

45. To conclude, I believe that a national measure such as the one at issue here is inconsistent with Article 52 of the Treaty under several aspects but that, in principle, it must nevertheless be regarded as justified by the need to ensure the cohesion of the tax system of the Member State concerned.

C — *Questions 1 and 2: a comprehensive approach*

46. In the foregoing examination of the first two questions referred for a preliminary ruling, I have concentrated on the elements that emerge clearly from the case file. I believe it is now worthwhile considering certain other elements which are relevant, in my view, for the purpose of giving a proper answer to the questions referred, namely, for the reasons set out below, the provisions of the bilateral Double-Taxation Convention concluded between the Kingdom of Belgium and the Kingdom of the Netherlands [98] (that is, the Member State where Petrofina has its registered office and the dividends at issue in the main proceedings originated, and the Member State where Mr Verkooijen is resident, respectively). Admittedly, the fact that both the order for reference and the observations submitted in the course of the proceedings before the Court [99] barely refer to the Convention could at once raise doubts on the proper formulation of the question referred by the Hoge Raad: by failing to consider the Convention (even if only to dismiss it as irrelevant to the proceedings), the order for reference does not appear to provide a sufficiently precise description of the legal background to the questions at issue. Moreover, as Advocate General Léger rightly observed in *Wielockx*, [100] 'double-taxation conventions... are an integral part of national tax law', and they must therefore be duly taken into account, in any event, in order to have a complete picture of the ins and outs in tax cases involving a cross-border element.

98 — Convention signed in Brussels on 19 October 1970 (see *Moniteur Belge-Belgisch Staatsblad* of 25 September 1971, No 187, p. 11096), hereinafter 'the Convention'.

99 — See, however, the passage referring to tax agreements in the observations submitted by the Netherlands Government (paragraph 14).

100 — Point 54 of the Opinion.

47. Nevertheless, to fulfil the obligations of judicial cooperation under Article 177 of the Treaty, I believe that it is for the Court to take into consideration all relevant elements of which it is aware, in order to provide the national court with a useful answer. In that regard, I would recall that the Court has already had several occasions to dwell (more or less at length) on these conventions, even where they were *not* the object of the questions referred for a preliminary ruling. [101] Therefore, it is necessary (or at least appropriate) here not to disregard [102] the provisions of a bilateral convention, such as that concluded between the Kingdom of Belgium and the Kingdom of the Netherlands, which the Court has already considered at length [103] and which contains provisions that specifically and directly concern the case at issue. [104]

48. By way of a further preliminary comment, I would observe that in preliminary rulings the Court has already had occasion to rely upon ambivalent wording in order to cover all possible alternative legal frameworks. In *Naranjo Arjona and Others*, [105] the Court interpreted Community law by referring first to the provisions of national law indicated by the national court (paragraphs 15 to 24 and the operative part of the judgment) and then broadening its analysis to encompass an international convention (cited by the Commission but not mentioned in the order for reference),

101 — See *Wielockx*, the operative part of the judgment and paragraphs 24 to 27, and *Bachmann* (paragraph 26), where absolutely no reference was made to international conventions either in the arguments of the parties before the Court or in the Opinion of Advocate General Mischo (for a description of that case, see paragraph 25 of this Opinion).
According to V. Petrella (*Il principio di non discriminazione nell'imposizione del reddito transnazionale. Analisi del principio nel contesto giuridico comunitario*, doctoral thesis, Università degli Studi 'Federico II', Naples, 1999, Chapter IV, Section 5): '[if fiscal cohesion is understood] as preserving the macro-economic balances underlying any tax system... the judgment [*Bachmann*] is open to censure in that it disregards the system introduced by bilateral agreement by failing to note that the provisions of the [double taxation] agreement produce a macroeconomic equilibrium, if only at bilateral level. The convention concluded between the Kingdom of Belgium and the Federal Republic of Germany distributes the fiscal power of the two countries by conferring on the Federal Republic of Germany the exclusive power to tax insurance sums paid to taxpayers residing in Germany at the time of payment, regardless of where the premiums were paid and the system to which they were subject' (on the basis of her interpretation of paragraph 26 of the judgment, the author in essence believes that, in *Bachmann*, the Court held that the conclusion of bilateral treaties establishing taxation rules for insurance contracts involving a cross-border element — such as those at issue — was irrelevant on the ground that, because they are bilateral, such treaties cannot uniformly regulate transactions within the Community). To the same effect, see B. Knobbe-Keuk, '*Restrictions on the Fundamental Freedoms Enshrined in the EC Treaty by Discriminatory Tax Provisions — Ban and Justification*', in *EC Tax Review*, 1994, p. 74, especially p. 80.
Thereinafter, in *Wielockx*, case-law evolved considerably in terms of the importance that the Court attaches to bilateral tax agreements for the proper resolution of the questions referred to it: 'In *Wielockx*, the Court notes the anomaly [of the result in *Bachmann*] and, *overturning* its conclusions in *Bachmann*, holds that fiscal cohesion must be appraised in the context of a State's *overall* taxation system, including also the system set up by bilateral agreements' (Petrella, ibidem; the italics are mine).
Also see *Royal Bank of Scotland* (paragraph 31) where, although the French Government referred to the double taxation agreement between Greece and the United Kingdom (the two Member States concerned by the facts in the main proceedings), that agreement was the object neither of the question referred to the Court for a preliminary ruling, since the referring court was uncertain as to compatibility with Community law *solely* as regards internal national law, nor of the description of the legal context presented in Judge-Rapporteur Wathelet's Report for the Hearing.

102 — Less, here, to ascertain the merits of a justification (fiscal cohesion) of a measure applicable in a discriminatory manner (see *Bachmann* and *Wielockx* where, as I have already pointed out, the Court did not follow the same line of reasoning), than to decide, as we will see further on (points 52 to 56), whether or not a national law is applicable in a discriminatory manner, or whether it constitutes a restriction on a fundamental freedom.

103 — See *Wielockx*, paragraphs 24 and 25, as well as point 54 and footnote 41 of the Opinion of Advocate General Léger.

104 — See *Avoir Fiscal*, paragraph 26, where the Court rejected the argument of the French Government — which relied upon double-taxation agreements to justify the national measure concerned — on the ground that those agreements did *not* deal with the cases at issue.

105 — Joined Cases C-31/96 to C-33/96 *Naranjo Arjona and Others* [1997] ECR I-5501.

in the event that that convention were to be deemed applicable 'in practice' (paragraphs 25 to 29 and the operative part of the judgment). In that case, the Court stated that '[i]t is therefore for the national court to verify whether application of that convention would in practice be [relevant]' (paragraph 29) before indicating in the operative part of the judgment the solution to the questions raised by the national court both for the case where only the national law of the Member State concerned was applicable and for the case where the national court considered it more appropriate to rule on the basis of the international convention.[106] Similarly, for the reasons already indicated, I believe that in the case at issue in the main proceedings before the Hoge Raad, it is necessary to consider, in the alternative, a legal framework incorporating the Convention, in addition to the rules of national law indicated in the order for reference.

(1) The Double-Taxation Convention between Belgium and the Netherlands

49. Let me now consider specifically this convention, but only in so far as it has a bearing on this case. My comments may, however, also apply in cases other than this one, since the provisions on 'cross-border' dividends between Belgium and the Netherlands are modelled (like practically all comparable conventions concluded between the Member States of the Community)[107] on the Model Double-Taxation Convention proposed by the OECD.[108] I would also point out that my Opinion based solely on the national legislation of the Netherlands remains unchanged in the non-hypothetical[109] case where national legislation is not coupled with a double-taxation convention containing provisions such as those examined below.

50. Article 10(1) of the Convention establishes the basic principle that the Contracting State where the shareholder is resident is entitled to charge tax on dividends originating in the other Contracting State.[110] Article 10(2) of the Convention also entitles the State of origin of the dividends (namely, the country where the distributing company is established) to charge tax on them (as a rule, by deduction at source, in addition to tax on company

106 — The operative part of the judgment in *Naranjo Arjona and Others* essentially reflects my Opinion where I outlined the two (alternative) answers which I proposed should be given to the questions referred for a preliminary ruling.

107 — See Case C-336/96 *Gilly* [1998] ECR I-2793, paragraph 24.

108 — Organisation for Economic Cooperation and Development.

109 — As late as 1992, the Ruding Report identified a number of cases where Member States had not concluded bilateral double-taxation agreements with each other (see Chapters 3 and 10, Section III, on tax agreements).

110 — Under Article 10(1) of the Convention (whose content, like that of paragraph 2, reflects that of Article 10 of the OECD Model Convention): 'Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State'.

profits) below a maximum limit. [111] Moreover, under Article 24 of the Convention, [112] the Netherlands must award a *tax credit* in order to avoid double taxation of the dividends paid to its taxpayers holding shares in companies established in Belgium, provided that, and to the extent that, a deduction at source such as that provided for in Article 10(2) of the Convention has already been made from those dividends in Belgium. [113] In essence, in the case of a Netherlands taxpayer receiving dividends from a Belgian company, the Convention provides for a mechanism which is quite common in practice and is designed less to *mitigate* than to *avoid* the effects of double taxation.

51. Considering the *whole* framework of relevant provisions — both national and international — the Netherlands tax system — which seeks to eliminate, or at least mitigate, the effects of double taxation both in purely 'internal' cases and in 'cross-border' cases — is therefore characterised by the consistent nature of the treatment applied to different circumstances. I would observe, moreover, that by applying a tax credit to dividends distributed by Belgian companies, the Netherlands apparently achieves a more effective result than that attained — in respect of dividends distributed by Netherlands companies — by means of the *partial* exemption granted under Article 47b. As I have just pointed out, in the case of 'cross-border' dividends, it is more appropriate to speak of the *elimination* rather than the *mitigation* of double taxation.

(2) Capital movements

52. That being said, let us now consider the circumstances underlying the first question. Take the case of a Netherlands taxpayer who, like Mr Verkooijen, has invested in shares of a company established in Belgium

111 — Article 10(2) of the Convention states: 'However, such dividends may also be taxed in the State of which the company paying the dividends is a resident and according to the laws of that State, but the tax so charged shall not exceed: (1) 5% of the gross amount of the dividends if the beneficial owner is a company (other than a partnership) which holds directly at least 25% of the capital of the company paying the dividends; (2) 15% of the gross amount of the dividends in all other cases...'. Moreover, under the last part of that same paragraph, those limits do *not* affect the taxation of *the company* in respect of the profits *out of which* the dividends are paid.
Although the Convention establishes the reciprocal obligation for Contracting States to apply — in the case of dividends paid to a shareholder resident in the Contracting State — a dividend tax not exceeding 15%, Mr Verkooijen claims that a withholding tax of 25% had already been deducted in Belgium in respect of the dividends he received.

112 — Which corresponds to Article 23 of the OECD Model Convention.

113 — Article 24(1) of the Convention provides that 'as regards residents of the Netherlands, double taxation shall be avoided as follows: (1) In assessing tax, the Netherlands may include in the taxable amount elements of income or private assets which are taxable in Belgium in accordance with this Convention;... (3) The Netherlands shall grant... a *reduction in the tax* thus assessed in respect of such elements of income as are taxable in Belgium pursuant to *Article 10(2)* and are included in the basis of assessment referred to in (1). That reduction shall be equal to the lower of: (a) an amount equal to the tax charged in Belgium; (b) an amount equal to the fraction of the Netherlands tax calculated in accordance with (1), which corresponds to the relationship between the amount of such elements of income and the taxable amount referred to in (1)....' As for Belgium, Article 24(2) requires — as a rule — Belgium to exempt its taxpayers in respect of income on which tax has already been charged in the Netherlands. 'Exemption' and 'tax credit' are the two basic methods for avoiding double taxation indicated in Article 23 of the OECD Model Convention.
In the present case, it cannot be established from the file whether the Netherlands tax authorities applied — in accordance with Article 24(1) of the Convention — to the dividends paid by Petrofina to Mr Verkooijen the tax credit in respect of the dividend tax already deducted in Belgium or whether Mr Verkooijen never applied for that advantage, designed to avoid double taxation.

and has thus received a tax credit in accordance with Article 24(1) of the Convention. What if that taxpayer also asks to benefit from the exemption under Article 47b? Although he may justify his request on the ground of the principle of equal treatment of capital invested in different places, not only is that taxpayer actually seeking more favourable treatment than those who are resident for tax purposes in the Netherlands and have invested in Netherlands shares, he is essentially seeking — despite the fact that he is in principle entitled to a tax credit under the Convention (thus *already avoiding* the effects of double taxation) — to *avoid* income tax, at least in respect of a taxable income of NLG 2 000. Such a result is inconsistent with the aims of the Treaty (and of the Directive) and unjustifiably interferes with the taxation power of the Member State concerned. Community rules on capital movements are not designed to create incentives for those movements but to remove all obstacles by requiring Member States to treat Community situations no *less favourably* than purely internal situations. In this case we are dealing with a Member State that has already concluded and implemented in its national legal system a convention designed to avoid double taxation of 'cross-border' dividends, a convention which certainly does not hinder free movement of capital according to Article 1(1) of the Directive (or Article 73b of the Treaty). I do not see on what basis Community law could require that Member State *also* to apply to those dividends the tax treatment reserved for 'national' dividends. That obligation would be tantamount to forgoing tax revenue and, what is more, it would be purely unilateral since there is no reciprocal obligation on the part of another Member State. Therefore, in my view, the national provisions are not open to criticism since they *generally* display a form of cohesion which goes beyond the purely national level. That point is important and warrants two additional observations.

53. Firstly, the foregoing observations do not refer to cohesion as a means for offsetting the *disadvantage* arising from the national measure (namely, the fact that the taxpayer does not benefit from a certain tax exemption) with an *advantage* of another kind, in *another* Member State: in its case-law, the Court has held that such broad cohesion cannot effectively justify taxation. [114] The case at issue is different. Cross-border investment and domestic investment are subject to different rules and regulations of the national legislature, some deriving from conventions, some arising autonomously from the national legal system. The distinguishing feature in the present case is the linkage between the fiscal advantages and disadvantages provided for in the legal system, considered as a whole, of *one and the same* Member State. The Netherlands does not extend the exemption provided for in Article 47b to dividends originating from Belgium because in the Netherlands those dividends have the advantage of a tax credit in accordance with Article 24(1) of the Convention.

114 — See end of footnote 72.

54. I would observe, moreover, that the fact that the Netherlands grants a tax credit corresponding to the deduction at source made in Belgium does not adversely affect the cohesion of the tax system concerned. From that point of view, fiscal cohesion is no longer claimed within the system of taxation itself, or on the basis of a strict correlation between the exemption from income tax and the subjection of the dividends to a corresponding tax, but rather by virtue of a different macro-economic balance, which is international and results from the bilateral regulation of the interests of the Contracting States as governed by conventions: '[f]iscal cohesion... is shifted to another level, that of the reciprocity of the rules applicable in the Contracting States'. [115] Although it is true that the obligation to grant a tax credit in respect of the deduction at source made by the other contracting State (Article 24(1) of the Convention) reduces the tax revenue of the Netherlands, it is equally true that that State is entitled to made a deduction at source from the dividends paid by Netherlands companies to shareholders residing in Belgium (Article 10(2) of the Convention).

55. That being said, it is now easier to see — taking into consideration all relevant provisions of the legal system in question, including the provisions of the aforesaid bilateral convention — how to classify the provision at issue in the main proceedings. I have already stated that Article 47b constitutes an obstacle to capital movements and is contrary to Article 1(1) of the Directive. However, that conclusion was based solely on the provisions of national law indicated by the Hoge Raad in its order for reference to the Court and the arguments submitted by the parties in the present proceedings. If, however, we take into consideration the conventions which *specifically* concern the circumstances in Mr Verkooijen's case, the national measure limiting the exemption under Article 47b to dividends distributed by Netherlands companies is no longer, in the eyes of Community law, a measure having the effect of dissuading Netherlands taxpayers from investing their capital in Belgium. For those who invest in shares in companies established in that State, the tax system of the Netherlands, considered as a whole, provides an even more effective solution than that introduced (ten years after the Convention was concluded) in the 'internal' case; moreover, Community law does not prohibit Member States from treating purely internal situations less favourably. [116] The Netherlands taxpayer wishing to invest his capital in shares with a view to collecting the corresponding dividends may thus choose between shares in companies established in Belgium (in which case he is assured so-called fiscal neutrality under the Convention, avoiding double taxation entirely) and shares in companies established in the Netherlands (in which case the effects of double taxation are simply miti-

115 — *Wielockx*, paragraph 24. The Ruding Report also held such reciprocity to be essential for imposing on Community Member States the obligation to grant to 'cross-border' dividends the advantages applicable to dividends of 'national' origin.

116 — See, for example, Case C-112/91 *Werner* [1993] ECR I-429 where the Court held that tax legalisation treating national citizens less favourably than foreigners (reverse discrimination) was compatible with Community law. See, more recently, *Asscher*, where the Court confirmed the compatibility with Community law of reverse discrimination measures, stating that, although the rules on freedom of establishment cannot be applied to situations which are purely internal, a Member State cannot interpret those rules in such a way as to exclude its own nationals from the benefit of Community law where those nationals are in an equivalent *situation* to that of other Community nationals enjoying the rights and liberties guaranteed by the Treaty (see paragraph 32).

gated, to a limited degree). In essence, therefore, the tax system of the Netherlands is distinguished by a sort of fiscal neutrality as regards investments in shares in Belgian and Netherlands companies. Considering the relevant legal framework in its entirety, I believe we can also rule out the aspect of discrimination referred to in point 18 above. The fact that the advantage provided for in Article 47b does not apply in respect of dividends distributed by companies established in another Member State is accounted for by the fact that the Convention establishes a particular system for that category of dividends: the two categories of dividends ('national' and 'cross-border') are not, therefore, in a comparable situation and the two advantages, concerning different situations, cannot be aggregated. [117]

(3) Freedom of establishment

56. In points 36 to 45, I explained the reasons why, in my view, in the light of national provisions alone, the provision at issue must be regarded as compatible with Article 52 of the Treaty. As for capital movements, however, a more comprehensive analysis encompassing the provisions of conventions described above leads me to reconsider my opinion on freedom of establishment. As I said, the 'cohesion' distinguishing the Netherlands tax system as a whole makes it 'neutral' in respect of the taxation of dividends for shareholders who are natural persons. It follows that such cohesion, or neutrality, also rules out the existence of any discrimination or restriction from the angle of freedom of establishment. Moreover, the fact that, as we have seen, 'cross-border' dividends enjoy truly privileged treatment compared with 'national' dividends has the effect of *encouraging* both capital movements between Member States and the exercise, in certain cases at least (see point 41(b) and (c)), of the right of establishment.

117 — My conclusions concerning the classification of the provision at issue are supported by those of the 1992 Ruding Report (already cited in footnote 32). That report recommends that Member States whose legal order provides for a form of tax advantage in respect of dividends paid by companies established in the Member State in question to those who are resident for tax purposes grant, on a reciprocal basis, an equivalent advantage in respect of dividends distributed by companies established in another Member State (see Chapter 10, Section III, in the part devoted to company tax regimes). In the absence of Community harmonisation, the Ruding Report claims that such a solution has the advantage of reducing to a minimum possible distortions. In the context of its bilateral relations with Belgium, the Netherlands grants an advantage on 'cross-border' dividends which is not equal to, but greater than that on 'national' dividends. Let me add that the provisions of the Convention are fully in line with the Commission's recommendations advocating a measure with less restrictive effects on capital movements, namely a tax credit for dividends originating in another Member State (see paragraph 29).

D — *Question 3*

57. By its third and last question, the Hoge Raad asks whether the answers to the first

two questions are likely to differ if the investor is an employee of a company controlled by the issuing company, who holds the shares giving rise to the dividends in the context of an employees' savings plan.

58. The parties which have submitted observations in these proceedings generally agree that that question must be answered in the negative, considering also that Article 47b does not lay down different rules depending on the type of taxpayer holding shares. That article does not distinguish between third-party investors and investors holding shares in the context of an employees' savings plan. As regards the first question for a preliminary ruling, which I have already considered, I share the position of the parties: the Treaty and the Directive guarantee the widest possible freedom as regards capital movements, [118] without any other conditions or distinctions based on the nature or characteristics of the person undertaking such a movement. The freedom in question must be understood as being guaranteed to *all* persons under the *same* conditions.

59. However, Mr Verkooijen submits an additional line of reasoning, concerning more specifically the object of the second question. He essentially takes the view that the limit introduced by Article 47b for the cases subject to the exemption has a negative influence on the professional mobility of employees, precisely because that provision excludes the application of the exemption to dividends distributed by the foreign companies employing them. That makes it more difficult for foreign companies to attract employees to the Netherlands. Foreign companies would be obliged to set up employees' participation schemes or employees' savings plans comparable to those which only companies established in the Netherlands can offer, and this would contribute to increasing the costs for a foreign company establishing a place of business in the Netherlands. While it is not my purpose to ignore the case-law of the Court according to which all restrictions, even minor, on freedom of establishment are contrary to Article 52 of the Treaty, [119] I believe, however, that the link between the provision at issue and the exercise of freedom of establishment in the Netherlands of companies with employees' savings plans comparable to that of Petrofina is too tenuous and indirect to have any intrinsic importance for the purposes of Article 52 of the Treaty. Even assuming it were sufficient to qualify as a restriction contrary to the article concerned, that link is not such as to alter my opinion on the second question, particularly as regards the existence of a valid justification for the restriction. Moreover, any restriction

118 — See *Bordessa*, paragraph 17, and *Brugnoni and Ruffinego*, paragraph 22 (although the latter judgment concerns a time when only certain capital movements had been liberalised, the findings of the Court concerning those capital movements are now generally applicable since the Directive brought about full liberalisation in this field).

119 — See the case-law referred to in point 17, especially in footnote 43.

would disappear in any event if the overall legal framework of reference also included provisions of conventions such as Articles 10 and 24 of the Double-Taxation Convention between Belgium and the Netherlands.

VI — Conclusion

60. In the light of the foregoing, I propose that the Court give the following answers to the questions submitted by the Hoge Raad:

(1) Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty and Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding the legislation of a Member State which makes the grant of an exemption from the income tax payable on dividends from shares subject to the condition that those dividends are paid by a company established in that Member State, unless the legislation in question is necessary to ensure the cohesion of the tax system. It is for the national court to establish whether that legislation goes further than is necessary to ensure the cohesion of the tax system.

However, where the Member State concerned has concluded a double-taxation convention containing provisions such as those in Articles 10 and 24 of the Convention concluded on 19 October 1990 between the Kingdom of Belgium and the Kingdom of the Netherlands, Article 1(1) of Directive 88/361 and Article 52 of the Treaty must be interpreted, solely as regards

capital movements and the exercise of freedom of establishment between contracting Member States, as not precluding national legislation such as that presently at issue.

(2) The answer under (1) is not affected by the fact that the recipient of the dividends is an employee of a company controlled by the issuing company, who acquired the shares in question in the context of an employees' savings plan set up by the company controlling the subsidiary.