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Judgment of the Court (Fifth Chamber) of 17 October 1996. - Denkavit International BV, VITIC Amsterdam BV and Voormeer BV v Bundesamt für Finanzen. - Reference for a preliminary ruling: Finanzgericht Köln - Germany. - Harmonization of tax legislation - Taxation of company profits - Parent companies and subsidiaries. - Joined cases C-283/94, C-291/94 and C-292/94.

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Keywords

1. Approximation of laws ° Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ° Directive 90/435 ° Exemption, in the Member State of the subsidiary, from withholding tax on the profits distributed to the parent company ° Conditions for granting ° Minimum holding in the capital of the subsidiary ° Option for Member States to make the exemption subject to a holding for a minimum period ° Strict interpretation ° National legislation recognizing a right to exemption, and solely prospectively, only once the minimum period laid down has been completed ° Not permissible ° Incorrect transposition by a Member State ° Whether obligation on the Member State to compensate a parent company for damage incurred ° No obligation

(Council Directive 90/435, Arts 3(2) and 5(1))

2. Approximation of laws ° Common system of taxation applicable in the case of parent companies and subsidiaries of different Member States ° Directive 90/435 ° Article 5(1) and (3) ° Exemption, in the Member State of the subsidiary, from withholding tax on the profits distributed to the parent company ° Clear nature ° Capable of being relied on by a parent company which has complied with the obligation to maintain its holding in the capital of its subsidiary for the period laid down by the Member State concerned

(Council Directive 90/435, Arts 3(2) and 5(1) and (3))

3. Community law ° Breach by a Member State ° Implementation of a directive ° Obligation to compensate individuals for damage incurred ° Conditions ° Sufficiently serious breach ° Concept

Summary

1. By authorizing Member States to grant exemption from withholding tax upon distribution of profits by a subsidiary to its parent company holding at least 25% of the subsidiary' s capital, provided for by Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, only in so far as the parent company maintains that minimum holding for a period which Member States are free to lay down but which cannot exceed two years, Article 3(2) of Directive 90/435 introduces an option to derogate from the obligation to grant the exemption which, as such, must be strictly interpreted. It cannot therefore be interpreted as authorizing a Member State to make that exemption subject to the condition that, at the moment when the profits are distributed, the parent company should have had the required holding in the capital of its subsidiary for a period at least equal to that which the Member State has laid down pursuant to the option which it is recognized as having.

It is for Member States to draw up rules for ensuring compliance with this minimum period, in accordance with the procedures laid down in their domestic law. On no view are those States obliged under the directive to grant the advantage immediately on the basis of a unilateral undertaking by the parent company to observe the minimum holding period.

That being so, Community law does not require a Member State which, when transposing that directive into its national law, stipulated that the minimum holding period set pursuant to Article 3(2) must be completed at the time when the profits that are the subject of the tax advantage afforded by Article 5 are distributed, to compensate the parent company for damage which it may have incurred by reason of the error thus made.

The conditions required for a breach of Community law by a Member State, on the occasion of the legislative activity involving a margin of discretion consisting in the transposition of a directive, to give rise to an obligation on that Member State to compensate individuals for damage which they have incurred are not satisfied in this case. There is, in any event, no sufficiently serious breach of Community law if it appears, inter alia, that the Member State' s interpretation of the directive corresponds to that of almost all the other Member States which have exercised the option to derogate.

2. Article 5(1) of Directive 90/435 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States clearly and unambiguously provides that a parent company holding a minimum of 25% of the capital of its subsidiary is to be exempt from withholding tax.

While it is true that Article 3(2) of the directive gives Member States the option of derogating from that principle where the parent company does not maintain its holding in the subsidiary for a minimum period and gives those States latitude as regards both the duration of that period, which may not exceed two years, and the administrative procedures applicable, this does not make it impossible to determine minimum rights on the basis of the provisions of principle contained in Article 5 of the directive. It follows that, where a Member State has exercised the option provided for in Article 3(2) of the directive, parent companies may, provided that they comply with the obligation to maintain their holding for the period set by that Member State, rely directly on the rights conferred by Article 5(1) and (3) of that directive before national courts.

3. Individuals injured by a breach of Community law attributable to a Member State are recognized as having a right to reparation when three conditions are met: the rule infringed must be intended

to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage suffered by the injured parties. Those conditions apply where a Member State incorrectly transposes a Community directive into national law. In this regard, a breach is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers. One of the factors that may be taken into consideration is the clarity and precision of the rule breached.

Parties

In Joined Cases C-283/94, C-291/94 and C-292/94,

REFERENCES to the Court under Article 177 of the EC Treaty by the Finanzgericht Koeln (Germany) for preliminary rulings in the proceedings pending before that court between

Denkavit Internationaal BV (C-283/94),

VITIC Amsterdam BV (C-291/94) and

Voormeer BV (C-292/94)

and

Bundesamt fuer Finanzen

on the interpretation of Articles 3 and 5 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6),

THE COURT (Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, L. Sevón, D.A.O. Edward, P. Jann (Rapporteur) and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

° Denkavit Internationaal BV, by V. Schiller, Rechtsanwalt, Cologne;

° the Bundesamt fuer Finanzen, by R. Schupp, Regierungsdirektor, acting as Agent;

° the German Government, by E. Roeder, Ministerialrat in the Federal Ministry of Economic Affairs, and G. Thiele, Assessor in that Ministry, acting as Agents;

° the Belgian Government, by J. Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, acting as Agent;

° the Greek Government, by F. Georgakopoulos, Assistant Legal Adviser to the State Legal Council, K. Grigoriou, Legal Assistant to the State Legal Council, and S. Chala, special scientific

assistant in the Special Community Legal Affairs Department of the Ministry of Foreign Affairs, acting as Agents;

° the Italian Government, by U. Leanza, Head of the Community Legal Affairs Department in the Ministry of Foreign Affairs, assisted by M. Fiorilli, Avvocato dello Stato, acting as Agents;

° the Netherlands Government, by A. Bos, Legal Adviser in the Ministry of Foreign Affairs, acting as Agent;

° the Commission of the European Communities, by J. Grunwald, Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Denkavit Internationaal BV, represented by V. Schiller; the German Government, represented by B. Kloke, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agent; the Greek Government, represented by K. Grigoriou and S. Chala; the French Government, represented by G. Mignot, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; the Netherlands Government, represented by M. Fierstra, Assistant Legal Adviser in the Ministry of Foreign Affairs, acting as Agent; and the Commission, represented by J. Grunwald, at the hearing on 21 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 2 May 1996,

gives the following

Judgment

Grounds

1 By orders of 19 September 1994, received at the Court on 19 October and 27 October 1994, the Finanzgericht Koeln (Finance Court, Cologne) submitted for preliminary rulings under Article 177 of the EC Treaty a number of questions concerning the interpretation of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6, hereinafter "the Directive"), and in particular Articles 3(2) and 5 thereof.

2 Those questions have arisen in three sets of proceedings brought against the Bundesamt fuer Finanzen (Federal Finance Authority, hereinafter "the Bundesamt") by Denkavit Internationaal BV ("Denkavit"), VITIC Amsterdam BV ("VITIC") and Voormeer BV ("Voormeer"), companies incorporated under Netherlands law and each having a holding in a German company, concerning the taxation of their subsidiaries' profits.

3 Article 3(1)(a) of the Directive provides that the status of parent company is to be attributed to any company of a Member State which fulfils certain conditions set out in Article 2 of the Directive and has a minimum holding of 25% in the capital of a company of another Member State. The second indent of Article 3(2) of the Directive provides each Member State with the option, by way of derogation from paragraph 1, of "not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State *does not maintain such a holding for an uninterrupted period of at least two years".*

4 Article 5(1) of the Directive provides that profits which a subsidiary has distributed to its parent company are, where the latter holds a minimum of 25% of the capital of the subsidiary, to be exempt from withholding tax. Article 5(3) of the Directive authorized the Federal Republic of Germany to impose a withholding tax of 5% until mid-1996 at the latest.

5 According to Article 8(1), the Directive was to be transposed into national law before 1 January 1992.

6 In Germany, the Directive was transposed by Paragraph 44d of the Einkommensteuergesetz (Law on Income Tax, hereinafter "the Law"). While Paragraph 44d(1) provides for a reduction of withholding tax to a rate of 5%, in accordance with Article 5(1) and (3) of the Directive, Paragraph 44d(2), which seeks to transpose the second indent of Article 3(2) of the Directive, states that "' Parent company' for the purposes of Paragraph 44d(1) shall mean a company ... which at the moment when liability to investment income tax arises ... can show that it has held directly at least one quarter of the share capital of the [subsidiary] for an uninterrupted period of at least 12 months."

7 In Case C-283/94, Denkavit had, since 1973, a direct holding of 20% in the capital of the German company Denkavit Futtermittel GmbH. On 14 July 1992, following the acquisition of further shares, Denkavit' s holding in its subsidiary increased to 99.4%. With a view, apparently, to making a distribution of its subsidiary' s profits scheduled for 16 October 1992, Denkavit requested the German tax authorities, on 6 October 1992, to reduce the withholding tax in accordance with Paragraph 44d(1) of the Law. In its request, it gave an express undertaking that its holding in its subsidiary would continue to be more than 25% for an uninterrupted period of at least two years from the date of acquisition, which was 14 July 1992.

8 The German tax authorities, however, refused to grant the exemption requested on the ground that the 12-month minimum holding period laid down by Paragraph 44d(2) of the Law had not been complied with.

9 Following an unsuccessful administrative appeal by Denkavit and institution of proceedings before the Finanzgericht Koeln, the tax authorities, on 17 May 1993, amended their decision and authorized withholding tax to be charged at the reduced rate from 15 July 1993 (one year after acquisition of the increased holding) on condition that Denkavit would maintain a sufficient holding until 30 September 1995.

10 Denkavit thereupon limited its action to the period prior to 15 July 1993. Before the referring court, it argued, in particular, that it had a legitimate interest in securing a declaration that the decision of the Bundesamt refusing to grant it a reduction in withholding tax for the period up to 14 July 1993 was illegal, since, owing to that refusal, its subsidiary had decided not to proceed with the distribution of profits originally scheduled for 16 October 1992. That involuntary decision not to proceed had resulted in considerable loss of interest, for which Denkavit intended to seek compensation once the proceedings before the revenue courts had been concluded.

11 In Case C-291/94, VITIC had, since 1987, a direct holding of 19% in the capital of the German company Wesumat GmbH. On 2 January 1992, following acquisition of further shares, that holding was increased to 95%. On 15 October 1991 the subsidiary decided to distribute a dividend, payable on 15 January 1992, calculated by reference to profits declared on 31 December 1990. The dividend due to the parent company was paid after deduction of investment income tax calculated at the normal rate.

12 On 29 June 1992, VITIC, pursuant to Paragraph 44d(1) of the Law, requested reimbursement of the tax charged in so far as it exceeded the reduced rate of 5%.

13 On 16 October 1992, the tax authorities refused to make the reimbursement requested on the ground that the 12-month period laid down by Paragraph 44d(2) of the Law had not been complied with.

14 Following rejection of its administrative appeal, VITIC brought proceedings before the Finanzgericht Koeln.

15 In Case C-292/94, Voormeer acquired 96.13% of the capital of the German company Framode GmbH on 27 February 1992. On 28 April 1992, Framode decided to distribute a dividend, payable on 4 May 1992, for the financial year from 1 March 1991 to 29 February 1992. The dividend due to the parent company was paid after deduction of investment income tax calculated at the normal rate.

16 On 15 October 1992, Voormeer applied for reimbursement of the tax charged, in so far as it exceeded the reduced rate of 5%. Following the refusal of the tax authorities to make the reimbursement requested on the same ground as in the VITIC case, Voormeer lodged an administrative appeal on 22 January 1993. Following rejection of that appeal on 23 February 1993, Voormeer instituted proceedings before the Finanzgericht Koeln.

17 In the main proceedings in the three cases, the Finanzgericht Koeln indicates that, on the basis of national law alone, the actions fall to be dismissed. However, it expresses doubts as to whether Paragraph 44d(2) of the Law is compatible with Article 3(2) of the Directive, which does not appear to require that the minimum period for which the parent company has to maintain its holding in the capital of its subsidiary must already have expired at the time when the reduction of withholding tax is applied for. It was for that reason that the Finanzgericht decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

In Case C-283/94:

"1. Is Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), and in particular Article 3(2) thereof, to be interpreted as meaning that Member States are entitled to exclude a parent company resident in another Member State from the tax benefits set out in Article 5 in the case where the parent company, at the time of distribution to it of the profits referred to in that article, has not yet continuously held for a period of at least 12 months a minimum of one quarter of the share capital of the domestic subsidiary, but has, however, given an undertaking to the relevant tax authorities of the Member State of the subsidiary that it will remain in possession of its holding in the subsidiary for a continuous period of at least two years from the date of acquisition?

2. If Question 1 is answered in the negative: is Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States to be interpreted as meaning that a parent company which satisfies the conditions of Articles 2 and 3 of the Directive can rely, as against the Member State of the subsidiary, directly on Article 5 as a basis for its right to claim exemption from or reduction in withholding tax there provided for and, if so, is protection of that right a matter for the national courts of the Member State of the subsidiary?

3. If Question 1 is answered in the negative: if the Member State of the subsidiary has incorrectly *transposed Article 3(2) of the Directive into national law in such a way that the minimum holding period set out in that provision must, under national legislation, already be completed before the profit distribution which is to benefit from Article 5 of the Directive, does the parent company referred to in Questions 1 and 2 have a right to compensation, according to the criteria established by the judgment of the Court of Justice of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Others [1991] ECR I-5357, under Community law or required by Community law against that Member State for the loss of interest which it has incurred by reason of the fact that it postponed the distribution of profits of the subsidiary, decided on during the abovementioned national minimum holding period, until the completion of that period?"*

In Cases C-291/94 and C-292/94:

"1. Is Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), and in particular Article 3(2) thereof, to be interpreted as meaning that Member States are entitled to exclude a parent company resident in another Member State from the tax benefits set out in Article 5 in the case where the parent company, at the time of distribution to it of the profits referred to in that article, had not yet continuously held for a period of at least two years a minimum of one quarter of the share capital of the domestic subsidiary, but did, however, subsequently complete that minimum holding period?

2. If Question 1 is answered in the negative: is the above Directive to be interpreted as meaning that a parent company which satisfies the conditions of Articles 2 and 3 of the Directive can rely, as against the Member State of the subsidiary, directly on Article 5 of the Directive as a basis for its right to claim exemption from or reduction in withholding tax there provided for and, if so, is protection of that right a matter for the national courts of the Member State of the subsidiary?"

The first question

18 The essence of the first question put by the national court in the three cases is whether a Member State may make grant of the advantage provided for in Article 5(1) of the Directive subject to the condition that, at the time when profits are distributed, the parent company must have held a minimum of 25% of the capital of the subsidiary for a period at least equal to that set by that Member State pursuant to Article 3(2) of the Directive. In Case C-283/94, the Finanzgericht also asks whether the reply would be different if a parent company which applies for the advantage before the minimum period has expired unilaterally undertakes to maintain its holding during that period.

19 According to Denkavit and the Commission, it follows from the actual wording of the Directive that the minimum period set pursuant to Article 3(2) need not necessarily have expired at the time when the tax advantage is granted. The Directive, they submit, is designed to encourage cross-border holdings, not to deter creation of such holdings by impeding their access to the tax advantages granted within the framework of national cooperation.

20 The Commission adds that, in the Proposal for a directive which it submitted to the Council on 16 January 1969 (JO 1969 C 39, p. 1)), it recommended that a company which ordinarily satisfied the requisite conditions should cease, with retrospective effect, to be regarded as a parent company if that company disposed of its holding within two years of acquiring it. So, according to the Commission, the tax advantage must be granted as soon as the holding is acquired, subject to subsequent confirmation that the minimum holding period has been complied with.

21 The Bundesamt essentially contends that, since Article 3(2) of the Directive is silent on the matter, the Member States retain a discretion. This opinion is shared, on the whole, by the

Governments of Germany, Belgium, Greece, Italy and the Netherlands. According to those Governments, the interpretation underlying the contested German provision is in fact the only one which allows authorities to counter abuse. Subsequent checks as to whether the holding period has in fact been complied with would give rise to many practical and technical difficulties, particularly in the case of cross-border payment of dividends.

22 It is to be noted, first, that, as appears particularly from the third recital in its preamble, the Directive seeks, by the introduction of a common tax system, to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate cross-border cooperation. Thus, with a view to avoiding double taxation, Article 5(1) of the Directive provides for exemption in the State of the subsidiary from withholding tax upon distribution of profits.

23 Article 3(2) of the Directive indeed gives Member States the option of making entitlement to that tax advantage subject to a minimum holding period which the Member States are free to set but which cannot, in any event, exceed two years.

24 However, reference must be made to the actual wording of the second indent of Article 3(2) of the Directive, according to which a parent company may be deprived of the exemption from withholding tax only if it "does not maintain such a holding for an uninterrupted period of at least two years."

25 It follows from the wording of that provision, and in particular from the use of the present tense ("maintain") in all language versions except the Danish, that, in order to receive the tax advantage, the parent company must have a holding in the subsidiary during a certain period of time, without its being necessary that this period should have come to an end at the time when the tax advantage is granted. This interpretation is not invalidated by the fact that the Danish version uses a past tense.

26 Moreover, the interpretation is confirmed by the purpose of the Directive, which, as already explained in paragraph 22 above, is to facilitate the tax arrangements governing cross-border cooperation. Member States cannot therefore, in this regard, unilaterally introduce restrictive measures such as the requirement, as in this instance, that a minimum holding period must already have been completed when the profits in respect of which the tax advantage is sought are distributed.

27 Likewise, the Member States' option to lay down a minimum period during which the parent company must maintain a holding in the subsidiary is to be interpreted strictly, since it constitutes a derogation from the principle of exemption from withholding tax provided for in Article 5(1) of the Directive. That option cannot, therefore, be given an interpretation going beyond the actual words of Article 3(2), to the detriment of beneficiary undertakings.

28 Against this interpretation, the intervening Governments object that most of the Member States which have exercised the option provided by Article 3(2) of the Directive have interpreted that provision as requiring that the minimum holding period should already have come to an end at the time when the request for tax exemption is made or when the subsidiary distributes its profits. They argue that, when the Directive was being adopted by the Council, it was agreed that relatively vague terms should be used in order to allow for differing interpretations according to the requirements of the domestic legal systems. The restrictive interpretation advocated by the Commission and Denkavit therefore runs counter to the legislative intention.

29 That argument cannot be accepted. Expressions of intent on the part of Member States in the Council, such as those on which the Governments rely in their observations, have no legal status if *they are not actually expressed in the legislation. Legislation is addressed to those affected by it. They must, in accordance with the principle of legal certainty, be able to rely on what it contains.*

30 Secondly, the Bundesamt and the German Government submit that the interpretation applied in the transposition of Article 3(2) of the Directive by the German legislature is supported by Article 1(2), which provides that the Directive "shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse".

31 It is to be noted that Article 1(2) of the Directive is a provision of principle, the content of which is explained in detail in Article 3(2) thereof. Thus, Article 3(2) ° and this is not disputed by any of the parties which have submitted observations to the Court ° is aimed in particular at counteracting abuse whereby holdings are taken in the capital of companies for the sole purpose of benefiting from the tax advantages available and which are not intended to be lasting. In those circumstances, it is not appropriate to refer to Article 1(2) of the Directive in interpreting Article 3(2).

32 So, Member States cannot make the grant of the tax advantage provided for by Article 5(1) of the Directive subject to the condition that, at the moment when profits are distributed, the parent company should have had a holding in the subsidiary during the minimum period laid down pursuant to Article 3(2), so long as this period is subsequently observed.

33 On this last point, the Member States are free to determine, in the light of the requirements of their domestic legal systems, the detailed arrangements for ensuring that this period is observed. The Directive does not indicate how Member States exercising the option provided under Article 3(2) of the Directive must ensure that the minimum holding period is observed where that period comes to an end after the request for tax exemption is made. In particular, contrary to the Commission' s contention, the Directive does not require a Member State to grant the exemption from the beginning of this period without being certain of being able to obtain payment of the tax later, in the event that the parent company fails to observe the minimum holding period which the Member State has laid down. Likewise, it does not follow from the Directive that a Member State is obliged to grant the tax exemption immediately if the parent company undertakes unilaterally to observe the minimum holding period.

34 The arguments of the German and Greek Governments to the effect that the actual nature of withholding tax has been misconceived and that legal certainty is not assured if tax authorities are to grant tax advantages and, only at a later date, examine whether they are justified are therefore unfounded.

35 Granting the tax advantage at the time when a parent company acquires a sufficient holding in the capital of a subsidiary, coupled with the possibility of recovery should it transpire that the minimum holding period has not been respected, is not the only way of ensuring compliance with the provisions of Article 3(2) of the Directive. As is clear from point 34 of the Advocate General' s Opinion, a number of Member States have, in such cases, adopted arrangements providing for appropriate procedures. However, since the Directive is silent on the matter, it is not for the Court to impose a particular arrangement on the Member States.

36 In view of the foregoing, the answer to the first question must be that a Member State may not make grant of the tax advantage provided for in Article 5(1) of the Directive subject to the condition that, at the moment when profits are distributed, the parent company must have held a minimum of 25% of the capital of the subsidiary for a period at least equal to that set by that Member State pursuant to Article 3(2) of the Directive. It is for the Member States to draw up rules for ensuring compliance with this minimum period, in accordance with the procedures laid down in their domestic law. On no view are those States obliged under the Directive to grant the advantage *immediately on the basis of a unilateral undertaking by the parent company to observe the minimum holding period.*

The second question

37 By its second question, the national court seeks to determine whether, in the event that national legislation is incompatible with Article 3(2) of the Directive, parent companies satisfying the conditions of Article 3(2) may rely directly on Article 5 of the Directive before national courts.

38 Article 5(1) of the Directive clearly and unambiguously provides that a parent company holding a minimum of 25% of the capital of its subsidiary is to be exempt from withholding tax. Likewise, Article 5(3) clearly indicates that the Federal Republic of Germany could, until mid-1996, impose withholding tax of 5%.

39 It is true that Article 3(2) of the Directive gives Member States the option of derogating from that principle where the parent company does not maintain its holding in the subsidiary for a minimum period and gives those States latitude as regards both the duration of that period, which may not exceed two years, and, as already found, the administrative procedures applicable. However, those factors do not make it impossible to determine minimum rights on the basis of the provisions of principle contained in Article 5 of the Directive (see, in this regard, Case C-91/92 Faccini Dori v Recreb [1994] ECR I-3325, paragraph 17).

40 The answer to the second question must therefore be that, where a Member State has exercised the option provided for in Article 3(2) of the Directive, parent companies may rely directly on the rights conferred by Article 5(1) and (3) of the Directive before national courts, if those companies observe the holding period set by that Member State.

The third question

41 By the third question, which relates solely to Case C-283/94, the national court seeks to determine whether, in the event of a negative reply to the first question, incorrect transposition of the Directive by the Member State concerned gives parent companies a right to compensation for loss of interest incurred through postponement of the distribution of a subsidiary' s profits until completion of the minimum holding period laid down pursuant to Article 3(2) of the Directive.

42 According to the German tax authorities, this question is irrelevant and therefore inadmissible, since, in the main proceedings, Denkavit has not sought compensation for the damage which it claims to have suffered by reason of the delay in granting it a reduction of withholding tax.

43 The German Government doubts whether Denkavit has suffered any damage, given the fact that its subsidiary was still able to invest the funds earmarked for distribution elsewhere.

44 Suffice it to recall in this regard that, according to settled case-law, it is for the national courts alone, before which the proceedings are pending and which must assume responsibility for the judgment to be given, to determine, having regard to the particular features of each case, both the need for a preliminary ruling to enable them to give judgment and the relevance of the questions which they refer to the Court. A request for a preliminary ruling from a national court may be rejected only if it is quite obvious that the interpretation of Community law sought by that court bears no relation to the actual nature of the case or the subject-matter of the action (see, in particular, Case C-129/94 Ruiz Bernáldez [1996] ECR I-0000, paragraph 7).

45 In this case, Denkavit explained during the hearing that, by its action before the national court, it was seeking to have the decision of the Bundesamt refusing to grant it the reduction in *withholding tax for the period from 14 July 1992 to 14 July 1993 declared unlawful, and thus obtain a finding that it had locus standi under the requirements of national law so as to prepare the way for an action for damages.*

46 In those circumstances, it cannot be concluded that the question submitted by the national court bears no relation to the actual nature of the case or the subject-matter of the action. The question must therefore be examined.

47 According to the consistent case-law of the Court, the principle of State liability for loss and damage caused to individuals as a result of breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty (see, in particular, Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur and Factortame [1996] ECR I-0000, paragraph 31, and Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others [1996] ECR I-0000, paragraph 20).

48 In those judgments, the Court, having regard to the circumstances of the cases, held that Community law recognizes the existence of a right to reparation when three conditions are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage suffered by the injured parties (Brasserie du Pêcheur and Factortame, cited above, paragraph 51, and Dillenkofer and Others, cited above, paragraphs 21 and 23). The Court has in particular held that those conditions apply where a Member State incorrectly transposes a Community directive into national law (Case C-392/93 British Telecommunications [1996] ECR I-0000, paragraph 40).

49 While it is, in principle, for national courts to determine whether the conditions for State liability for breach of Community law are met, it must be held that in this instance the Court has all the information necessary in order to judge whether the facts presented are to be characterized as a sufficiently serious breach of Community law.

50 It follows from the Court' s case-law that a breach is sufficiently serious if a Community institution or a Member State, in the exercise of its rule-making powers, manifestly and gravely disregards the limits on those powers (Brasserie du Pêcheur and Factortame, cited above, paragraph 55, and Dillenkofer and Others, cited above, paragraph 25). One of the factors that may be taken into consideration in this regard is the clarity and precision of the rule breached (Brasserie du Pêcheur and Factortame, cited above, paragraph 56, and British Telecommunications, cited above, paragraph 42).

51 In this instance, as regards the condition that the holding period must have been completed by the time when the tax advantage is granted, it is to be noted that the Federal Republic of Germany' s interpretation has been adopted by almost all the other Member States which have exercised the option to derogate. It appears that those Member States took the view, following discussions within the Council, that they were entitled to adopt such an interpretation. On this point, it will be noted in particular that Article 1(2) of the Directive refers expressly to the prevention of abuse.

52 Furthermore, these cases being the first to concern the Directive, the Court' s case-law did not provide the Federal Republic of Germany with any indication as to how the provision at issue was to be interpreted.

53 In those circumstances, the fact that, when transposing the Directive, a Member State took the view that it was entitled to require that the minimum holding period should have been completed at the time when profits are distributed cannot be regarded as a sufficiently serious breach of Community law within the meaning of the judgments in Brasserie du Pêcheur and Factortame, *British Telecommunications and Dillenkofer and Others, cited above.*

54 The answer to the third question must therefore be that Community law does not require a Member State which, when transposing the Directive, stipulated that the minimum holding period set pursuant to Article 3(2) must be completed at the time when the profits that are the subject of the tax advantage afforded by Article 5 are distributed, to compensate the parent company for damage which it may have incurred by reason of the error thus made.

Decision on costs

Costs

55 The costs incurred by the German, Belgian, Greek, French, Italian and Netherlands Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Finanzgericht Koeln, by orders of 19 September 1994, hereby rules:

1. A Member State may not make grant of the tax advantage provided for in Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States subject to the condition that, at the moment when profits are distributed, the parent company must have held a minimum of 25% of the capital of the subsidiary for a period at least equal to that set by that Member State pursuant to Article 3(2) of the Directive. It is for the Member States to draw up rules for ensuring compliance with this minimum period, in accordance with the procedures laid down in their domestic law. On no view are those States obliged under the Directive to grant the advantage immediately on the basis of a unilateral undertaking by the parent company to observe the minimum holding period.

2. Where a Member State has exercised the option provided for in Article 3(2) of the Directive, parent companies may rely directly on the rights conferred by Article 5(1) and (3) of the Directive before national courts, if those companies observe the holding period set by that Member State.

3. Community law does not require a Member State which, when transposing the Directive, stipulated that the minimum holding period set pursuant to Article 3(2) must be completed at the time when the profits that are the subject of the tax advantage afforded by Article 5 are distributed, to compensate the parent company for damage which it may have incurred by reason of the error thus made.