OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 27 April 2006 [1]

I — Introduction

1. By the present preliminary reference, the French Conseil d'État (Council of State) asks whether it is contrary to Article 43 EC for a Member State to maintain a dividend taxation system whereby it almost fully exempts dividends distributed to domestic parent companies from tax in the hands of those parent companies, while it subjects outgoing dividends distributed to non-resident parent companies to double economic taxation, which is not in fact relieved by the application of the applicable Double Taxation Convention ('DTC').

2. As this case concerns a Member State's treatment of outgoing dividends, it raises again the issue of the scope of a source State's obligations under Article 43 EC. I have dealt with this issue in some detail in my Opinion in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation.* [2]

II — Legal framework

A — *French law in force at the relevant time*

3. Article 119*bis*(2) of the French General Tax Code (*Code général des impôts*, hereafter 'CGI') provided that the income referred to in Articles 108 to 117*bis* of the CGI — which includes income from shares — gave rise to the levying of withholding tax at the rate fixed in Article 187(1) of the CGI in the case of income benefiting persons with their fiscal residence or seat outside France. Article 187(1) of the CGI fixed the rate of this

1 — Original language: English.

2 — Opinion of 23 February 2006 in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation.*

withholding tax at 25%. However, certain DTCs provided for a reduced rate of withholding tax.

4. In the case of dividends distributed by a French subsidiary to a French parent company, no withholding tax was levied. Further, by Article 145(1) of the CGI, companies and other bodies subject to French company tax at the normal rate, due to the presence of their seat or an establishment in France, were eligible to fall under the so-called 'parent company' tax regime set out in Article 216 of the CGI. This article essentially provided, in the form relevant to the present case, that dividends giving right to application of the parent company regime and falling under Article 145 of the CGI were almost totally exempted from tax in the parent company's hands; such dividends were deducted from the parent company's total taxable profit, with the exception that a fixed 5% of the parent company's total income from the shares, including tax credits, was not deductible (representing fees and charges).

B — *The France-Netherlands Double Taxation Convention of 16 March 1973*

5. Article 10(1) of the France-Netherlands DTC provides that dividends paid by a company resident in one State to a resident of the other State are taxable in the latter State. However, Article 10(2) of the DTC provides that such dividends may be taxed in the State of residence of the company paying the dividends at a maximum of 5% of the gross dividend, if the beneficiary of the dividends is a joint-stock company ('*société par actions*') or a limited liability company ('*société à responsabilité limitée*') with a direct holding of at least 25% in the capital of the distributing company.

6. Article 24(1) of the France-Netherlands DTC provides that, in order to avoid double taxation, the Netherlands may in its tax base include income or wealth which, in conformity with the provisions of that DTC, is taxable in France. Article 24(3) of the DTC essentially provides that, as regards income included in the Netherlands tax base by virtue of Article 24(1), and taxable under, inter alia, Article 10(2) of the DTC, credit would be granted by the Netherlands for French withholding tax levied on French-source dividends, up to the amount of Netherlands tax otherwise due on these dividends.

III — Facts and procedure

7. Denkavit International BV is a Netherlands company with at the relevant time two French subsidiaries, Agro finances SARL, in which it owned a 99.9% shareholding, and Denkavit France SARL, in which it owned a 50% shareholding. The other 50% of the capital in Denkavit France was held by Agro Finance, meaning that Denkavit International controlled almost all of the capital of Agro Finance and Denkavit France. Over the years 1987 to 1989, these two companies paid dividends of 14.5 million French francs (FRF) to Denkavit International. In application of the combined provisions of French tax legislation and the France-Netherlands DTC, these dividends were subject to a 5% withholding tax.

8. Although it is not explicitly stated in the Order for Reference, it is accepted that, under Netherlands law, dividends incoming from a French subsidiary to a Netherlands parent company such as Denkavit International would have been exempted from Netherlands taxation in the parent company's hands.

9. Denkavit International and Denkavit France challenged the 5% French withholding tax before the French tax administration, on the ground that this infringed Article 43 EC as well as the non-discrimination clause contained in Article 25 of the France-Netherlands DTC.

10. Following dismissal of this challenge, the companies brought an action before the Tribunal Administratif (Administrative Court), Nantes (France) which, by judgment of 10 April 1997, upheld their claim on the ground that the imposition of the withholding tax breached Article 43 EC, and awarded restitution of this tax to them. The French Minister for the Economy, Finance and Industry appealed to the Cour Administrative d'Appel (Administrative Court of Appeal), Nantes, which annulled the judgment and confirmed the validity of the withholding tax imposed. Denkavit International and Denkavit France in turn appealed against this to the Conseil d'État which, by judgment of 15 December 2004, referred the following questions to the Court:

'(1) Is a measure that subjects to tax non-French-resident parent companies in receipt of dividends, but not French-resident parent companies in receipt of dividends, contrary to the freedom of establishment?

(2) Is such a measure imposing withholding tax in itself contrary to the principle of freedom of establishment, or, where a taxation treaty between France and another Member State authorises this withholding tax and provides for the possibility to impute it onto the tax due in this other Member State, should this treaty be taken into account in assessing

the compatibility of the measure with the principle of freedom of establishment?

(3) In the event that the second branch of the alternative presented in Question 2 is correct, does the existence of the abovementioned treaty mean that the contested measure should be viewed as a simple mechanism dividing the object of taxation between the two States concerned, with no effect on undertakings, or does the possibility that a non-French-resident parent company may not be able to carry out the imputation provided for by the treaty mean that the measure should be considered contrary to the principle of freedom of establishment?'

IV — Analysis

11. By way of preliminary remark, I note that the facts at issue in the present case arose between 1987 and 1989, that is to say, prior to the passing of Directive 90/435 EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the 'Parent-Subsidiary Directive'). [3] Article 5(1) of this Directive provided, in its original form, that profits which a subsidiary distributed to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax. [4] By Article 8, Member States were obliged to transpose the Directive into their national systems before 1 January 1992, i.e., after the facts giving rise to the present case. As a result, the Parent-Subsidiary Directive does not apply here.

12. Further, I note that, as at the relevant time Denkavit International controlled almost all of the capital of Agro Finance and Denkavit France, the case clearly falls for consideration for compatibility with Article 43 EC rather than Article 56 EC. As the Court has consistently held, a company established in one Member State with a holding in the capital of a company established in another Member State which gives it definite influence over the latter company's decisions and allows it to determine the latter company's activities is exercising its right of establishment. [5]

A — *On the first question*

13. By its first question, the national court asks whether a measure that subjects to tax

3 — Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6).

4 — This Article has been amended by Council Directive 2003/123/EC of 22 December 2003 amending Directive 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2004 L 7, p. 41).

5 — See Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22, and my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 27.

non-French-resident parent companies in receipt of dividends, but not French-resident parent companies in receipt of dividends, is contrary to the freedom of establishment.

14. In the context of the facts of the present case, the national court is essentially asking whether it is in principle contrary to Article 43 EC for France to impose a withholding tax on dividends paid by a French subsidiary to a Netherlands parent company, but not to impose any similar tax on dividends paid by a French subsidiary to a French parent company.

15. In answering this question, it is important for clarity of analysis to distinguish between the different levels of taxation that may in principle arise on distributed subsidiary profits. In the first place, such profits may be taxed in the hands of the subsidiary as corporation tax. In the second place, the profits may be taxed upon distribution at the shareholder (parent company) level, which may take the form of income taxation on the receipt of the dividends and/or withholding tax to be withheld by the distributing company.

16. The existence of these two possible levels of taxation may lead, on the one hand, to economic double taxation (taxation of the same income twice, in the hands of two different taxpayers) and, on the other hand, to juridical double taxation (taxation of the same income twice in the hands of the same taxpayer). Economic double taxation, where, for example, the same profits are taxed first in the hands of the company as corporation tax, and second in the hands of the shareholder as income tax. Juridical double taxation, where, for example, a shareholder suffers first withholding tax and then income tax, levied by different States, on the same profits.

17. In the present case, in the case of dividends distributed by French subsidiaries to French parent companies, the French system of dividend taxation provided almost full relief of economic double taxation on the dividends by subjecting them to tax only once — as corporation tax levied on the subsidiary's profits — and almost totally exempting them from a second level of taxation in the parent company's hands.

18. In the case of dividends distributed by French subsidiaries to Netherlands parent companies, however, the French system — viewed discretely and without taking into account the effect of the France-Netherlands DTC, as required by the terms of the national court's first question — subjected these dividends to economic double taxation,

in the first place as corporation tax on the subsidiary's profits, and in the second place in the hands of the parent company as withholding tax levied upon their distribution.

19. The question is whether such a difference in treatment amounts to unlawful discrimination between a French parent company and a Netherlands parent company contrary to Article 43 EC.

20. The Court has consistently held that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law. [6] As I observed in my Opinions in *Test Claimants in the ACT Group Litigation, Test Claimants in the FII Group Litigation*, and *Kerckhaert and Morres*, [7] Articles 43 EC and 56 EC are infringed in a case where the different treatment applied by the relevant Member State to its tax subjects is not a direct and logical consequence of the fact that, in the present state of development of Community law, different tax obligations for subjects can apply for cross-border situations than for purely internal situations. [8] This means in particular that, in order to fall under the free movement provisions of the Treaty, disadvantageous tax treatment should follow from direct or covert discrimination resulting from the rules of one jurisdiction, and not purely from disparities or the division of tax jurisdiction between two or more Member States' tax systems, or from the coexistence of national tax administrations. [9]

21. In the present case, the tax jurisdiction exercised by France over outgoing dividends distributed to Netherlands parent companies — as non-residents of France — is restricted to what is termed in international tax law 'source State' or territorial jurisdiction: that is to say, France has tax jurisdiction only over the income that is earned by the Netherlands parent company within the source State's jurisdiction.

22. As I explained in my Opinion in *Test Claimants in the ACT Group Litigation*, the nature of a source State's obligation under Article 43 EC is, in so far as it exercises tax jurisdiction over non-residents' income, to treat it in a comparable way to residents'

6 — See, for example, judgment of 13 December 2005 in Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29, and cases cited therein.

7 — See my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 32 onwards, my Opinion of 6 April 2006 in Case C-446/04 *Test Claimants in the FII Group Litigation*, point 37 onwards, and my Opinion of 6 April 2006 in Case C-513/04 *Kerckhaert and Morres*, points 18 and 19.

8 — See, for extended reasoning on this, points 31 to 54 of my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above.

9 — Ibid., point 55.

income — that is to say, an obligation not to discriminate between residents and non-residents in so far as the latter fall within their tax jurisdiction. [10] Thus, for example, the Court has held that in so far as a source State exercises tax jurisdiction over a foreign branch, it cannot impose a higher corporate tax rate on this branch than that applied to its own resident companies. [11] Likewise, tax benefits accorded to resident companies — including those granted pursuant to DTCs [12] — must be accorded in the same way to branches (permanent establishments) of non-resident companies if these branches are otherwise subject to corporation tax in the same way as resident companies. [13] Similarly, in so far as a source State chooses to relieve domestic economic double taxation for its residents, it must extend this relief to non-residents to the extent that similar domestic double economic taxation results from the exercise of its tax jurisdiction over these non-residents (for example, where the source State subjects company profits first to corporation tax and then to a second level of (income or withholding) tax upon distribution). This follows from the principle that tax benefits granted by the source State to non-residents should equal those granted to residents in so far as the source State otherwise exercises equal tax jurisdiction over both groups. [14]

23. Applying these principles to the present facts, the scenario raised by the national court in its first question is a clear-cut example of discrimination on the part of France between French parent companies (domestic dividends) and Netherlands parent companies (outgoing dividends). As I have explained, the French system at issue ensured almost full relief of economic double taxation of profits distributed by a French subsidiary to a French parent company (via exemption from taxation in the parent company's hands), but imposed economic double taxation on profits distributed by a French subsidiary to a Netherlands parent company (via a withholding tax on outgoing dividends). [15] Taken by itself, therefore, without consideration of the effect of applicable DTCs — which is raised in the national court's second and third questions — such treatment is quite patently discriminatory within the meaning of Article 43 EC: in effect, France imposed a higher tax burden on dividends outgoing to Netherlands parent companies than to 'domestic' dividends distributed to French parent companies.

10 — Ibid., points 66 to 73 and point 88.

11 — Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651.

12 — Case C-307/97 *Saint-Gobain* [1999] ECR I-6161.

13 — See Case C-270/83 *Commission* v *France* ('*Avoir Fiscal*') [1986] ECR 273, Case C-330/91 *Commerzbank* [1993] ECR I-4017, and Case C-250/95 *Futura* [1997] ECR I-2471.

14 — See cases cited in footnotes 12 and 13 above.

15 — Although it is not dealt with in the Order for Reference, it would seem that this is also the case for other non-French parent companies, although the precise level of withholding tax levied on outgoing dividends depended on the terms of the applicable DTC (if any).

24. It is true that, under Article 216(2) of the CGI, while dividends distributed to a French parent company were almost totally exempted from tax in the parent company's hands, a fixed 5% of the parent company's total income from the shares, including tax credits, was not deductible from the parent company's total taxable profits (representing fees and charges linked to the exempted dividend income). Although this had the effect that domestic dividend income was not completely exempted from economic double taxation — i.e. 5% of this income was included in the taxable profits of the French parent company — such dividend income still clearly benefited from a lower overall tax burden than outgoing dividends, which were, under Article 187(1) of the CGI and in the absence of an applicable DTC, subject to 25% withholding tax, and, in the case of outgoing dividends distributed to a Netherlands parent company, subject to a 5% withholding tax pursuant to the France-Netherlands DTC.

25. The French Government argues, however, that this difference in treatment does not amount to discrimination within the meaning of Article 43 EC, because, under the principle of territoriality, France — as the source State — is within its rights to tax dividends of a French subsidiary outgoing to a non-French parent company.

26. This argument is manifestly unconvincing. As I have explained in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, while, under Community law, the power to allocate tax jurisdiction lies purely with Member States — and the Court has on numerous occasions expressly accepted the compatibility with Community law of the basic distinction between home State and source State jurisdiction — in the exercise of such jurisdiction Member States must none the less comply with the prohibition on discrimination laid down in Articles 43 EC and 56 EC. [16]

27. The French Government also argue that, under international tax law, in principle relief of double taxation in a situation of cross-border income falls to the home State of the taxpayer — i.e., in the case of a Netherlands parent company, the Netherlands. Again, however, I find this argument wholly without merit. It is true that, as I have noted in my Opinion in *Kerckhaert and Morres*, in cases where juridical double taxation arises of cross-border income, it is in principle, under the 'source country entitlement' principle of international tax

16 — See, my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, points 51 and 52; Case C-265/04 *Bouanich* [2006] ECR I-923, paragraphs 49 and 50; Case C-376/03 *D* [2005] ECR I-5821, paragraph 28; Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 45; Case C-385/00 *De Groot* [2000] ECR I-11819, paragraph 93; Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 30 and 31; *Saint-Gobain*, footnote 12 above; *Futura*, footnote 13 above, paragraphs 20 and 21; and Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 57.

law, for the home State to choose whether and to what extent it wishes to relieve such double taxation. [17] This in no way alters the obligation of a source State to treat non-residents in a comparable manner to residents, in so far as the former fall within their tax jurisdiction.

28. As a final point, I would add that the French Government has not put forward any argument as to why such discriminatory treatment should be considered justified, on the ground, for example, of the need to prevent abuse of law [18] or the need to ensure fiscal cohesion of national tax systems, [19] nor is the existence of any such justification suggested by the terms of the Order for Reference.

29. As a result, the answer to the first question should be that a measure such as that at issue in the main proceedings, which subjects non-French-resident parent companies receiving dividends from French-resident subsidiaries to withholding tax on the dividends, but does not subject French-resident parent companies receiving dividends from French-resident subsidiaries to any tax on the dividends, is a discriminatory restriction of freedom of establishment contrary to Article 43 EC.

B — *On the second and third questions*

30. By its second question, the national court asks whether, where a DTC between France and another Member State authorises a withholding tax such as that referred to in Question 1, and provides for the possibility to impute it onto the tax due in this other Member State, this treaty should be taken into account in assessing the compatibility of the measure with Article 43 EC. By its third question, the national court asks whether, if the applicable DTC should indeed be taken into account, the possibility that a non-French-resident parent company may not in fact be able to carry out the imputation provided for by the treaty means that the measure should be considered contrary to Article 43 EC.

31. These questions, taken together, raise the relevance of the facts that (1) under Article 24(3) of the France-Netherlands DTC, the Netherlands was to grant credit for the 5% French withholding tax levied on French-source dividends, up to the amount of Netherlands tax otherwise due on these dividends; but (2) in fact, as the Netherlands

17 — See footnote 7 above, point 34 and onwards.

18 — See, for example, Case C-324/00 *Lankhorst-Hohorst* [2002] ECR I-11779, and Case C-264/96 *ICI* [1998] ECR I-4695.

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

exempted incoming French- (and other foreign-) source dividends from taxation in the hands of a Netherlands parent company, it did not grant any credit for the French withholding tax.

32. I will deal first with the principles for analysis of the relevance of the effect of DTCs to the assessment of Article 43 EC compatibility in a given case, followed by application of these principles to the present case.

1. Should the effect of DTCs be taken into account in assessing compatibility of national measures with Article 43 EC?

33. To begin, as I have already made clear in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, it is my view that the actual effect of a DTC on a taxpayer's situation should be taken into account in assessing whether, in a specific case, that taxpayer is discriminated against in a manner contrary to Article 43 EC. Appreciation of Member States' compliance with the Treaty free movement obligations should take into account the effect of DTCs for two important reasons. [20]

34. In the first place, this follows from the fact that, as I already observed, [21] under Community law Member States have freedom to apportion between themselves not only tax jurisdiction but also priority to taxation. At present, there are no alternative criteria to be found in Community law, and no basis for laying down any such criteria. Thus, in *Gilly*, after observing that allocating fiscal jurisdiction on the basis of nationality cannot as such be regarded as constituting discrimination, the Court recognised that this 'flows, in the absence of any unifying or harmonising measures adopted in the Community context under, in particular, the second indent of Article [293] of the Treaty, from the contracting parties' competence to define the criteria for allocating their powers of taxation as between themselves, with a view to eliminating double taxation. Nor, in the allocation of fiscal jurisdiction, is it unreasonable for the Member States to base their agreements on international practice and the model convention drawn up by the OECD ...'. [22] The Court has confirmed this reasoning in, inter alia, its *D* judgment. [23]

35. This means that, for example, it is in principle open to a source State which imposes double economic taxation on dividends to ensure, by a DTCs and following

20 — See point 71 of my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above.

21 — See my Opinions in *Kerckhaert and Morres*, footnote 7 above, points 32 to 33, and in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 52.

22 — *Gilly*, footnote 16 above, paragraphs 30 and 31. See, also, *Saint-Gobain*, footnote 12 above, paragraph 57.

23 — See *D*, footnote 16 above, paragraphs 50 to 53.

inter-state negotiations, that this will be relieved by the home State.

36. In the second place, if the effect of the DTC in an individual case were not taken into account, this would ignore the economic reality of that taxable subject's activity and incentives in a cross-border context. Put otherwise, it could distort the real effect on that taxpayer of the combination of home and source State obligations.

37. Rather, as I observed in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, the combination of home state and source State obligations under the free movement provisions should properly be seen as a whole, or as achieving a type of equilibrium. Examination of the situation of an individual economic operator in the framework of just one of these States — without taking into account the Article 43 EC obligations of the other State — may give an unbalanced and misleading impression, and may fail to capture the economic reality in which that operator is acting. [24]

24 — *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 72.

38. This type of approach was adopted, for example, by the Court in its judgment in *Bouanich*. [25] That case concerned the compatibility with Article 56 EC of Swedish legislation providing that a payment in respect of a share repurchase to a non-resident shareholder in connection with a reduction in share capital was taxed as a dividend without there being a right to deduct the cost of acquisition of those shares, whereas the same payment made to a resident shareholder was taxed as a capital gain with a right to deduct the cost of acquisition. The Court held that, looked at on its own and without taking into account the applicable DTC, this legislation was clearly discriminatory. However, where on the facts of the proceedings before it the national court found that the effect of the applicable DTC [26] was that non-residents in reality were treated no less favourably than residents, there was no breach of Article 56 EC. The Court reasoned:

'Since the tax system under the Franco-Swedish agreement, as interpreted in the light of the commentaries on the OECD Model Tax Convention, forms part of the legal background to the main proceedings and has been presented as such by the national court, the Court of Justice must take

25 — See footnote 16 above, paragraph 51.

26 — In that case, the France-Sweden DTC, which fixed a lower ceiling on the taxation of dividends for non-resident shareholders than for resident shareholders, and, by interpreting that agreement in the light of the OECD's commentaries on its applicable model convention, permitted the nominal value of such shares to be deducted from the share repurchase payment.

it into account in order to give an interpretation of Community law that is relevant to the national court ... '. [27]

39. I respectfully concur with the Court's conclusion. [28]

40. It follows from the above that it is in principle open to a Member State to ensure the fulfilment of its obligations under the Treaty free movement provisions by means of provisions contained in a DTC. Thus, taking the example of a source State imposing domestic economic double taxation on its non-residents in the same way as on its residents, it is in my opinion in principle open to that source State to ensure that its non-residents receive the same double taxation relief as its residents by virtue of a DTC.

41. However, as I also pointed out in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, this principle is subject to two vital qualifications.

42. First, the treatment granted to non-residents under the applicable DTC must, in its actual effect, be equivalent to that granted to residents. In *Bouanich*, the Court rightly in my view held that it was for the national court to determine, on the facts of a given case, whether non-resident shareholders were in reality treated no less favourably than resident shareholders, taking account of the effect of the DTC. [29] I came to a similar conclusion on the facts of the case in *Test Claimants in Class IV of the ACT Group Litigation*, reasoning that, in cases where under certain DTCs the United Kingdom of Great Britain and Northern Ireland imposed economic double taxation on outgoing dividends in the form of UK income

27 — See footnote 16 above, paragraph 51.

28 — I note, as I observed in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, at point 83, that a different approach was taken by the EFTA Court in its *Fokus Bank* judgment (Case E-1/04 *Fokus Bank* v *The Norwegian State*, judgment of 23 November 2004). That case raised, inter alia, the compatibility with the free movement of capital (Article 40 of the EEA Agreement, equivalent to Article 56 EC) of Norwegian rules whereby Norway subjected company profits first to corporation tax and upon distribution, (1) in the case of residents, income tax. However, a full imputation tax credit was granted to resident shareholders to relieve economic double taxation of dividends; (2) in the case of non-residents, 15% withholding tax. However, by the relevant DTC in that case, this 15% was credited against tax imposed in the home State. In holding this rule to infringe the principle of free movement of capital, the EFTA Court equated taxation of outbound dividends (source State taxation) with inbound dividends (home State taxation), relying on the Court's judgments in *Lenz* and *Manninen* (paragraph 30), and reasoned that a source State could in principle not rely on the provisions of a DTC to remedy economic double taxation caused by that source State (paragraph 37). For the reasons explained above and in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, I do not concur with this analysis.

29 — See footnote 16 above, paragraphs 54 to 56.

tax liability, it was for the UK to ensure — via a DTC or otherwise — that those non-residents received equivalent treatment (in that case, equivalent economic double taxation relief) as residents who were subject to the same UK income tax liability. [30]

43. Second, the burden rests on the Member State whose measures are prima facie — without taking the applicable DTC into account — discriminatory to ensure that a non-discriminatory result has in fact been achieved by virtue of the DTC. In other words, it is clearly no defence to an action for breach of the Treaty prohibition provisions to argue that the other Contracting State to the DTC was in breach of its DTC obligations by failing, for example, to grant the relevant tax benefit or to relieve the relevant economic double taxation. Rather, as I observed in my Opinion in *Kerckhaert and Morres*, assessment of the compatibility of a Contracting Party's national law with the applicable DTC, and the potential effects of a breach under national law, is purely a matter for the relevant national court. [31] Inversely, the fact that a Member State's legislation may be in accordance with, or required by, the terms of the applicable DTC does not in itself mean that such conduct accords with the Treaty free movement provisions: the Court has consistently held that, in exercising their power of taxation as allocated by DTCs, Member States must none the less abide by the prohibition on discrimination contained in Articles 43 EC and 56 EC. [32] Thus, as I concluded in my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, in that case it formed in my view part of the UK's Article 43 EC obligation to ensure that the Claimant non-UK-residents had, via a DTC, received equivalent treatment to UK residents subject to equivalent UK double economic taxation, and it would be no defence for the UK to argue that another Contracting Party had been in breach of its DTC obligations by failing to relieve the relevant economic double taxation. [33]

2. Application of these principles to the present case

44. Applying these principles to the present case, it is my view that, if the effect of the France-Netherlands DTC had been that the

30 — *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 88.

31 — See footnote 7 above, point 38. See also, by analogy, the Opinion of Advocate General Ruiz-Jarabo Colomer in *Gilly*, footnote 16 above, point 25, observing that the Court cannot give a ruling on the compatibility with Community law of the provisions of a DTC, nor can it undertake to interpret such provisions, as part of 'a bilateral convention on a matter which is outside the Community's competence and which is regulated exclusively by the Member States.'

32 — Ibid. See also, for example, the conclusion of the Court in its judgment in *Bouanich*, footnote 16 above, paragraph 56, and the judgments of the Court in *De Groot*, footnote 16 above, paragraphs 93 and 94, and *Saint-Gobain*, footnote 12 above, paragraphs 57 and 58.

33 — *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, point 89.

relief granted to Netherlands parent companies for the French-imposed economic double taxation imposed on French-source dividends was in fact equivalent to that enjoyed by French parent companies receiving French-source dividends, France should be considered to have complied with its Article 43 EC obligations.

45. From the terms of the Order for Reference, however, it is evident that this was not the case.

46. In fact, as the Netherlands exempted foreign-source dividends incoming to Netherlands parent companies, incoming French-source dividends were not in reality subject to any Netherlands tax liability against which the 5% French withholding tax could be set. Moreover, this result seems to me to have been fully in accordance with the division of tax jurisdiction as set out in Article 24 of the France-Netherlands DTC. As provided by Article 24(1) of this DTC, it was open to the Netherlands to include in its tax base income or wealth which, in conformity with the provisions of that DTC, was taxable in France. Only in cases where the Netherlands had chosen to include such income in its tax base was it subject to the Article 24(3) DTC obligation to grant credit for French withholding tax levied on French-source dividends, and then only up to the amount of Netherlands tax otherwise due on these dividends.

47. The ultimate choice taken by the Netherlands was, however, to exempt incoming French-source dividends from taxation in Netherlands parent companies' hands. To my mind, this shows that the Netherlands had chosen not to include such dividends in its tax base and, as a result, the obligation to credit French withholding tax did not arise. In any event, such an obligation was limited to credit up to the amount of Netherlands tax that would otherwise have been due on the dividends — in the present case, this amount was zero.

48. The result was that French-source dividends distributed to Netherlands parent companies remained subject to the French-imposed double 'layer' of tax (corporation tax in the French subsidiary's hands followed by withholding tax in the Netherlands parent company's hands): economic double taxation was wholly unrelieved. In contrast, French-source dividends distributed to French parent companies were effectively subject to only one tax layer (corporation tax in the subsidiary's hands) — almost full relief of economic double taxation.

49. For the reasons I set out above in my answer to Question 1, this is clearly discriminatory and contrary to Article 43 EC.

50. Although not directly relevant to the present case, I would add that, for the reasons that I have explained above, it is my view that even had the Netherlands been in breach of its DTC obligations in failing to accord credit for French withholding tax levied, this would not be sufficient defence for France against a claim that its discriminatory tax provisions breached Article 43 EC. [34]

51. In its defence, the French Government has argued that any restrictive effects of its legislation, due to the inability in fact for Netherlands parent companies to impute French withholding tax against Netherlands tax levied, should not be seen as flowing directly from the French legislation, but rather from the disparities existing between the French and Netherlands tax systems. It should be clear from the above, however, that this argument fails to grasp the distinction between mere disparities between discrete (non-discriminatory) national tax systems — which fall outside the scope of Article 43 EC [35] — and discriminatory treatment resulting from the rules of just one jurisdiction, which contravene Article 43 EC unless justified. As the double economic taxation in the present case is imposed purely by France, it quite evidently falls into the latter category.

52. For these reasons, the answer to the national court's second and third questions should in my view be that, in principle, the actual effect of a DTC on a taxpayer's situation should be taken into account in assessing whether, in a specific case, that taxpayer is discriminated against in a manner contrary to Article 43 EC. By failing to ensure that, in fact, a non-French parent company receiving French-source dividends received relief for French-imposed double economic taxation equivalent to that received by a French parent company, whether pursuant to the applicable DTC or otherwise, France is in breach of Article 43 EC.

34 — See point 43 above.

35 — See my Opinion in *Test Claimants in Class IV of the ACT Group Litigation*, footnote 2 above, points 43 to 47.

V — Conclusion

53. For these reasons, I am of the view that the Court should give the following response to the questions referred by the Conseil d'État:

(1) A measure which subjects non-French-resident parent companies receiving dividends from French-resident subsidiaries to withholding tax on the dividends, but does not subject French-resident parent companies receiving dividends from French-resident subsidiaries to any tax on the dividends, is a discriminatory restriction of freedom of establishment contrary to Article 43 EC.

(2) In principle, the actual effect of a DTC on a taxpayer's situation should be taken into account in assessing whether, in a specific case, that taxpayer is discriminated against in a manner contrary to Article 43 EC. By failing to ensure that, in fact, a non-French parent company receiving French-source dividends received relief for French-imposed double economic taxation equivalent to that received by a French parent company, whether pursuant to the applicable DTC or otherwise, France is in breach of Article 43 EC.