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Case C-262/09

Wienand Meilicke and Others

v

Finanzamt Bonn-Innenstadt

(Reference for a preliminary ruling from the Finanzgericht Köln)

(Free movement of capital – Income tax – Certificate relating to corporation tax actually paid on dividends of foreign origin – Prevention of double taxation of dividends – Tax credit for dividends paid by resident companies – Proof required as to the foreign tax deductible)

Summary of the Judgment

1. *Free movement of capital – Restrictions – Tax legislation – Income tax – Taxation of dividends – Calculation of the tax credit granted to a taxable person fully taxable in a Member State for dividends paid by a capital company established in another Member State*

(Arts 56 EC and 58 EC)

2. *Free movement of capital – Restrictions – Tax legislation – Income tax – Taxation of dividends – Evidence to be adduced by a taxable person fully taxable in a Member State in order to obtain a tax credit for dividends paid by a capital company established in another Member State*

(Arts 56 EC and 58 EC)

3. *Free movement of capital – Restrictions – Tax legislation – Income tax – Taxation in a Member State of dividends paid by a capital company established in another Member State*

1. For the calculation of the amount of the tax credit to which a shareholder fully taxable in a Member State with regard to dividends paid by a capital company established in another Member State is entitled, Articles 56 EC and 58 EC preclude the application, failing the adducing of the evidence required under the legislation of the first Member State, of a national provision under which corporation tax imposed on dividends of foreign origin is set off against a shareholder's income tax to the level of the fraction of corporation tax imposed on gross dividends distributed by companies in the first Member State.

2. The calculation of the tax credit must be made in relation to the rate of corporation tax on the distributed profits applicable to the dividend?paying company according to the law of the Member State of establishment; the amount to be imposed may not, however, exceed the amount of the income tax to be paid on dividends received by the recipient shareholder in the Member State in which that shareholder is fully taxable.

When a Member State has a system for preventing or mitigating a series of charges to tax or economic double taxation for dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way. That implies that in such a situation such a national system must be transposed, to the fullest extent possible, to cross-border situations.

(see paras 29, 31, 34, operative part 1)

3. As regards the degree of detail which the evidence required must meet in order to benefit from a tax credit relating to dividends paid by a capital company established in a Member State other than that in which beneficiary is fully taxable, Articles 56 EC and 58 EC preclude the application of a national provision under which the degree of detail and the form of evidence to be adduced by such a shareholder must be the same as those required when the dividend-paying company is established in the Member State of taxation of that shareholder.

4. The tax authorities of the Member State of taxation are entitled to require that shareholder to provide documentary evidence enabling them to ascertain, clearly and precisely, whether the conditions for obtaining a tax credit under national legislation have been met without having to make an estimate of that tax credit.

National rules which would unconditionally prevent shareholders having invested abroad from adducing evidence which satisfies criteria, in particular those of presentation, other than those laid down for national investments, would not only breach the principle of sound administration, but in particular go beyond what is necessary to attain the objective of effective fiscal supervision.

(see paras 43, 53, operative part 2)

5. The principle of effectiveness precludes amended national legislation which, retroactively and without any transitional period, does not permit the offsetting of foreign corporation tax imposed on dividends paid by a capital company established in another Member State by submitting either a certificate relating to that tax in accordance with the legislation of the Member State in which the shareholder is fully taxable, or documentary evidence allowing the tax authorities of that Member State to determine, clearly and precisely, whether the conditions for obtaining that tax advantage have been met. It is for the referring court to determine a reasonable period for the submission of such a certificate or documentary evidence.

As regards the restitution of national taxes unduly levied, if the rules for restitution are amended by national law with retroactive effect, the principle of effectiveness requires new legislation to include transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the earlier legislation.

(see paras 57, 59, operative part 3)

JUDGMENT OF THE COURT (First Chamber)

30 June 2011 (*)

(Free movement of capital – Income tax – Certificate relating to corporation tax actually paid on dividends of foreign origin – Prevention of double taxation of dividends – Tax credit for dividends paid by resident companies – Proof required as to the foreign tax deductible)

In Case C?262/09,

REFERENCE for a preliminary ruling under Article 234 EC, from the Finanzgericht Köln (Germany), made by decision of 14 May 2009, received at the Court on 13 July 2009, corrected by decision of 10 August 2009, received at the Court on 7 September 2009, in the proceedings

Wienand Meilicke,

Heidi Christa Weyde,

Marina Stöffler

v

Finanzamt Bonn-Innenstadt,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Ileši?, E. Levits (Rapporteur), M. Safjan and M. Berger, Judges,

Advocate General: V. Trstenjak,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 27 October 2010,

after considering the observations submitted on behalf of:

– Mr Meilicke, Ms Weyde and Ms Stöffler, by W. Meilicke and D. Rabback, Rechtsanwälte,

– the Finanzamt Bonn-Innenstadt, by G. Sasonow and, F. Mlosch, Prozessbevollmächtigte,

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

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

– after hearing the Opinion of the Advocate General at the sitting on 13 January 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 56 EC and 58 EC which have been replaced, from 1 December 2009, by Articles 63 TFEU and 65 TFEU.

2 The reference has been made in proceedings between Mr W. Meilicke, Ms H.C.Weyde and Ms M. Stöffler, in their capacity as heirs of Mr H. Meilicke, who died on 3 May 1997, and the Finanzamt Bonn-Innenstadt (Germany) (Bonn?Innenstadt Tax Office, ‘the Finanzamt’), regarding the taxation of dividends paid to the deceased in the course of the years 1995 to 1997 by companies established in Denmark and in the Netherlands.

Legal context

Community law

3 In Chapter 4, entitled ‘Capital and payments’, of Title III, itself entitled ‘Free movement of persons, services and capital,’ in Part Three of the EC Treaty, dealing with the policies of the Community, Article 56(1) EC stated:

‘Within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.’

4 Article 58(1) EC provided:

‘The provisions of Article 56 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

…’ .

5 Article 58(3) EC provided:

‘The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 EC.’

6 Article 2(1) of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1997 L 336, p. 15) provides:

‘1. The competent authority of a Member State may request the competent authority of another Member State to forward the information referred to in Article 1(1) in a particular case. …’

German law applicable to the years 1995 to 1997

7 Under Paragraphs 1, 2 and 20 of the Law on Income Tax (Einkommensteuergesetz) of 7 September 1990 (BGBl. 1990 I, p. 1898), as amended by the Law of 13 September 1993 (BGBl. 1993 I, p. 1569, ‘the EStG’), dividends payable to a person resident in Germany and therefore fully taxable there for income tax purposes, are taxed there as income from capital.

8 Under Paragraph 27(1) of the Law on Corporation Tax (Körperschaftsteuergesetz) of 11 March 1991 (BGBl. 1991 I, p. 638), as amended by the Law of 13 September 1993 (‘the KStG’), dividends distributed by capital companies fully taxable for corporation tax purposes in Germany, are subject to that tax at 30%. That results in a distribution of 70% of the pre-tax profits and a tax credit of 30/70, that is 3/7 of the dividends received.

9 Under the second sentence of Paragraph 36(2)(3) of the EStG, as interpreted in the light of Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, that tax credit applies to dividends received from capital companies fully taxable for corporation tax purposes in Germany or in another Member State. Consequently, persons fully taxable for income tax purposes in Germany are entitled to that tax credit when they receive dividends from German companies or from foreign companies.

10 Under Paragraph 36(2), second sentence, point (3), fourth sentence, (b) of the EStG, there is no deduction of corporation tax inter alia if a corporation tax certificate under Articles 44 et seq of the KStG is not submitted.

11 Paragraph 44 of the KStG provides:

'1. 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 that may be offset 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, part, or a single right to dividend;

6. the proportion of the service for which the capital item referred to in Paragraph 30(2), point 1, is deemed to be used;

7. the proportion of the service for which the capital item referred to in Paragraph 30(2), point 4, is deemed to be used.

…'.

12 Paragraph 175 of the Regulations on Taxes (Abgabenordnung), introduced by the Law of 16 March 1976 (BGBl.1976 I, p. 613, corrigendum in BGBl. 1977 I, p. 269), in the version published on 1 October 2002 (BGBl. 2002 I, p. 3866, corrigendum in BGBl. 2003 I, p. 61, 'the AO') provides:

'(1). A tax assessment must be issued, cancelled or amended,

…

(2) if an event occurs that has tax implications for periods already elapsed (event having retroactive effect).

In the cases referred to in the first sentence of point 2, the period for assessing the tax begins on the expiry of the calendar year during which the event occurred.

…'.

13 On 9 December 2004, the AO was amended, in relation to the finality of tax assessments and their amendment in the case of events having a retroactive effect, by the Law on the transposition of EU directives in national tax law and amendment of other provisions (Gesetz zur Umsetzung von EU-Richtlinien in nationales Steuerrecht und zur Änderung weiterer Vorschriften, BGBl. 2004 I, p. 3310, 'the amended AO'). As laid down in Article 8 of that amending law, the second sentence of Paragraph 175(2) of the amended AO reads as follows:

'The subsequent issue or production of a certificate or confirmation shall not have the force of a retroactive event.'

14 In order to define the temporal scope of the second sentence of Paragraph 175(2) of the amended AO, Paragraph 97(9)(3) of the Law introducing the Tax Code (Einführungsgesetz zur Abgabenordnung) of 14 December 1976 (BGBl. 1976 I, p. 3341, and corrigendum in BGBl. 1977 I, p. 667, 'the EGAO'), itself further amended, now reads as follows:

'The second sentence of Paragraph 175(2) of the [amended] AO shall apply to certificates or confirmations submitted or issued after 28 October 2004. … .'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 Heinz Meilicke, who was resident in Germany, held shares in companies established in the Netherlands and in Denmark. In the course of the years 1995 to 1997, he received dividends from those shares totalling DEM 39 631.32, that is EUR 20 263.17.

16 By letter of 30 October 2000, the applicants in the main proceedings applied to the Finanzamt for a tax credit equal to 3/7 of those dividends, to be deducted from the income tax payable on behalf of Mr H. Meilicke.

17 The Finanzamt rejected that application, on the ground that only corporation tax on companies fully taxable for corporation tax purposes in Germany could be set off against income tax.

18 The applicants brought an action against that decision before the Finanzgericht Köln (Finance Court, Cologne) which, by a decision of 24 June 2004, referred the following question to the Court of Justice for a preliminary ruling:

'Is Paragraph 36(2)(3) of the EStG, whereby only corporation tax payable by a fully-taxable corporation or association amounting to 3/7 of the income within the meaning of Paragraph 20(1)(1) or (2) of the EStG is set off against income tax, compatible with Articles 56(1) EC and 58(1)(a) and (3) EC?'

19 Following the judgment in Case C-319/02 *Manninen* [2004] ECR I?7477, the applicants in the main proceedings amended their application by pleadings dated 7 January 2005, 16 May 2007 and 23 November 2007, by seeking a tax credit under corporation tax not up to 3/7 of the contested dividends, but up to 34/66 of the gross dividends of Danish origin and 35/65 of the gross dividends originating in the Netherlands.

20 In *Meilicke and Others*, the Court (Grand Chamber) held:

'Articles 56 EC and 58 EC are to be interpreted as precluding tax legislation under which, on a distribution of dividends by a capital company, a shareholder who is fully taxable in a Member State is entitled to a tax credit, calculated by reference to the corporation tax rate on the distributed profits, if the dividend-paying company is established in that same Member State but not if it is

established in another Member State.’

21 Following that judgment, the referring court considers that the applicants in the main proceedings must have the right to two tax credits calculated by reference to the rate of tax on the distributed profits in respect of the corporation tax of the Member States where the dividend-paying companies are established.

22 The Finanzgericht Köln states that the amounts actually paid under that corporation tax in the Netherlands and Denmark cannot, in practice, be determined. Consequently, the referring court has doubts as to the course to be taken, in particular concerning the actual calculation making it possible to determine the amount of tax credits which the applicants in the main proceedings may claim. In this respect, the referring court contemplates three possible solutions, namely, first, to apply a national provision which provides that corporation tax imposed on dividends of foreign origin is set off against income tax to the level of the applicable fraction as regards net dividends distributed by national companies, second, to make an estimate of the rate of foreign corporation tax imposed on dividends of foreign origin, or, third, to determine as precisely as possible the amounts levied under the foreign corporation tax. In the last case, the Finanzgericht Köln is uncertain what evidence must be established in order to be able to calculate the tax credit.

23 Against that background, the Finanzgericht Köln again decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

1) Do the free movement of capital under Articles 56(1) EC and 58(1)(a) and (3) EC, the principle of effectiveness and the principle of ‘effet utile’ preclude legislation – like Paragraph 36(2), second sentence, point 3 of the EStG’ (in the version in force during the relevant years) – under which corporation tax amounting to three sevenths of the gross dividends is set off against income tax, provided such dividends do not originate from distributions for which capital and reserves are deemed to have been used within the meaning of Paragraph 30(2)(1) of the KStG (in the version in force during the relevant years), although the corporation tax attached to dividends received from a company established in another Member State which was actually paid is in practice impossible to determine and could be higher?

2) Do the free movement of capital, the principle of effectiveness and the principle of ‘effet utile’ preclude legislation – like Paragraph 36(2), second sentence, point 3, fourth sentence, (b) of the EStG (in the version in force in the relevant years) – under which offsetting corporation tax [against income tax] requires the submission of a corporation tax certificate within the meaning of Paragraphs 44 et seq. of the KStG (in the version in force in the relevant years), which must contain, inter alia, the amount of corporation tax deductible and the composition of the payment under the various parts of the capital and reserves available for distribution on the basis of a special division of capital and reserves within the meaning of Paragraph 30 of the KStG (in the version in force in the relevant years), although it is in practice impossible to determine the foreign corporation tax actually paid which is to be set off and to provide the certificate in respect of foreign dividends?

3) Does the free movement of capital require that where it is actually impossible to submit a corporation tax certificate within the meaning of Paragraph 44 of the KStG (in the version in force in the relevant years) and in the absence of being able to determine the corporation tax charged on the foreign dividends which was actually paid, the amount of the charge to corporation tax should be estimated and if appropriate at the same time indirect prior charges to corporation tax should be taken into account?

4) (a) If the second question is answered in the negative and a corporation tax certificate … is

required, should the principle of effectiveness and the principle of ‘effet utile’ be understood as meaning that they preclude legislation – like the second sentence of Paragraph 175(2) of the amended AO in conjunction with Article 97(9)(3) of the EGAO – under which, from 29 October 2004, without any transitional period for the purposes of claiming a deduction for foreign corporation tax, the submission, inter alia, of a corporation tax certificate is no longer deemed to be an event with retroactive effect, as a result of which it is made procedurally impossible to set off foreign corporation tax where income tax assessments [in relation to income tax due in Germany] have become final?

(b) If the second question is answered in the affirmative and no corporation tax certificate is required, should the free movement of capital under Article 56 EC, the principle of effectiveness and the principle of ‘effet utile’ be understood to preclude legislation – like Paragraph 175(1)(2) of the AO – under which a tax assessment notice must be amended provided that an event with retroactive effect occurs – such as for example the submission of a corporation tax certificate – and consequently offsetting corporation tax is possible in relation to dividends of German origin even where income tax assessments have become final, whereas this would not be possible in relation to foreign dividends for want of a [foreign] corporation tax certificate?’

Consideration of the questions referred

The first question

24 By its first question, read in conjunction with the following two, the referring court asks, in essence, whether Article 56 CE and 58 EC must be interpreted to the effect that, if evidence required under the legislation of a Member State in order to benefit from a tax credit relating to corporation tax imposed on dividends is not adduced, they preclude the application of a provision such as Paragraph 36(2), second sentence, point 3 of the EStG under which corporation tax on dividends of foreign origin is set off against income tax to the level of the fraction of corporation tax imposed on gross dividends distributed by national companies.

25 In the grounds of *Meilicke and Others*, the Court pointed out that the Finanzgericht Köln had made its reference for a preliminary ruling before the delivery of the judgment in *Manninen*.

26 The Court then pointed out that, in accordance with paragraph 54 of *Manninen*, the calculation of a tax credit granted to a shareholder fully taxable in Finland, who received dividends from a company established in another Member State, must take account of the tax actually paid by the company established in that other Member State, as such tax arises from the general rules on calculating the basis of assessment and from the rate of corporation tax in that latter Member State (*Meilicke and Others*, paragraph 15).

27 Taking account of, first, the claim of the applicants in the main proceedings for a tax credit corresponding to 34/66 of the dividends of Danish origin and to 35/65 of the dividends of Netherlands origin, and, second, the view of the German Government that, in the case of dividends of foreign origin, a tax credit of 3/7 of the dividends received could not be granted, since the tax credit had to be linked to the tax rate applicable to the profits distributed in accordance with corporation tax legislation of the Member State in which the dividend-paying company is established (*Meilicke*, paragraphs 16 and 17), the Court confirmed the case-law stemming from *Manninen*.

28 It follows from the foregoing that, in its answer to the question referred in *Meilicke and Others*, recalled in paragraph 20 of this judgment, the Court ruled out the possibility that the calculation of the tax credit to which a shareholder who is fully taxable in a Member State as regards dividends distributed by a capital company established in another Member State could be done on a basis

other than that of the corporation tax rate on the distributed profits applicable to the dividend-paying company according to law of the Member State of establishment.

29 Furthermore, the Court has already held that where a Member State has a system for preventing or mitigating a series of charges to tax or economic double taxation for dividends paid to residents by resident companies, it must treat dividends paid to residents by non-resident companies in the same way (see, to that effect, Case C-315/02 *Lenz* [2004] ECR I-7063, paragraphs 27 to 49; *Manninen*, paragraphs 29 to 55, and Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 55).

30 Under such systems, the situation of shareholders resident in a Member State and receiving dividends from a company established in that State is comparable to that of shareholders who are resident in that State and receive dividends from a company established in another Member State, inasmuch as both the dividends deriving from a national source and those deriving from a foreign source may be subject, first, in the case of corporate shareholders, to a series of charges to tax and, secondly, in the case of ultimate shareholders, to economic double taxation (see, to that effect, *Lenz*, paragraphs 31 and 32, and *Manninen*, paragraphs 35 and 36 and *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 56).

31 In the light of that case-law, a Member State such as the Federal Republic of Germany is, having regard to its system of preventing economic double taxation, in the case of dividends paid to residents by non-resident companies, obliged to accord equivalent treatment to dividends paid to residents by resident companies. That implies that the national system must be transposed, to the fullest extent possible, to cross-border situations. Accordingly, in situations for which it is not possible to take account of indirect prior charges to corporation tax at the national level, which it is for the national court to determine, such account is not to be taken of dividends paid to residents by non-resident companies.

32 In a context such as that in the case in the main proceedings, the obligation of a Member State to eliminate double taxation on a natural person benefiting ultimately from dividends of foreign origin is limited to the deduction of the corporation tax paid by the dividend-paying company on dividends distributed, according to the law of the Member State in which the company is established, from the income tax payable by the shareholder in respect of those dividends.

33 As the Finanzamt Köln and the German Government claim, the principle of free movement of capital, in Article 56(1) TFEU, cannot have the effect of requiring Member States to go beyond the cancelling of national income tax payable by a shareholder on dividends of foreign origin received and the reimbursing of a sum whose origin is in the tax system of another Member State (see, by analogy, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 52), if the first Member State is not to see its fiscal autonomy limited by the exercise of fiscal power of the other Member State (see, in particular, *Test Claimants in the FII Group Litigation*, paragraph 47; Case C?194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 30, and Case C-128/08 *Damseaux* [2009] ECR I-6823, paragraph 25).

34 In the light of the forgoing, the answer to the first question, read in conjunction with the two following, is that for the calculation of the amount of the tax credit to which a shareholder who is fully taxable in one Member State is entitled with regard to dividends paid by a capital company established in another Member State, Articles 56 EC and 58 EC preclude the application – if evidence required under the legislation of the first Member State is not adduced – of a provision such as Paragraph 36(2), second sentence, point 3 of the EStG, under which corporation tax imposed on dividends of foreign origin is set off against a shareholder's income tax to the level of the fraction of corporation tax attached to gross dividends distributed by companies in the first Member State. The calculation of the tax credit must be made in relation to the rate of corporation

tax on the distributed profits applicable to the dividend-paying company according to the law of its Member State of establishment; however the amount to be imposed may not exceed the amount of the income tax to be paid on dividends received by the recipient shareholder in the Member State in which that shareholder is fully taxable.

The second and third questions

35 By its second and third questions, the referring court asks whether Articles 56 EC and 58 EC must be interpreted as precluding the application of a provision such as Paragraph 36(2), second sentence, point 3, fourth sentence, (b) of the EStG under which the degree of detail and the form of evidence to be adduced by a shareholder fully taxable in one Member State in order to benefit in that Member State from a tax credit in respect of receipt of dividends paid by a capital company established in another Member State must be the same as those required where the dividend-paying company is established in the first Member State. If the answer is affirmative, the referring court is uncertain what degree of detail is required of the evidence adduced in order to establish the foreign corporation tax rate imposed on dividends, with a view to establishing the amount of the tax credit to which the beneficiaries of such dividends are entitled and, where necessary, whether Articles 56 EC and 58 EC allow the national court to estimate that rate of tax.

36 In order to answer these questions, it must first be noted that the rate of corporation tax on the distributed profits applicable to the dividend-paying company being decisive for the calculation of the tax credit to which the shareholder is entitled in the Member State of his residence, that rate must be determined as precisely as possible. Accordingly, from the outset basing the calculation of that tax credit on a simple estimate of the relevant rate is not permissible.

37 That being made clear, it must be noted that, next, it is inherent in the principle of the fiscal autonomy of Member States that they determine what is, according to their own national system, the evidence required in order to benefit from such a tax credit.

38 Nevertheless, the exercise of that fiscal autonomy must be carried out in accordance with the requirements of EU law, in particular those imposed by the Treaty provisions on the free movement of capital.

39 In this respect, the Court has already had occasion to state that the possible difficulties that may arise in determining the tax actually paid in another Member State cannot justify a restriction on the free movement of capital (see *Manninen*, paragraph 54, and *Test Claimants in the FII Group Litigation*, paragraph 70).

40 In the present case, it must be held that national legislation such as that at issue in the main proceedings, under which the tax credit is granted only following submission of a certificate in accordance with its national system, without any opportunity for the shareholder of showing, by means of other factors and relevant information, the tax actually paid, constitutes a disguised restriction on the free movement of capital prohibited by Article 65(3) TFEU (see, to that effect, Case C-318/07 *Persche* [2009] ECR I-359, paragraph 72).

41 However, it is clear from the case-law that the need to ensure the effectiveness of fiscal supervision constitutes an overriding reason relating to the general interest capable of justifying a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty and that a Member State is authorised to apply measures which enable the amount of costs deductible in that Member State, which were incurred in another Member State, to be ascertained clearly and precisely (see, in particular, Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31, and Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 24).

42 However, for a restrictive measure to be justified, it must observe the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (Case C?101/05 *A* [2007] ECR I?11531, paragraphs 55 and 56, and *Persche*, paragraph 52).

43 National rules which would unconditionally prevent shareholders having invested abroad from adducing evidence which satisfies criteria, in particular those of presentation, other than those laid down for national investments, would not only breach the principle of sound administration, but in particular go beyond what is necessary to attain the objective of effective fiscal supervision.

44 It is not a priori inconceivable that those shareholders may be able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the reality and nature of tax deductions made in other Member States (see, by analogy, *Laboratoires Fournier*, paragraph 25 and *Persche*, paragraph 53).

45 As regards the burden of proof and the degree of detail which the evidence required must meet in order to benefit from a tax credit in respect of dividends paid by a capital company established in another Member State, it must be borne in mind that the tax authorities of a Member State are entitled to require the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for a tax advantage provided for in the legislation at issue have been met and, consequently, whether or not to grant that advantage (see Joined Cases C-436/08 et C-437/08 *Haribo Lakritzen Hans Riegel and Österreichische Salinen* [2011) ECR 1-0000, paragraph 95 and case-law cited).

46 Such an assessment must not be conducted too formalistically, so that the provision of documentary evidence which lacks the degree of detail and is not presented in the form of a corporation tax certificate provided for by the Member State of taxation of a shareholder having received dividends from a capital company established in another Member State, but which enables the tax authorities of the Member State of taxation to ascertain, clearly and precisely, whether the conditions for obtaining a tax advantage are met, must be considered by those authorities to be equivalent to the production of the above-mentioned certificate.

47 Only if the shareholder concerned produces no information, such as discussed in the previous paragraphs, may the relevant tax authorities refuse the tax advantage sought.

48 In this respect, as a matter of fact, the Court has already stated that the inadequate flow of information to the investor is not a problem for which the Member State concerned should have to answer (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 98).

49 In that case-law, concerning a company receiving dividends but which also applies to natural persons who are shareholders, the Court, moreover, recalls the scope of Directive 77/799, the objective of which is to prevent tax evasion.

50 In that connection, the fact that, for dividends distributed by companies established in Member States other than that granting a tax credit, the tax authorities of that latter Member State may have recourse to the mechanism of mutual assistance under Directive 77/799 does not mean that they would be required to spare the company receiving dividends the necessity of providing them with proof of the tax paid in another Member State by the company making the distribution (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 100).

51 Since Directive 77/799 provides that the national tax authorities may request information

which they cannot obtain themselves, the use, in Article 2(1), of the word 'may' indicates that, whilst it is possible for those authorities to request information from the competent authority of another Member State, such a request does not in any way constitute an obligation. It is for each Member State to assess the specific cases in which information concerning transactions by taxable persons in its territory is lacking and to decide whether those cases justify submitting a request for information to another Member State (*Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 101 and the case-law cited).

52 Consequently, Directive 77/799 does not require the tax authorities to have recourse to the mechanism of mutual assistance for which the directive provides as soon as the information provided by that shareholder is not sufficient to establish whether that shareholder fulfils the conditions laid down by the national legislation for a right to a tax credit (see *Haribo Lakritzen Hans Riegel and Österreichische Salinen*, paragraph 102 and the case-law cited).

53 In the light of the above, the answer to the second and third questions as regards the degree of detail which the evidence required must meet in order to benefit from a tax credit relating to dividends paid by a capital company established in a Member State other than that in which the beneficiary is fully taxable, must be that Articles 56 EC and 58 EC preclude the application of a provision such as Paragraph 36(2), second sentence, point 3, fourth sentence, (b) of the EStG under which the degree of detail and the form of evidence to be adduced by such a shareholder must be the same as those required where the dividend-paying company is established in the Member State of taxation of that shareholder. The tax authorities of the Member State of taxation are entitled to require that shareholder to provide documentary evidence enabling them to ascertain, clearly and precisely, whether the conditions for obtaining a tax credit under national legislation are met without having to make an estimate of that tax credit.

The fourth question

54 By its fourth question the referring court seeks to ascertain whether the principle of effectiveness must be interpreted as meaning that it precludes legislation like that arising from the combined provisions of the second sentence of Paragraph 175(2) of the amended AO and the third sentence of Paragraph 97(9) of the EGAO which, retroactively and without any transitional period, does not permit a person fully taxable in the Member State concerned to offset the foreign corporation tax imposed on dividends paid to that person by a capital company established in another Member State by submitting either a certificate relating to that tax in accordance with the requirements of the legislation of the first Member State, or documents any evidence allowing the tax authorities of that first Member State to determine, clearly and precisely, whether the conditions for obtaining that tax advantage were met.

55 It must be borne in mind that, according to settled case-law, in the absence of relevant EU rules, the detailed procedural rules designed to ensure the protection of the rights which individuals acquire under EU law are a matter for the domestic legal order of each Member State, in accordance with the principle of the procedural autonomy of the Member States, provided that they are not less favourable than those governing similar domestic situations (principle of equivalence) and that they do not render impossible in practice or excessively difficult the exercise of rights conferred by the EU legal order (principle of effectiveness) (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 67 and Joined Cases C-392/04 et C?422/04 *i-21 Germany and Arcor* [2006] ECR I-8559, paragraph 57).

56 As regards the latter principle, the Court has held that it is compatible with EU law to lay down reasonable time-limits for bringing proceedings in the interests of legal certainty which protects both the taxpayer and the administration concerned. Such time-limits do not make it impossible in practice or excessively difficult to exercise the rights conferred by EU law (see Case

C-228/96 *Aprile* [1998] ECR I?7141, paragraph 19).

57 Moreover, as regards the restitution of national taxes unduly levied, the Court has stated that, where the rules for restitution are amended by national law with retroactive effect, the principle of effectiveness requires new legislation to include transitional arrangements allowing an adequate period after the enactment of the legislation for lodging claims for repayment which persons were entitled to submit under the original legislation (see, to that effect, Case C-62/00 *Marks & Spencer* [2002] ECR I-6325, paragraph 38, and Case C?255/00 *Grundig Italiana* [2002] ECR I-8003, paragraph 37).

58 It is apparent from the order for reference that the combined provisions of the second sentence of Paragraph 175(2) of the amended AO and the third sentence of Paragraph 97(9) of the EGAO, in the version of 9 December 2004, amended national law with retroactive effect without a transitional period enabling the shareholders concerned to exercise their right to a tax credit. Consequently, the principle of effectiveness precludes such a legislative amendment, since it does not grant taxpayers a reasonable period to make their claim to a tax credit during a transitional period. It is for the referring court to determine this period in order to enable shareholders to exercise those rights, by submitting a corporation tax certificate as provided for in national legislation or documentary evidence referred to in paragraph 54 above.

59 It follows from the foregoing that the answer to the fourth question must be that the principle of effectiveness precludes national legislation such as that arising from the combined provisions of the second sentence of Paragraph 175(2) of the amended AO and the third sentence of Paragraph 97(9) of the EGAO, which, retroactively and without any transitional period, does not permit the offsetting of foreign corporation tax imposed on dividends paid by a capital company established in another Member State by submitting either a certificate relating to that tax in accordance with the legislation of the Member State in which the shareholder is fully taxable, or documentary evidence allowing the tax authorities of that Member State to determine, clearly and precisely, whether the conditions for obtaining that tax advantage were met. It is for the referring court to determine a reasonable period for the submission of such a certificate or documentary evidence.

Costs

60 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 (Cour) hereby rules:

1. **For the calculation of the amount of the tax credit to which a shareholder who is fully taxable in a Member State with regard to dividends paid by a capital company established in another Member State is entitled, Articles 56 EC and 58 EC preclude the application – if evidence required under the legislation of the first Member State is not adduced – of a provision such as Paragraph 36(2), second sentence, point 3 of the Law on Income Tax (Einkommensteuergesetz) of 7 September 1990, as amended by the Law of 13 September 1993, under which corporation tax imposed on dividends of foreign origin is set off against a shareholder's income tax to the level of the fraction of corporation tax imposed on gross dividends distributed by companies in the first Member State.**

The calculation of the tax credit must be made in relation to the rate of corporation tax on the distributed profits applicable to the dividend?paying company according to the law of the Member State of establishment, however the amount to be imposed may not exceed the amount of the income tax to be paid on dividends received by the recipient shareholder in the Member State in which that shareholder is fully taxable.

2. **As regards the degree of detail which the evidence required must meet in order to benefit from a tax credit relating to dividends paid by a capital company established in a Member State other than that where the beneficiary is fully taxable, Articles 56 EC and 58 EC preclude the application of a provision such as Paragraph 36(2), second sentence, point 3, fourth sentence, (b) of the EStG under which the degree of detail and the form of evidence to be adduced by such a shareholder must be the same as those required where the dividend-paying company is established in the Member State of taxation of that shareholder.**

The tax authorities of the Member State of taxation are entitled to require that shareholder to provide documentary evidence enabling them to ascertain, clearly and precisely, whether the conditions for obtaining a tax credit under national legislation are met without having to make an estimate of that tax credit.

3. **The principle of effectiveness precludes national legislation like that arising from the combined provisions of the second sentence of Paragraph 175(2) of the amended Regulations on Taxes (Abgabenordnung) and the third sentence of Paragraph 97(9) of the Law introducing the Tax Code (Einführungsgesetz zur Abgabenordnung), which, retroactively and without any transitional period, does not permit the offsetting of foreign corporation tax imposed on dividends paid by a capital company established in another Member State by submitting either a certificate relating to that tax in accordance with the legislation of the Member State in which the shareholder is fully taxable, or documentary evidence allowing the tax authorities of that Member State to determine, clearly and precisely, whether the conditions for obtaining that tax advantage were met. It is for the referring court to determine a reasonable period for the submission of such a certificate or documentary evidence.**

[Signatures]

* Language of the case: German.