Downloaded via the EU tax law app / web

OPINION OF ADVOCATE GENERAL

TRSTENJAK

13 January 2011 (1)

Case C?262/09

Wienand Meilicke

Heidi Christa Weyde

Marina Stöffler

v

Finanzamt Bonn-Innenstadt

(Reference for a preliminary ruling from the Finanzgericht Cologne (Germany))

(Free movement of capital – Avoidance of double taxation of dividends – Income tax – Corporation tax – Proof of prior corporation tax charge – Procedural autonomy of Member States – Principle of equivalence – Principle of effectiveness)

Table of contents

I – **Introduction**

1. In the present case the Finanzgericht Köln has requested a second preliminary ruling from the Court in the context of a pending action concerning the taxation of foreign dividend distributions. In essence, the referring court seeks clarification as to how, in practical terms, it is to give effect to the Court's judgment in *Meilicke*, (2) which was delivered in response to the first request for a preliminary ruling in the same proceedings.

2. The claimants in the main proceedings are Mr W. Meilicke, Mrs H.C. Weyde and Mrs M. Stöffler as the heirs of Mr H. Meilicke, who died on 3 May 1997, and the defendant is the Finanzamt Bonn-Innenstadt. The dispute concerns, inter alia, the application of national legislation on the avoidance of double taxation on dividends which were paid to the deceased from 1995 to 1997 by companies established in Denmark and the Netherlands.

3. In the *Meilicke* judgment the Court found that national legislation on the avoidance of double taxation, by virtue of which the corporation tax on dividend distributions is credited to taxpayer shareholders resident in Germany by means of an income tax credit equal to the prior corporation tax charge, must be applied equally to domestic dividends and dividends from other EU countries.

4. Although that reply clarified the rules applicable in the main proceedings, the referring court is now confronted with the problem of establishing in actual practice the prior corporation tax charge on dividends from other EU countries. In substance, therefore, the Court is asked for further clarification as to how, in practice, the income tax credit for the corporation tax on dividend distributions from other EU countries is to be granted in the main proceedings, and what procedural rules are to be followed.

II – **Legal context**

A – *Union law* (3)

5. Cooperation between the tax authorities within the Community is the subject 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, and taxation of insurance premiums. (4)

6. Under Article 2(1) of that Directive, the competent authority of a Member State may request the competent authority of another Member State to forward all information that may enable them to effect a correct assessment of taxes on income and on capital. The competent authority of the requested State need not comply with the request if it appears that the competent authority of the State making the request has not exhausted its own usual sources of information, which it could have utilised, according to the circumstances, to obtain the information requested without running the risk of endangering the attainment of the result sought.

7. Under Article 2(2) of Directive 77/799, for the purpose of forwarding the information referred to in paragraph 1, the competent authority of the requested Member State is to arrange for the conduct of any enquiries necessary to obtain such information. In order to obtain the information sought, the requested authority or the administrative authority to which it has recourse shall proceed as though acting on its own account or at the request of another authority in its own Member State.

B – *National law*

8. Under Paragraphs 1, 2 and 20 of the Einkommensteuergesetz (Law on income tax; EStG) of 7 September 1990 (5) in the version in force during the relevant years, dividends distributed by capital companies to persons residing in Germany who are liable to income tax are taxed there as income from capital assets.

9. Under Paragraph 27(1) of the Körperschaftsteuergesetz (Law on corporation tax; KStG) of 11 March 1991 (6) in the version in force during the relevant years, a 30% distribution charge is levied on capital and reserves which are subject to corporation tax and are distributed as dividends by capital companies which are fully taxable for corporation tax purposes in Germany.

10. Under Paragraph 36(2), point 3, EStG in conjunction with Paragraph 20 EStG, taxpayers may deduct from their income tax debt to the German revenue three-sevenths of the dividends paid to them by German corporations or associations which are fully taxable for corporation tax purposes, provided that the dividends originate from distributions subject to corporation tax and provided that the corporation tax which can be credited is included as taxable income in the income tax assessment.

11. Under Paragraph 36(2), point 3(b), EStG the credit for corporation tax is conditional on the production of a corporation tax certificate within the meaning of Articles 44 and 45 KStG.

12. Under Paragraph 175(1), point 2, of the Abgabenordnung (‘Tax Code’; ‘AO’) of 16 March 1976, in the version in force during the relevant years, a tax assessment is to be issued, cancelled or amended if an event which has tax implications for periods already elapsed occurs (retroactive effect). The EU-Richtlinien-Umsetzunsgesetz (Law on the transposition of EU directives) of 9 December 2004 (7) amended Paragraph 175 AO with effect from 29 October 2004 to the effect that the subsequent issue or production of a certificate or confirmation is not to be deemed to be a

retroactive event. There are no transitional provisions.

III – **Facts and references for a preliminary ruling**

A – *Facts*

13. From 1995 to 1997 H. Meilicke, a German national residing in Germany, received dividends from his shares in Dutch and Danish companies. Income tax was charged on that investment income in Germany without allowance being made for the corporation tax assessed in the Netherlands and Denmark on the company profits distributed as dividends.

14. The 1995 income tax assessment for H. Meilicke, dated 16 February 1998, and the 1996 assessment dated 7 September 1998 are stated to be subject to verification. The 1997 assessment for H. Meilicke, dated 26 July 2000, is not stated to be subject to verification.

15. The claimants in the main proceedings are heirs of the deceased H. Meilicke, who died in 1997.

16. By letter of 30 October 2000 the claimants in the main proceedings applied to the defendant Finanzamt for the corporation tax on the dividends from Dutch and Danish shares in 1995 and 1997 to be set off against the income tax assessed for the deceased.

17. The defendant rejected the application by decision of 30 November 2000. The claimants lodged an objection to that decision on 16 January 2001 and the objection too was dismissed by decision of 25 March 2002. The defendant Finanzamt took the view that, according to the legal position at the time, only the corporation tax due from companies fully taxable for corporation tax purposes in Germany for distributed dividends could be set off the income tax due from shareholders. In the claimants' opinion, that constitutes an impermissible restriction of the free movement of capital and of the freedom of establishment and they brought an action before the referring court.

B – *First reference for a preliminary ruling and judgment of 6 March 2007*

18. By a decision received by the Court of Justice on 9 July 2004, the referring court stayed the proceedings for the first time and sought a preliminary ruling from the Court on the question of whether Paragraph 36(2), point 3, of the EStG, whereby only corporation tax payable by a fully taxable corporation or association amounting to three sevenths of the income within the meaning of Paragraph 20(1), points 1 or 2, of the EStG is set off against income tax, is compatible with Articles 56(1) EC and 58(1)(a) and (3) EC.

19. In reply to the question, the Court ruled in the *Meilicke* judgment (8) ruled that 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.

C – *Second reference for a preliminary ruling*

20. Taking account of the Union law requirements set out in the abovementioned judgment, the referring court now considers that the claimants in the main proceedings in principle satisfy the conditions for the corporation tax charged on the dividend distributions from the Dutch and Danish companies to be set off against income tax. However, the referring court is uncertain as to whether and, if so, under what procedural rules and conditions, that set-off is to be effected in practice. In

particular, the question arises of in what way and by which parties the prior charge to foreign corporation tax is to be proved. Other questions confronting the referring court relate to the problem of whether and, if so, in what way the corporation tax charged on dividends from other EU countries is to be set off against income tax if the corporation tax which is actually due or has been paid cannot in fact be ascertained and may even be higher than the corporation tax on German dividends. The final question is likewise whether and, if so, under what conditions a prior charge to foreign corporation tax must be set off *ex post facto*, in spite of income tax assessments which have become final.

21. In those circumstances the referring court decided to stay judgment once again and to refer the following questions to the Court 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 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 the 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 KStG (in the version in force during the relevant years), although the corporation tax charged on dividends received from a company resident in another EC country which was actually paid is in practice impossible to determine and could be higher?

2. 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, fourth sentence, (b) of the EStG (in the version in force in the relevant years) – under which credit for corporation tax requires the submission of a corporation tax certificate within the meaning of Paragraph 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 under Articles 56(1) EC and 58(1)(a) and (3) EC 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 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 credit 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 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), point 1, 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 a corporation tax credit is possible in relation to domestic dividends even where income tax assessments have become final, whereas this would not be possible in relation to foreign dividends for want of a corporation tax certificate?’

IV – **Procedure before the Court**

22. The order for reference, dated 14 May 2009, was received by the Court Registry on 13 July 2009. In the written procedure the claimants and the defendant in the main proceedings, the German Government and the Commission submitted observations. The representatives of the claimants and the defendant in the main proceedings, the German Government and the Commission took part at the hearing of 27 October 2010.

V – **The parties’ submissions**

A – *First question referred*

23. The first question from the referring court seeks to establish whether a national provision for the avoidance of double taxation on company profits distributed as dividends is compatible with Union law where, under that provision, the corporation tax charged on the dividend distributions is set off against income tax in the form of a credit fixed at three-sevenths of the gross dividend in the case of German dividends as well as dividends from other EU countries, although the corporation tax charged on dividends received from other EU countries is in practice impossible to determine and could be higher than the fixed distribution charge of 30% on German dividends.

24. In the *Commission’s* opinion the referring court’s question seeks to clarify whether the amount of foreign corporation tax to be credited in accordance with the principles of the *Meilicke* judgment should in principle be determined by reference to the effective prior charge on the distribution or, rather, according to the statutory fraction of three-sevenths of the gross dividend. If it depends in principle on the effective prior charge, the referring court also wishes to know whether other criteria may be used if it is in practice impossible to ascertain the prior charge or that cannot reasonably be expected.

25. The Commission submits that the allowable foreign corporation tax should be determined according to the effective prior charge on the distribution. However, the latter need not be higher than the fraction of the distribution which is credited in the case of German company dividends. If in a particular case it is impossible to ascertain the prior charge or that cannot reasonably be expected, it would not alter the fact that the effective prior charge represents the relevant reference value. In particular, it would not mean that alternative reference values would have to be used, such as the amount of three-sevenths of the distribution specified in Paragraph 36(2) point, 3, EStG.

26. In the opinion of the *German Government* and the defendant *Finanzamt*, the credit for foreign corporation tax should be equal to the effective tax charge, disregarding indirect prior charges. Furthermore, the credit should not exceed the income tax due from the shareholder on the dividend he has received.

27. The *claimants in the main proceedings* submit in essence that the allowable corporation tax

must be calculated according to the tax which is due in principle from the company making the distribution and which is charged, directly or indirectly, on the dividend received. However, the amount credited should under no circumstances be limited to the income tax payable by the shareholder on the dividend received.

B – *Second question referred*

28. The second question from the referring court is whether and, if so, on what conditions, the production of a corporation tax certificate in accordance with the official model, which is required by law for the prior corporation tax charge on German dividends to be set off against income tax due from the shareholder, may also be made a condition for setting off the prior corporation tax charge on dividends from other EU countries.

29. In the *Commission's* opinion it is necessary, in replying to the second question as to whether a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG relating to dividends from other EU countries can be required, to distinguish between the necessary proof in itself and the detailed provisions of Paragraph 44 et seq. KStG. Under Union law the Member States are not normally compelled to grant tax advantages without the necessary vouchers. However, this does not mean that a Member State in a situation such as that in the main proceedings can lay down any formalities and any means it wishes for adducing evidence. Rather, it must limit itself to what is actually necessary having regard to the relevant national rule and therefore to what is in keeping with a justified interest in information. Consequently the Member State concerned cannot require all the relevant information to be provided by a uniform document which is issued by the company and conforms exactly with the model of Paragraph 44 KStG. It must be sufficient if the relevant vouchers and information are presented to the tax authorities in a form which they can use. Furthermore, the Member State concerned cannot insist on the production of information and vouchers from which it is clear that they are not relevant in the particular case. Any such requirement would be disproportionate.

30. The *German Government* considers that it is not contrary to Articles 56 EC and 58 EC or to the principles of equivalence and effectiveness if a taxpayer who wishes to claim a tax credit is required to produce a tax certificate or equivalent proof of the foreign corporation tax. Although such proof need not necessarily conform to a particular model, in principle the only acceptable basis for a credit is a statement which gives information in a clear and transparent manner on the actual prior charge to corporation tax on the dividends received. Furthermore, the tax authorities are not obliged to make use of cross-border administrative assistance pursuant to Directive 77/799 in order to obtain missing information and supporting documents concerning the taxpayer.

31. With regard to the second question from the referring court, the *defendant Finanzamt* contends in its written observations that neither Article 56 EC nor Article 58 EC nor the principles of equivalence and effectiveness preclude national legislation which lays down that income tax credit for corporation tax on dividends from other EU countries requires the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG. However, in response to a question in the course of the hearing, the defendant in the main proceedings revised its opinion and in effect concurred with the Commission's standpoint.

32. The *claimants in the main proceedings* submit in substance that income tax credit for corporation tax on foreign dividends should not be made conditional on the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG.

C – *Third question referred*

33. The third question from the referring court seeks clarification as to whether Articles 56 EC

and 58 EC require a national court to estimate the corporation tax on dividends from other EU countries if it is impossible to produce a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG and it is impossible to ascertain the corporation tax which was actually levied. In addition, the referring court asks whether indirect corporation tax charges are also to be taken into account in any such estimate.

34. In the *Commission's* opinion, a duty to estimate the corporation tax charge on dividends from other EU countries may be inferred from Union law in conjunction with the general national provisions on estimating the basis of taxation. Such a duty exists in so far as a taxpayer in a comparable purely domestic situation is likewise given the benefit of an estimate. Irrespective of any such national rules concerning estimates, the tax authorities must, under Article 56 EC, set off a prior charge of that kind, but always to the extent that sufficient proof is provided by the taxpayer, even if the exact amount of the prior charge cannot be established.

35. On the question of indirect prior corporation tax charges on dividends from other EU countries, the Commission submits that, under Article 56 EC, a taxable shareholder is entitled to have prior charges arising in relation to subsidiary companies of the distributing company taken into account if a taxpayer can set off such charges in the case of dividends from domestic companies.

36. The *German Government* submits, first, that there can be no question of taking into account indirect prior corporation tax charges on dividends from other EU countries because the previous German corporation tax system aimed to avoid the economic double taxation of dividends at the next higher shareholder level. The corporation tax of the distributing company only is set off. Furthermore, a corporation tax certificate must always be produced in order for the corporation tax on dividends from domestic companies to be set off against the shareholder's income tax. Consequently the corporation tax payable in other countries can be set off against the shareholder's income tax only where the shareholder produces vouchers which show in a clear and transparent manner the corporation tax actually owed.

37. The *defendant in the main proceedings* also considers that there can be no question of taking into account indirect prior corporation tax charges on dividends from other EU countries. In cross-border situations also, a corporation tax certificate is always necessary to prove direct prior charges. The question of whether the national tax authorities who taxed the recipient of the dividends are obliged, on the basis of Directive 77/799, to contact the authorities of the other Member State for the missing information must be answered in the negative.

38. The *claimants in the main proceedings* submit in effect that an estimate of the indirect prior corporation tax charge which cannot be ascertained on dividends from foreign companies may be used. However, the indirect corporation tax must also be taken into account.

D – *Fourth question referred*

39. With its fourth question, the referring court asks first whether it is compatible with Union law to interpret Paragraph 175 AO, in the version in force up to 28 October 2004, as meaning that an income tax assessment which has already become final may be rectified on the basis of the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG, whereas rectification is not possible on the basis of foreign statements or certificates which do not meet the formal requirements of Paragraph 44 *et sq.* KStG (question 4(b)). The referring court also asks whether the retroactive loss of the possibility of rectification of final income tax assessments, as provided for by Paragraph 175 AO, is compatible with Union law (question 4(a)).

40. In the *Commission's* opinion, Paragraph 175 AO is a procedural provision which must

therefore accord with the principle of equivalence. This means that a national provision such as Paragraph 175 AO is incompatible with Union law if, in the case of dividends of domestic companies, that provision enables the corporation tax charge to be set off by means of the subsequent production of a corporation tax certificate proving the claim to set off the prior charge, even after the income tax assessment in question has become final, but does not allow the same amendment of final income tax assessments in relation to dividends of companies of other EU countries even if the claim to set-off is proved by the subsequent production of other appropriate documents.

41. In addition, Union law precludes the retroactive effect of Paragraph 175 AO described by the referring court, in so far it results in preventing the subsequent production of the necessary documents from leading to the rectification of final income tax assessments in relation to dividends of companies of other EU countries, without providing for a transitional arrangement for a reasonable period within which such documents can be submitted for the purpose of set-off.

42. In the opinion of the *German Government* and the *defendant in the main proceedings*, a national provision by virtue of which the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG forms the procedural basis for the rectification of final income tax assessments, whereas rectification is not possible where foreign statements or certificates are produced which do not meet the formal requirements of Paragraph 44 et seq. KStG, is undoubtedly compatible with Union law. Furthermore, the retroactive repeal of that provision in the particular circumstances of the main proceedings is compatible with Union law even if, as a result, the procedural basis for the subsequent set-off of corporation tax arising in other EU countries retrospectively ceased to exist, without any transitional arrangement. However, it must be borne in mind that the tax arrangements which are applicable *ratione temporis* in the main proceedings, for setting off the prior corporation tax charge on dividends (the so-called ‘full set-off procedure’), applied only until 2001. Consequently there can be no objection from the viewpoint of Union law to the fact that the German legislature made certain procedural modifications affecting that system almost four years after the full set-off procedure was discontinued.

43. The *claimants in the main proceedings* consider that, for replying to the fourth question, the decisive factor is that the Federal German Republic has not yet made available an official model corporation tax certificate for foreign dividends. As Germany has insisted on the production of a certificate of that kind for setting off corporation tax on dividends from other EU countries, it would in practice be impossible or excessively difficult to enforce the rights conferred by Union law if the transitional period for amending Paragraph 175 AO was such that the production of a corporation tax certificate conforming to the official model for foreign dividends could no longer lead to the rectification of final income tax assessments before any such certificate was made available at all.

VI – **Legal assessment**

A – *Introductory remarks*

44. The four questions which have been referred to the Court refer to various national tax provisions and are therefore of a particularly technical nature. For a better understanding of the situation, I think a brief outline of the context in national tax law is necessary. At the same time it will be possible to reduce the questions to the points which are relevant to Union law.

45. The main proceedings have thrown up questions of the taxation of dividends which are distributed by capital companies, which are fully taxable for corporation tax purposes, to their shareholders who are liable for income tax in Germany. It appears from the order for reference and from the parties’ written observations that, under the national law which is applicable *ratione temporis*

, domestic dividends are deemed to be paid out of the capital and reserves available for distribution of such companies. Before they are distributed, such dividends are as a rule subject to corporation tax paid by the company and, after distribution to shareholders liable to income tax, the dividends are subject to income tax.

46. To avoid double taxation, the German tax law applicable at the relevant period sets up a complex system whereby the corporation tax due on the dividends distributed by companies is refunded in the form of an income tax credit equal to three-sevenths of the gross dividend to shareholders paying income tax. (9)

47. That imputation system has the important feature that the variable corporation tax rates applying to the capital and reserves available for distribution are adjusted to the fixed income tax credit of three-sevenths of the gross dividend. In the case of dividend distributions, this is done by increasing or reducing the corporation tax already levied on the distribution so as to create in effect a corporation tax ‘distribution charge’ of 30% of the gross dividend. However, some parts of distributions which are exempt from corporation tax are not subject to the ‘distribution charge’ and therefore ultimately remain exempt from corporation tax. Where such exempt capital and reserves are distributed, shareholders are not in principle granted a tax credit for the income tax. Consequently the corporation tax set-off equal to three-sevenths of the dividend normally corresponds to the corporation tax actually paid by the distributing company. (10)

48. In order to enable the tax offices dealing with the income tax returns of individual shareholders to ascertain the exact amount of the income tax credit, shareholders must submit a corporation tax certificate conforming with the prescribed model and issued by the distributing company. The effective corporation tax charge on distributed dividends can be determined on the basis of the certificate. If the certificate is not produced, the corporation tax on the dividends cannot, by law, be set off.

49. Finally, another feature of this system is that the corporation tax due is set off regardless of whether it has actually been paid. According to the referring court, however, in practice the German tax system normally results in the corporation tax set-off of three-sevenths of the gross dividend being equal to the corporation tax actually paid by the distributing company.

B – *First question referred*

50. In substance, the first question from the referring court is whether, where the effective prior corporation tax charge on dividends from other EU countries cannot be ascertained and therefore may be higher than the fixed 30% distribution charge on domestic dividends, the prior corporation tax charge on dividends from other EU countries must or may be set off against the income tax payable by shareholders in the form of a credit equal to the fixed fraction of three-sevenths of the gross dividend which applies to domestic dividends.

51. In replying to that question, it should be observed that, in *Meilicke*, (11) the Court found that tax legislation under which, on a distribution of dividends by a capital company, a shareholder who is fully taxable in Germany 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, is incompatible with Articles 56 EC and 58 EC. (12)

52. Therefore it may be inferred from *Meilicke* that the prior corporation tax charge on dividends from other EU countries must be set off in an equivalent way to that on domestic dividends against the income tax due from shareholders who are subject to income tax.

53. That duty may be fulfilled in by means of various taxation procedures. (13) The question from the referring court presumes that the system for granting income tax credit on domestic dividends may also be applied to dividends from other EU countries. In principle, that procedure is compatible with Union law.

54. In relation to domestic dividends, double taxation is basically avoided by setting off the prior corporation tax charge on the dividends by means of an income tax credit the amount of which depends on the corporation tax rate effectively applicable to the profit distribution: the ‘fixed’ income tax credit of three-sevenths of the gross domestic dividend corresponds in principle to an effective prior corporation tax charge of 30%. (14) It follows that income tax credits for avoiding double taxation of distributed profits from other EU countries must be linked to the effective prior corporation tax charge on those dividends. The effective prior corporation tax charge in that connection means the corporation tax actually paid or to be paid by the distributing company on the dividend distribution.

55. If the effective prior corporation tax charge on dividends from other EU countries is 30% or less, it follows that an income tax credit must be granted in accordance with the prior charge. In the case of a proven prior corporation tax charge of 20% on dividends from other EU countries, it is therefore sufficient if shareholders subject to income tax receive an income tax credit equal to two-eighths of the gross dividend. A proven prior corporation tax charge of 25% must be offset by an income tax credit of 25/75 of the gross dividend.

56. Consequently, under Union law only a proven effective prior corporation tax charge of 30% entitles a recipient of dividends from other EU countries who is subject to income tax to receive an income tax credit of three-sevenths of the gross dividends, which is nominally the same as in a domestic situation. This is also logical because the free movement of capital does not require dividends from foreign companies to be treated more favourably under tax law.

57. However, the free movement of capital also prohibits more favourable treatment of dividends from companies in other EU countries, so that in a case where the prior corporation tax charge on dividends from other EU countries is 30% or less, in effect an income tax credit ‘in accordance with’ that prior charge or precisely a flat-rate credit of three-sevenths of the dividend distribution would have to be regarded as conforming with Union law.

58. On the other hand, the position is different with regard to a proven effective prior corporation tax charge on dividends from other EU countries which exceeds 30%.

59. It could be argued, if a one-sided emphasis were put on the effect of the fundamental freedoms, that in principle the income tax credit of three-sevenths of domestic dividends always corresponds in full to the 30% prior corporation tax charge so that, in relation to domestic dividends, the latter is set off against income tax with no upper limit in law. From that it could be concluded in turn that there should be no legal upper limit for setting off the prior corporation tax charge on dividends from other EU countries. On the basis of that reasoning an effective prior corporation tax charge of 40% on dividends from other EU countries would, in Union law, entitle a recipient who is subject to income tax to an income tax credit equal to four-sixths of the dividends. (15)

60. However, that argument would overlook the fact that the German tax imputation system is ultimately based on Germany’s decision, made by way of exercising its sovereignty in tax matters, to establish a uniform 30% corporation tax charge on capital and reserves used for dividend distributions. As the shareholders’ income tax credit of three-sevenths of the dividend distribution aims to offset the corporation tax based on the distribution, this is in line with Germany’s decision

in principle to subject dividend distributions to a 30% uniform rate of corporation tax.

61. If Germany were now obliged to offset the prior corporation tax charge on dividends from other EU countries also beyond a 30% tax rate, that would mean that it would have to raise the prior corporation tax charge on such dividends above the level of the domestic corporation tax. The result of this would be that Germany would be obliged, by means of income tax legislation, to offset the consequences of another Member State's decision, made in exercise of its sovereignty in tax matters, to impose corporation tax of more than 30% on dividend distributions.

62. Such a far-reaching obligation cannot be inferred from the fundamental freedoms. If corporation tax of more than 30% has been charged on dividends from other EU countries, a shareholder who is liable to income tax in Germany is entitled, under Union law, to an income tax credit of only three-sevenths of the dividend. The differences in setting off that prior charge for income tax purposes, by comparison with domestic dividends, must be classified as disadvantages arising from the differences between the corporation tax rules of the Member States in question. In view of the residual powers of the Member States in the field of direct taxation, (16) those disadvantages must be accepted by the taxpayers concerned. (17)

63. In that connection reference may be made in particular to the judgment in the case of *Test Claimants in the FII Group Litigation,* (18) where the Court had to consider national tax rules for the avoidance of a series of charges to tax on dividends received by a resident company. Those rules exempted dividends from tax when they were paid by a resident company and, when paid by a non-resident company, provided for the prior charge to be credited. In the Court's opinion, such a system is compatible with the fundamental freedoms provided, first, that foreign-sourced dividends are not subject to a higher rate of tax than nationally-sourced dividends and, second, that foreign-sourced dividends are not liable to a series of charges to tax, by setting off the amount of tax paid by the non-resident company making the distribution against the amount of tax for which the recipient resident company is liable, up to the limit of the latter amount. (19) With regard to the actual implementation of the imputation system, the Court went on to point out that, when the profits underlying foreign-sourced dividends are subject in the Member State of the company making the distribution to a lower level of tax than the tax levied in the Member State of the recipient company, an overall tax credit corresponding to the tax paid by the company making the distribution in the Member State in which it is resident must be granted. Where, conversely, those profits are subject in the Member State of the company making the distribution to a higher level of tax than the tax levied by the Member State of the company receiving them, the latter Member State is obliged to grant a tax credit only up to the limit of the amount of corporation tax for which the company receiving the dividends is liable. (20)

64. Taking account of the particular context of the main proceedings in the *Test Claimants in the FII Group Litigation* case, the Court found that the obligation, arising from the fundamental freedoms, to avoid double taxation does not go so far that the resident company receiving foreign dividends must be credited even with a prior charge which exceeds the level of the national tax. In that connection, from the viewpoint of Union law, double taxation must be avoided only to the extent of the domestic level. (21)

65. In the present proceedings also I think it is to be presumed that the obligation, arising from the free movement of capital, to avoid double taxation of dividends from other EU countries must not go so far as to grant a tax credit to recipients of such dividends who are liable to income tax in Germany, but where the tax credit exceeds the uniform level of the national prior corporation tax charge and the corresponding income tax credit.

66. I therefore conclude that recipients of dividends from other EU countries who are liable to income tax in Germany, and in cases where the effective prior corporation tax charge on the

dividends exceeds 30%, are entitled to set off that prior charge up to the amount of the 30% corporation tax in Germany. Consequently in any such case an income tax credit of three-sevenths of the dividend distribution must be deemed to conform with Union law.

67. If, on the other hand, the Court reaches the conclusion that a prior corporation tax charge on dividends from other EU countries exceeding 30% must be set off in full, that would mean that an effective prior corporation tax charge of 40% would lead to an income tax credit of four-sixths of the dividend and a prior charge of 50% would justify a credit of one half of the dividend.

68. In view of the potentially serious effects of that approach, it would be necessary to consider in addition whether the obligation for the unlimited imputation of the prior corporation tax charge on dividends from other EU countries undermines the coherence of the national tax system and, if so, what conclusions must be drawn.

69. In that connection it would be necessary to consider whether the flat-rate 30% distribution charge on domestic dividends in Germany and the corresponding income tax credit of three-sevenths of the gross dividend normally result in the credit being less than the income tax payable on the dividend. If that were the case, it would always be necessary, in specific proceedings concerning the imputation of the prior corporation tax charge on dividends from other EU countries, to determine whether the income tax credit to be granted exceeds the income tax payable by the shareholder. In cases where the tax credit would actually exceed the tax due, the coherence of the German tax system would possibly be affected. In addition, on the basis of the general justification for maintaining the coherence of the national tax system, (22) it would then be necessary to establish whether Germany should be permitted in such cases to limit the income tax credit for dividends from other EU countries to the income tax payable by the shareholder on such dividends.

70. To sum up, I therefore conclude that Articles 56 EC and 58 EC are to be interpreted as meaning, in a case such as that in the main proceedings, that they require the prior corporation tax charge on dividends from other EU countries to be set off against the income tax due from shareholders in the form of a credit which is calculated in accordance with the effective prior corporation tax charge on those dividends. However, that credit must not exceed the rate of corporation tax applicable to domestic dividends.

C – *Second question referred*

71. The second question from the referring court seeks clarification as to whether and, if so, on what conditions, credit for the corporation tax on dividends from other EU countries against the income tax due from shareholders may be made conditional on the submission of a corporation tax certificate, to be issued by the distributing company in conformity with a model laid down by law, where there is an obligation to submit such a certificate in relation to a credit for the corporation tax on domestic dividends.

72. To answer that question, it must be observed that, first, in the *Meilicke* judgment the Court in effect confirmed that a shareholder who is fully taxable in Germany and who receives dividends from companies established in other EU countries is entitled, in accordance with Articles 56 EC and 58 EC and taking account of the relevant national legislation at the material date, to an income tax credit which, in principle, is calculated in accordance with the corporation tax rate on the distributed profits.

73. However, for the shareholder concerned to obtain that right arising from Union law, it presupposes that the effective prior corporation tax charge on the dividends can be ascertained in the Member State where the distributing company is taxable.

74. Against that background, the second question is to be understood as asking whether a rule of national procedure is compatible with Union law where that rule is that the prior corporation tax charge on dividends from other EU countries can be proved only by means of a corporation tax certificate to be issued by the distributing company in conformity with a particularly detailed model prescribed by law.

75. That question must be answered by reference to the principles developed in the Court’s case-law relating to the procedural autonomy of the Member States.

76. According to the case-law, in the absence of European Union rules in the field it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, secondly, that they do not render practically impossible or excessively difficult the exercise of rights conferred by European Union law (principle of effectiveness). (23)

77. In that connection, it is particularly questionable whether the requirement for the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG for proving the effective prior charge on dividends from other EU countries does render not practically impossible or excessively difficult the exercise of the right (conferred by European Union law) to an income tax credit for that charge, so that the principle of effectiveness is not observed.

78. Although the reply to that question is, in the final analysis, a matter for the referring court, the order for reference mentions a number of factors which indicate that the requirement for the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG for proving the prior corporation tax charge on dividends from other EU countries is very probably contrary to the principle of effectiveness. The referring court shows in detail that the corporation tax certificate within the meaning of Paragraph 44 *et seq*. KStG is closely bound up with the complicated rules for making a distribution charge of 30% on gross dividends, although there are certain exceptions to the latter rule. As the corporation tax certificate basically reflects those complicated corporation tax rules, it can normally be issued only by companies which are subject to those rules.

79. Consequently the reply to the second question must be that national legislation whereby the income tax credit for corporation tax charged on dividends from other EU countries always requires the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG to prove the prior charge is contrary to the principle of effectiveness in so far as that requirement renders it practically impossible or excessively difficult to grant credit for the prior corporation tax charge on dividends from other EU countries. A finding on that point must be made by the referring court.

D – *Third question referred*

80. The third question from the referring court is whether and, if so, on what conditions, Articles 56 EC and 58 EC require the prior corporation tax charged on dividends from other EU countries, if it cannot be ascertained, to be estimated for the purpose of set-off. The referring court also asks whether indirect prior corporation tax charges are to be taken into account, if necessary.

81. Although the third question in itself is merely whether and, if so, on what conditions, the corporation tax charged on dividends from companies in other EU countries may or must be determined by estimate, I think it is appropriate, in order to give a proper reply to the question, to clear up generally the problems relating to the burden of proof, the risk that proof cannot be obtained and the evaluation of evidence in a case such as that in the main proceedings. At various points in the order for reference the referring court expresses its doubts regarding several aspects of the burden of proof and the evaluation of evidence in the main proceedings, so that the parties have also given their views on those points. Furthermore, although the Court has no jurisdiction to assess the factual situation at issue in the main proceedings, it may give the referring court any helpful guidance to assist it in reaching a decision in view of the special aspects of the case.

82. The question of how, in a case such as that in the main proceedings, the taxpayer and the national tax authorities must assist in determining the effective prior corporation tax charge on dividends from other EU countries, as well as the question of the role of the national court in obtaining and evaluating evidence, must be answered on the basis of the principles of the Member States' autonomy in relation to procedure.

83. As I have already said, the principle of the Member States' autonomy in relation to procedure is to be understood as meaning that, in the absence of European Union rules in the field, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from European Union law, provided that the principles of equivalence and effectiveness are taken into account. (24)

84. It appears from the order for reference that a shareholder who has to pay income tax must prove the existence and the amount of the prior corporation tax charge on domestic dividends by producing a corporation tax certificate. If he cannot do so, no set-off is effected. Consequently, under the German tax rules the taxpayer bears not only the burden of adducing proof, but also the risk that proof cannot be obtained. Furthermore, the taxpayer has basically only one means of proof, namely the corporation tax certificate within the meaning of paragraph 44 et seq. KStG.

85. As I have already shown in reply to the second question, the requirement for the production of a certificate within the meaning of Paragraph 44 et seq. KStG to prove the prior corporation tax charge on dividends from other EU countries is contrary to the principle of effectiveness in so far as that requirement renders it practically impossible or excessively difficult to exercise the right, conferred by Union law, to the income tax credit for that prior charge. (25) However, that does not mean that *eo ipso* the placing of the burden of proof underlying the German tax legislation and of the risk that proof cannot be obtained in cross-border situations would have to be classified as contrary to Union law.

86. Rather, it must be presumed that legislation by virtue of which a shareholder paying income tax in Germany can claim the corporation tax on dividends from other EU countries only if and so far as he actually proves the effective prior charge, is compatible as such with the principle of effectiveness. Where, in that way, the taxpayer shareholder bears the burden of proof and the risk of having no proof, that does not in itself mean that it becomes practically impossible or excessively difficult to exercise the right to claim a credit for the corporation tax on dividends from other EU countries. (26)

87. In the opinion of the referring court, where the taxpayer shareholder bears the burden of proof and the risk that proof cannot be obtained in a case such as that in the main proceedings, that would *de facto* mean that shareholders would always be refused a credit for corporation tax. (27) The referring court states that, in view of the Dutch and Danish corporation tax systems in the relevant years, it is in fact impossible, or excessively difficult, to prove the effective prior

corporation tax charge on the Dutch and Danish dividend distributions in question.

88. In my opinion, those practical reservations of the referring court do not preclude the consistency with Union law of an imputation system by virtue of which a taxable shareholder bears the burden of proof as well as the risk that proof cannot be obtained with regard to the corporation tax on dividends from other EU countries. Those practical reservations arise from the detailed rules of the Dutch and Danish corporation tax systems which, according to the referring court, give rise to difficulties in establishing the effective prior corporation tax charge on dividends. As there is no harmonised Union law in that area of direct taxation, the Member States are entitled to lay down unilaterally those aspects of their corporation tax systems consistently with Union law. Any disadvantages for taxpayers that may arise from the fact that the Member States exercise their powers without coordination do not constitute restrictions prohibited by primary law, provided that there is no discrimination. (28) Union law does not form the basis of any independent obligation of the Member States to coordinate their national tax systems in areas where, as matters stand at present, they have retained their autonomy in relation to taxation. (29)

89. As, in my view, the German rules on the placing of the burden of proof and the risk of having no proof are compatible with the principle of effectiveness, (30) and cannot in themselves be regarded as discriminating against shareholders of companies in other EU countries, the doubts of the referring court concerning the practical impossibility of proving the effective prior corporation tax charge on dividends from other EU countries because of the specific rules of the Danish and Dutch corporation tax system must be regarded as disadvantages for taxpayer shareholders which, in the current state of Union law, do not constitute prohibited restrictions.

90. In the main proceedings the question also arises of whether it can be concluded from Directive 77/799 that, in cross-border cases, the burden of proof shifts from taxpayer shareholders to the tax authorities. In my view, that question must also be answered in the negative.

91. It has consistently been held that Directive 77/799 *may* be relied on by a Member State for the purposes of obtaining from the competent authorities of another Member State any information which is necessary to enable it to effect a correct assessment of the taxes covered by the directive. (31) Article 2(1) of the Directive provides, inter alia, that the national tax authorities *may* ask the competent authority of another Member State for information to which they themselves do not have access. In the Court's opinion, the use of the word 'may' in that connection indicates that, whilst those authorities have the possibility of requesting information from the competent authority of another Member State, such a request does not in any way constitute an obligation. Consequently it is for each Member State in principle 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. (32)

92. However, in their decisions on the submission of requests for assistance pursuant to Directive 77/799, the Member States must always observe the principle of equivalence. In so far as the national authorities responsible for the collection of income tax on domestic dividend distributions request information from the national authorities responsible for the collection of corporation tax on profit distributions in accordance with normal practice, if for any reason the amount of the prior corporation tax charge is in doubt, the principle of equivalence means that, in cross-border cases also, the income tax authorities must, on the basis of Directive 77/799, request the corporation tax authorities of the Member State in which the distributing company is established for information on the prior corporation tax charge on the dividends in question, if there is any doubt.

93. Regarding the question of what evidence the taxpayer shareholder must produce to prove the corporation tax on dividends from other EU countries, I have already said that the requirement

for a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG very probably does not conform with the principle of effectiveness.

94. The principle of effectiveness also requires the taxpayer shareholder to be given the procedural means, in a case such as that in the main proceedings, of actually offering that proof. (33)

95. The question of what evidence must be admitted in a case such as that in the main proceedings cannot be answered from a theoretical viewpoint. Normally it would be presumed that a shareholder of a capital company established in another EU country would find it extremely difficult to adduce evidence if declarations or certificates issued by the company were never accepted as evidence. Administrative difficulties of the tax office in relation to the verification of foreign documents are not sufficient to justify the global rejection of such evidence in that context. (34) Nevertheless it is open to the Member States to insist on the production of sound documentary evidence which enables tax offices in practice to verify sufficiently accurately whether and, if so, in what amount corporation tax was payable on dividends from other EU countries by the distributing company. (35)

96. In that connection the evaluation of evidence remains ultimately a matter for the national courts, which must have regard to the principles of effectiveness and equivalence.

97. The referring court’s question as to whether and, if so, on what conditions, Articles 56 EC and 58 EC require the prior corporation tax charge on dividends from other EU countries to be estimated if it cannot be ascertained can also be answered conclusively only by taking into account the functions and powers of the national courts in relation to the evaluation of evidence in similar taxation cases which concern only situations within a single Member State. It would be necessary, in accordance with the principle of equivalence, for the court to estimate the prior corporation tax charge on dividends from other EU countries in a situation where the national court, for the purpose of evaluating the evidence in similar taxation cases relating to purely internal situations, would likewise be obliged to estimate a prior tax charge which was not specifically ascertainable.

98. If, on the other hand, the national court is not obliged, under the relevant national tax law, to make such estimates, that obligation cannot be inferred from the principle of effectiveness either. As I have already pointed out, (36) national legislation by virtue of which a shareholder paying income tax in Germany can claim the corporation tax on dividends from other EU countries only if and so far as he actually proves the effective prior charge, is compatible as such with the principle of effectiveness. It follows directly from this that the principle of effectiveness does not require the court to estimate the prior corporation tax charge on dividends from other EU countries if that prior charge cannot be proved.

99. The question of whether indirect prior charges must also be taken into account in connection with the credit for the prior corporation tax charge on dividends from other EU countries cannot be answered from a theoretical viewpoint. As I have already shown, the *Meilicke* judgment (37) must be construed as meaning that, in a case such as that in the main proceedings, the corporation tax on dividends from the Netherlands and Denmark must in principle be set off in an equivalent way to the corporation tax set-off on dividends from Germany. (38) Therefore indirect prior corporation tax charges on dividends from other EU countries are to be taken into account in determining the amount of the income tax credit, if and so far as indirect prior corporation tax charges on domestic dividends affect the amount of the income tax credit granted to shareholders.

100. Consequently the reply to the third question must be that, as there is no relevant Union legislation, it is for the Member States to lay down the rules as to where the burden of proof and

the risk that proof cannot be obtained lie, as well as the rules relating to the evaluation of evidence by the national court, those being the rules for determining the prior corporation tax charge on dividends from other EU countries, and they must conform with the principles of effectiveness and of equivalence. The principle of effectiveness means that a national court is under no obligation to estimate a prior corporation tax charge which cannot be ascertained on dividends from other EU countries. However, by virtue of the principle of equivalence, that obligation does arise if a national court, in a comparable, purely domestic situation, has to make a similar estimate. In so far as indirect prior corporation tax charges on domestic dividends affect the amount of the income tax credit granted to shareholders, such indirect charges on dividends from other EU countries must also be taken into account.

E – *Fourth question referred*

101. The fourth question arises from the referring court's finding that the 1997 income tax assessment for H. Meilicke, dated 26 July 2000, is not stated to be subject to verification, so that it has in the meantime become final. Under Paragraph 175 AO, in the version applicable until 28 October 2004, an income tax assessment, even if it had become final, could be rectified if an event having tax implications for periods already elapsed occurred (retroactive effect), the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG being classified as a retroactive event. The EU-Richtlinien-Umsetzungesetz (Law on the transposition of EU directives) of 8 December 2004 (39) amended Paragraph 175 AO with effect from 29 October 2004, with no transitional period, to the effect that the subsequent issue or production of a certificate or confirmation was no longer to be deemed to be a retroactive event. Consequently it was no longer possible, with retrospective effect from 29 October 2004, to overcome the finality of tax assessments by subsequently producing a corporation tax certificate.

102. Should the Court's reply to the second question be to the effect that the income tax credit for the corporation tax on dividends from other EU countries may be made conditional on the production of a certificate within the meaning of Paragraph 44 et seq. KStG, the referring court wishes to know whether the retrospective amendment of Paragraph 175 AO is compatible with Union law (question 4(a)).

103. Should the Court's reply to the second question be to the effect that the prior corporation tax charge on dividends from other EU countries may be proved by other means than the production of a certificate within the meaning of Paragraph 44 et seq. KStG, the referring court asks on the other hand whether it is compatible with Union law to interpret Paragraph 175 AO, in the version applicable until 28 October 2004, under which a tax assessment which has already become final may be rectified on the basis of the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG, whereas rectification is excluded on the basis of declarations or certificates which relate to dividends from other EU countries and which do not conform with the formal requirements of Paragraph 44 et seq. KStG (question 4(b)).

104. As, in my opinion, the reply to the second question must be that the prior corporation tax charge on dividends from other EU countries may be proved by other means than the production of a certificate within the meaning of Paragraph 44 et seq. KStG, I shall consider question 4(b) first. After having done so, I shall then discuss the problem of the retrospective amendment of Paragraph 175 AO which is raised in question 4(a). Although that part of the question is expressly put only if the corporation tax on dividends from other EU countries must be proved by the production of a certificate within the meaning of Paragraph 44 et seq. KStG, it is also relevant if proof may be adduced by other means.

1. Question 4(b)

105. Question 4(b) is whether it is compatible with Union law for national legislation to provide that a tax assessment which has become final may be rectified for the purpose of crediting (40) the corporation tax on dividends on which tax has been paid if the prior charge is proved by the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG, whereas rectification is excluded on the subsequent production of declarations or certificates which relate to the prior corporation tax charge on dividends from other EU countries and which do not conform with the formal requirements of Paragraph 44 et seq. KStG. That question is once again to be answered on the basis of the principles of the Member States' autonomy in relation to procedure.

106. However, it must be observed that legislation by virtue of which final income tax assessments can be rectified for the purpose of crediting corporation tax paid on dividends only in relation to dividends of domestic companies, but not in relation to dividends of companies in other EU countries, is to be deemed to place dividends from other EU countries at a disadvantage, which restricts the free movement of capital and is therefore prohibited in principle. (41) Consequently it must be presumed that Union law confers upon the taxpayer recipients of dividends from other EU countries a right, in a case such as that in the main proceedings, to the subsequent amendment of the tax on dividends calculated in final income tax assessments for the purpose of crediting that corporation tax, in so far as taxpayer recipients of domestic dividends may also apply for subsequent rectification.

107. According to the Court's case-law concerning the Member States' autonomy in procedural matters, in the absence of European Union rules in the field it is for each Member State to lay down the detailed procedural rules governing actions for safeguarding that right, provided that the principles of equivalence and of effectiveness are observed. (42) In that connection the particular question arising here is whether it is contrary to the principle of effectiveness to transfer the requirement for the subsequent production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG for domestic dividends to the proof of the corporation tax on dividends from other EU countries.

108. Ultimately the reply to the question of non-conformity with the principle of effectiveness is a matter for the referring court. Nevertheless the order for reference contains a number of indications that the requirement for a corporation tax certificate to prove the prior corporation tax charge on dividends from other EU countries in that connection would not conform with the principle of effectiveness As I have already said in relation to the reply to the second question, the corporation tax certificate is closely bound up with the complicated rules for making a distribution charge of 30% on gross dividends, so that companies in other EU countries which are not subject to those rules cannot normally issue such certificates. (43)

109. Should the Court find that there is non-conformity with the principle of effectiveness, that principle also requires taxpayer recipients of dividends from other EU countries to be given the procedural means of offering proof of the foreign prior corporation tax charge for the purpose of rectifying final tax assessments. (44)

110. The question of what evidence must be admitted in the present case cannot be answered from a theoretical viewpoint either. Normally it would be presumed that a shareholder of a capital company established in another EU country would find it extremely difficult to adduce evidence if declarations or certificates in that connection issued by the company were never accepted as evidence. Nevertheless it is open to the Member States to insist on the production of sound documentary evidence. The evaluation of the evidence is then once again a matter for the national courts, having regard to the principles of effectiveness and of equivalence. (45)

111. Consequently the reply to question 4(b) must be that, where national legislation provides that the tax on dividends assessed in a final tax assessment, where the dividends are from domestic companies as well as companies in other EU countries, for the purpose of crediting the corporation tax on those dividends, may be rectified only on production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG, that legislation is not consistent with the principle of effectiveness if, as a result, the rectification of tax on dividends of companies from other EU countries is made practically impossible or excessively difficult. It is for the referring court to reach a decision on that point.

2. Question 4(a)

112. In substance, with this question the referring court is asking whether it is contrary to Union law for national legislation on taxation procedure to be amended in such a way as to exclude with retroactive effect the rectification of the tax assessed in a final income tax assessment on dividends from domestic companies as well as companies in other EU countries on the basis of the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG.

113. In view of my proposed reply to question 4(b), the national court's reference to the 'production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG' in this connection must be construed as a reference to the requirement, in accordance with Union law, for the production of 'valid proof of the prior corporation tax charge'. An appropriate reply can be given to the question only if it is reworded in that way.

114. It must also be noted that the referring court, in formulating this question, proceeds expressly from the standpoint that the amendment in question is in such general terms that it is directed not only at the avoidance of credit for foreign corporation taxes and applies equally to resident and non-resident taxpayers. There is no clear information in the file which conflicts with that appraisal by the referring court.

115. The referring court's uncertainty as whether it is in conformity with Union law for the Law of 8 December 2004 to amend the German legislation on taxation procedure so as to exclude with retroactive effect from 29 October 2004 the rectification of final income tax assessments on the basis of the production of valid proof of the prior corporation tax charge on domestic dividends as well as dividends from other EU countries arises from the fact that, as a consequence of the amendment, taxpayer recipients of dividends from other EU countries have lost the procedural right, which they had under the previous law, to claim a credit for the corporation tax on dividends which have borne tax, notwithstanding that the tax assessment in question had become final.

116. The present question must once again be answered on the basis of the principles developed in the Court's case-law concerning the Member States' autonomy in relation to procedural matters For that purpose it is necessary to answer the question of whether the amendment of the German legislation on taxation procedure by the Law of 8 December 2004 is consistent with the principle of effectiveness.

117. In that connection it must be observed first of all that a national provision by virtue of which tax assessments become final after a reasonable period is in principle consistent with Union law even if that provision means that past income tax assessments cannot be challenged after a certain period has elapsed, with the result that rights arising from Union law cannot be exercised.

118. On that point it must be noted that a rule on finality of that kind contributes by nature to legal certainty which, according to settled case-law, is one of the general principles recognised by Union law (46) and therefore serves to protect taxpayers as well as the tax authorities. On the other

hand, the Court has consistently held that the laying down of reasonable national limitation periods for bringing proceedings, in the interest of legal certainty, is in principle compatible with Union law, so that the expiry of such periods also makes it impossible to exercise the rights conferred by European Union law. (47)

119. Here, however, the particular question arises of whether an amendment repealing, with retroactive effect and without a transitional period, legislation for the rectification of final tax assessments, which may also be used in order to assert claims to tax credits arising from Union law, is compatible with the principle of effectiveness.

120. To answer that question it is necessary to start from the finding, which has just been made, that a national provision by virtue of which tax assessments become final after a reasonable period is in principle consistent with Union law. It follows that a measure amending and partly repealing national legislation which allows the rectification of tax assessments under certain conditions, even though they have become final, is in principle compatible with Union law.

121. However, the principles of effectiveness and of equivalence require a reasonable transitional period before such an amendment takes effect.

122. With regard to the principle of effectiveness, it must be borne in mind in that connection that national procedures governing actions for safeguarding rights which individuals derive from European Union law must not render practically impossible or excessively difficult the exercise of those rights. If now the taxation procedure is altered and the rules on the finality of tax assessments are made more stringent, with the result that the enforcement of certain rights derived from Union law is made impossible, without a reasonable transitional period being granted, that renders the exercise of those rights excessively difficult, which in such a case is inconsistent with the principle of effectiveness. (48)

123. With regard to the principle of the protection of legitimate expectations, the Court has held that it precludes a national legislative amendment which retroactively deprives a taxable person of the right enjoyed prior to that amendment to obtain repayment of taxes collected in breach of provisions of Union law. (49)

124. The amending Law of 8 December 2004 in question here contains no reasonable transitional provision. As a result of the amendment, from 29 October 2004 it was no longer possible to overcome the finality of tax assessments by subsequently producing valid proof of the prior corporation tax charge on dividends from other EU countries. Consequently taxpayer shareholders were, with retrospective effect, no longer able to claim a tax credit in accordance with the national rules which had previously applied, in spite of the fact that the income tax assessments in question had become final. As the retrospective change in the legal position has made it in practice impossible to exercise rights arising from the Union legal system, the amendment is inconsistent with the principle of effectiveness. At the same time it is inconsistent with the principle of the protection of legitimate expectations.

125. However, the lack of a reasonable transitional period in the amending Law of 8 December 2004 does not mean *eo ipso* that the previous legislation on the rectification of tax, assessed in a final tax assessment, on dividends from companies in other EU countries must continue to apply without qualification. (50) Such a legal consequence would go beyond the aim of effective legal protection and would therefore be inconsistent with the general legal principle of proportionality.

126. Therefore, in a case such as that in the main proceedings, the principle of effectiveness and the protection of legitimate expectations make it necessary to lay down a transitional period for the amending Law of 8 December 2004 to come into force, so that during that period taxpayer

shareholders can apply for the rectification of final income tax assessments on the basis of valid proof of the prior corporation tax charge on dividends from other EU countries.

127. The transitional period must be sufficient to allow taxpayer shareholders who initially thought that the old period for claiming credit for the prior corporation tax charge on dividends from other EU countries was available to them for a reasonable period of time to assert their right of recovery. In any event, they must not be compelled to prepare their application with the haste imposed by an obligation to act in circumstances of urgency unrelated to the time-limit on which they could initially count. (51)

128. To determine the transitional period for the applicability of the new rules on taxation procedure in the present case, it must be observed first that, until the amending Law of 8 December 2004, there was no time limit within which an application for the rectification of a final tax assessment had to be submitted. Secondly, it is to be presumed that some taxpayer shareholders would not be able immediately to ask the distributing companies for valid proof of the prior corporation tax charge on dividends from other EU countries, but would have to carry out their own investigations first.

129. I therefore conclude that the minimum transitional period necessary in order to ensure that rights conferred by Union law can be effectively asserted by allowing the taxpayer recipients of dividends from other EU countries, taking ordinary care, to be informed of the amending Law of 8 December 2004 and the new rules, and to prepare and submit their application for rectification of the final tax assessments in question on conditions which do not prejudice their chances of success, must, on reasonable consideration, be twelve months.

130. Therefore the reply to question 4(a) must be that the amendment of national legislation so as to preclude the rectification of tax assessed in a final tax assessment on dividends from companies in other EU countries on the basis of the production of valid proof of the corporation tax on those dividends, with retroactive effect and without a transitional period, thereby also precluding, with retroactive effect, a credit for that prior corporation tax charge, is not consistent with the principle of effectiveness or the principle of the protection of legitimate expectations. Before legislation such as the amending Law of 8 December 2004 was brought into force, the two principles required a reasonable transitional period which should not be less than twelve months from the date of publication of that law.

VII – **Conclusion**

131. Accordingly I propose that the following replies be given to the questions referred to the Court by the Finanzgericht Köln:

1) Articles 56 EC and 58 EC are to be interpreted as meaning, in a case such as that in the main proceedings, that they require the prior corporation tax charge on dividends from other EU countries to be set off against the income tax due from shareholders in the form of a credit which is calculated in accordance with the effective prior corporation tax charge on those dividends. However, that credit must not exceed the rate of corporation tax applicable to domestic dividends.

2) National legislation whereby the income tax credit for corporation tax charged on dividends from other EU countries always requires the production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG to prove the prior charge is contrary to the principle of effectiveness in so far as that requirement renders it practically impossible or excessively difficult to grant credit for the prior corporation tax charge on dividends from other EU countries. A finding on that point must be made by the referring court.

3) As there is no relevant Union legislation, it is for the Member States to lay down the rules on the burden of proof and the risk that proof cannot be obtained, as well as the rules relating to the evaluation of evidence by the national court, in relation to determining the prior corporation tax charge on dividends from other EU countries, and they must conform with the principles of effectiveness and of equivalence. The principle of effectiveness means that a national court is under no obligation to estimate a prior corporation tax charge which cannot be ascertained on dividends from other EU countries. However, by virtue of the principle of equivalence, that obligation does arise if a national court, in a comparable, purely domestic situation, has to make a similar estimate. In so far as indirect prior corporation tax charges on domestic dividends affect the amount of the income tax credit granted to shareholders, such indirect charges on dividends from other EU countries must also be taken into account.

4) Where national legislation provides that the tax on dividends assessed in a final tax assessment, where the dividends are from domestic companies as well as companies in other EU countries, for the purpose of crediting the corporation tax on those dividends, may be rectified only on production of a corporation tax certificate within the meaning of Paragraph 44 et seq. KStG, that legislation is not consistent with the principle of effectiveness if, as a result, the rectification of tax on dividends of companies from other EU countries is made practically impossible or excessively difficult. It is for the referring court to reach a decision on that point.

5) The amendment of national legislation so as to preclude the rectification of tax assessed in a final tax assessment on dividends from companies in other EU countries on the basis of the production of valid proof of the corporation tax on those dividends, with retroactive effect and without a transitional period, thereby also precluding, with retroactive effect, a credit for that prior corporation tax charge, is not consistent with the principle of effectiveness or the principle of the protection of legitimate expectations. Before legislation such as the amending Law of 8 December 2004 is brought into force, the two principles require a reasonable transitional period which should not be less than twelve months from the date of publication of that law.

1 – Original language of the Opinion: German.

Language of case: German

2 – Case C?292/04 *Meilicke and Others* [2007] ECR I?1835.

3 – In accordance with the terms used in the EU and FEU Treaties, ‘Union law’ is used as a collective term for Community law and Union law. Where reference is made below to individual primary-law provisions, those which are applicable *ratione temporis* are cited.

4 – OJ 1977 L 336, p. 15, in the version amended by Council Directive 2006/98/EC of 20 November 2006 adapting certain directives in the field of taxation, by reason of the accession of Bulgaria and Romania (OJ 2006 L 363, p. 129).

5 – BGBl. I 1990 p. 1898.

6 – BGBl. I 1991 p. 638.

7 – BGBl. I 2004, p. 3310.

8 – Cited in footnote 2.

9 – This credit means in effect that the corporation tax on the dividends is treated as income tax paid in advance by the shareholder and is to be taken into account in full when the shareholder is

assessed for tax, see Mössner, J., 'Rückgewähr europarechtswidrig erhobener Steuern', in *Europa im Wandel: Festschrift für Hans-Werner Rengeling*, Cologne, 2008, p. 339, 341 f. The system also means that the income tax credit must be classified as income on which the income tax is based, see Gosch, D., 'Anrechnung ausländischer Steuern nach dem EuGH-Urteil in der Rechtssache "Manninen" trotz Bestandskraft?', DStR 2004, 1988, 1989.

10 – See the express observations of the referring court in the order for reference, [original] pp. 30 and 43. In so far as the submissions of the claimants in the main proceedings in their written observations and at the hearing amplify or challenge these findings of the referring court, it may be pointed out that that it is the task of the Court to take account, under the division of jurisdiction between the Union courts and the national courts, of the factual and legislative context in which the question put to it is set and in principle must base its reasoning in the procedural respect on the findings of the referring court (Case C?409/06 *Winner Wetten* [2010] ECR I?8015, paragraph 35; Case C?115/08 *?EZ* [2009] ECR I?10265, paragraph 57; Case C?360/06 *Heinrich Bauer Verlag* [2008] ECR I?7333, paragraph 15, and Joined Cases C?482/01 and C?493/01 *Orfanopoulos and Oliveri* [2004] I?5257, paragraph 42).

11 – Cited in footnote 2.

12 – Consequently in *Meilicke* the Court confirmed its settled case-law to the effect that although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law (Case C?233/09 *Dijkman and Dijkman-Lavaleije* [2010] ECR I?6649, paragraph 20; Case C?487/08 *Commission* v *Spain* [2010] ECR I?4843, paragraph 37; Case C?182/08 *Glaxo Wellcome* [2009] ECR I?8591, paragraph 34; Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 19, and Case C?311/97 *Royal Bank of Scotland* [1999] ECR I?2651, paragraph 19).

13 – See Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753, where the Court held that a Member State which seeks to prevent economic double taxation of domestic dividends on the basis of a tax exemption system may achieve the necessary equivalent treatment of foreign dividends on the basis of an advance tax credit system, provided that the tax rate for foreign dividends is not higher than that for domestic dividends and the amount paid abroad is credited up to the amount of domestic taxes. For a detailed analysis of the principle of equivalence of exemption and set-off methods of avoiding economic double taxation of dividends, see the Opinion of Advocate General Kokott in Joined Cases C?436/08 and C?437/08 *Haribo and Österreichische Salinen* [2010] ECR I?305, paragraph 15 et seq.

14 – See paragraph 46 et seq. above.

15 – See, for example, Stuhrmann, G., § 36 EStG, paragraph 29a, in *Blümich – Kommentar EStG KStG GewStG* (publ. Heuermann, B.), Verlag Franz Vahlen, Munich, Supplement 106 (as at May 2010), who states that the case-law of the European Court of Justice is to be construed as meaning that the foreign corporation tax is to be offset at the tax rate applying in the country where the distributing company is established. That could result in a set-off amount which is either more or less than three-sevenths of the gross dividend. See, to the same effect, also Lüdicke, J., 'Pending Cases Filed by German Courts I: The Meilicke, CLT-UFA, Keller Holding, Lasertec, Rewe Zentralfinanz, Ritter-Coulais, Kolumbus Container Services, and Stauffer Cases', in Lang/Schuch/Staringer (publ.), *ECJ : recent developments in direct taxation*, Vienna, 2006, p. 113, 119.

16 – For the regard paid in the case-law of the European Court of Justice to the Member States' residual powers in the field of direct taxation, see Lenaerts, K., 'Die Entwicklung der Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften auf dem Gebiet der direkten

Besteuerung', EuR 2009, p. 728, 737 et seq.

17 – See the opinions of Advocate General Geelhoed in *Test Claimants in the FII Group Litigation*, cited in footnote 13, paragraph 45, and in Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 43 et seq.

18 – Cited in footnote 13. In substance that judgment was confirmed in Case C?201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I?2875.

19 – *Test Claimants in the FII Group Litigation*, cited in footnote 13, paragraph 48 et seq.

20 – Ibid., paragraph 51 et seq.

21 – See, to that effect, the Opinion of Advocate General Kokott in Joined Cases C?436/08 and C?437/08, cited in footnote 13, paragraph 153 et seq.

22 – According to settled case-law, national measures restricting the free movement of capital may be justified on the grounds set out in Article 58 EC or by overriding reasons in the public interest provided that they are appropriate to secure the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it, *Dijkman and Dijkman-Lavaleije*, cited in footnote 12, paragraph 49. On the 'need to maintain the coherence of the national tax system' as an overriding reason in the public interest, see Case C?418/07 *Papillon* [2008] ECR I?8947, paragraph 43; *Meilicke and Others*, cited in footnote 2, paragraph 26 et seq.; *Manninen*, cited in footnote 12, paragraph 42, and Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph.21 et seq.

23 – Case C?246/09 *Bulicke* [2010] ECR I?7003 paragraph 25; Case C?2/06 *Kempter* [2008] ECR I?411, paragraph.57; Joined Cases C?222/05 to C?225/05 *van der Weerd and Others* [2007] ECR I?4233, paragraph 28, and Case C?432/05 *Unibet* [2007] ECR I?2271, paragraph 43.

24 – See paragraph 76 of this Opinion.

25 – See paragraph 79 of this Opinion.

26 – Case C?318/07 *Persche* [2009] ECR I?359, where the Court concluded that Article 56 EC precludes legislation of a Member State by virtue of which, as regards gifts made to bodies recognised as having charitable status, the benefit of a deduction for tax purposes is allowed only in respect of gifts made to bodies established in that Member State, without any possibility for the taxpayer to show that a gift made to a body established in another Member State satisfies the requirements imposed by that legislation for the grant of such a benefit (paragraph 72 and operative part). At the same time, however, the Court pointed out that, if it proves difficult to verify the information provided by the taxpayer, nothing prevents the tax authorities concerned [from] refusing the deduction applied for if the evidence that they consider they need to effect a correct assessment of the tax is not supplied (paragraph 69). On the latter consideration, see Case C?101/05 *A* [2007] ECR I?11531, paragraph 58 et seq.; Case C?451/05 *ELISA* [2007] ECR I?8251, paragraph 95 et seq.), and Case C?150/04 *Commissionv Denmark* [2007] ECR I?1163, paragraph 54).

27 – Order for reference, 14 May 2009, p. 44.

28 – *Commission* v *Spain*, cited in footnote 12, paragraph 56, where the Court, on the subject of the uncoordinated exercise of taxation powers by the Member States, expressly pointed out that the disadvantages which could arise from the parallel exercise of powers of taxation by different Member States, to the extent that such an exercise is not discriminatory, do not constitute

restrictions prohibited by the Treaty. See also, to that effect, Case C?128/08 *Damseaux* [2009] ECR I?6823, paragraph 27; Case C?194/06 *Orange European Smallcap Fund* [2008] ECR I?3747, paragraphs 41, 42 and 47, and Case C?513/04 *Kerckhaert und Morres*.[2006] ECR I?10967, paragraphs 19, 20 and 24.

29 – Case C?157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I?8061, paragraph 50; Case C?293/06 *Deutsche Shell* [2008] ECR I?1129, paragraph 43, and Case C?298/05 *Columbus Container Services*.[2007] ECR I?10451, paragraph 51.

30 – See paragraph 86 of this Opinion.

31 – *ELISA*, cited in footnote 26, paragraph 92, and *Commission* v *Denmark*, cited in footnote 26, paragraph 52.

32 – *Persche*, cited in footnote 26, paragraph 65, and Case C?184/05 *Twoh International* [2007] ECR I?7897, paragraph 32.

33 – Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?8203, paragraph 49, where the Court pointed out that national legislation which absolutely prevents the taxpayer, in a cross-border tax situation, from submitting relevant evidence from other EU countries for tax exemption, cannot be justified in the name of effectiveness of fiscal supervision as an overriding reason in the general interest.

34 – *Persche,* cited in footnote 26, paragraph 55, and *Centro di Musicologia Walter Stauffer*, cited in footnote 33, paragraph 48.

35 – *Persche,* cited in footnote 26, paragraphs 54 and 60; *Heinrich Bauer Verlag*, cited in footnote 10, paragraph 41, and Case C?464/05 *Geurts and Vogten* [2007] ECR I?9325, paragraph 28, and *ELISA*, cited in footnote 26, paragraph 95.

36 – See paragraph 86 of this Opinion.

37 – Cited in footnote 2.

38 – See paragraph 52 of this Opinion.

39 – BGBl. I 2004, p. 3310.

40 - So far as can be seen, in that connection the referring court is confronted with the procedural problem that an income tax credit for the corporation tax on dividends presupposes that the corporation tax charge which is to be repaid is taxed in the shareholder’s hands as income subject to income tax. With regard to dividend distributions included in a final tax assessment, that means that, although the assessment has become final, it can be amended for the purpose of taxing the prior corporation tax charge that is to be credited.

41 – Consequently such a difference in the treatment of domestic dividends and dividends from other EU countries may be regarded as compatible with the provisions of the Treaty on the free movement of capital only if the difference in treatment concerns situations which are not objectively comparable or is justified by an overriding reason in the public interest (*Commission* v *Spain*, cited in footnote 12, paragraph 47; Case C?379/05 *Amurta* [2007] ECR I?9569, paragraph 32, and *Manninen*, cited in footnote 12, paragraph 29). Here there appears to be nothing to suggest that the subsequent rectification of final income tax assessments relating to dividends from domestic companies on the one hand and the subsequent rectification of final income tax assessments relating to dividends from companies in other EU countries on the other hand are not

objectively comparable. Furthermore, there appear to be no overriding reasons in the public interest which could justify different treatment for the subsequent amendment of final income tax assessments, depending on whether they relate to domestic dividends or dividends from other EU countries.

42 – See paragraph 76 of this Opinion.

43 – See paragraph 78 of this Opinion.

44 – See paragraph 94 of this Opinion.

45 – See paragraph 95 of this Opinion.

46 – Case C?206 *Kempter* [2008] ECR I?411, paragraph 37, and Case C?453/00 *Kühne* [2004] ECR I?837, paragraph 24.

47 – *Bulicke*, cited in footnote 23, paragraph 36; Case C?542/08 *Barth* [2010] ECR I?3189, paragraph 28 et seq.; Case C?63/08 *Pontin* [2009] ECR I?10467, paragraph 48, and Case C?445/06 *Danske Slagterier* [2009] ECR I?2119, paragraph 32.

48 – In that connection, see the Court's case-law on the amendment of national limitation periods for the recovery of amounts levied in breach of Union law: Case C?255/00 *Grundig Italiana* [2002] ECR I?8003, paragraph.35 et seq.), and Case C?62/00 *Marks & Spencer* [2002] ECR I?6325, paragraph.36 et seq.

49 – *Marks & Spencer*, cited in footnote 48, paragraph 46.

50 – *Grundig Italiana*, cited in footnote 48, paragraph 41.

51 – Ibid., paragraph 38.