JUDGMENT OF THE COURT (First Chamber)

18 June 2009 *

In Case C-303/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Korkein hallinto-oikeus (Finland), made by decision of 27 June 2007, received at the Court on 29 June 2007, in the proceedings brought by

Aberdeen Property Fininvest Alpha Oy,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Tizzano, A. Borg Barthet, E. Levits (Rapporteur) and J.-J. Kasel, Judges,

Advocate General: J. Mazák,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 13 November 2008,

* Language of the case: Finnish.

after considering the observations submitted on behalf of:

— Aberdeen Property Fininvest Alpha Oy, by J. Laaksonen, oikeustieteen kandidaatti, and M. Virolainen, kauppatieteiden maisteri,

— the Finnish Government, by J. Himmanen, acting as Agent,

— the Cypriot Government, by E. Neofitou, acting as Agent,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the Commission of the European Communities, by R. Lyal and I. Koskinen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 18 December 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 43 EC, 48 EC, 56 EC and 58 EC.

2 The reference was made in the course of proceedings before the Korkein hallinto-oikeus (Supreme Administrative Court) brought by Aberdeen Property Fininvest Alpha Oy ('Alpha'), a company governed by Finnish law, concerning the charging of withholding tax on dividends to be distributed to Aberdeen Property Nordic Fund I SICAV ('Nordic Fund SICAV'), an open-ended investment company (société d'investissement à capital variable, SICAV) governed by Luxembourg law and established in Luxembourg.

Legal context

Community legislation

3 Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States

(OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) ('Directive 90/435'), provides in Article 2:

'1. For the purposes of … Directive [90/435] "company of a Member State" shall mean any company which:

(a) takes one of the forms listed in the Annex hereto;

…

(c) moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:

…

— impôt sur le revenu des collectivités in Luxembourg,

…

— yhteisöjen tulovero/inkomstskatten för samfund in Finland,

…’

4 The first indent of Article 3(1)(a) of Directive 90/435 provides that, for the purposes of applying the directive, the status of parent company is to be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 of the directive and has a minimum holding of 20% in the capital of a company of another Member State fulfilling the same conditions. In accordance with the third and fourth indents of Article 3(1)(a), the minimum holding percentage is 15% from 1 January 2007 and 10% from 1 January 2009.

5 Under Article 5 of the directive, profits which a subsidiary distributes to its parent company are exempt from withholding tax.

6 Points (i) and (m) of the annex to Directive 90/435 read as follows:

‘(i) companies under Luxembourg law known as “société anonyme”, “société en commandite par actions”, “société à responsabilité limitée”, “société coopérative”, “société coopérative organisée comme une société anonyme”, “association d’assurances mutuelles”, “association d’épargne-pension”, “entreprise de nature commerciale, industrielle ou minière de l’État, des communes, des syndicats de communes, des établissements publics et des autres personnes morales de droit public”, and other companies constituted under Luxembourg law subject to Luxembourg corporate tax;

(m) companies under Finnish law known as "osakeyhtiö/aktiebolag", "osuuskunta/andelslag", "säästöpankki/sparbank" and "vakuutusyhtiö/försäkringsbolag"'.

National legislation

7 Under Paragraph 3 of the Tuloverolaki (Law on income tax, 1535/1992) of 30 December 1992, a 'corporation' means inter alia a share company, cooperative, savings bank, investment fund, or any other legal person or a totality of assets reserved for a specific purpose comparable to those corporations.

8 The first subparagraph of Paragraph 9 of that law provides:

'The following are liable to pay tax on income:

…

(2) a person who did not reside in Finland in the tax year, and a foreign corporation as regards its income received from there (limited tax liability).'

9 Under the sixth subparagraph of Paragraph 10 of that law, a dividend paid by a Finnish share company, cooperative or other corporation constitutes income received from Finland.

10 Paragraph 6a of the Laki elinkeinotulon verottamisesta (Law on the taxation of business income, 360/1968) of 24 June 1968, which governs the taxation of dividends received by share companies established in Finland, in the version of 30 July 2004, provides:

'A dividend received by a corporation is not taxable income. However, subject to the provisions of the second subparagraph, 75% of a dividend is taxable income and 25% tax-free income if:

(1) the dividend has been received on shares forming part of investment property and the corporation distributing the dividend is not a foreign corporation within the meaning of Article 2 of [Directive 90/435] of whose share capital the recipient of the dividend owns directly at least 10% when the dividend is distributed,

(2) the corporation distributing the dividend is not a Finnish corporation or a corporation resident in a Member State of the European Union within the meaning of indent (1), or

(3) the corporation distributing the dividend is a publicly quoted company within the meaning of the second subparagraph of Paragraph 33a of the Tuloverolaki and the recipient of the dividend is a corporation other than a publicly quoted company which when the dividend is distributed does not own directly at least 10% of the share capital of the company distributing the dividend.

Where there is no agreement for the avoidance of double taxation in force during the tax year between the State of residence of the foreign corporation distributing the dividend within the meaning of indent (2) of the first subparagraph and [the Republic of] Finland, applicable to the dividend distributed by the corporation, the dividend distributed by the corporation is taxable income in its entirety.

…'

11 Under Paragraph 3 of the Laki rajoitetusti verovelvollisen tulon verottamisesta (Law on the taxation of the income of persons with limited tax liability, 627/1978) of 11 August 1978, withholding tax is charged inter alia on dividends. The provisions of that law applicable to dividends also apply to shares in profits of investment funds.

12 Under the fifth subparagraph of Paragraph 3 of that law in the version of 30 July 2004, withholding tax is not charged on a dividend paid to a corporation resident in a Member State of the European Union which owns directly at least 20% of the share capital of the company paying the dividend, provided that the recipient of the dividend is a company within the meaning of Article 2 of Directive 90/435.

13 Dividends not covered by the exception in the fifth subparagraph of Paragraph 3 are subject to withholding tax, the rate of which is determined by the tax agreement between the Member State of residence of the recipient and the Republic of Finland, and in the absence of such an agreement is 28% of the gross amount of the dividend.

The double taxation convention

14 The Convention between Luxembourg and Finland for the avoidance of double taxation in the field of taxes on income and capital, concluded on 1 March 1982 (*Mémorial* A 1982, p. 1966), in the version applicable in the main proceedings ('the Tax Convention'), does not contain any particular provisions on companies in the form of a SICAV governed by Luxembourg law, but according to the case-law of the Korkein hallinto-oikeus such a company is regarded as a person resident in Luxembourg for the purposes of the convention.

15 In accordance with Article 10 of the Tax Convention, dividends which a company resident in one of the contracting Member States pays to a person resident in the other contracting Member State may be taxed in the latter State. Dividends may also be taxed in the contracting Member State in which the company paying the dividend is resident, under the law of that State. However, if the recipient is the person actually entitled to the dividend, the tax may not exceed 5% of the total dividend in the case of a company which directly or indirectly holds at least 25% of the capital of the company paying the dividend.

The main proceedings and the order for reference

16 Alpha made an application to the Keskusverolautakunta (Central Tax Commission) for a preliminary ruling on the taxation of dividends paid by that company to Nordic Fund SICAV, of which — according to the application — it was to become a wholly-owned subsidiary. Aberdeen Property Investors Luxemburg SA, a company in the Aberdeen Property Investors group, would be responsible for managing Nordic Fund SICAV.

17 The shares in Nordic Fund SICAV were to be offered primarily to institutional investors such as German insurance companies and pension funds. The aim was for Nordic Fund SICAV to invest in real property in Finland through Alpha, which would acquire shares in property companies, or possibly also acquire direct ownership of real property.

18 Alpha asked the Keskusverolautakunta whether it was obliged to charge withholding tax on dividends paid to Nordic Fund SICAV, having regard to Articles 43 EC and 56 EC and the fact that a dividend paid to a Finnish share company corresponding to a company in the form of a SICAV and investing in real property, or to another corporation of an equivalent kind resident in Finland, would not be taxable income under Finnish law and would not be subject to withholding tax.

19 The Keskusverolautakunta, in preliminary ruling No 2/2006 of 25 January 2006 concerning the charging of withholding tax for 2005 and 2006, took the view that Alpha was required to charge withholding tax on dividends paid to Nordic Fund SICAV.

20 It observed, first, that as SICAVs did not appear on the list in the annex to Directive 90/435 and did not pay income tax in their Member State of residence, Nordic Fund SICAV could not be regarded as a company within the meaning of that directive, so that a dividend paid to it was not to be exempted from withholding tax.

21 It stated, second, that while Nordic Fund SICAV was comparable to a Finnish share company ('osakeyhtiö'), there were several differences between them. They differed in that the share capital of a Finnish share company was tied up and could not be repaid to the shareholders during the company's operating life. They also differed in that a Finnish share company was liable to tax in its State of residence, and was a company

within the meaning of Directive 90/435. Those two types of company were not therefore comparable for the purposes of Community law.

22 Alpha challenged the decision of the Keskusverolautakunta before the Korkein hallinto-oikeus. Since it considered that resolving the dispute before it required an interpretation of Community law, that court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Are Articles 43 EC and 48 EC and Articles 56 EC and 58 EC to be interpreted as meaning that, in order to safeguard the fundamental freedoms set out therein, a share company or an investment fund governed by Finnish law and a SICAV governed by Luxembourg law are to be regarded as comparable despite the fact that a form of company corresponding exactly to a SICAV is not recognised in Finnish legislation, having regard, first, to the fact that a SICAV, which is a company governed by Luxembourg law, is not mentioned in the list of companies referred to in Article 2(a) of Directive [90/435], with which the Finnish withholding tax legislation applicable in the present case is consistent, and, second, to the fact that a SICAV is exempt from income tax under the domestic tax legislation of [the Grand Duchy of] Luxembourg? Is it therefore contrary to the above articles of the EC Treaty for a SICAV resident in Luxembourg which is the recipient of a dividend not to be exempt from the withholding tax charged in Finland on dividends?'

The question referred for a preliminary ruling

23 By its question the referring court asks essentially whether Articles 43 EC, 48 EC, 56 EC and 58 EC preclude legislation of a Member State which exempts from withholding tax dividends distributed by a subsidiary resident in that State to a share company or investment fund also resident in that State, but charges withholding tax on similar

dividends paid to a parent company in the form of a SICAV resident in another Member State which has a legal form unknown in the law of the former State, does not appear on the list of companies referred to in Article 2(a) of Directive 90/435, and is exempt from income tax under the law of the other Member State.

24 It should be noted at the outset that, according to consistent case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, in particular, Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 29; Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 36; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16).

25 It must also be pointed out that, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 24 and 30; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57; Case C-470/04 *N* [2006] ECR I-7409, paragraph 44; and *Amurta*, paragraph 17).

26 Only for distributions of dividends within the scope of Directive 90/435 does Article 5 of that directive require the Member States to exempt from withholding tax dividends distributed by a subsidiary to its parent company.

27 As the referring court observes, the situation at issue in the main proceedings does not fall within the scope of Directive 90/435, since a company in the form of a SICAV does not satisfy the conditions set out in Article 2(1)(a) and (c) of that directive.

28 The Court has already held that, in respect of shareholdings which are not covered by Directive 90/435, it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided and, for that purpose, to establish, either unilaterally or by conventions concluded with other Member States, procedures intended to prevent or mitigate such economic double taxation. However, that does not of itself allow them to impose measures that are contrary to the freedoms of movement guaranteed by the Treaty (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 54, and *Amurta*, paragraph 24).

29 Since the referring court has asked its question with respect both to Articles 43 EC and 48 EC and to Articles 56 EC and 58 EC, it must first be determined whether and to what extent national legislation such as that at issue in the main proceedings is liable to affect the freedoms guaranteed by those articles.

The applicable freedom

30 National legislation under which the application of the exemption from withholding tax to dividends distributed by a resident company depends, first, on whether the recipient company is resident or non-resident and, second, in the case of non-resident recipient companies, on the extent of the holding in the distributing company held by the recipient company and on the recipient company being classified as a company within

the meaning of Article 2 of Directive 90/435 may come under both Article 43 EC on freedom of establishment and Article 56 EC on the free movement of capital.

31 Exemption from withholding tax is not available to non-resident companies whose holdings in the distributing company are below the threshold fixed by national legislation, which at the material time for the main proceedings was 20% of the share capital, or to companies which, although their holdings are above that threshold, do not correspond to the definition of a company within the meaning of Article 2 of Directive 90/435.

32 According to the order for reference, in the main proceedings the company receiving the dividends is supposed to hold 100% of the shares in the distributing company, but is not regarded as a company within the meaning of Article 2 of that directive.

33 It is therefore clear that the main proceedings relate exclusively to the effect of the national legislation at issue in those proceedings on the situation of a resident company which distributes dividends to shareholders whose holdings give them definite influence over the decisions of that company and enable them to determine its activities (see, to that effect, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 38, and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 72).

34 According to settled case-law, where a company has a shareholding in another company which gives it definite influence over that company's decisions and allows it to determine that company's activities, it is the provisions of the Treaty on the freedom of

establishment that are to be applied (see, inter alia, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 31; *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 39; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 27; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20; and *Burda*, paragraph 69).

35 Should the legislation at issue in the main proceedings have restrictive effects on the free movement of capital, those effects would be the unavoidable consequence of such an obstacle to freedom of establishment as there might be, and do not therefore justify an independent examination of that legislation from the point of view of Article 56 EC (see, to that effect, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 33; *Test Claimants in the Thin Cap Group Litigation*, paragraph 34; and *Oy AA*, paragraph 24).

36 The referring court's question should therefore be answered with respect to Articles 43 EC and 48 EC alone.

The existence of a restriction of freedom of establishment

37 The Court's case-law shows that freedom of establishment, which Article 43 EC grants to Community nationals and which includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State of establishment, entails, in accordance with Article 48 EC, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29, and Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 20).

38 In the case of companies, their registered office for the purposes of Article 48 EC serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. Acceptance of the proposition that the Member State of residence may freely apply different treatment merely by reason of the fact that the registered office of a company is situated in another Member State would deprive Article 43 EC of all meaning. Freedom of establishment thus aims to guarantee the benefit of national treatment in the host Member State, by prohibiting any discrimination based on the place in which companies have their seat (see *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 43; *Denkavit Internationaal and Denkavit France*, paragraph 22; *Burda*, paragraph 77; and Case C-282/07 *Truck Center* [2008] ECR I-10767, paragraph 32).

39 In the present case, it is common ground that a share company or investment fund governed by Finnish law and resident in Finland which receives dividends from another company also having its seat in that Member State is in principle exempt from tax on those dividends, whereas dividends distributed by a resident company to a non-resident company which is not regarded as a company within the meaning of Article 2 of Directive 90/435 are subject to withholding tax.

40 In so far as dividends distributed by a resident company are first taxed in that company's hands as profits realised, a non-resident recipient company which is not regarded as a company within the meaning of Article 2 of Directive 90/435 is subject, because of the withholding tax, to a series of charges to tax on those dividends, whereas there is no such series of charges to tax for dividends received by a resident share company or investment fund.

41 Such a difference in tax treatment of dividends between parent companies based on the place where they have their seat is liable to constitute a restriction of freedom of establishment, prohibited in principle by Articles 43 EC and 48 EC, in that it makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the Member State which applies such different treatment (see, to that effect, *Denkavit Internationaal and Denkavit France*, paragraphs 29 and 30).

42 It is true that the Court has held that, in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or economic double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a comparable situation to that of shareholders receiving dividends who are resident in another Member State (*Denkavit Internationaal and Denkavit France*, paragraph 34, and *Amurta*, paragraph 37).

43 However, once a Member State, unilaterally or by way of a convention, imposes a charge to income tax not only on resident shareholders but also on non-resident shareholders in respect of dividends which they receive from a resident company, the position of those non-resident shareholders becomes comparable to that of resident shareholders (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 68; *Denkavit Internationaal and Denkavit France*, paragraph 35; and *Amurta*, paragraph 38).

44 Consequently, where a Member State has chosen to relieve resident parent companies of a series of charges to tax on the profits distributed by a resident subsidiary, it must extend that relief to non-resident parent companies which are in a comparable situation, since an imposition of that kind on those non-resident companies results from the exercise of its tax jurisdiction over them (see, to that effect, *Denkavit Internationaal and Denkavit France*, paragraph 37).

45 The Finnish Government submits, however, that since national legislation does not allow companies to be set up in Finland with a legal form identical to that of a SICAV under Luxembourg law, that SICAV, because of its legal form and tax treatment, is in a situation which is objectively different from that of companies or investment funds established in Finland.

46 The government argues that a SICAV, unlike a Finnish share company, is not subject to income tax in the Member State of residence, in that, in Luxembourg, such a company is subject only to a tax on capital at the rate of 0.01% and the profits it distributes to a person resident in another Member State are not subject to any withholding tax. In contrast, dividends received by Finnish share companies are exempted from tax solely in order to avoid their being subject to a series of charges to tax when profits are distributed between share companies, while the other income of those companies is taxed.

47 The Italian Government adds in this respect that a real property SICAV, which is not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) (OJ 1985 L 375, p. 3) and whose sole purpose is the collective investment of funds gathered by the sale to the public of its own shares, constitutes a fundamentally transparent entity which aims, through collective management, to add value to each member's individual contribution and is not comparable in itself to an ordinary company. The specific nature of such a company justifies it being exempted from income tax in the State of residence, since the only income to be taken into account is in reality that of each member. The problem of a series of charges to tax does not therefore arise at the level of the SICAV but at that of the members, and it is then for the law of the Member State concerned to provide a remedy.

48 As regards the comparison between a SICAV governed by Luxembourg law and an investment fund governed by Finnish law, the Finnish Government observes, first, that during the period at issue in the main proceedings national legislation prohibited such a tax-exempt fund from making real property investments such as those mentioned in the order for reference. Second, the profits distributed by a SICAV do not give rise to withholding tax in Luxembourg, unlike profits distributed by a Finnish investment fund to a person resident in another Member State, unless a provision in a double taxation convention provides otherwise.

49 Those arguments cannot be accepted.

50 In the first place, the circumstance that in Finnish law there is no type of company with a legal form identical to that of a SICAV governed by Luxembourg law cannot in itself justify a difference in treatment, since, as the company law of the Member States has not been fully harmonised at Community level, that would deprive the freedom of establishment of all effectiveness.

51 In the second place, the circumstance relied on by the Finnish Government that the income of a SICAV is not taxed in Luxembourg, assuming that to be correct, does not create a difference between a SICAV and a resident share company which justifies different treatment as regards withholding tax on dividends received by those two classes of company.

52 Thus, according to the Finnish Government, dividends paid by a resident company to another resident company are not taxed either by means of withholding tax or by forming part of the income of the recipient company. Consequently, the non-taxation of that category of income in Luxembourg is not such as to justify it being taxed by the Finnish State, since that State has chosen not to exercise its tax jurisdiction over such income where it is received by companies resident in Finland.

53 Also, the Finnish Government has not shown how the tax treatment of other categories of income of resident companies and non-resident SICAVs could be relevant for assessing the comparability of those two types of company from the point of view of the exemption from withholding tax on dividends received.

54 In the third place, there is no merit in the Italian Government's argument that, because the Grand Duchy of Luxembourg does not tax the income of a SICAV, the imposition of a series of charges to tax takes place not at the level of the SICAV but at that of its members and should be avoided by the Member State in which those members reside. It is the Republic of Finland which, by subjecting to withholding tax income that has already been taxed at the level of the distributing company, creates the series of charges to tax, a series which that Member State chose to prevent in the case of dividends distributed to resident companies.

55 In those circumstances, the differences between a SICAV governed by Luxembourg law and a share company governed by Finnish law, relied on by the Finnish and Italian Governments, are not sufficient to create an objective distinction with respect to exemption from withholding tax on dividends received. Consequently, there is no further need to examine to what extent the differences between a SICAV governed by Luxembourg law and an investment fund governed by Finnish law, said to exist by those governments, are relevant for establishing such an objective difference in situation.

56 It follows that the difference in treatment between non-resident SICAVs and resident share companies with respect to the exemption from withholding tax on dividends distributed to them by resident companies constitutes a restriction of freedom of establishment, prohibited in principle by Articles 43 EC and 48 EC.

Justification of the restriction of freedom of establishment

57 According to the Court's case-law, a restriction of freedom of establishment is permissible only if it is justified by overriding reasons in the public interest. It is further necessary, in such a case, that it should be appropriate to ensuring the attainment of the

objective in question and not go beyond what is necessary to attain that objective (see Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 27, and Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 40 and the case-law cited).

58 The Finnish Government submits on this point that the national rules are intended to prevent tax avoidance, in that the exemption from withholding tax of a dividend paid to a company resident in a Member State other than the Republic of Finland, which does not itself pay tax on that income and the distribution of whose profits does not give rise to withholding tax, entails a risk of artificial arrangements being set up with the intention of avoiding all forms of tax on income.

59 It argues, moreover, that the tax system at issue in the main proceedings is intended to prevent conduct which could compromise the Republic of Finland's right to exercise its tax jurisdiction in relation to activities carried out on its territory. The application of withholding tax is thus justified by the need to preserve a balanced apportionment of the power of taxation agreed between that Member State and the Grand Duchy of Luxembourg in the Tax Convention, under which the State of origin of the income retains the right to charge 5% withholding tax on it.

60 The Italian Government adds that an exemption from withholding tax would encourage groups of companies to locate their parent companies in the States where taxes are lowest, or where there are no taxes, which would ultimately give groups of companies the power to choose where and to what extent the dividends arising in the territory of a Member State were to be taxed, that State being deprived of its tax jurisdiction over those dividends. Also according to the Italian Government, the need to prevent tax avoidance and to safeguard the balanced apportionment of the power to tax justifies the application of withholding tax.

61 Finally, according to the Finnish Government, the legislation at issue in the main proceedings is justified by the need to maintain the coherence of the Finnish tax system, which is based on the principle that the exemption from withholding tax of dividends received by resident share companies and investment funds is offset by the taxation of

the corresponding income at the level of the natural person receiving them, since a shareholder in a share company pays tax on those dividends and profit shares paid by investment funds are regarded in Finland as capital income, which is taxed at 28%.

62 The justifications put forward by the Finnish and Italian Governments cannot be accepted.

63 As regards, first, the argument concerning the prevention of tax avoidance, it must be recalled that, according to established case-law, a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned (see, to that effect, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 26; *Marks & Spencer*, paragraph 57; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 51; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 72).

64 For a restriction of freedom of establishment to be justified on grounds of the prevention of abusive practices, the specific objective of such a restriction must be to prevent 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 (*Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 55, and *Test Claimants in the Thin Cap Group Litigation*, paragraph 74).

65 It suffices to note that the tax system at issue in the main proceedings does not specifically aim at such purely artificial arrangements which do not reflect economic reality and are created solely with a view to escaping the tax normally due on the profits generated by activities carried out on national territory, and cannot therefore be justified on grounds connected with the prevention of tax avoidance.

66 As regards, next, the argument concerning the balanced apportionment of the power to tax, it should be recalled that such a justification may be accepted, 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 on in its territory (see Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 42; *Oy AA*, paragraph 54; and *Amurta*, paragraph 58).

67 Where, however, a Member State has chosen not to tax recipient companies established in its territory in respect of this kind of income, it cannot rely on the argument that there is a need to safeguard the balanced apportionment of the power to tax between the Member States in order to justify the taxation of recipient companies established in another Member State (*Amurta*, paragraph 59).

68 In this respect, the fact that the Tax Convention reserves to the Republic of Finland the right to exercise its tax jurisdiction over dividends paid by companies resident in Finland to recipients resident in Luxembourg is of no relevance.

69 A Member State cannot rely on a double taxation convention in order to avoid its obligations imposed under the Treaty (see *Denkavit Internationaal and Denkavit France*, paragraph 53, and *Amurta*, paragraph 55).

70 Moreover, in so far as dividends distributed by resident companies are taxed in the hands of the distributing companies as profits realised, the exemption from withholding tax on those dividends does not deprive the Republic of Finland of all right to tax the income relating to activities carried out on its territory.

71 As regards, finally, the argument concerning the preservation of the coherence of the Finnish tax system, the Court has acknowledged that the need to preserve such coherence may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty (see Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28; Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21; *Keller Holding*, paragraph 40; *Amurta*, paragraph 46; and Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 37).

72 For an argument based on such a justification to succeed, however, the Court requires a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 18; *ICI*, paragraph 29; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; and *Keller Holding*, paragraph 40), with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (*Manninen*, paragraph 43; *Deutsche Shell*, paragraph 39; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 44).

73 In the tax system at issue in the main proceedings, the exemption of dividends from withholding tax is not subject to the condition that the dividends received by the share company are distributed onward by it and that their taxation in the hands of the shareholders in the company allows the exemption from withholding tax to be offset.

74 Consequently, there is no direct link within the meaning of the case-law cited in paragraph 72 above between the exemption from withholding tax and the taxation of those dividends as income of the shareholders in a share company.

75 It follows that the restriction of freedom of establishment constituted by the legislation at issue in the main proceedings cannot be justified by the need to preserve the coherence of the Finnish tax system.

76 In the light of the foregoing, the answer to the referring court's question is that Articles 43 EC and 48 EC must be interpreted as precluding legislation of a Member State which exempts from withholding tax dividends distributed by a subsidiary resident in that State to a share company resident in that State, but charges withholding tax on similar dividends paid to a parent company in the form of a SICAV resident in another Member State which has a legal form unknown in the law of the former State, does not appear on the list of companies referred to in Article 2(a) of Directive 90/435, and is exempt from income tax under the law of the other Member State.

Costs

77 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 43 EC and 48 EC must be interpreted as precluding legislation of a Member State which exempts from withholding tax dividends distributed by a subsidiary resident in that State to a share company resident in that State, but charges withholding tax on similar dividends paid to a parent company in the form of an open-ended investment company (SICAV) resident in another Member State which has a legal form unknown in the law of the former State, does not appear on the list of companies referred to in Article 2(a) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2003/123/EC of 22 December 2003, and is exempt from income tax under the law of the other Member State.

[Signatures]