Case C-284/06

Finanzamt Hamburg-Am Tierpark

v

Burda GmbH, formerly Burda Verlagsbeteiligungen GmbH

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Tax legislation – Freedom of establishment – Directive 90/435/EEC – Corporation tax – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Company with a share capital – Distribution of revenue and of increases in share capital – Withholding tax – Tax credit – Treatment of resident shareholders and non-resident shareholders)

Summary of the Judgment

1. *Procedure – Oral procedure – Reopening*

(Art. 234 EC; Rules of Procedure of the Court, Art. 61)

2. *Approximation of laws – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Directive 90/435*

(Council Directive 90/435, Art. 5(1))

3. *Freedom of movement for persons – Freedom of establishment – Tax legislation – Corporation tax*

(EC Treaty, Art. 52 (now, after amendment, Art. 43 EC); Council Directive 90/435, Art. 4)

1. The Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties. However, the argument that the Advocate General did not take account in his Opinion of the provisions of certain provisions of national law not mentioned by the national court in its order for reference cannot justify the reopening of the oral procedure, having regard to the requirements laid down in that article.

In proceedings brought under Article 234 EC, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the court making the reference which, while drawing up the internal legal framework, leaves it open to the Court to provide all the criteria of interpretation of Community law so as to permit the court making the reference to assess the compatibility of national legislation with the Community rules. Moreover, neither the Statute of the Court of Justice nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion.

Similarly, only the court making the reference may define the factual context in which the questions which it asks arise or, at very least, explain the factual assumptions on which the questions are based. Consequently, when certain facts are not set out by the national court in the order for reference, a party cannot argue that certain factual premises on which the Advocate General's analysis is based are incorrect or incomplete so as to justify the reopening of the oral procedure, having regard to the requirements laid down in Article 61 of the Rules of Procedure of the Court.

(see paras 37-40, 42, 44-47)

2. A provision of national law which, in relation to cases where profits are distributed by a subsidiary to its parent company, provides for the taxation of income and asset increases of the subsidiary which would not have been taxed if they had remained with the subsidiary and had not been distributed to the parent company does not constitute a withholding tax within the meaning of Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

Any tax on income received in the State in which dividends are distributed is a withholding tax on distributed profits where the chargeable event for the tax is the payment of dividends or of any other income from shares, the taxable amount is the income from those shares and the taxable person is the holder of the shares. It follows that three conditions must be cumulatively fulfilled for the application of the abovementioned provision. Since the third condition, namely that the taxable person is the holder of the shares, is not fulfilled, Article 5(1) of Directive 90/435 does not preclude a corrective accounting mechanism such as that laid down in the abovementioned provision of national law.

(see paras 52-53, 61, 63-64, operative part 1)

3. Article 52 of the Treaty (now, after amendment, Article 43 EC) must be interpreted as not precluding the application of a national measure under which the taxation of profits distributed by a subsidiary resident in a Member State to its parent company is subject to the same corrective mechanism regardless of whether the parent company is resident in the same Member State or in another Member State even though – unlike a resident parent company – a non-resident parent company is not granted a tax credit by the Member State in which the subsidiary is resident.

Where application of the corrective mechanism at issue does not alter the tax burden of the resident subsidiary on the basis of whether its parent company is resident in the same Member State or in another Member State, so that the subsidiary's situation in regard to the legislation of its Member State of residence is not different according to whether it distributes its profits to a non-resident parent company or to a resident one, application of the mechanism in question does not cause, in regard to the subsidiary, different situations to receive identical treatment, constituting discriminatory fiscal treatment which is prohibited in principle by Article 52 of the Treaty.

That assessment is not weakened by the fact that, for non-resident shareholders, the tax levied on the company making the distribution becomes definitive in the sense that the increase in the tax burden imposed on the company making the distribution is not compensated for by the allocation of a corresponding tax credit. 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. On that basis, the tax credit granted to the resident parent company under such national legislation is intended to prevent economic double taxation of profits distributed by a resident subsidiary which have already been taxed in the latter's hands. In the case of cross-border distribution of profits, it is, in principle, not for the Member State in which the subsidiary is resident to prevent economic double taxation but for the Member State in whose territory the parent company is resident, as is clear from Article 4 of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States. Consequently, the Member State in which the parent company is resident is required to accord fiscal treatment which is designed to achieve the same result as the tax credit granted by the Member State in which the subsidiary is resident to parent companies established there, with the effect that economic double taxation of profits distributed in the form of dividends is also avoided. Thus, just as the resident parent company of a resident subsidiary is granted a tax credit by its Member State of residence, acting also in its capacity as the Member State in which the subsidiary is resident, the non-resident parent company of a resident subsidiary is protected against the risk of economic double taxation of profits distributed in the form of dividends, but by the Member State in which it is resident. The fact that the Member State in which the subsidiary is resident does not grant a tax credit to a non-resident parent company does not therefore distinguish the situation of the resident subsidiary of a resident parent company from that of the resident subsidiary of a non-resident parent company.

(see paras 82-85, 87-92, 94-96, operative part 2)

JUDGMENT OF THE COURT (Fourth Chamber)

26 June 2008 (*)

(Tax legislation – Freedom of establishment – Directive 90/435/CEE – Corporation tax – Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States – Company with a share capital – Distribution of revenue and of increases in share capital – Withholding tax – Tax credit – Treatment of resident shareholders and non-resident shareholders)

In Case C?284/06,

REFERENCE for a preliminary ruling under Article 234 EC, by the Bundesfinanzhof (Germany), made by decision of 22 February 2006, received at the Court on 29 June 2006, in the proceedings

Finanzamt Hamburg-Am Tierpark

v

Burda GmbH, formerly Burda Verlagsbeteiligungen GmbH,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of Chamber, G. Arestis (Rapporteur), R. Silva de Lapuerta, E. Juhász and T. von Danwitz, Judges,

Advocate General: P. Mengozzi,

Registrar: J. Swedenborg, Administrator,

having regard to the written procedure and further to the hearing on 13 June 2007, after considering the observations submitted on behalf of:

– Burda GmbH, formerly Burda Verlagsbeteiligungen GmbH, by H. Geißler, B. von Winterfeld and J. Lüdicke, Rechtsanwälte,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 31 January 2008,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation 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 (OJ 1990 L 225, p. 6) in the version applicable to the dispute in the main proceedings ('Directive 90/435'), Article 52 of the EC Treaty (now, after amendment, Article 43 EC) and Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC respectively).

2 The reference has been made in proceedings between Burda GmbH, formerly Burda Verlagsbeteiligungen GmbH ('Burda') and Finanzamt Hamburg-Am Tierpak ('the Finanzamt') concerning the taxation of the profit which Burda distributed in respect of the financial years 1996 and 1997 to one of its parent companies, namely RCS International Services BV ('RCS'), established in the Netherlands.

Legal context

Community rules

3 In accordance with the first recital in the preamble thereto, Directive 90/435 is intended to introduce 'tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level'.

4 According to the third recital in the preamble to Directive 90/435, that directive is intended, in particular, to eliminate the fiscal disadvantage suffered by groups of companies of different Member States in comparison with groups of companies of the same Member State.

5 Articles 1 to 7 of Directive 90/435 provide as follows:

'Article 1

1. Each Member State shall apply this Directive:

– to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,

– to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries.

…

Article 2

For the purposes of this Directive ‘company of a Member State’ shall mean any company which:

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

(b) according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;

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

…

– Koerperschaftsteuer in the Federal Republic of Germany,

…

or to any other tax which may be substituted for any of the above taxes.

Article 3

1. For the purposes of applying this Directive:

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 25% in the capital of a company of another Member State fulfilling the same conditions;

(b) ‘subsidiary’ shall mean that company the capital of which includes the holding referred to in (a).

…

Article 4

1. Where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the State of the parent company shall, except when the latter is liquidated, either:

– refrain from taxing such profits, or

– tax such profits while authorising the parent company to deduct from the amount of tax payable that fraction of the corporation tax paid by the subsidiary which relates to those profits and, if appropriate, the amount of the withholding tax levied by the Member State in which the subsidiary is resident, pursuant to the derogations provided for in Article 5, up to the limit of the amount of the corresponding domestic tax.

2. However, each Member State shall retain the option of providing that any charges relating to the holding and any losses resulting from the distribution of the profits of the subsidiary may not be deducted from the taxable profits of the parent company. …

…

Article 5

1. Profits which a subsidiary distribute[s] to its parent company shall, at least where the latter holds a minimum of 25% of the capital of the subsidiary, be exempt from withholding tax.

…

3. Notwithstanding paragraph 1, the Federal Republic of Germany may, for as long as it charges corporation tax on distributed profits at a rate at least 11 points lower than the rate applicable to retained profits, and at the latest until mid-1996, impose a compensatory withholding tax of 5% on profits distributed by its subsidiary companies.

…

Article 6

The Member State of a parent company may not charge withholding tax on the profits which such a company receives from a subsidiary.

Article 7

1. The term “withholding tax” as used in this Directive shall not cover an advance payment or prepayment (précompte) of corporation tax to the Member State of the subsidiary which is made in connection with a distribution of profits to its parent company.

2. This Directive shall not affect the application of domestic or agreement?based provisions designed to eliminate or lessen economic double taxation of dividends, in particular provisions relating to the payment of tax credits to the recipients of dividends.’

6 Pursuant to the annex to Directive 90/435, the directive applies to companies under German law known as: ‘Aktiengesellschaft’, ‘Kommanditgesellschaft auf Aktien’, ‘Gesellschaft mit beschränkter Haftung’, ‘bergrechtliche Gewerkschaft’.

National legislation

The KStG 1996

7 Paragraph 1 of the Law on Corporation Tax 1996, in the version applicable to the facts of the main proceedings (Körperschaftsteuergesetz 1996, BGBl. 1996 I, p. 340, ‘the KStG 1996’) provides that companies with a share capital (‘companies’) having their management or registered office in Germany are to be fully liable to corporation tax.

8 Under Paragraph 2 of the KStG 1996, corporations, associations of persons and pools of assets which have neither their management nor their registered office in Germany are partly liable to corporation tax on their income obtained in Germany.

9 Under Paragraph 23 of KStG 1996, the normal rate of corporation tax is 45% of the taxable income.

10 Paragraph 27(1) of the KStG 1996 provides that ‘if a company fully liable to [corporation] tax distributes profits, the amount of the tax shall be increased or reduced as a consequence, depending on the difference between the tax on the company’s capital and reserves (tax on

retentions) which, under Paragraph 28, are deemed to be used for the distribution of profits, and the tax resulting from the application of a rate of 30% of the profit before the deduction of corporation tax (tax on distribution).'

11 Paragraph 28(3) and (4) of the KStG 1996 provides as follows:

'3. The available items of capital and reserves shall be deemed to be used for a distribution in the order shown in Paragraph 30, subject to subparagraphs 4, 5 and 7. The amount up to and including which an item is deemed to be used shall be determined by reference to its normal tax.

4. If the capital item or items within the meaning of Paragraph 30(1), third sentence, points 1 or 2, initially deemed to have been used for the purposes of subparagraph 3 are not sufficient subsequently to offset a profit distribution, that distribution shall be charged to the capital item referred to in Paragraph 30(2), point 2, even if that item becomes negative as a result.'

12 Under Paragraph 29(2) of the KStG 1996, at the end of each financial year the capital and reserves are to be divided into capital and reserves available for distribution and other capital and reserves, the former representing the portion of the capital and reserves which exceeds the share capital.

13 Paragraph 30(1) and (2) of the KStG 1996 provides as follows:

'1. At the end of each financial year, the capital and reserves available for distribution shall be divided according to the tax rules. Each portion shall depend on the division during the preceding financial year. In the division there shall be shown separately the portions which correspond to:

1. income which was subject to the full rate of corporation tax from 31 December 1993;

…

3. additions to assets not subject to corporation tax or which increased the company's capital and reserves in the course of the financial years prior to 1 January 1977.

2. The amount indicated in subparagraph 1, point 3, shall be subdivided into:

1. Capital and reserves originating from foreign income during the financial years subsequent to 31 December 1976 …;

2. Other additions to assets not subject to corporation tax and not falling within categories 3 or 4;

3. Capital and reserves available for distribution generated before the end of the financial year preceding 1 January 1977;

4. Contributions by shareholders which augmented the capital and reserves in the course of the financial years subsequent to 31 December 1976'.

14 The portion of income referred to in Paragraph 30(1), point 1, of the KStG 1996 and subject to corporation tax at the full rate (45%) is designated as 'EK 45'.

15 The additions to assets referred to in Paragraph 30(1), point 3, of the KStG 1996, not subject to corporation tax, are designated as 'EK 0' and, in relation to the four categories set out in Paragraph 30(2) of the KStG 1996, as 'EK 01' to 'EK 04'.

16 Paragraph 40 of the KStG 1996 provides as follows:

‘Pursuant to Paragraph 27, corporation tax shall not be increased:

1. for the distribution of portions covered by the provisions of Paragraph 30(2), point 1 [EK 01];

2. for the distribution of portions covered by the provisions of Paragraph 30(2), point 4 [EK 04].’

17 Paragraph 44(1), first sentence, of the KStG 1996 provides as follows:

‘If an entity fully liable to the tax supplies services for its own account, which are equivalent, for the shareholders, to earnings within the meaning of Paragraph 20(1), points 1 and 2, of the Law on Income Tax, it shall, subject to Paragraph 20(2) of the Law, provide its shareholders. on demand, with a certificate containing the following particulars on the appropriate official administrative form:

1. the shareholder’s name and address;

2. the amount of the services;

3. the settlement date;

4. the amount of corporation tax deductible under Paragraph 36(2), point 3, first sentence, of the Law on Income Tax;

5. the amount of corporation tax to be repaid for the purposes of Paragraph 52; it shall be sufficient if the particulars relate to a single share or a single right to dividend;

6. the amount of the service for which the capital item within the meaning of Paragraph 30(2), point 1, is deemed to be used;

7. the amount of the service for which the capital item within the meaning of Paragraph 30(2), point 4, is deemed to be used.’

18 Paragraph 50(1), point 2, of the KStG 1996 provides, inter alia, that the corporation tax on income subject to withholding tax is to be paid by deduction at source where the recipient is only partly taxable and where the income does not originate from a commercial, agricultural or forestry enterprise located in the national territory.

19 Paragraph 51 of the KStG 1996 provides that ‘[i]f the shareholder is not liable to income tax within the meaning of Paragraph 20(1), points 1 to 3, or subparagraph (2), point 2(a), of the Law on Income Tax or if that income is not taken into account in determining the basis of assessment in accordance with Paragraph 50(1), points 1 or 2, the corporation tax which may be set off under Paragraph 36(2), point 3, of the Law on Income Tax shall not be set off or repaid.’

20 Under Paragraph 52(1) of the KStG 1996:

‘The corporation tax which cannot be set off pursuant to Paragraph 51 shall be repaid, on demand, to shareholders who are fully liable, but exempt from corporation tax, to legal persons governed by public law and to shareholders partly liable to corporation tax under Paragraph 2(1), in so far as that tax increases, in accordance with Paragraph 27, because the capital and reserves within the meaning of Paragraph 30(2), point 3, are deemed to have been used for the distribution or for a similar payment.’

The EStG 1990

21 Paragraph 20(1) of the 1990 Law on Income Tax (Einkommensteuergesetz 1990, BGBl 1990 I, p. 1898, 'the EStG 1990'), provides as follows:

'Investment income comprises:

1. dividend distributions;

2. …

3. The amount of corporation tax which is deductible under Paragraph 36(2), point 3.'

22 Paragraph 36(2) of the EStG 1990 states that:

'…

The following amounts shall be deducted from income tax:

…

3. Corporation tax paid by a corporation or an association of persons (1) fully liable to corporation tax in an amount up to 3/7 of income within the meaning of Paragraph 20(1), point 1 (dividends) or 2, in so far as such income does not originate from distributions for which capital or reserves within the meaning of Paragraph 30(2), point 1, of the Law on Corporation Tax have been used.'

23 Under Paragraph 43(1) of the EStG 1990:

'The following investment income received in Germany shall be subject to income tax by deduction from investment income (investment income tax):

1. investment income within the meaning of Paragraph 20(1), points 1 and 2 …'

The facts of the main proceedings, the questions referred and the procedure before the Court

24 As is clear from the order for reference, Burda is a limited liability company governed by German law, its registered office and management being located in Germany. During the period relevant to the main proceedings it was owned in equal shares by RCS, a company established in the Netherlands, and by Burda International Holding GmbH ('Burda International') a company situated in Germany.

25 In 1998 Burda decided to carry out a profit distribution in respect of the financial years 1996 and 1997 to RCS and Burda International in equal shares. The distribution was taxed under Paragraph 27(1) of the KStG 1996 at the rate of 30%.

26 It is clear from the order for reference that, in accordance with Paragraph 44 of the KStG 1996, only Burda International received a certificate of deductibility of corporation tax in respect of the profit distribution by Burda.

27 The order for reference also shows that, following a tax audit, it was established that Burda had distributed profits in an amount greater than the taxable income. The Finanzamt therefore reduced the various available capital and reserve items subject to corporation tax at the full rate (EK 45) from DEM 6 049 925 to DEM 4 915 490 and, in accordance with Paragraph 28(4) of the

KStG 1996, set off the distributions which, after reduction, were no longer covered by the taxed available capital and reserves, against the capital and reserves within the meaning of Paragraph 30(2), point 2, of the KStG 1996 (EK 02).

28 That set-off gave rise to increases in corporation tax for the two years in question in the main proceedings and, therefore, to the issue, in particular, of two amended tax assessments.

29 Burda brought an action before the Finanzgericht Hamburg against the assessments, disputing the application of Paragraph 28(4) of the KStG 1996 on the ground that setting off the profit distributions to RCS against EK 02 was erroneous.

30 In that connection, Burda claimed that it had available cash contributions falling within category EK 04 which were sufficient to finance the profit distributions and that in any case it had no additional assets falling within EK 02.

31 By judgment of 29 April 2005 the Finanzgericht Hamburg allowed Burda's claim. The court found, in substance, that Paragraph 28(3) of the KStG should be applied in the sense that the part of the distribution paid to RCS ought to have been charged to EK 04.

32 The Finanzamt appealed to the Bundesfinanzhof on a point of law against the judgment.

33 The latter found that the Finanzgericht Hamburg's interpretation of Paragraph 28(4) of the KStG 1996 should be rejected. According to the Bundesfinanzhof, the scope of that provision cannot be limited to shareholders with a right of set-off, thus excluding shareholders such as RCS who are not entitled to a tax credit.

34 However, the Bundesfinanzhof expressed doubt as to whether the assessment of tax on distributions made from EK 02 was compatible with Directive 90/435 – inasmuch as it constitutes a withholding tax – and, as the case may be, with the provisions of the EC Treaty on the free movement of capital or the freedom of establishment.

35 In those circumstances, the Bundesginanzhof decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

(1) Is there withholding tax within the meaning of Article 5(1) of Council Directive 90/435 …, now Article 5 in the version resulting from Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41) in the case in which national law provides that, where profits are distributed by a subsidiary to its parent company, income and asset increases of the capital company are to be taxed which, under national law, would not be taxed if they remained with the subsidiary and were not distributed to the parent company?

(2) Should Question 1 be answered in the negative: is it compatible with [Articles 52, 73b and 73d of the Treaty] for a national rule to provide for divergent set-off arrangements for the distribution of profits by a capital company using portions of its own capital, resulting in consequent tax liability even in cases in which the capital company demonstrates that it has distributed dividends to non-resident shareholders, even though, under national law, such non-resident shareholders, unlike resident shareholders, are not entitled to set off against their own tax the corporation tax thus determined?

36 By document lodged at the Registry of the Court of Justice on 18 February 2008, Burda requested the Court of Justice to order the reopening of the oral procedure, pursuant to Article 61 of the Rules of Procedure, with a view to prescribing 'measures of organisation of procedure'.

The application to have the oral procedure re-opened and the prescribing of measures of organisation of procedure

37 It is clear from the case-law that the Court may of its own motion, or on a proposal from the Advocate General, or at the request of the parties, order the reopening of the oral procedure in accordance with Article 61 of the Rules of Procedure if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see Case C?210/03 *Swedish Match* [2004] ECR I?11893, paragraph 25; Case C?306/05 *SGAE* [2006] ECR I?11519, paragraph 27; and Case C?466/03 *Albert Reiss Beteiligungsgesellschaft* [2007] ECR I?5357, paragraph 29).

38 In support of its application, Burda argues, first, that the Advocate General did not take account in his Opinion of the provisions of Paragraph 78(5) of the German Circular on Corporation Tax (Körperschaftsteuerrichtlinien, 'the KStR').

39 It should be pointed out that in proceedings brought under Article 234 EC, it is not for the Court to specify the relevant provisions of national law applicable to the main proceedings. That is the prerogative of the court making the reference which, while drawing up the internal legal framework, leaves it open to the Court to provide all the criteria of interpretation of Community law so as to permit the court making the reference to assess the compatibility of national legislation with the Community rules.

40 It is common ground, however, that the court making the reference did not mention Paragraph 78(5) of the KStR in its order for reference.

41 In reality, Burda is criticising the position adopted by the Advocate General in regard to the interpretation of Paragraph 28(4) of the KStG 1996 and the fact that he did not agree with Burda's analysis.

42 However, it is clear from the case-law that neither the Statute of the Court of Justice nor the Rules of Procedure make provision for the parties to submit observations in response to the Advocate General's Opinion (see, in particular, *SGAE*, paragraph 26 and the case-law cited therein).

43 Secondly, Burda claims that, contrary to the Advocate General's view, it did not have profits available for distribution liable to be taxed at 30% and that the dividend was no more than the repayment, exempt from tax, of cash contributions made by the members.

44 In making those claims, Burda is essentially arguing that certain factual premises on which the Advocate General's analysis is based are incorrect or incomplete.

45 It should be pointed out that only the court making the reference may define the factual context in which the questions which it asks arise or, at very least, explain the factual assumptions on which the questions are based.

46 It is clear from the questions referred to the Court that the facts raised by Burda in its application were not set out by the national court.

47 It follows that the claims mentioned in paragraph 43 of the present judgment cannot justify the reopening of the oral procedure, having regard to the requirements laid down in Article 61 of the Rules of Procedure.

48 Under those circumstances, the Court, after hearing the Advocate General, finds that it has

before it all the information and arguments necessary to reply to the questions referred by the national court.

49 Therefore, there are no grounds for ordering the reopening of the oral procedure and, consequently, the related application to prescribe measures of organisation of procedure must be rejected.

The questions referred to the Court

The first question

50 By its first question, the national court is asking essentially whether a provision of national law which, in relation to cases where profits are distributed by a subsidiary to its parent company, provides for the taxation of income and asset increases of the subsidiary which would not have been taxed if they had remained with the subsidiary and had not been distributed to the parent company constitutes withholding tax within the meaning of Article 5(1) of Directive 90/435.

51 According to settled case-law, the aim of that directive – which, as can be seen from paragraphs 5 and 24 of the present judgment, is applicable in the main proceedings – is to eliminate, through the introduction of a common system of taxation, any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State, and thereby to facilitate cross-border cooperation. Thus, with a view to preventing double taxation, Article 5(1) of Directive 90/435 provides for exemption, in the State of the subsidiary, from withholding tax upon distribution of profits (see Joined Cases C?283/94, C-291/94 and C-292/94 *Denkavit and Others* [1996] ECR I?5063, paragraph 22; Case C?375/98 *Epson Europe* [2000] ECR I?4243, paragraph 20; Case C-294/99 *Athinaïki Zithopoiïa* [2001] ECR I?6797, paragraph 25; Case C?58/01 *Océ Van der Grinten* [2003] ECR I?9809, paragraph 45; and Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753, paragraph 103).

52 As regards, in particular, the prohibition laid down in Article 5 of Directive 90/435 on Member States levying a withholding tax on profits distributed by a resident subsidiary to its parent company, where that parent company is resident in another Member State, the Court has already held that any tax on income received in the State in which dividends are distributed is a withholding tax on distributed profits where the chargeable event for the tax is the payment of dividends or of any other income from shares, the taxable amount is the income from those shares and the taxable person is the holder of the shares (*Epson Europe*, paragraph 23; *Athinaïki Zithopoiïa*, paragraphs 28 and 29; *Océ Van der Grinten*, paragraph 47; and *Test Claimants in the FII Group Litigation*, paragraph 108).

53 It follows from that case-law that three conditions must be cumulatively fulfilled for the application of Article 5(1) of Directive 90/435.

54 The German Government argues that the third condition referred to in paragraph 52 of the present judgment – that the taxable person must be the ‘holder of the shares’ – is not fulfilled in the case before the referring court.

55 It must be stated that Burda is liable to corporation tax when it distributes profits, but the holders of the shares are Burda International and RCS.

56 Thus, the third condition for the existence of a withholding tax within the meaning of Article 5(1) of Directive 90/435 is lacking in the case before the referring court.

57 That assessment is not called into question by the arguments which Burda and the Commission of the European Communities draw from *Athinaïki Zithopoiïa* order to maintain that the Court does not in fact apply the abovementioned condition and prefers an approach based on economic assessments.

58 In particular, in the Commission's view, the interpretation of the conditions for the application of Article 5(1) of Directive 90/435 must take account of the specific economic function of the withholding tax mechanism which the directive puts in place. If that is not done, the provision will be compromised in the most frequent cases, that is to say, every time a subsidiary distributes dividends to its parent companies where the latter are resident in a Member State other than the one in which the subsidiary is resident.

59 In that regard, the Commission adds that the economic effect of taxing the subsidiary corresponds to taxing the parent company inasmuch as the tax is withheld by the company distributing the profits and paid directly to the tax authorities.

60 The preceding arguments cannot be accepted.

61 It should be noted at once that, as is clear from the case-law subsequent to *Athinaïki Zithopoiïa*, the Court maintains, as a condition for the existence of a withholding tax within the meaning of Article 5(1) of Directive 90/435, that the taxable person must be the holder of the shares (see *Océ Van der Grinten*, paragraph 47, and *Test Claimants in the FII Group Litigation*, paragraph 108).

62 Moreover, that finding cannot be set aside on the basis of supposed economic considerations inherent in the withholding tax mechanism, such as those invoked by the Commission. Such considerations, even if they were relevant, form a basis for the application of Article 5(1) of Directive 90/435 only if the conditions laid down in the case-law cited in paragraph 52 of the present judgment are all fulfilled.

63 Since the third condition for the existence of a withholding tax within the meaning of Article 5(1) of Directive 90/435 is not fulfilled in the case before the referring court, that provision does not preclude a corrective accounting mechanism such as that laid down in Paragraph 28(4) of the KStG 1996.

64 Consequently, the answer to the first question must be that a provision of national law which, in relation to cases where profits are distributed by a subsidiary to its parent company, provides for the taxation of income and asset increases of the subsidiary which would not have been taxed if they had remained with the subsidiary and had not been distributed to the parent company does not constitute withholding tax within the meaning of Article 5(1) of Council Directive 90/435.

The second question

65 By its second question, the national court essentially asks the Court whether Articles 52, 73b and 73d of the Treaty must be interpreted as precluding the application of a national measure, such as Paragraph 28(4) of the KStG 1996, under which the taxation of profits distributed by a subsidiary resident in a Member State to its parent company is subject to the same corrective mechanism regardless of whether the parent company is resident in the same Member State or in another Member State, even though – unlike a resident parent company – a non-resident parent company is not granted a tax credit by the Member State in which its subsidiary is resident.

66 First of all, it should be borne in mind that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, inter alia, 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?231/05 *Oy AA* [2007] ECR I?6373, paragraph 20).

67 In the circumstances of the main proceedings, it must first be determined whether and, if so, to what extent, national rules such as those at issue in the main proceedings are likely to affect the freedoms referred to in Articles 52, 73b and 73d of the Treaty.

The applicable freedom

68 It follows from settled case-law that, in so far as any given national rules concern only relationships within a group of companies, they primarily affect the freedom of establishment (see, inter alia, to that effect *Test Claimants in the FII Group Litigation*, paragraph 118; *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 33; and *Oy AA*, paragraph 23).

69 Moreover, according to consistent 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; *Oy AA*, paragraph 20; Case C?112/05 *Commission* v *Germany* [2007] ECR I?8995, paragraph 13; and Case C?298/05 *Columbus Container Services* [2007] ECR I?0000, paragraph 29).

70 It emerges from the order for reference that Burda, which is resident in German territory, is 50% owned by a non-resident company, namely, RCS. In principle, a holding of that size in Burda's capital by RCS gives the latter the right to exercise definite and decisive influence over its subsidiary's activities within the meaning of the case-law cited in the previous paragraph of the present judgment.

71 In that regard, it should also be pointed out that national legislation such as that at issue in the main proceedings, the application of which does not depend on the extent of the holding which the company receiving the dividend has in the company paying it, may fall within the purview both of Article 43 EC on freedom of establishment and of Article 56 EC on the free movement of capital (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 36).

72 The fact remains that the dispute before the referring court relates exclusively to the effect of the national legislation at issue in the main proceedings on the situation of a resident company which has distributed dividends to shareholders whose holding gives them definite influence over the decisions of that company and enables them to determine its activities (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 38).

73 In that context, the provisions of the Treaty on freedom of establishment apply to a case such as that before the referring court.

74 In any event, should the provisions of the KStG 1996 have restrictive effects on the free movement of capital, it follows from the case-law that 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 73b

of the Treaty (*Oy AA*, paragraph 24 and the case-law cited therein).

75 It follows from the foregoing that the present question must be answered solely in the light of the provisions of the Treaty on freedom of establishment.

Whether there is a restriction on freedom of establishment

76 Freedom of establishment, which Article 52 of the Treaty 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 residence, entails, in accordance with Article 58 of the EC Treaty (now 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, branch or agency (see, inter alia, *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 41, and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 42).

77 In the case of companies, it should be borne in mind that their registered office for the purposes of Article 58 of the Treaty 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 52 of the Treaty 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, inter alia, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 43 and the case-law cited therein).

78 It is clear from the order for reference that the corrective mechanism at issue in the main proceedings is intended to ensure that the amount of tax paid by the company making the distribution corresponds, after correction, to the amount of the tax credit erroneously granted to the shareholder. To that end, the corrective mechanism provides that the available capital belonging to EK 02 is to be taken into account for the purposes of taxation so as to ensure that the tax and the tax credit are in accordance with the tax certificates supplied to the shareholders.

79 It should be pointed out that, in accordance with the corrective mechanism – which is intended to avoid a tax credit being granted in respect of tax not paid – the correction does not relate to the amount of the tax credit but to the amount of the tax paid by the company making the distribution.

80 Moreover, it is common ground that the corrective mechanism laid down in Paragraph 28(4) of the KStG 1996 is applicable to a company resident in Germany, regardless of whether it is a subsidiary of a parent company which is also resident in Germany or of a parent company resident in another Member State.

81 In that context, Burda maintains that the discriminatory treatment in the case before the referring court consists, specifically, in the application of the same corrective mechanism to different situations, inasmuch as non-resident parent companies of resident subsidiaries, unlike resident parent companies, are not granted a tax credit to compensate for the corporation tax paid by the company making the distribution.

82 Since discrimination can consist in applying the same rule to different situations, it must be

determined – in order to establish the existence in the case before the referring court of discriminatory fiscal treatment, which is prohibited in principle by Article 52 of the Treaty – whether the national measure at issue places resident subsidiaries in a different situation according to whether the parent company is resident or non-resident and, consequently, according to whether or not the parent company receives a tax credit.

83 In that regard, it should be pointed out that it is clear from the order for reference that the application of the corrective mechanism laid down in Paragraph 28(4) of the KStG 1996 does not alter Burda’s tax burden on the basis of whether its parent company is resident in Germany or in another Member State.

84 It cannot therefore be accepted that the application of Paragraph 28(4) of the KStG 1996 caused, in regard to the subsidiary, different situations to receive identical treatment, since the position of the subsidiary in regard to the legislation of its Member State of residence, in this case, the Federal Republic of Germany, is not different according to whether it distributes its profits to a non-resident parent company or to a resident one.

85 That assessment is not weakened by the fact, pointed out by the national court, that, for non-resident shareholders, the tax levied on the company making the distribution becomes definitive in the sense that the increase in the tax burden imposed on the company making the distribution is not compensated for by the allocation of a corresponding tax credit.

86 It should be pointed out that, according to the case-law, it is for each Member State to organise, in compliance with Community law, its system of taxation of distributed profits and, in that context, to define the tax base as well as the tax rates which apply to the company making the distribution and/or to the shareholder to whom the dividends are paid, in so far as they are liable to tax in that State (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 50).

87 According to the same line of authority, 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 (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 52).

88 On that basis, the tax credit granted to the resident parent company under the national legislation applicable in the main proceedings is intended to prevent economic double taxation of profits distributed by a resident subsidiary which have already been taxed in the latter’s hands.

89 In the case before the referring court, which concerns the cross-border distribution of profits, it is, in principle, not for the Member State in which the subsidiary is resident to prevent that economic double taxation but for the Member State in whose territory the parent company is resident.

90 In accordance with Article 4 of Directive 90/435, the Member State in which the parent company is resident must either exempt from tax profits received by it from a subsidiary resident in another Member State or authorise the parent company to deduct from the amount of tax payable that fraction of the corporation tax paid by the subsidiary which relates to those profits.

91 Consequently, in both hypotheses, the Member State in which the parent company is resident is required to accord fiscal treatment which is designed to achieve the same result as the tax credit granted by the Member State in which the subsidiary is resident to parent companies established there, with the effect that economic double taxation of profits distributed in the form of dividends is also avoided.

92 Thus, just as the resident parent company of a resident subsidiary is granted a tax credit by its Member State of residence, acting also in its capacity as the Member State in which the subsidiary is resident, the non-resident parent company of a resident subsidiary is protected against the risk of economic double taxation of profits distributed in the form of dividends, but by the Member State in which it is resident.

93 Consequently, the taxation of distributed profits, such as those covered by EK 02 in the circumstances of the main proceedings, is, in any event, compensated for by the Member State in which the parent company is resident.

94 The fact that the Member State in which the subsidiary is resident does not grant a tax credit to a non-resident parent company does not therefore distinguish the situation of the resident subsidiary of a resident parent company from that of the resident subsidiary of a non-resident parent company.

95 It follows that, for the purposes of the application of the legislation at issue in the main proceedings, the situation of the resident subsidiary of a resident parent company is no different from that of the resident subsidiary of a non-resident parent company, with the result that no discrimination exists in that regard against the resident subsidiary.

96 It follows from the foregoing that the answer to the second question must therefore be that Article 52 of the Treaty (now, after amendment, Article 43 EC) must be interpreted as not precluding the application of a national measure, such as Paragraph 28(4) of the KStG 1996, under which the taxation of profits distributed by a subsidiary resident in a Member State to its parent company is subject to the same corrective mechanism regardless of whether the parent company is resident in the same Member State or in another Member State even though – unlike a resident parent company – a non-resident parent company is not granted a tax credit by the Member State in which the subsidiary is resident.

Costs

97 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 (Fourth Chamber) hereby rules:

1. **A provision of national law which, in relation to cases where profits are distributed by a subsidiary to its parent company, provides for the taxation of income and asset increases of the subsidiary which would not have been taxed if they had remained with the subsidiary and had not been distributed to the parent company does not constitute a withholding tax within the meaning of Article 5(1) 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.**

2. **Article 52 of the Treaty (now, after amendment, Article 43 EC) must be interpreted as not precluding the application of a national measure, such as Paragraph 28(4) of the Law on Corporation Tax 1996 (Körperschaftsteuergesetz 1996), in the version applicable to the facts of the main proceedings, under which the taxation of profits distributed by a subsidiary resident in a Member State to its parent company is subject to the same corrective mechanism regardless of whether the parent company is resident in the same Member State or in another Member State even though – unlike a resident parent company – a non-resident parent company is not granted a tax credit by the Member State in which the subsidiary is resident.**

[Signatures]

* Language of the case: German.

1 – See paragraph 8 of the present judgment.