Reports of Cases

OPINION OF ADVOCATE GENERAL
RANTOS
delivered on 30 September 2021 [1]

Case C-257/20

'Viva Telecom Bulgaria' EOOD
v
Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' – Sofia,
intervener:
Varhovna administrativna prokuratura na Republika Bulgaria

(Request for a preliminary ruling from the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria))

(Reference for a preliminary ruling – Direct taxation – Common system of taxation applicable to interest and royalty payments made between associated companies of different Member States – Article 63 TFEU – Free movement of capital – Article 49 TFEU – Freedom of establishment – Directive 2003/49/EC – Exclusion of payments as interest or royalties – Interest-free loan payments – Directive 2011/96/EU – Directive 2008/7/EC – Arm's length principle – Withholding tax on unpaid interest – Tax evasion, tax avoidance and abuse)

I. Introduction

1. The present case is concerned with whether EU law precludes tax legislation of a Member State which, pursuant to the 'arm's length principle' and in order to combat tax avoidance, provides for the taxation in the form of withholding tax of notional interest that a resident subsidiary which has been granted an interest-free loan by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions. In so doing, this case raises an issue with which the Court is already familiar, namely the compatibility with the free movement provisions of national 'anti-abuse' legislation in the field of direct tax.

2. This request for a preliminary ruling has been made in Bulgarian tax proceedings concerning an interest-free loan convertible into a capital contribution granted to a company established in Bulgaria, Viva Telecom Bulgaria ('the applicant'), by its sole shareholder, a company established in Luxembourg, InterV Investment Sàrl ('InterV Investment').

3. This case will require the Court to rule on the compatibility of national tax legislation intended to combat fraud with primary and secondary EU law in the very sensitive area of the taxation of intra-group transactions within the European Union.

[1] Original language: French.

II. Legal context

A. EU law

1. Accession of the Republic of Bulgaria to the European Union

4. Article 20 of the Protocol concerning the conditions and arrangements for admission of the Republic of Bulgaria and Romania to the European Union [2] and Article 23 of the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded, [3] concerning transitional measures, provide that the measures listed in Annexes VI to that protocol and that act are to apply to the Republic of Bulgaria under the conditions laid down in those annexes.

5. Those annexes, entitled, respectively, 'List referred to in Article 20 of the Protocol: transitional measures, Bulgaria' and 'List referred to in Article 23 of the Act of Accession: Transitional provisions, Bulgaria', refer, in point 3 of Section 6, entitled 'Taxation', to Directive 2003/49/EC, [4] as amended by Directive 2004/76/EC, [5] and read as follows:

'Bulgaria shall be authorised not to apply the provisions of Article 1 of [Directive 2003/49] until 31 December 2014. During that transitional period, the rate of tax on payments of interest or royalties made to an associated company of another Member State or to a permanent establishment situated in another Member State of an associated company of a Member State must not exceed 10% until 31 December 2010 and must not exceed 5% for the following years until 31 December 2014.'

2. Directive 2003/49

6. Recitals 2 and 4 of Directive 2003/49 are worded as follows:

'(2) This requirement is not currently met as regards interest and royalty payments; national tax laws coupled, where applicable, with bilateral or multilateral agreements may not always ensure that double taxation is eliminated, and their application often entails burdensome administrative formalities and cash-flow problems for the companies concerned.

…

(4) The abolition of taxation on interest and royalty payments in the Member State where they arise, whether collected by deduction at source or by assessment, is the most appropriate means of eliminating the aforementioned formalities and problems and of ensuring the equality of tax treatment as between national and cross-border transactions; it is particularly necessary to abolish such taxes in respect of such payments made between associated companies of different Member States as well as between permanent establishments of such companies.'

[2] OJ 2005 L 157, p. 29.

[3] OJ 2005 L 157, p. 203; 'Act of Accession'.

[4] Council Directive of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

[5] Council Directive of 29 April 2004 amending Directive 2003/49 (OJ 2004 L 157, p. 106).

7. Article 1 of that directive, entitled 'Scope and procedure', provides:

'1. Interest or royalty payments arising in a Member State shall be exempt from any taxes imposed on those payments in that State, whether by deduction at source or by assessment, provided that the beneficial owner of the interest or royalties is a company of another Member State or a permanent establishment situated in another Member State of a company of a Member State.

2. A payment made by a company of a Member State or by a permanent establishment situated in another Member State shall be deemed to arise in that Member State, hereafter referred to as the "source State".

…

4. A company of a Member State shall be treated as the beneficial owner of interest or royalties only if it receives those payments for its own benefit and not as an intermediary, such as an agent, trustee or authorised signatory, for some other person.

…'

8. Article 2 of Directive 2003/49, entitled 'Definition of interest and royalties', states, in paragraph (a):

'For the purpose of this Directive:

(a) the term "interest" means income from debt-claims of every kind, whether or not secured by mortgage and whether or not carrying a right to participate in the debtor's profits, and in particular, income from securities and income from bonds or debentures, including premiums and prizes attaching to such securities, bonds or debentures; penalty charges for late payment shall not be regarded as interest;'

9. Article 4 of that directive, entitled 'Exclusion of payments as interest or royalties', states:

'1. The source State shall not be obliged to ensure the benefits of this Directive in the following cases:

(a) payments which are treated as a distribution of profits or as a repayment of capital under the law of the source State;

…

(d) payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue.

2. Where, by reason of a special relationship between the payer and the beneficial owner of interest or royalties, or between one of them and some other person, the amount of the interest or royalties exceeds the amount which would have been agreed by the payer and the beneficial owner in the absence of such a relationship, the provisions of this Directive shall apply only to the latter amount, if any.'

10. Article 5 of Directive 2003/49, entitled 'Fraud and abuse', provides:

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

2. Member States may, in the case of transactions for which the principal motive or one of the principal motives is tax evasion, tax avoidance or abuse, withdraw the benefits of this Directive or refuse to apply this Directive.'

3. Directive 2008/7/EC

11. Article 3 of Directive 2008/7/EC,[6] entitled 'Contributions of capital', provides:

'For the purposes of this Directive and subject to Article 4, the following transactions shall be considered to be "contributions of capital":

…

(h) an increase in the assets of a capital company through the provision of services by a member which does not entail an increase in the company's capital, but which does result in a variation in the rights in the company or which may increase the value of the company's shares;

(i) a loan taken up by a capital company, if the creditor is entitled to a share in the profits of the company;

(j) a loan taken up by a capital company with a member or a member's spouse or child, or a loan taken up with a third party, if it is guaranteed by a member, on condition that such loans have the same function as an increase in the company's capital.'

12. Article 5 of that directive, entitled 'Transactions not subject to indirect tax', provides, in paragraph 1:

'Member States shall not subject capital companies to any form of indirect tax whatsoever in respect of the following:

(a) contributions of capital;

(b) loans, or the provision of services, occurring as part of contributions of capital;

…'

[6] Council Directive of 12 February 2008 concerning indirect taxes on the raising of capital (OJ 2008 L 46, p. 11).

4. Directive 2011/96/EU

13. Recitals 3 to 5 of Directive 2011/96/EU[7] are worded as follows:

'(3) The objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.

(4) The grouping together of companies of different Member States may be necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market. Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

(5) Such grouping together may result in the formation of groups of parent companies and subsidiaries.'

14. Under Article 1 of that directive:

'1. Each Member State shall apply this Directive:

…

(b) to distributions of profits by companies of that Member State to companies of other Member States of which they are subsidiaries;

…

2. Member States shall not grant the benefits of this Directive to an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of this Directive, are not genuine having regard to all relevant facts and circumstances.

An arrangement may comprise more than one step or part.

3. For the purposes of paragraph 2, an arrangement or a series of arrangements shall be regarded as not genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

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

[7] Council Directive of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 2011 L 345, p. 8), as amended by Council Directive (EU) 2015/121 of 27 January 2015 (OJ 2015 L 21, p. 1) ('Directive 2011/96').

15. Article 5 of that directive states:

'Profits which a subsidiary distributes to its parent company shall be exempt from withholding tax.'

B. Bulgarian law

16. Article 1(4) of the Zakon za korporativnoto podohodno oblagane (Law on corporation tax) [8] ('the ZKPO') provides:

'This law governs the taxation of income falling within its scope received in the Republic of Bulgaria by resident or non-resident legal persons.'

17. Under Article 5 of the ZKPO:

'1. Profits shall be subject to corporation tax.

2. The income of resident or non-resident legal persons falling within the scope of this law shall be subject to a tax that is deducted at source.'

18. Article 12(5) of the ZKPO states:

'The following income shall be deemed to be from a domestic source where it is received by resident legal persons, resident individual traders or non-resident legal persons or non-resident individual traders by means of a permanent establishment or a specific place of business on domestic territory, or where it is paid to non-resident legal persons by resident natural persons or by non-resident natural persons with a specific place of business:

(1) interest, including interest incorporated into lease repayments.

…'

19. Article 16 of the ZKPO, entitled 'Tax avoidance', provides:

'1. (… in force from 1 January 2010) Where one or more transactions, including between unrelated persons, are concluded on terms that give rise to tax avoidance, those transactions, certain of their terms and their legal form shall be disregarded for the purpose of determining the basis of assessment, and the basis of assessment that would be obtained if a similar transaction were carried out in the normal course of business at arm's length and which is designed to achieve the same financial result without giving rise to tax avoidance shall apply.

2. The following shall also be regarded as tax avoidance:

…

[8] DV No 105 of 22 December 2006.

(3) Borrowing or lending at an interest rate that diverges from the market interest rate at the time of conclusion of the transaction, including interest-free loans or other temporary financial assistance provided free of charge and the cancellation of loans or the repayment of non-business loans on one's own account;

…'

20. Article 20 of the ZKPO, entitled 'Tax rate', provides:

'The rate of corporation tax shall be 10%.'

21. Part three of the ZKPO, entitled 'Withholding tax', includes, inter alia, Articles 195 to 202a.

22. Article 195 of the ZKPO, entitled 'Withholding tax in respect of non-residents', provides:

'1. (… in force from 1 January 2011) Income received by non-resident legal persons from domestic sources … shall be subject to a withholding tax which extinguishes the tax debt.

2. The withholding tax provided for in paragraph 1 shall be retained by resident legal persons … paying income to non-resident legal persons …

…

6. The following shall not be subject to withholding tax:

…

(3) (… in force from 1 January 2015) Income deriving from interest, copyright royalties and licence fees, under the conditions laid down in paragraphs 7 to 12;

…

7. (… in force from 1 January 2015) Income deriving from interest, copyright royalties and licence fees shall not be subject to withholding tax where the following conditions are satisfied simultaneously:

…

11. (… in force from 1 January 2015) Paragraphs 7, 8, 9 and 10 shall not apply to:

(1) income constituting a distribution of profits or a repayment of capital;

…

(4) income from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue of the debt;

…

(7) income from transactions for which the principal reason or one of the principal reasons is tax avoidance or tax elimination.'

23. Article 199 of the ZKPO, entitled 'Basis of assessment for withholding tax on non-residents' income', states, in paragraph 1:

'The basis of assessment for determining withholding tax on the income referred to in Article 195(1) shall be the gross amount of that income …'

24. Article 200 of the ZKPO, entitled 'Tax rate', provided, in paragraph 2, in the version in force from 1 January 2011:

'… The rate of income tax referred to in Article 195 shall be 10%, except in the cases referred to in Article 200a.'

25. With effect from 1 January 2015, that provision was amended to read as follows:

'… The rate of income tax referred to in Article 195 shall be 10%.'

26. Article 200a of the ZKPO, in the version in force from 1 January 2011, as amended and supplemented as of 1 January 2014, provided, until its repeal with effect from 1 January 2015:

'1. The rate of tax on income from interest, copyright royalties and licence fees shall be 5% where the following conditions are satisfied simultaneously;

…

5. Paragraphs 1 to 4 shall not apply to:

(1) income constituting a distribution of profits or a repayment of capital;

…

(4) income from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue of the debt;

…'

27. Article 202a, entitled 'Recalculation of withholding tax', in the version in force from 1 January 2010, provides, in paragraphs 1 to 4:[9]

'1. … A non-resident legal person which is resident for tax purposes in a Member State of the European Union or in another State of the European Economic Area shall be entitled to opt for the recalculation of withholding tax in respect of the income referred to in Article 12(2), (3), (5) and (8). Where the non-resident opts for the recalculation of withholding tax, that recalculation shall include all the income referred to in Article 12(2), (3), (5) and (8) which the non-resident has received during the financial year.

[9] The wording of that provision was not supplied by the referring court, but by the tax authorities (in part) and the Bulgarian Government (in full) in their written observations.

2. Where the non-resident opts for the recalculation of withholding tax in respect of the income which it receives, the recalculated tax shall be equivalent to the corporation tax which would have been payable on that income if it had been received by a resident legal person. Where the non-resident has incurred expenditure related to income within the meaning of the first sentence on which expenditure tax would have been payable if such expenditure had been incurred by a resident legal person, the amount of recalculated tax shall be increased by that tax.

3. Where the amount of the withholding tax provided for in Article 195(1) exceeds the amount of tax recalculated in accordance with paragraph 2, the difference shall be repaid up to the amount of the withholding tax provided for in Article 195(1), which may not be deducted by the non-resident from the tax payable in the State of residence.

4. The annual tax return filed shall indicate whether the option for the recalculation of withholding tax was exercised. The non-resident shall file its tax return at the Teritorialna direktsia na Natsionalna agentsia za prihodite – Sofia [Regional Directorate of the National Revenue Agency for the City of Sofia, Bulgaria] by 31 December of the year following that in which the income was received.'

III. The dispute in the main proceedings, the questions referred and the procedure before the Court

28. On 22 November 2013, the applicant, as borrower, concluded a loan agreement with its sole shareholder, InterV Investment, in which the latter, as lender, granted it an interest-free convertible loan scheduled to mature 60 years after the date of entry into force of that agreement ('the loan at issue'). Under that agreement, the borrower's obligation to repay the loan would be extinguished at any time after the date of disbursement if the borrower decided to make a contribution in kind of the outstanding amount of the loan to its capital.

29. By decision of 16 October 2017, the Teritorialna direktsia na Natsionalnata agentive za prihodite (Regional Directorate of the National Revenue Agency, Bulgaria) ('the tax authorities') made a tax adjustment in respect of the applicant, ordering it, under Article 195(2) of the ZKPO, to pay withholding tax on certain interest income paid to InterV Investment, concerning the period from 14 February 2014 to 31 March 2015.

30. Having established that, at the time of the tax inspection, the loan at issue had not been converted into capital [10] and the borrower had neither repaid that loan nor paid interest, the tax authorities found that there was a transaction giving rise to 'tax avoidance' within the meaning of Article 16(2), point 3, of the ZKPO, which classifies borrowing or lending at an interest rate that diverges from the market interest rate at the time of conclusion of the transaction, including interest-free loans, as tax avoidance. In its decision, the tax authorities determined the market interest rate to be applied to the loan in order to calculate the interest not paid by the borrower before imposing withholding tax on that interest at a rate of 10%.

31. By judgment of 29 March 2019, the Administrativen sad Sofia (Administrative Court, Sofia, Bulgaria), hearing an action brought by the applicant challenging the legality of the contested decision, dismissed that action on the ground that the loan at issue was a financial asset of that company which generated a profit as a result of the non-payment of interest, whereas the lender

[10] That conversion took place on 31 October 2018.

had, for its part, suffered economic loss as a result of the non-collection of that interest. According to that court, the amount borrowed was used to repay a number of the borrower's financial obligations as set out in the loan agreement and was not therefore part of its equity.

32. The applicant brought an appeal on a point of law before the referring court, the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria), seeking to have that judgment set aside.

33. In support of its appeal, the applicant claimed that the withholding tax was levied on notional interest income without taking account of the proven existence of a commercial interest in granting an interest-free loan. It also maintained that it did not have the funds to pay interest on the loan at issue and that InterV Investment was the sole owner of the capital on the date of conclusion of the loan agreement. Furthermore, it submitted that Article 16(2), point 3, of the ZKPO was contrary to the case-law of the Court as it denies parties to an interest-free loan the opportunity to prove that there were sound economic reasons for the grant of the loan.

34. In the alternative, the applicant argued that since the Republic of Bulgaria had exercised the option referred to in Article 4(1)(d) of Directive 2003/49, allowing Member States to exclude from the scope of that directive interest on loans which they treat for tax purposes as income from capital instruments, Directive 2011/96, which concerns income of that type, is applicable. Under Article 5 of that directive, profits which a resident subsidiary distributes to its non-resident parent company are to be exempt from withholding tax. The applicant also added that the loan at issue was a contribution of capital within the meaning of Article 3(h) to (j) of Directive 2008/7, which, in accordance with Article 5 thereof, should not be subject to any indirect tax.

35. In those circumstances, the Varhoven administrativen sad (Supreme Administrative Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does national legislation such as that enacted in Article 16(2), point 3, of [the ZKPO] conflict with the principle of proportionality enshrined in Article 5(4) and Article 12(b) [TEU] and the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter of Fundamental Rights of the European Union [("the Charter")]?

(2) Are interest payments in accordance with Article 4(1)(d) of Directive [2003/49] profit distributions to which Article 5 of Directive [2011/96] applies?

(3) Does the rule laid down in Article 1(1)(b) and (3) and Article 5 of Directive [2011/96] apply to payments pursuant to an interest-free loan, which becomes due 60 years after the loan contract was entered into, and which is covered by Article 4(1)(d) of Directive [2003/49]?

(4) Does national legislation such as that enacted in Article 195(1)[,] Article 200(2) … and Article 200a(1) and (5), point 4, of the ZKPO (repealed), as amended, which applied from 1 January 2011 to 1 January 2015, and Article 195(1), (6), point 3, and (11), point 4, of the ZKPO, as amended on 1 January 2015, and a taxation practice according to which unpaid interest on an interest-free 60-year loan granted on 22 November 2013 to a resident subsidiary by a parent company registered in a different Member State is subject to withholding tax conflict with Article 49 and Article 63(1) and (2) [TFEU], Article 1(1)(b) and (3) and Article 5 of Directive [2011/96] and Article 4(1)(d) of Directive [2003/49]?

(5) Does national legislation such as that enacted in Article 16(1) and (2), point 3, and Article 195(1) of the ZKPO on the taxation at source of fictitious interest income on an interest-free loan granted to a resident company by a company in another Member State which is the borrower's sole shareholder conflict with Article [3(h) to (j)], Article 5(1)(a) and (b), Article 7(1) and Article 8 of [Directive 2008/7]?

(6) Does the transposition of Directive [2003/49] in Article 200(2) and Article 200a(1) and (5), point 4, of the ZKPO in 2011, that is prior to expiry of the transposition period laid down in point 3 of the section on taxation in Annex VI to the Act [of Accession], which sets a tax rate of 10% rather than the maximum rate of 5% prescribed in the Act [of Accession] and the Protocol [for Admission], infringe the principles of legal certainty and legitimate expectation?'

36. Written observations were lodged by the applicant, the tax authorities, the Bulgarian Government and the European Commission. Those parties also presented oral argument at the hearing on 30 June 2021.

IV. Analysis

A. Preliminary remarks

37. By its six questions, the referring court asks, in essence, whether a withholding tax is contrary, first, to primary EU law stemming from Article 5(4) and Article 12(b) TEU, Article 47 of the Charter and Articles 49 and 63 TFEU (questions 1 and 4) and/or, secondly, to secondary EU law resulting from Directive 2003/49 (questions 2, 3, 4 and 6), Directive 2011/96 (questions 2, 3 and 4) and Directive 2008/7 (question 5).

38. Before conducting the legal analysis of the questions submitted by the referring court, the following preliminary remarks should be made.

1. Fiscal sovereignty of the Member States and EU law

39. I note that, according to the Court's case-law, although direct taxation falls within the competence of the Member States and there is no requirement for a harmonised approach to that taxation, Member States must nonetheless exercise that competence consistently with EU law. [11] That case-law also acknowledges that the provisions relating to the freedoms laid down in the Treaties are capable of limiting Member States' rights to determine the conditions and manner in which tax is to be levied on the income of nationals of other Member States arising from an activity in the territory of the Member State of taxation. [12]

[11] See judgments of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 21), and of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 29).

[12] See judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 24).

40. It should also be noted that although the Member States have autonomy in relation to establishing fraud, the Court has found that, in order for national legislation to be regarded as seeking to prevent fraud and abuse, its specific purpose must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage. [13]

2. International tax practice and EU law

(a) Anti-abuse provisions

41. The goal of eliminating double taxation without creating opportunities for non-taxation or reduced taxation through tax avoidance or tax evasion – particularly through treaty shopping – is a fiscal policy objective pursued at international level.

42. That is especially evident in the context of international tax conventions containing 'anti-abuse' provisions, which seek to preclude, in the event of fraud or abuse, the application of provisions conferring rights on the taxpayer. Such clauses are found both in EU law and in the domestic legal order of several Member States, as the present case demonstrates.

43. I note, in that regard, that the Court has consistently held that a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned. [14]

44. I would also point out that Directives 2003/49 and 2011/96, which are the subject of the questions referred for a preliminary ruling, have the common objective of preventing tax avoidance and enable Member States not only to take the measures necessary to prevent fraud of that kind, but also to withdraw the benefits of those directives or to refuse to apply them in the event of fraud or abuse.

(b) The arm's length principle

45. The 'arm's length principle' – which is found inter alia in Article 9 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention, [15] an instrument that reflects the consensus among the organisation's members – aims to ensure that taxpayers operating within a group of undertakings are treated in the same way as taxpayers trading independently on the market under the general corporate tax system.

46. That principle has also been recognised by the Court, which has held, in the tax sphere and other non-tax spheres, that the arm's length principle constitutes the appropriate test by which to distinguish artificial arrangements from genuine economic transactions and represents in that context an objective factor by which it can be assessed whether the essential aim of the transaction concerned is to obtain a tax advantage. [16]

[13] See judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 60).

[14] See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 109 and the case-law cited).

[15] *Model Tax Convention on Income and Capital 2017*, for the elimination of double taxation with respect to taxes on income and on capital and the prevention of tax evasion and avoidance, as published by the OECD on 21 November 2017.

[16] See judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 86), and of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 81).

B. Question 1

47. By its first question, the referring court asks, in essence, whether Article 16(2), point 3, of the ZKPO is contrary to Article 5(4) and Article 12(b) TEU and to the right to an effective remedy and to a fair trial enshrined in Article 47 of the Charter.

48. It should be noted first of all that, in accordance with Article 5(4) TEU, the principle of proportionality applies to the 'content and form of Union action', while Article 12(b) TEU concerns the role of national parliaments in ensuring that the principle of subsidiarity is respected. Thus, those provisions set out the principles which must govern the implementation of the legislative process of the European Union, not that of the Member States. In that regard, the Court held relatively recently that it was not necessary to answer a similar question put by the same referring court, as those provisions do not concern national legislation and are not applicable to a situation such as that at issue in the main proceedings. [17]

49. As regards, next, the right to an effective remedy provided for in Article 47 of the Charter, it is settled case-law that the requirements flowing from the protection of fundamental rights are binding only on the Member States when they implement EU law. [18]

50. Under Article 16(2), point 3, of the ZKPO, borrowing or lending at an interest rate that diverges from the market interest rate at the time of conclusion of the transaction, including interest-free loans, constitutes tax avoidance. That provision of Bulgarian legislation neither transposes an EU directive nor applies or implements any other provision of EU law.

51. For the same reasons and in the light of Article 51 of the Charter, it must be considered that the provisions of the Charter are inapplicable to such a provision of Bulgarian tax law which does not implement EU law.

52. Consequently, I propose that the following answer be given to the first question referred for a preliminary ruling: Article 5(4) and Article 12(b) TEU and Article 47 of the Charter must be interpreted as meaning that they do not apply to the interpretation of Article 16(2), point 3, of the ZKPO, as that provision of Bulgarian law does not implement EU law.

C. Question 2

53. By its second question, the referring court enquires, in essence, whether interest payments as referred to in Article 4(1)(d) of Directive 2003/49 may be regarded as profit distributions to which Article 5 of Directive 2011/96 applies.

54. So far as concerns Directive 2003/49, I would point out that the aim of that directive – which brings about harmonisation in the field of direct taxation in order to enable economic operators to benefit from the internal market – is, in accordance with recitals 2 to 4 thereof, to eliminate double taxation with respect to interest payments made between associated companies of

[17] See judgment of 25 July 2018, *TTL* (C-553/16, EU:C:2018:604, paragraphs 30 to 35).

[18] See judgment of 19 September 2013, *Betriu Montull* (C-5/12, EU:C:2013:571, paragraph 70 and the case-law cited).

different Member States and to ensure that those payments are subject to tax once in a single Member State, by prohibiting the taxation of interest in the source Member State to the detriment of the actual beneficial owner. [19]

55. In the first place, the question arises as to whether notional interest, such as that established by the tax authorities in this case, may be covered by Directive 2003/49 and be regarded as 'interest payments' for the purpose of Article 1(1) and Article 2(a) of that directive, specifically in the very particular case before the Court here, where no separate payment has been made.

56. It should be pointed out that Directive 2003/49, as is apparent from recital 5 thereof, applies to 'payments'. Furthermore, I note that Article 1 of that directive, entitled 'Scope and procedure', clearly identifies a 'beneficial owner of the interest' located in another Member State in receipt of 'a payment made' by a company established in the source State.

57. It is also apparent from the case-law of the Court that, since Article 2(a) of Directive 2003/49 defines interest as 'income from debt-claims of every kind', only the 'actual' beneficial owner can receive interest which constitutes income from such claims and, therefore, the concept of the 'beneficial owner of the interest', within the meaning of that directive, must be interpreted as referring to an entity which 'genuinely' benefits, in economic terms, from the interest 'which is paid to it' and which therefore has the power freely to determine the use to which it is put. [20]

58. Where the tax authorities set and tax notional interest on an interest-free loan, [21] the lender receives no interest and cannot therefore, in my view, be regarded as an 'actual beneficial owner' of that interest.

59. In the second place, I would point out that, in any event, even if notional interest could be regarded as 'interest payments' for the purpose of Directive 2003/49, those payments, since they relate to an interest-free loan scheduled to mature 60 years after its conclusion, fall within the derogation provided for in Article 4(1)(d) of that directive, which excludes from its scope 'payments from debt-claims which contain no provision for repayment of the principal amount or where the repayment is due more than 50 years after the date of issue'. The term of the loan at issue was 60 years, meaning that Directive 2003/49 does not apply to the present case.

60. In the third and last place, for the sake of completeness, I think that consideration should also be given to the fact that Directive 2003/49 pursues a twofold objective, namely to prevent double taxation [22] and to combat abuse and tax evasion. [23]

61. Thus, in order to avoid the double taxation of cross-border interest payments, the taxation of interest in the source Member State to the detriment of the actual beneficial owner of that interest is prohibited. [24] The possibility of double taxation which is potentially contrary to Directive 2003/49 does not arise here, since the notional interest set by the tax authorities may not be taxed in Luxembourg as that interest is not transferred to the parent company.

[19] See judgments of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraphs 24, 25 and 28), and of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraphs 85, 86 and 108).

[20] See judgment of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraph 27).

[21] I note that the purpose of setting and taxing notional interest is to subject to tax the advantage deriving from an interest-free loan for the benefit of the borrower.

[22] See recitals 2 to 4 of Directive 2003/49.

[23] See Article 5 of Directive 2003/49.

[24] See judgment of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraphs 24, 25 and 28).

62. As regards the risk of abuse and tax evasion, Article 5(1) of Directive 2003/49 does not preclude the application of national provisions which are necessary to prevent fraud or abuse. I note, moreover, that endorsing the applicant's interpretation would mean accepting a circumvention of national tax legislation. In practice, that would be tantamount to allowing related companies to take out loans (or to conclude other types of intra-group transactions) in breach of national law and then to rely on EU law in order to avoid national tax legislation (and possibly also avoid taxation). Such an interpretation would defeat the objectives of that directive, which include combating tax evasion. [25]

63. In the light of the foregoing, I take the view that the provisions of Directive 2003/49 cannot apply in a case such as that in the main proceedings.

64. I therefore propose that the following answer be given to the second question referred for a preliminary ruling: Article 4 of Directive 2003/49 must be interpreted as meaning that it does not require interest payments, such as those referred to in Article 4(1)(d) of that directive, to be classified as 'profit distributions' to which Article 5 of Directive 2011/96 applies.

D. Question 3

65. By its third question, the referring court asks, in essence, whether Article 1(1)(b) and (3) and Article 5 of Directive 2011/96 apply to payments under an interest-free loan which is scheduled to mature 60 years after its conclusion and is covered by Article 4(1)(d) of Directive 2003/49.

66. I note that the objective of Directive 2011/96 is to exempt dividends and other profit distributions paid by subsidiaries established in one Member State to their parent companies established in another Member State from withholding taxes and to eliminate double taxation of such income at the level of the parent company, in order to facilitate the grouping together of companies at EU level. [26]

67. From that point of view, Article 1(1)(b) of that directive provides that Directive 2011/96 applies to 'distributions of profits', in a cross-border relationship, by a subsidiary to its parent company.

68. I note that the concept of 'distribution of profit' is not defined as such in that directive.

69. In that regard, the Court has held that the Member State in which a company is resident may lawfully treat interest paid by that company to the parent company established in another Member State as a distribution of profits. [27] However, that conclusion was applied in a context in which the subsidiary had actually paid interest on the loan, which is not the case here.

70. My view is that the notional interest which was solely established by the tax authorities as a means of subjecting to tax a transaction considered to be a concealed transaction under national law cannot be regarded as a 'distribution of profits' within the meaning of Directive 2011/96, particularly in the absence of any actual payment of interest between those two companies of the same group.

[25] See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 109 and the case-law cited).

[26] See judgment of 2 April 2020, *GVC Services (Bulgaria)* (C-458/18, EU:C:2020:266, paragraph 31).

[27] See judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 89).

71. I also note that, like Directive 2003/49, the primary objectives of Directive 2011/96 include both the prevention of double taxation and the prevention of abuse and tax evasion. In that regard, I refer to the reasoning set out in points 61 and 62 of this Opinion, which applies *mutatis mutandis* to Directive 2011/96.

72. For the above reasons, I consider that Directive 2011/96 is not applicable to a situation such as that in the main proceedings.

73. I therefore propose that the following answer be given to the third question referred for a preliminary ruling: Directive 2011/96 must be interpreted as meaning that it is not applicable to a withholding tax on notional interest income under an interest-free loan granted by a parent company to its subsidiary.

E. Question 4

74. The fourth question comprises two main parts which should be distinguished from each other.

75. The first part concerns whether the taxation at source of presumed interest payments under an interest-free loan is consistent with Directive 2003/49 and with the exemption from withholding tax provided for in Directive 2011/96. The second part raises the same question, but in the light of the requirements of Article 49 TFEU and Article 63(1) and (2) TFEU.

76. In that regard, in accordance with the recent judgment delivered by the Grand Chamber of the Court in joined cases *N Luxembourg 1 and Others*,[28] a distinction must be drawn from the outset between two situations.

77. The first situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax arises from a finding that there is fraud or abuse, within the meaning of Article 5 of that directive. In such a situation, a company resident in a Member State cannot, in the light of the case-law recalled in paragraph 43 above, claim the benefit of the freedoms enshrined in the TFEU in order to call into question the national legislation governing the taxation of interest paid to a company resident in another Member State. In view of the fact that Directive 2011/96 contains, in Article 1(2), a provision similar to Article 5 of Directive 2003/49 as regards its inapplicability in the event of fraud or abuse, I consider that that situation must apply *mutatis mutandis* to Directive 2011/96.

78. The second situation is where the inapplicability of the system, laid down by Directive 2003/49, of exemption from withholding tax (and, by analogy, the inapplicability of Directive 2011/96) arises from the fact that the conditions for the application of that system of exemption are not fulfilled, but without a finding having been made that there is fraud or abuse, within the meaning of Article 5 of Directive 2003/49 (or Article 1(2) of Directive 2011/96). In such a situation, it should be determined whether Article 49 and Article 63(1) and (2) TFEU must be interpreted as precluding national legislation, such as that at issue in the main proceedings, relating to the taxation of the aforesaid interest.[29]

[28] See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 155).

[29] See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 156).

79. I note at the outset that the referring court's question concerns only the compatibility with Article 49 and Article 63(1) and (2) TFEU of Articles 195, 200 and 200a of the ZKPO, which lay down, respectively, detailed rules on the deduction at source and on the procedure for reassessing and refunding tax in favour of non-residents.

80. I consider, however, that the analysis of that question should not be restricted solely to the aforementioned provisions of national law and that account should also be taken of the Bulgarian tax system as a whole applicable to non-resident companies. [30] I therefore propose to include in the analysis set out below Article 16 of the ZKPO (which lays down detailed rules for the taxation of non-resident companies in the event of an infringement of the arm's length principle), Article 199 of the ZKPO (which concerns the basis of assessment for withholding tax on income of non-resident companies) and Article 202a (which lays down the scheme for the recalculation and refund of tax withheld at source of which non-resident companies may avail themselves).

81. It is clear from the case-law of the Court that the examination should not be limited to a purely formal assessment of the exemption from a type of tax, but should take account of the entire fiscal environment surrounding the taxation of non-resident companies, that is to say, it is necessary to carry out a comprehensive (material) examination. [31]

1. Directives 2003/49 and 2011/96

82. The answer to the question as regards Directives 2003/49 and 2011/96 was given in the proposed answers to the second and third questions referred, in which I concluded that those directives were not applicable to the facts of the present case. [32]

2. Articles 49 and 63 TFEU

83. In order to answer the fourth question submitted by the referring court, it is necessary, first of all, to examine whether Articles 49 and 63 TFEU preclude national legislation under which the scheme applied automatically to non-resident companies, unlike resident companies, prevents them from deducting expenses related to the loan in question. If the answer is yes, it is necessary to examine whether such a difference in treatment may be eliminated by a mechanism for reassessing and refunding tax, of which non-resident companies may avail themselves, and whether it may be justified by overriding reasons in the public interest. Even if that were so, the application of that restriction would still have to be appropriate for attaining the aim pursued and not go beyond what is necessary for that purpose.

(a) Relevant provisions of the TFEU

84. Since the referring court seeks a ruling from the Court on the compatibility of the Bulgarian legislation at issue with the freedom of establishment and free movement of capital provisions of the Treaty (Articles 49 and 63 TFEU), the first issue to consider is against which of those Treaty provisions the legislation should be assessed.

30 That finding is without prejudice to the national court's monopoly over the interpretation of national law.

31 See judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 29 et seq.).

32 See points 53 to 73 of this Opinion.

85. I would point out that, in principle, questions relating to the tax treatment of interest and income from capital paid between companies of two Member States are capable of falling within the scope of both the free movement of capital [33] and the freedom of establishment, in particular, as regards the latter, where a loan is concluded between related companies whereby a company of one Member State has a holding in the capital of a company established in another Member State enabling the former to exert a definite influence on the latter's decisions and to determine its activities. [34]

86. However, according to settled case-law, in order to ascertain whether national legislation falls within the scope of one or another of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration. [35]

87. It is apparent from the order for reference that Article 16(2), point 3, of the ZKPO applies to all situations in which interest-free loans are granted, beyond those involving related companies and irrespective of the size of the lender company's holding in the borrower company's capital. At first sight, that suggests that the examination of the fourth question referred should be conducted from the perspective of free movement of capital.

88. However, I consider that the factual context of the present case calls for an examination of the relevant Bulgarian legislation in the light of freedom of establishment. Indeed, apart from the fact that InterV Investment was the applicant's sole shareholder when the loan at issue was concluded, the characteristics of that loan, in particular the loan period and the repayment terms, indicate that it could only have been concluded between related companies. There is thus no doubt that there is a relationship of interdependence between those companies giving InterV Investment, in view of its holding in the applicant's capital, definite influence over the latter's decisions and allowing it to determine the latter's activities.

89. Such an approach is, moreover, consistent with the Court's decisions in a line of cases involving national rules bearing similarities to Bulgarian legislation. I note in that regard that, in *SGI*, the Court examined, in the light of freedom of establishment, Belgian legislation allowing the tax authorities to add back to the profits of a resident company, for the purposes of income tax, the notional interest on an interest-free loan granted to a non-resident subsidiary, on the ground that, even though the scope of that legislation was not limited to related companies, the situation at issue in that case concerned related companies. [36]

90. Although I am inclined to the view that it would be more appropriate to examine the fourth question in the light of freedom of establishment, it is entirely conceivable for the national legislation at issue to be examined from the perspective of free movement of capital.

91. However, despite choosing to analyse the compatibility of the national measures at issue in the light of freedom of establishment, the same conclusions as those set out below also follow if the question is analysed in the light of free movement of capital. Like freedom of establishment, free movement of capital prohibits measures that are such as to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States. [37]

[33] See judgment of 3 October 2013, *Itelcar* (C-282/12, EU:C:2013:629, paragraph 14 and the case-law cited).

[34] See judgment of 17 September 2009, *Glaxo Wellcome* (C-182/08, EU:C:2009:559, paragraph 47 and the case-law cited).

[35] See judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraph 25 and the case-law cited).

[36] See judgment of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraphs 25 to 37).

[37] See judgment of 30 April 2020, *Société Générale* (C-565/18, EU:C:2020:318, paragraph 22 and the case-law cited).

92. Lastly, if the national legislation at issue has restrictive effects on the free movement of capital, they are the unavoidable consequence of any restriction on the freedom of establishment and, therefore, do not justify an independent examination of that legislation in the light of Article 63 TFEU. [38]

(b) Do Articles 195 and 199 of the ZKPO discriminate between resident and non-resident companies?

93. According to settled case-law, Article 49 TFEU aims to guarantee the benefit of national treatment in the host Member State to companies and prohibits any discrimination based on the place where they have their seat [39] and, generally, any unjustified restriction on the exercise of that freedom. [40]

94. It is apparent from the wording of Article 16(2), point 3, of the ZKPO that that provision is applicable to any interest-free loan, irrespective of whether the parties thereto are only resident companies or are both resident and non-resident companies. Furthermore, it is not disputed that the same rate of tax of 10% applies whether the lender is a resident company or a non-resident company.

95. However, it follows from the wording of Articles 195 and 199 of the ZKPO that different tax treatment is reserved for non-resident companies which conclude that type of transaction. Thus, while notional interest on a loan granted by a non-resident company is subject to withholding tax constituting immediate and definitive taxation, without it being possible to deduct the charges associated with the grant of that loan, the taxation of notional interest on a loan granted by a resident company depends, in the corporation tax context, on the profit or loss of that company after any charges associated with the grant of that loan have been taken into account.

96. I would point out at this stage of my analysis that the Court has abundant case-law tackling that issue, from the point of view of both the free movement of capital and the freedom of establishment. Specifically, in a line of cases involving facts similar to those in the main proceedings, the Court held that national legislation under which a non-resident company is taxed, by means of tax withheld at source by a resident company, on the interest which it is paid by the latter without it being possible to deduct expenses, such as interest expenditure, that are directly related to the lending at issue, whereas such a possibility of deduction is accorded to resident companies receiving interest from another resident company, constitutes a restriction on the freedom of establishment. [41] The same conclusion was reached with regard to the free movement of capital. [42]

97. In the light of the foregoing, I consider that such a difference in the method for calculating the tax may be such as to constitute a restriction falling within the scope of Article 49 TFEU.

38 See order of 10 May 2007, *Lasertec* (C-492/04, EU:C:2007:273, paragraph 25).

39 See judgment of 3 March 2020, *Vodafone Magyarország* (C-75/18, EU:C:2020:139, paragraph 39 and the case-law cited).

40 See judgment of 20 January 2021, *Lexel* (C-484/19, EU:C:2021:34, paragraph 33 and the case-law cited).

41 See judgments of 12 June 2003, *Gerritse* (C-234/01, EU:C:2003:340, paragraphs 29 and 55); of 3 October 2006, *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630, paragraph 42); and of 15 February 2007, *Centro Equestre da Lezíria Grande* (C-345/04, EU:C:2007:96, paragraph 23).

42 See judgments of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 57), and of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 17).

98. The present case can nevertheless be distinguished from those cases in that Bulgarian law appears to lay down, in Article 202a of the ZKPO, a procedure enabling non-resident companies to be treated in the same way as resident companies for tax purposes. Before examining whether the discriminatory measure introduced by Articles 195 and 199 of the ZKPO can be justified, it is therefore necessary to consider whether Article 202a of that law serves to eliminate the difference in treatment between resident and non-resident companies established above.

(c) Does Article 202a of the ZKPO serve to eliminate the discriminatory features of the tax scheme applicable to non-residents under Articles 195 and 199 of that law?

(1) The scope of Article 202a of the ZKPO

99. It is apparent from the written observations submitted by the tax authorities and the Bulgarian Government that Article 202a of the ZKPO lays down a mechanism enabling non-resident companies to opt for the tax scheme applicable to resident companies. Consequently, that procedure enables them, on the one hand, to deduct expenses, such as interest expenditure directly related to the lending at issue, and, on the other, to secure a refund of or exemption from withholding tax if they are in a loss-making situation.

100. The tax authorities and the Bulgarian Government argue that if the applicant had opted for that scheme in the present case, it would not have been charged corporation tax in Bulgaria, since (according to the applicant's submissions) it was in a loss-making situation during the period concerned.

101. The applicant, for its part, expresses doubts as to whether the procedure laid down in Article 202a of the ZKPO is capable of mitigating the discrimination, discrimination which continues even though a non-resident undertaking has opted for that provision owing to the fact that the refund procedure is not immediate.

102. Based on the information provided at the hearing by the applicant, the tax authorities and the Bulgarian Government, the reassessment and refund procedure provided for in Article 202a of the ZKPO may be summarised as follows.

103. The procedure laid down in Article 202a of the ZKPO does not apply by default. In order to be eligible for that procedure, a non-resident company must expressly opt for it in its tax return. Even if a company decides to avail itself of that option, the deduction at source will be levied in accordance with the scheme provided for in Articles 195 and 199 of the ZKPO, namely the tax will be levied directly at source on that gross income. Only subsequently will the non-resident company become eligible for a tax refund if, following the reassessment of its situation by the tax authorities, its loss-making situation is proven.

104. As regards the duration of the reassessment and refund procedure provided for in Article 202a of the ZKPO, it emerged at the hearing that there is a difference of views between, on the one hand, the applicant, which claims that that procedure may be particularly protracted and, on the other, the tax authorities and the Bulgarian Government, which deny the existence of unreasonable delay in that procedure.

105. The description of the tax refund scheme provided for in Article 202a of the ZKPO warrants the following observations.

106. In the first place, it is apparent from a combined reading of Article 202a(1) to (4) of the ZKPO that that scheme allows non-resident companies to submit an application for the reassessment of tax already withheld at source under the scheme applicable to resident companies. That provision appears to seek to bring the tax treatment of non-resident companies into line with that of companies resident in Bulgaria, or at least approximate that treatment.

107. In that regard, I note that the Court has previously held that the right to deduct may also arise after the levying of withholding tax in the form of a partial refund of the tax withheld at source. [43]

108. It must be stated, however, that notwithstanding that possibility for non-resident companies, the risk of resident companies obtaining a tax advantage remains. It seems to follow that a cash-flow advantage could be procured for resident companies since, if they are in a loss-making situation, they would not have to pay tax on notional interest, unlike non-resident companies.

109. Specifically, that 'cash-flow disadvantage' for loss-making non-resident companies takes the form of the time lag between the date of the deduction at source and the date on which the overpaid tax is refunded by the tax authorities.

110. My view is that the extent of the cash-flow advantage resulting from that difference in treatment, which may constitute an element of discrimination, closely depends on national procedural rules and the practice followed by the tax authorities in implementing the procedure laid down in Article 202a of the ZKPO. Thus, if the duration of the recalculation procedure and any refund exceeds a reasonable period, as the applicant claimed at the hearing, the cash-flow advantage enjoyed by a resident company compared with a non-resident company may be considerable and, therefore, may constitute discrimination or an obstacle to the free movement of capital. Conversely, if that period is reasonable, such a measure could mitigate or remedy the discrimination between resident and non-resident companies. I note that the fact that Bulgarian legislation provides for default interest could potentially mitigate that cash-flow discrimination, provided that that period is not significant.

111. In that regard, I would point out that the assessment of whether there exists a potentially detrimental treatment of interest paid to non-resident companies must be undertaken for each tax year, taken individually. [44]

112. In the second place, it should also be stated that, in addition to the issue of the refund period, the examination of the implementation of Article 202a of the ZKPO must take account of all the factors capable of resulting in a difference in treatment between resident and non-resident companies. Even if that article seeks to establish equal treatment between those two types of company, which, in principle, should preclude unequal treatment (other than the cash-flow advantage established above), it is necessary to check that its implementation does not give rise to other forms of discrimination. That point is thus closely linked to the payment methods provided for in Bulgarian corporation tax law, including their periodicity and the possibility of deferring the payment of tax or of obtaining other facilities liable to amplify the cash-flow advantage that has been established. By way of example, if Bulgarian law were to allow a

[43] See judgment of 13 July 2016, *Brisal and KBC Finance Ireland* (C-18/15, EU:C:2016:549, paragraph 42).

[44] See judgments of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 41), and of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraphs 30 and 52).

loss-making resident company to adjust or carry forward its tax liability to a subsequent profit-making year, that might amplify its cash-flow advantage vis-à-vis a non-resident company. [45]

113. In the third place, and lastly, I consider that from a practical point of view, the extent to which that provision is capable of mitigating that discrimination will also depend on whether it is possible, first, for the non-resident company to adduce evidence of the deductible expenses it claims and, secondly, for the tax authorities of the State of residence of the borrower company, in this case Bulgaria, to exercise effective supervision. In that regard, I note that neither the referring court nor the other parties to the main proceedings have invoked the existence of a bilateral agreement between the Grand Duchy of Luxembourg and the Republic of Bulgaria covering that type of situation.

114. A process which safeguards against discrimination with regard to non-resident companies, while ensuring that the tax authorities are able to check whether the expenses incurred warrant reimbursement, can only be based on cooperation and the exchange of information between the tax authorities of the Member States (or non-Member States) concerned. I note, moreover, that besides the bilateral treaties concluded between Member States, provision is also made for such cooperation in Directive 2011/16/EU, [46] which aims inter alia to avoid both double taxation and non-taxation which may result from situations of fraud or abuse. [47]

115. In principle, therefore, it is for the referring court to examine, in the light of the clarification provided above and having regard to national procedural rules and administrative practice in tax matters, whether the difference in treatment between resident and non-resident companies that avail themselves of Article 202a of the ZKPO may confer a cash-flow advantage.

(2) The objective comparability of the tax situation of resident companies and of non-resident companies

116. It is settled case-law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. [48]

117. As regards, first of all, Article 16 of the ZKPO, there is little doubt that that provision applies in the same way both to resident and non-resident companies.

118. However, as described above, even though resident and non-resident companies are subject to withholding tax, the method for calculating the tax for those two types of company differs. Consequently, Bulgarian tax legislation establishes a difference in treatment between non-resident companies taxed at source on their gross income, under Articles 195 and 199 of the ZKPO (which, moreover, is the scheme that applies automatically to them), and resident companies which are taxed at source on their net income.

[45] See judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 34).

[46] Council Directive of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1).

[47] Thus, as is shown by international tax practice, such a mechanism is appropriate for preventing the double counting of deductible costs since, where it is applied by the first State, that State can check the operating expenses that have been taken into account in calculating the tax paid in the second State. It is also commonplace, in the context of such a mechanism, for the tax authorities of a State to inform the State of residence of the taxpayer with restricted tax liability of the latter's request for reimbursement.

[48] See judgment of 14 February 1995, *Schumacker* (C-279/93, EU:C:1995:31, paragraph 30).

119. Although the Court held, in its judgment in *Truck Center*, that a difference in treatment consisting in the application of different taxation arrangements on the basis of the place of residence of the taxable person relates to situations which are not objectively comparable,[49] it should be noted that, unlike the case cited above in which the withholding tax at issue was levied only on interest paid to non-resident recipient companies, in the action in the main proceedings, the applicable legislation subjects both resident taxpayers and non-resident taxpayers to the same method of collecting the tax on dividends, that is to say withholding the tax.[50]

120. Accordingly, as soon as a Member State imposes a charge to tax not only on resident companies but also on non-resident companies in respect of interest which they receive from a company established in that State, the respective situations of those two categories of taxpayers become comparable and they must therefore be subject to the same treatment for tax purposes.[51]

121. It is clear from the wording of Articles 195 and 199 of the ZKPO that the cash-flow advantage granted to resident companies does not extend to non-resident companies. Nevertheless, the option provided for in Article 202a of the ZKPO, subject to the findings set out in points 109 to 115 of this Opinion, could achieve that objective.

(3) The optional nature of Article 202a of the ZKPO

122. It is settled case-law that a national scheme that restricts the freedoms of movement may still be incompatible with EU law even if it is optional in application, since the existence of an option which would possibly render a situation compatible with EU law does not, in itself, correct the unlawful nature of a system which still includes a mechanism of taxation that is not compatible with that law.[52]

123. The question therefore arises whether the scheme provided for in Article 202a of the ZKPO must be regarded as optional. If so, it cannot eliminate the discriminatory effects of the scheme provided for in Articles 195 and 199 of the ZKPO.

124. It should be pointed out that, at the hearing, the Commission argued that the scheme provided for in Article 202a of the ZKPO should not be regarded as optional in the light of the Court's case-law, particularly its judgments in *Gielen*[53] and *Autoridade Tributária e Aduaneira (Tax on capital gains from immovable property)*,[54] and should instead be viewed as a tax refund mechanism.

125. I note that those two cases differ from the main action, in particular in two respects. First of all, it is true that, unlike the Bulgarian scheme at issue, the choice made by the taxable persons in those two cases had a direct impact on their tax liability. Under the Bulgarian scheme at issue, regardless of the choice made by a non-resident company to opt for one or other of the two available schemes, that company will be taxed at source on its gross income. It is only subsequently that its tax situation will be reassessed and a refund may be possible, provided that

[49] See judgment of 22 December 2008, *Truck Center* (C-282/07, EU:C:2008:762, paragraph 41).

[50] See judgment of 17 September 2015, *Miljoen and Others* (C-10/14, C-14/14 and C-17/14, EU:C:2015:608, paragraph 72).

[51] See judgment of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraphs 38 and 39), and order of 12 July 2012, *Tate & Lyle Investments* (C-384/11, not published, EU:C:2012:463, paragraphs 31 and 32 and the case-law cited).

[52] See judgment of 8 June 2016, *Hünnebeck* (C-479/14, EU:C:2016:412, paragraph 42 and the case-law cited).

[53] See judgment of 18 March 2010 (C-440/08, EU:C:2010:148, paragraph 43 and the case-law cited).

[54] See judgment of 18 March 2021 (C-388/19, EU:C:2021:212, paragraph 45).

it has opted for the scheme provided for in Article 202a of the ZKPO. It should also be pointed out that, unlike the present case, the abovementioned cases did not arise in a context of possible abuse or tax evasion.

126. Nonetheless, I consider that the optional nature of Article 202a of the ZKPO cannot be called into question.

127. Thus, the very fact that the taxpayer may opt for two different schemes, irrespective of the tax treatment which those schemes reserve for the taxpayer, indicates that it is optional. That is even more so where, as appears to be the case here, the mechanism incompatible with EU law is one which is automatically applied when the taxpayer fails to make a choice.

128. I also consider that the fact that the mechanism established in Article 202a of the ZKPO is more akin to a mechanism for refunding tax where there has been a deduction at source cannot call into question its optional nature for the taxpayer.

(d) Justifying circumstances

129. The last question which arises is whether the difference in treatment to which non-resident companies are subject can be justified. In order to do so, it is necessary to consider whether the relevant Bulgarian legislation (a) pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest; (b) is appropriate for attaining the objective thus pursued; and (c) does not go beyond what is necessary to attain that objective.

130. In that regard, the tax authorities and the Bulgarian Government submit that the legislation at issue pursues in a proportionate manner legitimate policy objectives, which are apparent in particular from the preservation of the balanced allocation between Member States of the power to impose taxes (1) and the prevention of tax evasion or tax avoidance (2).

(1) Justification on the ground of preserving the balanced allocation between Member States of the power to impose taxes

131. The Court has held that the balanced allocation between Member States of the power to impose taxes may be accepted as justification for a restriction on fundamental freedoms, in particular where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to exercise its tax jurisdiction in relation to activities carried out in its territory. [55]

132. I recall that that objective is an expression of the fiscal sovereignty of the Member States. That includes a State's right to protect its tax revenue, in particular with regard to profits generated in its territory (principle of territoriality), and a State's right to organise its system of tax law autonomously (principle of autonomy). [56]

[55] See judgment of 5 July 2012, *SIAT* (C-318/10, EU:C:2012:415, paragraph 45).

[56] See Opinion of Advocate General Kokott in *Allianzgi-Fonds Aevn* (C-545/19, EU:C:2021:372).

133. In the absence of harmonisation, at the current stage of development of EU law, the power to impose direct taxes lies with the Member States. It is likewise a matter for the Member States to lay down criteria for allocating their powers to impose taxes by the conclusion of conventions for the avoidance of double taxation or by unilateral measures. [57]

134. As Advocate General Kokott observed in *N Luxembourg 1 and Others*, [58] in cross-border cases, proper taxation of the recipient's income is not always ensured. As a rule, the interest recipient's State of residence will rarely be aware of his or her income from abroad, unless functioning data exchange systems exist between the tax authorities. Thus, in such a situation, the taxation at source in the interest payer's State of residence constitutes a special taxation arrangement which is intended essentially to secure (minimum) taxation of the interest recipient.

135. However, it is settled case-law that national tax legislation, like Articles 195 and 199 of the ZKPO, which takes into account gross income when taxing non-residents without deducting operating expenses, whereas residents are taxed on their net income after deduction of those expenses, cannot be justified by the objective of preserving the balanced allocation between Member States of the power to impose taxes. [59] The same is true if, notwithstanding its optional nature, discrimination in the form of a cash-flow advantage for resident companies results from the application of Article 202a of the ZKPO. [60]

136. Thus, in accordance with the Court's case-law, [61] I consider it appropriate to analyse the Bulgarian tax legislation applicable to non-resident companies as a whole, also taking into consideration Article 16 of the ZKPO, which, in the light of the objectives pursued by that provision, calls for an examination of the justification on the ground of preventing fraud and abuse.

(2) Justification on the ground of the prevention of fraud and abusive practices

137. The Court has already held that the prevention of tax evasion or tax avoidance constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the Treaty. [62]

138. A finding of abuse requires an overall examination of the circumstances of the individual case, which it is for the competent national authorities to carry out and which must be open to review by the courts. [63] It is for the referring court to conduct that overall examination; [64] however, the Court can give the referring court some useful pointers for the purpose of determining if the transactions are being carried out in the context of normal commercial transactions or solely for the purpose of wrongfully obtaining advantages provided for by EU law. [65]

57 See judgment of 5 July 2005, *D.* (C-376/03, EU:C:2005:424, paragraphs 50 and 51 and the case-law cited).

58 See Opinion of Advocate General Kokott in *N Luxembourg 1*, (C-115/16, EU:C:2018:143).

59 See the case-law cited in point 96of this Opinion.

60 See judgment of 22 November 2018, *Sofina and Others* (C-575/17, EU:C:2018:943, paragraph 34).

61 See judgment of 2 June 2016, *Pensioenfonds Metaal en Techniek* (C-252/14, EU:C:2016:402, paragraph 29 et seq.).

62 See judgment of 8 March 2017, *Euro Park Service* (C-14/16, EU:C:2017:177, paragraph 65).

63 See judgment of 17 July 1997, *Leur-Bloem* (C-28/95, EU:C:1997:369, paragraph 41).

64 See judgment of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 59 and the case-law cited).

65 See judgment of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 34 and the case-law cited).

139. I recall that the Court has clarified that the mere fact that a resident company is granted a loan by a related company which is established in another Member State cannot be the basis of a general presumption of abusive practices and justify a measure which compromises the exercise of a fundamental freedom guaranteed by the TFEU.[66] However, it should be noted that a taxpayer cannot enjoy a right or advantage arising from EU law where the transaction at issue is purely artificial economically and is designed to circumvent the application of the legislation of the Member State concerned.[67]

140. In that regard, I should point out that the objective of Article 16 of the ZKPO is to combat tax avoidance by transposing the 'arm's length' principle into Bulgarian law, which is recognised both by international tax practice and by the case-law of the Court as an appropriate means of preventing artificial manipulations of cross-border transactions.[68]

141. I therefore take the view that, in the light of an overall analysis of the tax environment in this case, the tax treatment provided for in the relevant legislation, and particularly Article 16 of the ZKPO, is justified by a risk of non-taxation as a result, first, of no tax being levied on interest income in the Member State which was to receive such tax (namely the Grand Duchy of Luxembourg) in view of the characteristics of the loan at issue (and, specifically, the lack of any actual beneficial owner of the interest, given that the loan was interest free) and, secondly, of the fact that prior to the tax adjustment and thus the period with which the present case is concerned, the loan at issue had not been converted into capital by the applicant (and, as such, could not be taxed in Bulgaria as a capital contribution).[69] I therefore consider that Article 16 of the ZKPO as an 'anti-abuse' provision makes it possible to ensure effective recovery of the tax.

142. Accordingly, inasmuch as, in application of the principles enshrined in national law, interpreted in compliance with EU law, the referring court finds that the arrangement in question is abusive, taxation at source of the kind at issue here will apply. However, the question then no longer arises in the present case, as that taxation is the result of abuse and, according to the Court's settled case-law, EU law cannot be relied on for abusive or fraudulent ends. .[70]

143. As described in points 41 to 44 of this Opinion, such an approach is consistent both with international tax practice and with EU law and the case-law of the Court on abuse and fraud.

144. Lastly, I note that the foregoing reasoning can succeed not only if the legitimate objective of preventing fraud and abuse is taken into account in isolation, but also if that objective is examined in conjunction with the objective of preserving the balanced allocation between Member States of the power to impose taxes.

145. In that regard, I should make clear that the Court has held that the objectives of safeguarding the balanced allocation between Member States of the power to impose taxes and the prevention of tax avoidance are linked. Indeed, the Court has found that conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory, is such as

66 See judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 73 and the case-law cited).

67 See judgment of 26 February 2019, *N Luxembourg 1 and Others* (C-115/16, C-118/16, C-119/16 and C-299/16, EU:C:2019:134, paragraph 109 and the case-law cited).

68 See point 46 of this Opinion.

69 In that regard, I would point out that the loan was converted after the tax adjustment made by the tax authorities.

70 See judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 68), and of 22 November 2017, *Cussens and Others* (C-251/16, EU:C:2017:881, paragraph 27).

to undermine the right of the Member States to exercise their tax jurisdiction in relation to those activities and jeopardise a balanced allocation between Member States of the power to impose taxes. [71]

146. However, it should be stated that the taking into consideration of those grounds of justification together has been accepted by the Court in very specific situations, namely where the prevention of tax avoidance constitutes a particular aspect of the public interest linked to the need to preserve a balanced allocation between Member States of the power to impose taxes. On that basis, the Court has been able to hold that, given in particular the need to preserve the balanced allocation between Member States of the power to impose taxes, despite the fact that the measures at issue do not specifically target purely artificial arrangements, devoid of economic reality and created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory, such measures may nevertheless be justified. [72]

147. In the light of those two objectives, concerning, primarily, the prevention of tax avoidance but also, to a lesser extent, the need to maintain the balanced allocation between Member States of the power to impose taxes (taken together with the first objective referred to), my view is that legislation such as that at issue in the main proceedings pursues legitimate objectives which are compatible with the TFEU and constitute overriding reasons in the public interest and that such legislation is appropriate for ensuring the attainment of those objectives.

(3) Review of proportionality

148. Lastly, the question arises as to whether the tax procedure provided for by Bulgarian law when making a finding of abuse or tax evasion complies with the principle of proportionality.

149. In that regard, I note that according to the Court's settled case-law, in order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue. [73]

150. In that context, the Court has held that national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents a purely artificial arrangement, entered into for tax reasons alone, is to be considered as not going beyond what is necessary to prevent abusive practices where, in the first place, on each occasion on which the existence of such an arrangement cannot be ruled out, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that arrangement. [74]

151. In order for such legislation to remain compatible with the principle of proportionality, it is necessary, in the second place, that, where the consideration of those elements leads to the conclusion that the transaction in question represents a purely artificial arrangement without any underlying commercial justification, the re-characterisation of interest paid as a distribution

71 See judgment of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraph 62).

72 See judgments of 18 July 2007, *Oy AA* (C-231/05, EU:C:2007:439, paragraphs 58, 59 and 63), and of 21 January 2010, *SGI* (C-311/08, EU:C:2010:26, paragraphs 66 and 67).

73 See judgment of 20 December 2017, *Deister Holding and Juhler Holding* (C-504/16 and C-613/16, EU:C:2017:1009, paragraph 62 and the case-law cited).

74 See judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation*, C-524/04, EU:C:2007:161, paragraph 82), and order of 23 April 2008, *Test Claimants in the CFC and Dividend Group Litigation* (C-201/05, EU:C:2008:239, paragraph 84).

is limited to the proportion of that interest which exceeds what would have been agreed had the relationship between the parties or between those parties and a third party been one at arm's length. [75]

152. In that regard, it should be noted that the fact that a resident company has been granted a loan by a non-resident company on terms which do not correspond to those which would have been agreed upon at arm's length constitutes, for the Member State in which the borrower company is resident, an objective element which can be independently verified in order to determine whether the transaction in question represents, in whole or in part, a purely artificial arrangement, the essential purpose of which is to circumvent the tax legislation of that Member State. [76]

153. Furthermore, I note that Article 16 of the ZKPO also appears to satisfy the second criterion laid down in the case-law of the Court, in that the corrective tax measure provided for by that provision seeks to ensure that loans between related companies are concluded 'at arm's length', by modifying the applicable rate and checking that it is consistent with the market rate in order to calculate the unpaid interest.

154. Finally, concerning the tax practice of the Bulgarian authorities, I note that the applicant's argument that that tax is payable 'on the basis of an irrebuttable presumption of tax avoidance', without it being possible for the parties to the transaction to rely on the existence of economic grounds justifying its conclusion, does not appear to be borne out by Article 16 of the ZKPO, which makes any tax adjustment conditional on an overall assessment of the evidence provided by the taxable person and of that gathered by the tax authorities.

155. In those circumstances and subject to verification of the preceding points by the referring court, I consider that the tax adjustment procedure provided for in Article 16 of the ZKPO satisfies the proportionality requirements laid down in the case-law of the Court and does not go beyond what is necessary in order to attain the objectives pursued.

156. In the light of the foregoing, I propose that the following answer be given to the fourth question referred for a preliminary ruling: Article 49 and Article 63(1) and (2) TFEU must be interpreted as meaning that they do not, in principle, preclude national legislation which, pursuant to the 'arm's length principle' and in order to combat tax avoidance, provides for the taxation in the form of withholding tax of notional interest that a resident subsidiary which has been granted an interest-free loan by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions, provided that the tax adjustment laid down in that legislation is based on an individual examination of the transaction concerned and gives the taxable person the opportunity to provide evidence of any economic justification that there may have been for that transaction.

F. Question 5

157. The fifth question seeks to ascertain whether Article 3(h) to (j), Article 5(1)(a) and (b), Article 7(1) and Article 8 of Directive 2008/7 preclude provisions of national law such as Article 16(1) and (2), point 3, and Article 195(1) of the ZKPO on the taxation at source of notional interest income, established within the framework of the loan at issue.

[75] See judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 83).

[76] See judgment of 13 March 2007, *Test Claimants in the Thin Cap Group Litigation* (C-524/04, EU:C:2007:161, paragraph 81).

158. First of all, I recall that Directive 2008/7 provides for complete harmonisation of the cases in which the Member States may levy indirect taxes on the raising of capital [77] in order to eliminate, as far as possible, factors which may distort conditions of competition or hinder the free movement of capital, and thus to ensure the smooth functioning of the internal market. [78]

159. From that point of view, Article 5(1)(a) of that directive requires Member States to exempt capital companies from any form of 'indirect tax' in respect of 'contributions of capital'.

160. In order to answer the question referred, it must first be established whether an interest-free loan, such as that granted in the present case by the sole shareholder of the recipient company, constitutes a 'contribution of capital' within the meaning of Article 3(h) of Directive 2008/7.

161. The answer to that question may be discerned from both the wording of the abovementioned provision and the case-law of the Court.

162. Thus, Article 3(h) of Directive 2008/7 defines a 'contribution of capital' as 'an increase in the assets of a capital company through the provision of services by a member which does not entail an increase in the company's capital, but … which may increase the value of the company's shares'.

163. It is also apparent from the case-law of the Court that an increase in assets includes, in principle, every kind of increase in the net assets of a capital company. [79] Accordingly, the Court has held that the grant of an interest-free loan is capable of constituting a 'contribution of capital'. [80]

164. Lastly, I consider that the characteristics of the loan at issue, in particular its convertibility and its long term, are further evidence that that loan may be regarded as a 'contribution of capital'.

165. Concerning the second part of the question, in particular whether the tax levied under Articles 16 and 195 of the ZKPO falls within the scope of Directive 2008/7, specifically Article 5(1)(a) thereof, it should be noted that that provision requires Member States to exempt capital companies from all forms of indirect tax in respect of contributions of capital.

166. Nevertheless, Directive 2008/7 does not require Member States to exempt contributions of capital from all forms of direct tax.

167. As the Court has already held, that directive does not concern direct taxes which, like corporation tax, are in principle a matter for the Member States, in compliance with EU law. [81]

168. There is no doubt that the withholding tax at issue in the main proceedings is a direct tax on income and that it is an example of corporation tax.

169. In the light of the foregoing, I propose that the following answer be given to the fifth question referred: Directive 2008/7 must be interpreted as meaning that it does not preclude a withholding tax such as that at issue in the present case.

77 See judgment of 19 October 2017, *Air Berlin* (C-573/16, EU:C:2017:772, paragraph 27 and the case-law cited).

78 See judgment of 22 April 2015, *Drukarnia Multipress* (C-357/13, EU:C:2015:253, paragraph 31).

79 See judgment of 12 January 2006, *Senior Engineering Investments* (C-494/03, EU:C:2006:17, paragraph 34).

80 See judgment of 17 September 2002, *Norddeutsche Gesellschaft zur Beratung und Durchführung von Entsorgungsaufgaben bei Kernkraftwerken* (C-392/00, EU:C:2002:500, paragraph 18 and the case-law cited).

81 See judgment of 18 January 2001, *P. P. Handelsgesellschaft* (C-113/99, EU:C:2001:32, paragraph 24 and the case-law cited).

G. Question 6

170. By its sixth and final question, the referring court states that Article 200(2) and Article 200a(1) and (5), point 4, of the ZKPO, in the version applicable on 1 January 2011, set the rate of withholding tax at 10%, whereas the maximum rate applicable during the transitional period was 5%. The referring court asks whether such a difference infringes the principles of legal certainty and legitimate expectation.

171. It is apparent from the analysis of the second question set out in points 54 to 63 of this Opinion that the interest-free loan at issue in the main proceedings falls within, inter alia, the exception laid down in Article 4(1)(d) of Directive 2003/49 and that that directive is not applicable to the facts of the present case.

172. In the light of the foregoing, I take the view that the sixth question is devoid of purpose in the pending action.

V. Conclusion

173. In the light of the foregoing, I propose that the Court's answer to the questions referred for a preliminary ruling by the Varhoven administrativen sad (Supreme Administrative Court, Bulgaria) should be as follows:

(1) Article 5(4) and Article 12(b) TEU and Article 47 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that they do not apply to the interpretation of Article 16(2), point 3, of the Zakon za korporativnoto podohodno oblagane (Law on corporation tax), as that provision of Bulgarian law does not apply EU law.

(2) Article 4 of Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States must be interpreted as meaning that it does not require interest payments, such as those referred to in Article 4(1)(d) of that directive, to be classified as profit distributions to which Article 5 of Council Directive 2011/96/EU of 30 November 2011 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States applies.

(3) Directive 2011/96 must be interpreted as meaning that it is not applicable to a withholding tax on notional interest income under an interest-free loan granted by a parent company to its subsidiary, such as the withholding tax at issue in the present case.

(4) Article 49 and Article 63(1) and (2) TFEU must be interpreted as meaning that they do not, in principle, preclude national legislation which, pursuant to the 'arm's length principle' and in order to combat tax avoidance, provides for the taxation in the form of withholding tax of notional interest that a resident subsidiary which has been granted an interest-free loan by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions, provided that the tax adjustment laid down in the national legislation is based on an individual examination of the transaction concerned and gives the taxable person the opportunity to provide evidence of any economic justification that there may have been for that transaction.

(5) Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital must be interpreted as meaning that it does not preclude a withholding tax such as that at issue in the present case.