Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 17 November 2016 [1]

Case C-68/15

X

(Reference for a preliminary ruling from the Grondwettelijk Hof (Constitutional Court, Belgium))

(Tax legislation or fiscal legislation — Freedom of establishment — Article 4(3) and Article 5 of Directive 2011/96/EU — Parent-Subsidiary Directive — Taxation of companies when profits are distributed — Concept of withholding tax — 'Fairness tax')

I – **Introduction**

1. In this reference for a preliminary ruling, the Court of Justice has been asked to determine whether a tax levied in the Kingdom of Belgium, which undertakings are required to pay under certain circumstances when they distribute profits, is compatible with the freedom of establishment and with Directive 2011/96/EU [2] ('the Parent-Subsidiary Directive').

2. Belgian tax law enables undertakings to carry forward losses without limitation to future assessment periods and to claim a deduction for so-called risk capital. [3] However, according to the Belgian government, these measures resulted in a situation where certain undertakings paid virtually no tax but still distributed profits. Since this is unfair to other taxpayers, a tax called the 'fairness tax' was to be separately levied in order to limit the excesses caused by the opportunities for deduction. [4]

3. The tax essentially applies where companies distribute profits but have effectively lowered their liability for tax on profits in the same taxable period through use of the aforementioned deductions. In simple terms, the taxable amount is based on the amount by which a company's distributed profits exceed its taxable profits. Prior to applying the tax rate, that amount is multiplied by a so-called proportionality factor, which reflects the extent by which profits were reduced through the use of loss and risk-capital deductions.

1 — Original language: German.

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

3 — The deduction allows interest to be notionally deducted from the basis of assessment for the tax levied on the income of undertakings, where such interest is considered a return on the undertaking's equity capital. The Court of Justice previously addressed this deduction in its judgment in *Argenta Spaarbank* (C-350/11, EU:C:2013:447).

4 — Cf. the remarks of the competent minister reproduced in the report of 15 July 2013 on behalf of the Committee for Social Affairs of the Belgian Chamber of Representatives (Parl. St., Kamer, 2012-2013, DOC 53-2891/007, p. 38).

4. Doubt is cast on whether the fairness tax is compatible with the freedom of establishment, since it also covers non-resident companies that operate in Belgium through a permanent establishment rather than through a subsidiary. Moreover, since the tax has characteristics of both a corporation tax and a dividend withholding tax, it is in dispute whether the tax is precluded by the Parent-Subsidiary Directive. [5]

II – **Legal context**

A –*EU law*

5. The EU law framework for the present proceedings is the freedom of establishment enshrined in Articles 49 to 55 TFEU and the Parent-Subsidiary Directive.

6. Pursuant to Article 1(1), the Parent-Subsidiary Directive is to be applied

‘(a) to distributions of profits received by companies of that Member State which come from their subsidiaries of other Member States;

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

…’

7. Article 4 of the Parent-Subsidiary Directive specifies:

‘(1) Where a parent company or its permanent establishment, by virtue of the association of the parent company with its subsidiary, receives distributed profits, the Member State of the parent company and the Member State of its permanent establishment shall, except when the subsidiary is liquidated, either:

(a) refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary; or

(b) tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary fall within the definitions laid down in Article 2 and meet the requirements provided for in Article 3, up to the limit of the amount of the corresponding tax due.

…

(3) 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.

Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.

…’

5 — Also pending before the Court of Justice are proceedings concerning a tax levied in France that is structurally similar to the Belgian fairness tax; see *Association française des entreprises privées and Others* (C-365/16).

8. Article 5 of the Parent-Subsidiary Directive specifies:

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

B –*National law*

9. The fairness tax is based on the Law of 30 July 2013,[6] which amended Articles 43 to 50 of the Wetboek van de inkomstenbelastingen 1992 (Income Tax Code 1992; ‘WIB 1992’). On the basis of Paragraph 1 of Article 219ter WIB 1992, which was introduced by that Law, Belgian companies are subject to a separate tax in connection with corporation tax, starting with the 2014 tax year.[7]

10. According to Paragraph 2 of Article 219ter WIB 1992, the starting point for determining the taxable amount for that tax is the positive difference between the gross dividends that were distributed for the taxable period and the final taxable profits that are actually subject to the rate of corporation tax. According to Paragraph 3 of Article 219ter WIB 1992, that amount is reduced by the portion of the distributed dividends that originates from reserves that were taxed at an earlier date but not later than the 2014 tax year.

11. Pursuant to Paragraph 4 of Article 219ter WIB 1992, the balance thus obtained is then multiplied by a coefficient (the so-called proportionality factor), which consists of a fraction and expresses the ratio between:

— on the one hand, in the numerator, the deductions for losses carried forward and risk capital that were actually applied in respect of the taxable period, and

— on the other, in the denominator, the taxable profits for the taxable period, without taking into account exemptions in respect of depreciation, provisions and capital gains.

12. Paragraph 5 of Article 219ter WIB 1992 specifies that the taxable amount may not be limited or reduced in any other way.

13. According to Paragraph 6 of Article 219ter in conjunction with Paragraph 1(1) of Article 463bis WIB 1992, the tax rate is 5.15%.

14. On the basis of Article 233(3) WIB 1992, the fairness tax is also levied against foreign companies that maintain a permanent establishment in Belgium when they distribute profits. In determining the taxable amount, consideration is given only to that portion of the gross dividends distributed by the company that corresponds to the share of the company’s total profits that were contributed by the Belgian permanent establishment.

III – **Main proceedings and proceedings before the Court of Justice**

15. The subject of the main proceedings is an action brought by X NV before the Belgian Constitutional Court seeking the annulment of those articles of the Law of 30 July 2013 that introduced the fairness tax.

6 — Law containing various provisions (Wet van 30 juli 2013 houdende diverse bepalingen), published in the *Belgisch Staatsblad* of 1 August 2013.

7 — Pursuant to Paragraph 1(2) of Article 1 WIB 1992, corporation tax means the tax on the total income of companies resident in Belgium.

16. Since the Constitutional Court has doubts about the compatibility of the fairness tax with the freedom of establishment and the Parent-Subsidiary Directive, it referred the following questions to the Court of Justice on 28 January 2015 for a preliminary ruling pursuant to Article 267 TFEU:

(1) Must Article 49 TFEU be interpreted as precluding national rules under which

(a) companies established in another Member State and having a Belgian permanent establishment are subject to a tax if they decide to distribute profits which are not included in the final taxable profits of the company, irrespective of whether profits have flowed from the Belgian permanent establishment to the main establishment, whereas companies established in another Member State and having a Belgian subsidiary are not subject to such a tax if they decide to distribute profits which are not included in the final taxable profits of the company, irrespective of whether or not the subsidiary has distributed a dividend;

(b) companies established in another Member State and having a Belgian permanent establishment are, if they retain the Belgian profits in full, subject to a tax if they decide to distribute profits which are not included in the final taxable profits of the company, whereas Belgian companies are not subject to such a tax if they retain their profits in full?

(2) Must Article 5 of the Parent-Subsidiary Directive be interpreted as meaning that there is withholding tax in the case where a provision of national law requires that a tax be imposed on a distribution of profits by a subsidiary to its parent company in that, in the same taxable period, dividends are distributed and the taxable profits are wholly or partly reduced by the deduction for risk capital and/or by tax losses carried forward, whereas under national law the profits would not be taxable if they remained with the subsidiary and were not distributed to the parent company?

(3) Must Article 4(3) of the Parent-Subsidiary Directive be interpreted as precluding national legislation under which a tax is levied on the distribution of dividends if that legislation has the effect that, in the case where a company distributes a received dividend in a year subsequent to the year in which it received that dividend itself, it is taxed on a portion of the dividend which exceeds the threshold laid down in the aforementioned Article 4(3) of the directive, whereas that is not the case if that company redistributes a dividend in the year in which it receives it?

17. In the proceedings before the Court of Justice, the applicant in the main proceedings, the Kingdom of Belgium, the French Republic, and the European Commission submitted written observations and participated at the hearing on 22 June 2016.

IV – **Law**

A – *The first question referred*

18. The first question asked by the referring court relates to the compatibility of the fairness tax with the freedom of establishment from two different aspects. Whereas the first part of the question is directed at the different tax consequences for a non-resident company depending on the legal form it chooses for its activities in Belgium, the second part of the question concerns the case of unequal treatment of resident and non-resident companies as regards the retaining of profits generated in Belgium.

1. Alleged unequal treatment on account of the legal form chosen

19. The first part of the first question referred essentially seeks to clarify whether the freedom of establishment precludes national legislation that levies a tax on non-resident companies in case of a distribution of profits when they maintain a permanent establishment in Belgium, but not when they exercise their activities in Belgium through a subsidiary.

20. In the opinion of the applicant in the main proceedings, the way in which the fairness tax is levied poses an obstacle to non-resident companies in freely choosing the legal form for their activities in Belgium. If a non-resident company operates there through a subsidiary, it faces tax only indirectly, namely to the extent of the profits distributed to it by the subsidiary. But if it exercises its activities in Belgium through a permanent establishment, it is subject to the fairness tax if it itself distributes profits. Consequently, a non-resident company with a permanent establishment in Belgium is treated less favourably than if it were to maintain a subsidiary there.

21. Therefore, it must be examined whether it constitutes a restriction on the freedom of establishment when a Member State levies a tax that results in non-resident companies being treated differently depending on whether they operate in that Member State through a permanent establishment or a through subsidiary.

22. Companies are accorded the freedom of establishment by Articles 49 and 54 TFEU. Accordingly, companies established in a Member State of the European Union have the right to exercise their activities in another Member State through a subsidiary, a branch or an agency. [8] A branch is equivalent to a permanent establishment for tax purposes. [9]

23. Moreover, as the second sentence of the first paragraph of Article 49 expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions in the host Member State. [10] The freedom to choose the appropriate legal form in which to pursue activities in another Member State serves, inter alia, to allow companies having their seat in a Member State to open a branch in another Member State in order to pursue their activities under the same conditions as those which apply to subsidiaries. [11] The host Member State may not rely on the fact that the foreign company may prevent any detrimental difference in treatment by choosing another legal form for its activity in the host Member State, for example a subsidiary rather than a branch. [12]

8 — See, inter alia, *Commission* v *France* (270/83, EU:C:1986:37, paragraph 18), *Saint-Gobain ZN* (C-307/97, EU:C:1999:438, paragraph 35), *X Holding* (C-337/08, EU:C:2010:89, paragraph 17), and *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 12).

9 — Article 5(1)(b) of the European Commission's Proposal for a Council Directive on a Common Consolidated Corporate Tax Base (CCCTB) of 3 October 2011 (COM(2011) 121 final).

10 — See, inter alia, the judgments in *Commission* v *France* (270/83, EU:C:1986:37, paragraph 22), *CLT-UFA* (C-253/03, EU:C:2006:129, paragraph 14), *Oy AA* (C-231/05, EU:C:2007:439, paragraph 40), and *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 13), as well as the order in *KBC Bank and Beleggen, Risicokapitaal, Beheer* (C-439/07 and C-499/07, EU:C:2009:339, paragraph 77).

11 — Judgments in *CLT-UFA* (C-253/03, EU:C:2006:129, paragraph 15) and *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraph 14).

12 — Judgment in *Oy AA* (C-231/05, EU:C:2007:439, paragraph 40).

24. However, contrary to the view of the applicant in the main proceedings, freedom to choose the legal form is not to be understood as an independent requirement. The Court of Justice properly considers it to be merely a corollary of the requirement of treatment equal to that afforded to nationals, without this being accorded a higher level of protection.[13] If in fact the fundamental freedoms are to serve the establishment of the internal market by removing obstacles precisely to cross-border economic activity, there can be no room for a separate duty to structure tax legislation in a manner that is neutral as to legal form.

25. Therefore, the fact that a non-resident company is ultimately treated differently depending on whether it operates in the host Member State through a permanent establishment or through a subsidiary cannot in and of itself constitute a restriction on the freedom of establishment. Rather, such a restriction instead requires adverse treatment of the cross-border situation compared with a comparable, purely domestic one.

26. In the present case, therefore, a determination that the freedom of establishment has been restricted presupposes that a non-resident company that exercises its activities in Belgium through a permanent establishment is treated adversely compared with a resident company, which in turn may be the subsidiary of a non-resident company, with regard to the levying of the Belgian fairness tax.

27. Such adverse treatment is not, however, apparent.

28. Resident and non-resident companies alike are subject to the same tax rate in connection with the levying of the fairness tax. Also, the chargeable event is the same in both cases, namely the distribution of profits where deductions were taken in the same taxable period for losses carried forward and for risk capital. If in addition the share of dividends attributable to the profits contributed by the Belgian permanent establishment to the parent's total profits is used to determine the taxable amount for non-resident companies, this approach reflects the limited tax liability of such companies in Belgium.

29. Admittedly, the portion of the dividends distributed by a non-resident company that is used to calculate the fairness tax does not necessarily represent the precise amount of profits that were generated by that company's Belgian permanent establishment under Belgian fiscal sovereignty. However, this applies equally to the dividends of a resident company that in turn maintains permanent establishments outside of Belgium. The profits of those permanent establishments are as a rule effectively exempt from taxation in Belgium, but they are included in the dividends that are taken into account for the purposes of calculating the fairness tax for resident companies. Seen from this perspective, the way in which the tax is calculated rather tends to favour non-resident companies, thus ruling out any adverse treatment that is relevant for freedom of establishment.

30. Consequently, the answer to the first part of the first question referred should be that the freedom of establishment does not preclude national legislation that levies a tax, like the fairness tax, on non-resident companies in case of a distribution of profits when they maintain a permanent establishment in Belgium, but not when they exercise their activities in Belgium through a subsidiary.

13 — Judgments in *Commission* v *France* (270/83, EU:C:1986:37, paragraph 15), and *Saint-Gobain ZN* (C-307/97, EU:C:1999:438, paragraph 44), in which the Court of Justice ruled that there had been a single composite infringement of the freedom of establishment. See also the judgment in *Philips Electronics UK* (C-18/11, EU:C:2012:532, paragraphs 13 to 15). Although in its judgment in *CLT-UFA* (C-253/03, EU:C:2006:129), the Court of Justice limited its appraisal to the aspect of restriction on the freedom to choose the legal form, this does not change the fact that this case as well was essentially based on adverse treatment of a cross-border situation compared with a domestic one.

2. Alleged unequal treatment in the formation of reserves

31. With the second part of its first question, the referring court wishes to know whether the freedom of establishment precludes the levying of the fairness tax in such a way that non-resident companies that operate in Belgium through a permanent establishment are subject to it when they distribute profits, even though the permanent establishment's profits were retained, whereas resident companies that retain profits in full are not.

32. In the situation described, the non-resident company is treated adversely compared with the resident company, since only the former is subject to the fairness tax. However, the two situations are manifestly not objectively comparable with respect to the levying of the tax.

33. This is because in the situation on which the question referred is based the resident company retains all of its profits, whereas the non-resident company distributes profits. It is evident, however, that the only companies adversely affected by a tax like the fairness tax, which is levied solely when profits are distributed, are those that in fact distribute profits. Under those circumstances, a restriction on the freedom of establishment cannot be concluded.

34. The answer to the second part of the first question referred should therefore be that the freedom of establishment does not preclude the levying of a tax like the Belgian fairness tax in such a way that a non-resident company with a permanent establishment in a Member State is subject to it when it distributes profits, even though the permanent establishment's profits were retained, whereas a resident company that retains profits in full is not.

B – *The second question referred*

35. With its second question, the referring court wishes to know whether the levying of the fairness tax qualifies as a withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive.

36. If that question were to be answered in the affirmative, the tax would be in conflict with Article 5 of the Parent-Subsidiary Directive, since under that provision, profits which a subsidiary distributes to its parent company are exempt from withholding tax.

37. The Parent-Subsidiary Directive does not define the concept of 'withholding tax' for the purposes of Article 5. In its settled case-law, however, the Court of Justice has interpreted that provision as meaning that any tax on income received in the State in which dividends are distributed is a withholding tax on distributed profits for the purposes of Article 5 of the directive 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. [14]

38. Consequently, three conditions must be met in order to assume that a tax is a withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive: the tax is triggered by the distribution of profits, the taxable amount is based on the amount of the distribution, and the taxable person is the recipient of the distribution.

14 — Judgments in *Epson Europe* (C-375/98, EU:C:2000:302, paragraph 23), *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 47), *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 108), *Burda* (C-284/06, EU:C:2008:365, paragraph 52), and *P. Ferrero and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 26).

39. The parties to the proceedings do not dispute that the fairness tax meets the first two conditions. First, the tax is imposed on the distribution of profits. Were there no distribution of profits, it would not be levied. Second, the amount of the distribution is used to determine the taxable amount. In this regard, it is irrelevant that the taxable amount of the fairness tax is subsequently modified. According to case-law, it suffices if the distribution of profits is included in the taxable amount. [15]

40. By contrast, the third condition is not met, since the taxable person owing the fairness tax is not the recipient of the distribution but rather the company distributing the profits.

41. Admittedly, in its judgment in *Athinaïki Zythopoiia*, [16] the Court of Justice characterised the taxation of the subsidiary as a withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive and in doing so adopted an economic perspective that was based on the effect that taxation of the subsidiary had on the parent company. [17] However, in all of its other case-law on that provision, it has consistently emphasised the condition that liability for the tax due rests with the distributing company. [18] In its judgment in *Burda*, [19] the Court of Justice rightly made it expressly clear that it requires, as a condition for the existence of a withholding tax within the meaning of Article 5, that the taxable person must be the holder of the shares that entitle it to participate in the profits of the distributing company. [20]

42. In other words, the first taxation of the income of a subsidiary is not covered by the Parent-Subsidiary Directive. [21] The prohibition contained in Article 5 of levying a withholding tax on the distribution of profits to a parent company accordingly does not extend to the payment of tax on income that the subsidiary generated through its economic activities, even if that tax is payable only when the subsidiary distributes profits. [22] This finds confirmation in Article 7(1) of the directive, which specifies that advance payment or prepayment of corporation tax by a subsidiary is expressly not covered by the concept of withholding tax. The same must apply to a tax like the fairness tax, on the basis of which the income of a company is ultimately subject to recapture under certain conditions.

43. Thus, it is also not possible to uphold the objection by the applicant in the main proceedings that the taxable person for purposes of the fairness tax is only formally the distributing company but in reality the shareholder, since the distribution of profits is lower as a result of the paid tax. Rather, when a company's income is taxed, this necessarily means that only a correspondingly smaller amount of profits is capable of being distributed to shareholders.

44. The second question referred should accordingly be answered in such a way that the levying of a tax like the Belgian fairness tax does not constitute a withholding tax within the meaning of Article 5 of the Parent-Subsidiary Directive.

15 — Judgment in *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 52).

16 — C-294/99, EU:C:2001:505.

17 — Judgment in *Athinaïki Zythopoiia* (C-294/99, EU:C:2001:505, paragraph 29), as well as paragraph 32 of the Opinion of Advocate General Alber in that case (EU:C:2001:263).

18 — Judgments in *Epson Europe* (C-375/98, EU:C:2000:302, paragraph 23), *Océ van der Grinten* (C-58/01, EU:C:2003:495, paragraph 47), *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 108), *Burda* (C-284/06, EU:C:2008:365, paragraph 52), and *P. Ferrero and General Beverage Europe* (C-338/08 and C-339/08, EU:C:2010:364, paragraph 26).

19 — C-284/06, EU:C:2008:365.

20 — Judgment in *Burda* (C-284/06, EU:C:2008:365, paragraphs 61 and 62).

21 — Judgments in *Test Claimants in Class IV of the ACT Group Litigation* (C-374/04, EU:C:2006:773, paragraph 60) and *Oy AA* (C-231/05, EU:C:2007:439, paragraph 27).

22 — Opinion of Advocate General Mengozzi in *Burda* (C-284/06, EU:C:2008:60, paragraph 55).

C –The third question referred

45. Finally, with its third question, the referring court wishes to know whether Article 4(3) of the Parent-Subsidiary Directive precludes the levying of the fairness tax if it has the effect that, in the case where a company distributes a received dividend in a year subsequent to the year in which it received that dividend itself, it is taxed on a portion of the dividend that exceeds the amount permitted under that provision.

46. The question referred concerns a situation in which a company that is resident in Belgium is the middle link in a chain of companies, receives dividends itself, and then in turn subsequently (re-) distributes them. Moreover, the question is grounded on the premiss that such dividends, if (re-) distributed in a year subsequent to the year in which they were received, are ultimately subject to a higher tax burden than that allowed by Article 4(3) of the Parent-Subsidiary Directive because of the way in which the fairness tax is levied.

47. Article 4(3) of the Parent-Subsidiary Directive permits Member States to provide 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. Where the management costs relating to the holding in such a case are fixed as a flat rate, the fixed amount may not exceed 5% of the profits distributed by the subsidiary.

48. According to the information provided by the referring court, in transposing Article 4(3) of the Parent-Subsidiary Directive, the Belgian legislature enacted legislation that enables 95% of dividends received by the parent company to be deducted from the profits of that company if the conditions laid down in that legislation are satisfied. The remaining 5% is subject only to tax on the company's income.

49. The parties to the proceedings disagree as to the circumstances under which dividends can in fact be subject to an extra tax burden if they are redistributed. However, even the argument by the Belgian government indicates that such an extra tax burden is conceivable. The apparent reason for this is that the gross dividends distributed in a taxable period are used to determine the taxable amount of the fairness tax. No further distinction is made as to whether this also includes dividends received by the distributing company itself.

50. The Belgian Government however takes the position that the requirements of Article 4(3) of the Parent-Subsidiary Directive are nevertheless met. If Article 4(1) of the directive provides for an exemption or tax credit for received dividends, it may be concluded from the wording of that provision that this obligation applies only with respect to the receipt of such dividends and not to a subsequent redistribution. The same applies for Article 4(3) of the directive.

51. That argument cannot be accepted. Such an interpretation would be contrary to the system and purpose of the Parent-Subsidiary Directive and would interfere with its practical effectiveness.

52. In Articles 4 and 5, the Parent-Subsidiary Directive makes a fundamental decision about the allocation of the power to tax a subsidiary's profits. In principle, the Member State of the subsidiary has the right to tax its profits. This is intended to ensure that distributions of profit that fall within the scope of the Parent-Subsidiary Directive are fiscally neutral.[23] The same applies to chains of companies, since double or multiple taxation is to be eliminated also where profits are distributed through the chain of subsidiaries to the parent company.[24]

23 — Judgments in *Banque Fédérative du Crédit Mutuel* (C-27/07, EU:C:2008:195, paragraph 24) and *Cobelfret* (C-138/07, EU:C:2009:82, paragraph 29), as well as recital 8 of the Parent-Subsidiary Directive.

24 — See recital 11 of the Parent-Subsidiary Directive.

53. Consequently, it is incompatible with the Parent-Subsidiary Directive if the profits of a company further up the chain are subject to a higher tax burden than that permitted by Article 4 of the directive. In this regard, it cannot be of significance whether that burden takes hold when dividends are received or instead when they are redistributed. A different interpretation would mean that a Member State could avoid its obligations under the directive simply by changing the way it levies taxes. However, the foregoing notwithstanding, all of the other requirements in Articles 1 to 3 of the directive must always be met with respect to each distribution.

54. The judgment in *Test Claimants in the FII Group Litigation*[25] cited by the governments of Belgium and France does not preclude this. That case concerned a system of advance payment of corporation tax, which is payable by a resident parent company when it in turn pays dividends received from a non-resident subsidiary. In this respect, the Court of Justice held that Article 4(1) of the Parent-Subsidiary Directive does not oblige a Member State to ensure that the amount payable in advance is, in every case, to be determined by reference to the corporation tax paid by the subsidiary in the State in which it is resident.[26] However, it may not be concluded from this that the directive is not applicable in the case of a redistribution of received dividends.

55. Thus, the third question referred should be answered in such a way that Article 4(3) of the Parent-Subsidiary Directive precludes the levying of a tax if it has the effect of subjecting a company to a tax burden that exceeds the amount allowed under Article 4(3) when it distributes profits with respect to dividends that it has, within the scope of the directive, received and then redistributes.

V – **Conclusion**

56. In conclusion, I suggest that the request from the Grondwettelijk Hof (Constitutional Court, Belgium) for a preliminary ruling should be answered as follows:

(1) Article 49 in conjunction with Article 54 TFEU is to be interpreted as not precluding legislation of a Member State which provides that

   (a) a non-resident company with a profit-making permanent establishment in that Member State is subject to a tax under certain conditions when it distributes profits, whereas a non-resident company with a subsidiary in that Member State is not subject to such tax;

   (b) a non-resident company with a profit-making permanent establishment in that Member State that retains in full the profits generated there is subject to a tax under certain conditions when it distribute profits, whereas a resident company is not subject to such tax when it retains profits in full.

(2) National legislation that subjects a company to additional taxation of revenue when it distributes profits does not constitute a withholding tax within the meaning of Article 5 of Directive 2011/96/EU.

(3) Article 4(3) of the Directive 2011/96/EU precludes national legislation that has the effect of subjecting a company to a tax burden that exceeds the amount allowed under Article 4(3) when it distributes profits with respect to dividends that it has, within the scope of the directive, received and then redistributes.

25 — C-446/04, EU:C:2006:774.

26 — Judgment in *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 105).