

OPINION OF ADVOCATE GENERAL

MAZÁK

delivered on 18 December 2008¹

1. The present reference for a preliminary ruling is submitted to the Court by the Korkein hallinto-oikeus (Supreme Administrative Court, Finland). The question referred for a preliminary ruling concerns the interpretation of Articles 43 EC and 48 EC, and Articles 56 EC and 58 EC.

Alpha paid a dividend to a Finnish company limited by shares similar to a company in the form of a SICAV or to another equivalent Finnish corporation, that dividend would not be taxable income or subject to withholding tax.

2. The referring court considers that an interpretation of those articles of the EC Treaty may be of use in order to determine the application from the company Aberdeen Property Fininvest Alpha Oy (hereinafter 'Alpha') to set aside the preliminary ruling of the Keskusverolautakunta (Central Tax Commission) of 25 January 2006 holding that, for the years 2005 and 2006, Alpha was required to charge withholding tax on the dividends that it paid to its parent company Aberdeen Property Nordic Fund I SICAV ('Nordic Fund SICAV'), which was constituted as a *société d'investissement à capital variable* (SICAV) or open-ended investment company ('a company in the form of a SICAV') under Luxembourg law.

I — Legal framework

A — Community law

Directive 90/435

3. The referring court's doubts stem from the fact that, under the national legislation, if

4. The aim 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 States² is to exempt dividends and other profit distributions paid by subsidiary

1 — Original language: French.

2 — OJ 1990 L 225, p. 6, 'Directive 90/435'.

companies to their parent companies from withholding taxes, and to eliminate double taxation of such income at the level of the parent company.³

communes, des établissements publics et des autres personnes morales de droit public”, and other companies constituted under Luxembourg law subject to Luxembourg corporate tax’.⁴ As regards the third condition in relation to Luxembourg, a company must be subject to *impôt sur le revenu des collectivités*.

5. In accordance with Article 2 of Directive 90/435, for the purposes of the directive, a ‘company of a Member State’ means every company fulfilling each of three separate conditions. First, the company takes one of the forms listed in the Annex to Directive 90/435. Second, the company is considered, according to the tax laws of a Member State, to be resident in that State for tax purposes, and is not considered, under the terms of a double taxation agreement concluded with a non-member country, to be resident for tax purposes outside the Community. Third, the company is subject to one of the taxes listed in Article 2(1)(c) of Directive 90/435, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes.

6. In relation to Luxembourg, the Annex to Directive 90/435 lists “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

B — National law

Law on income tax

7. Pursuant to Paragraph 9 of the Tuloverolaki (Law on income tax),⁵ all foreign legal persons have a limited tax liability to income tax, that is to say for income received from Finland.

8. The income received from Finland is listed in Paragraph 10 of the Tuloverolaki, which includes, inter alia, dividends paid by a company limited by shares, a cooperative or any other Finnish corporation.

3 — The objective of Directive 90/435 was described in detail by Advocate General Sharpston at points 46 and 47 of her recent Opinion in Case C-48/07 *Les Vergers du Vieux Tauves*.

4 — In relation to Luxembourg, the current version of the Annex stems from an amending directive, Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41).

5 — 1535/1992.

9. Paragraph 20 of the Tuloverolaki contains a list of corporations that are exempt from income tax, which also includes, *inter alia*, investment funds.

received by a legal person established in Finland are not as a general rule taxable income. By contrast, dividends received by natural persons are taxable income.

Law on taxation of income of persons with limited tax liability

II — Factual background

10. Pursuant to Paragraph 3 of the Laki rajoitetusti verovelvollisen tulon verottamisesta (Law on taxation of the income of persons with limited tax liability) ('the Lähdeverolaki' or Law on withholding tax),⁶ dividends paid by a Finnish corporation to a person with limited tax liability are subject to withholding tax, except where the recipient of the dividend is a corporation resident in a European Union Member State and directly holds at least 20% of the capital of the company paying the dividend, and at the same time is one of the companies listed in Article 2 of Directive 90/435.

12. Alpha is an unlisted Finnish company limited by shares established in August 2005. Since it was to be a wholly owned subsidiary of Nordic Fund SICAV, constituted under Luxembourg law as a company in the form of a SICAV, Alpha applied to the Keskusverolautakunta for a preliminary ruling regarding its obligation to charge withholding tax on the dividends paid to Nordic Fund SICAV.

Law on the taxation of business income

11. Paragraph 6a of the Laki elinkeinotulon verottamisesta (Law on the taxation of business income)⁷ provides that dividends

13. Alpha made reference to Articles 43 EC and 56 EC on freedom of establishment and the free movement of capital. It follows from them that objectively comparable situations should be treated in the same way with regard to taxation. Alpha, which pays dividends to a company established in another Member State, finds itself in a comparable situation to a Finnish company that pays dividends to a Finnish shareholder. If Alpha paid a dividend to a Finnish share company equivalent to a SICAV pursuing real property investment, or to another equivalent Finnish corporation,

⁶ — 627/1978.

⁷ — 360/1968.

such a dividend would not be taxable income under either the Laki elinkeinotulon verottamisesta or the Tuloverolaki. It therefore follows that neither would withholding tax be charged on the dividend distributed.

14. The Keskusverolautakunta held in its preliminary ruling of 25 January 2006 that Alpha was required to charge withholding tax on the dividends it paid to Nordic Fund SICAV. That ruling made reference to the Tuloverolaki, which provides that a foreign corporation must pay tax on its income from Finland, and to the Laki rajoitetusti verovelvollisen tulon verottamisesta, which provides that the dividends paid by a Finnish corporation to a person with limited tax liability are subject to withholding tax, except where the recipient of the dividend is a corporation resident in a Member State and directly holds at least 20% of the capital of the company paying the dividend, and at the same time is one of the companies listed in Article 2 of Directive 90/435. Since a company in the form of a SICAV is not listed in the Annex to Directive 90/435 and is wholly exempt from paying tax on its income in Luxembourg, Nordic Fund SICAV could not be regarded as a company within the meaning of Directive 90/435, and the dividends which it receives could not be exempt from withholding tax.

15. As regards the EC Treaty rules on freedom of establishment and on free movement of capital, such rules do not, in the view of the Keskusverolautakunta, preclude the application of the abovementioned Finnish laws, since the position of a Finnish company limited by shares and that of a company in the form of a SICAV are not comparable. The Keskusverolautakunta sees three differences between the two types of company. First, the share capital of a Finnish company limited by shares is tied up, that is to say it cannot therefore as a general rule be repaid to the shareholders while the company is operational. Second, a Finnish company limited by shares is liable to tax on its income from Finland. Third, a Finnish company limited by shares is a company for the purposes of Directive 90/435, which is not the case for a company in the form of a SICAV.

16. Alpha made an application to the Korkein hallinto-oikeus to set aside the preliminary ruling of the Keskusverolautakunta. It made further reference to Articles 43 EC and 56 EC, and it submitted that the argument that the situations of a Finnish company limited by shares and a company in the form of a SICAV are not comparable is unfounded.

III — Question referred for a preliminary ruling and proceedings before the Court

17. The Korkein hallinto-oikeus decided to stay the proceedings and to 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/EEC, 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 domestic Luxembourg tax legislation? 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 withholding tax charged in Finland on dividends?’

18. The Finnish, Italian and Cypriot Governments and the Commission of the European Communities have submitted written observations. The Finnish Government proposes answering the question by stating that it is not contrary to Articles 43 EC and 48 EC, or Articles 56 EC and 58 EC, that a company in the form of a SICAV resident in Luxembourg is not exempt from withholding tax in Finland on the dividend received. The Italian Government in substance shares that view. By contrast, the Cypriot Government and the Commission are of the view that a company limited by shares or an investment fund constituted under Finnish law and a company in the form of a SICAV under 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 law, and it is therefore contrary to the Treaty that a company in the form of a SICAV resident in Luxembourg is not exempt in Finland from withholding tax on the dividend received.

19. Alpha, the Finnish Government and the Commission were represented at the hearing, which was held on 13 November 2008 at Alpha’s request. Alpha’s representatives did not submit written observations, and in essence concurred with the view of the Cypriot Government and the Commission.

IV — Assessment

A — *Introductory remarks*

20. The question posed by the referring court seeks in fact to ascertain whether Articles 43 EC and 48 EC and Articles 56 EC and 58 EC preclude the legislation of a Member State, such as that at issue in the main proceedings, under which dividends paid by a company established in Finland to a company limited by shares or an investment fund established in Finland are not taxable income, whereas dividends paid to a company in the form of a SICAV governed by Luxembourg law, which is wholly exempt from income tax in Luxembourg, constitute taxable income and are subject to withholding tax.

21. It should be noted as a preliminary observation that the Court has consistently held that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law⁸ and avoid any discrimination on grounds of nationality.⁹

22. The tax rules of the Member States concerning parent and subsidiary companies of different Member States are influenced by Directive 90/435. As a result of the directive's implementation in Finland, withholding tax is not charged on a dividend paid to a corporation resident in a European Union Member State which directly holds at least 20% of the capital of the company paying the dividend, and which at the same time is one of the companies listed in Article 2 of Directive 90/435.

23. Clearly that is not the case for Nordic Fund SICAV, which fulfils the requirement as to the size of the holding in the company paying the dividend, but is not one of the companies to which Article 2 of Directive 90/435 applies, since it is not listed in the Annex to Directive 90/435, and is wholly exempt from income tax in Luxembourg. However, it does not therefore follow that that company may not rely on the fundamental freedoms established by the EC Treaty.

24. For that reason, the situation must in the present case be examined in the light of the relevant Treaty provisions.

25. However, what are the relevant provisions in this instance? The question posed by the referring court concerns both freedom of

⁸ — See, to that effect, Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 16 and the case-law cited.

⁹ — See Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 37; Case C-170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I-11949, paragraph 19; and Case C-360/06 *Heinrich Bauer Verlag* [2008] ECR I-7333, paragraph 17.

establishment and the free movement of capital. The views of the Commission, on the one hand, and the Finnish and Cypriot Governments on the other, differ as to the basis on which the present case must be examined.

26. Depending on the individual case, it is possible for the decision to be based on freedom of establishment or free movement of capital. According to case-law, the decisive criterion is a shareholding which gives the parent company definite influence over its subsidiary's decisions, and allows it to determine its subsidiary's activities.¹⁰

27. As is apparent from the order for reference, Alpha is a wholly owned subsidiary of Nordic Fund SICAV. It is therefore clear that Nordic Fund SICAV has a substantial influence over Alpha's management. That means that the main proceedings are concerned with freedom of establishment, and that is why I shall seek to answer the question referred on the basis of the Treaty provisions on freedom of establishment.

28. Nevertheless, I must observe that, as the Commission rightly points out, the choice of Treaty provisions to be applied is not,

however, of any practical effect, the result of applying either Articles 43 EC or 56 EC being the same. The arguments concerning the comparability of the situation of a company limited by shares or an investment fund governed by Finnish law and that of a company in the form of a SICAV governed by Luxembourg law may be used for both freedom of establishment and the free movement of capital.

B — Freedom of establishment and comparable situation

29. According to the case-law of the Court, 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 Community, freedom of establishment entails the right to exercise their activity in other Member States through a subsidiary, branch or agency;¹¹ it cannot therefore be denied that Nordic Fund SICAV exercises freedom of establishment by carrying on its activity in Finland through the Finnish company Alpha, of which it is the sole shareholder.

¹⁰ — See Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 21 and 22; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 37; Case C-231/05 *Oy AA* [2007] ECR I-6373, paragraph 20; and Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 69.

¹¹ — See Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 35; Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 20; Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29; *Denkavit Internationaal and Denkavit France*, cited in footnote 9, paragraph 20; Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 18; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 15.

30. In addition, it cannot be denied that the Finnish legislation is at the origin of the different treatment of dividends paid by a Finnish company. Dividends paid to a company resident in Finland, irrespective of their form, are not taxable income, in the interest of avoiding their being taxed at several stages. By contrast, dividends paid to a company established abroad are taxable income and subject to withholding tax, with the exception of companies resident in a European Union Member State which directly hold at least 20% of the capital of the company paying the dividend, and are at the same time one of the companies listed in Article 2 of Directive 90/435. The different treatment therefore concerns companies established in Finland, and companies established abroad which are not covered by Directive 90/435, and is based on where a company has its seat.

31. As the Court has stated on several occasions, freedom of establishment seeks thus to guarantee the benefit of national treatment in the host Member State of the subsidiary, by prohibiting all discrimination, even minimal, based on the place in which companies have their seat.¹²

32. Different treatment does not in itself constitute discrimination. 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.¹³ The question referred for a preliminary ruling is also along such lines.

33. I consider that the answer to the question of whether a parent company established in Finland, or, more precisely, a parent company in the form of a 'share company' or an 'investment fund' governed by Finnish law, is in a comparable situation to a company in the form of a SICAV governed by Luxembourg law is to be found in the Court's judgment in *Denkavit Internationaal and Denkavit France*.¹⁴

34. Unlike the Finnish and Italian Governments, I do not think that the Court's reasoning in *Denkavit* cannot be applicable in the present case. In my estimation, the argument that the facts in the main proceedings in *Denkavit* occurred prior to the entry into force of Directive 90/435, and therefore that the Court was unable to take account of that directive in interpreting the system, is not well founded. In *Denkavit*, the Court explained the effects of the provisions of the

12 — See, to that effect, Case 270/83 *Commission v France* [1986] ECR 273, paragraph 14; *Saint-Gobain*, cited in footnote 11, paragraph 35; and *Denkavit Internationaal and Denkavit France*, cited in footnote 9, paragraph 22.

13 — See, to that effect, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 30; Case C-383/05 *Talotta* [2007] ECR I-2555, paragraph 18; Case C-182/06 *Lakebrink and Peters-Lakebrink* [2007] ECR I-6705, paragraph 27; and Case C-341/05 *Laval un Partneri* [2007] ECR I-11767, paragraph 115.

14 — Cited in footnote 9.

Treaty, and the provisions themselves cannot lose their effects as a result of the influence of a directive. The interpretation of a directive cannot override the interpretation of the Treaty.

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.

35. That conclusion is confirmed by paragraph 24 of the Court's judgment in *Amurta*, which stated that, in respect of shareholdings not covered by Directive 90/435,¹⁵ 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 procedures intended to prevent or mitigate such economic double taxation. However, that does not of itself mean that the Member States are entitled to impose measures that contravene the freedoms of movement guaranteed by the Treaty.

37. Parent companies established in Finland and parent companies established abroad are therefore in a comparable situation, as in both cases they are subject to income tax in Finland. In that connection, it should be noted that parent companies established abroad are subject to income tax, whatever their form. However, Finnish legislation provides for the exemption from taxation of dividends paid to parent companies established in Finland and, pursuant to Directive 90/435, those paid to some only of the parent companies established abroad, that is to say, parent companies established abroad covered by Directive 90/435. The remaining parent companies established abroad, namely companies not covered by Directive 90/435, are subject to withholding tax.

36. Once it is accepted that the Court's reasoning in *Denkavit* may be applicable in the present case, an answer to the present question may be found at paragraph 38 of *Denkavit*, which states that as soon as a Member State imposes a charge to income tax not only on resident shareholders but also on

38. It is also evident from the case-law of the Court that in order to establish whether discrimination exists, the comparability of a Community situation with one which is purely domestic must be examined by taking

¹⁵ — Cited in footnote 8.

into account the objective pursued by the national provisions at issue.¹⁶

dents results from the exercise of its tax jurisdiction over them.¹⁷

39. According to the Finnish Government's written observations, the aim of exempting dividends from taxation is to avoid a series of charges to tax.

40. At this juncture, I must emphasise that, under Paragraph 6a of the Laki elinkeinotulon verottamisesta, the exemption concerns not only companies limited by shares but also any legal person established in Finland. That means that, as a general rule, the exemption is designed to avoid the imposition of a series of charges to tax on the profits of subsidiaries which are distributed by way of dividend to the parent companies of those subsidiaries.

41. It is clear from the case-law of the Court that once a Member State has chosen to relieve its residents of a liability to a series of charges to tax, it must extend that measure to non-residents to the extent to which an imposition of that kind on those non-resi-

42. Accordingly, the Finnish legislation at issue causes parent companies in a comparable situation with regard to dividends paid by subsidiaries established in Finland to be treated differently. That means that that legislation creates discrimination between parent companies on the basis of their residence, whatever their form.

43. That conclusion is not called into question by the fact that a SICAV company is exempt from income tax under the national tax rules in Luxembourg. In that regard, it should be recalled that it is settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist.¹⁸

16 — See, to that effect, *Metallgesellschaft and Others*, cited in footnote 9, paragraph 60; *Oy AA*, cited in footnote 10, paragraph 38; and *Papillon*, cited in footnote 11, paragraph 27.

17 — See *Denkavit Internationaal and Denkavit France*, cited in footnote 9, paragraph 37.

18 — See, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 61, and *Amurta*, cited in footnote 8, paragraph 75.

V — Conclusion

44. In light of the foregoing considerations, I therefore propose that, in answer to the questions referred for a preliminary ruling, the Court should rule as follows:

Articles 43 EC and 48 EC preclude legislation of a Member State under which dividends paid by a resident subsidiary company to a resident parent company are not taxable income, whatever the form of the parent company, whereas dividends paid to a non-resident parent company whose form is not recognised in the legislation of the Member State of the subsidiary, and which is not covered by 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, constitute taxable income and are subject to withholding tax, even where the non-resident parent company is exempt from income tax in the State where it is resident.