Case C-521/07

Commission of the European Communities

v

Kingdom of the Netherlands

(Failure of a Member State to fulfil obligations – Agreement on the European Economic Area – Article 40 – Free movement of capital – Discrimination in the treatment of dividends paid by Netherlands companies – Deduction at source – Exemption – Beneficiary companies established in Member States of the Community – Beneficiary companies established in Iceland or Norway)

Summary of the Judgment

International agreements – European Economic Area Agreement – Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends

(EEA Agreement, Art. 40)

A Member State fails to fulfil its obligations under Article 40 of the European Economic Area (EEA) Agreement where it does not exempt dividends paid by resident companies to companies established in the EEA States from the deduction at source of tax on dividends under the same conditions as dividends paid to resident companies or to companies established in other Member States, by requiring that, in order to benefit from the exemption, companies established in the two EEA States in question hold at least, respectively, 10% or 25% of the shares of the distributing resident company and companies having their seat in the Member State concerned or in another Member State hold shares representing at least 5% of the paid-up nominal capital of the resident distributing company.

Such a difference in treatment as regards the method of taxing dividends paid to beneficiary companies established in the EEA States in question, compared with those paid to beneficiary companies established in the Member States is likely to deter companies established in the former two States from making investments in the Member State concerned. Moreover, it makes it more difficult for a resident company to raise capital from the two EEA States in question than from the Member State concerned or another Member State of the Community. It thus constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 40 of the EEA Agreement.

The argument based on the different situations of, on the one hand, companies having their seat in Member States of the Community and, on the other hand, companies established in the two EEA States in question cannot justify the requirement that the latter companies hold a higher stake in the capital of the resident companies distributing the dividends in order for them to benefit, like the former companies, from exemption from the deduction of tax at source on the dividends which they receive from resident companies. In that regard, although a difference in the system of legal obligations of the EEA States in question in the tax area, in comparison with those of the Member States of the Community, is capable of justifying a State in making the benefit of exemption from deduction at source of the tax on dividends subject, for companies established in the two EEA States in question, to proof that those companies do in fact fulfil the conditions laid down by its national legislation, it does not justify that legislation in making the benefit of that exemption

subject to the holding of a higher stake in the capital of the distributing company. Such a requirement bears no relation to the conditions otherwise required from all companies in order to be entitled to that exemption, namely that companies take a certain legal form, that they be subject to tax on profits and that they be the final beneficiary of the dividends paid, those being conditions with which the national tax authorities must indeed be able to verify compliance.

(see paras 37, 39, 47-48, 50, 52, operative part)

JUDGMENT OF THE COURT (Second Chamber)

11 June 2009 (*)

(Failure of a Member State to fulfil obligations – Agreement on the European Economic Area – Article 40 – Free movement of capital – Discrimination in the treatment of dividends paid by Netherlands companies – Deduction at source – Exemption – Beneficiary companies established in Member States of the Community – Beneficiary companies established in Iceland or Norway)

In Case C?521/07,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 November 2007,

Commission of the European Communities, represented by P. van Nuffel and R. Lyal, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of the Netherlands, represented by C.M. Wissels and D.J.M. de Grave, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, J.-C. Bonichot (Rapporteur), K. Schiemann, L. Bay Larsen and C. Toader, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration of the Court that, by not exempting dividends paid to companies established in Iceland or Norway from the deduction at source of tax on dividends under the same conditions as dividends paid to Netherlands companies, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; ‘the EEA Agreement’).

Legal context

The EEA Agreement and Community law

2 According to Article 40 of the EEA Agreement:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions between the Contracting Parties on the movement of capital belonging to persons resident in [European Community] Member States or [European Free Trade Association (EFTA)] States and no discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested. Annex XII contains the provisions necessary to implement this Article.’

3 The said Annex XII, entitled ‘Free movement of capital’, refers to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

4 Article 1(1) of that directive provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. …’

5 According to Article 4 of the same directive:

‘This Directive shall be without prejudice to the right of Member States to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation ...

Application of those measures and procedures may not have the effect of impeding capital movements carried out in accordance with Community law.’

National legislation

6 Article 1(1) of the Law on the Taxation of Dividends (Wet op de Dividendbelasting) of 23 December 1965 (‘the Wet DB’), provides:

‘Under the name of “tax on dividends” a direct tax shall be charged on persons who – directly or by means of certificates – enjoy income from shares in, participation certificates of and loans such as referred to in Article 10(1)(d) of the Corporation Tax Law of 1969 [Wet op de Vennootschapsbelasting 1969 (“the Wet Vpb”) of private limited liability companies, limited partnerships and other companies established in the Netherlands whose capital is wholly or partially divided into shares.’

7 According to Article 4 of the Wet DB:

‘1. The tax on income from shares, participation certificates and loans such as referred to in

Article 10(1)(d) of the Wet Vpb may be not deducted at source if:

a. the holding exemption provided for in Article 13 of the [Wet Vpb] or the holding compensation provided for in Article 13aa of that law applies to the advantages which the beneficiary derives from those shares, participation certificates and loans, and the holding forms part of the assets of its undertaking operated in the Netherlands;

b. ...

2. Tax is not deducted at source on income from shares, participation certificates and loans such as referred to in Article 10(1)(d) of the [Wet Vpb] if the beneficiary of the income is a body established in another Member State of the European Union and the following conditions are satisfied:

1. the beneficiary of the income and the taxable person take one of the legal forms set out in the Annex to 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), or a legal form indicated by ministerial decree;

2. at the date on which the income is distributed, the beneficiary is the holder of at least 5 per cent of the paid-up nominal capital of the taxable person, or, at that date, holds a stake in the taxable person to which Article 13(5) or (14) of the [Wet Vpb] would apply if it were established in the Netherlands;

3. the beneficiary of the income and the taxable person are subject, in the Member State of establishment, without the possibility of an option or of being exempt, to the tax which is there levied on profits, as referred to in Article 2(c) of that directive;

4. in the Member State of establishment, the beneficiary of the income and the taxable person are not deemed to be established outside the Member States of the European Union pursuant to an agreement for the avoidance of double taxation concluded with a non-member State;

...’

8 According to Article 13 of the Wet Vpb:

‘1. For the purposes of determining profits, no account shall be taken of the advantages by virtue of a holding or the costs linked to the acquisition or sale of that holding (holding exemption).

2. There is a holding if the taxpaying company:

a. is, as to at least 5% of the paid-up nominal capital, a shareholder of a company whose capital it wholly or partially divided into shares;

b. ...’

9 As regards companies established in Iceland or Norway, the Netherlands legislation contains no specific provision taking account of the fact that they may rely on Article 40 of the EEA Agreement. It is on the basis of bilateral agreements for the avoidance of double taxation concluded with those States parties to the EEA Agreement that the tax on dividends is not levied in the case of a holding in a Netherlands company of at least 10% (Article 10 of the agreement concerning taxes on income and capital between the Netherlands and Iceland, signed on 25 September 1997) or at least 25% (Article 10 of the agreement concerning taxes on income and capital between the Netherlands and Norway, signed on 12 January 1990) .

The pre-litigation procedure

10 Taking the view that dividends paid to companies established in the Netherlands were receiving more favourable treatment than dividends paid to companies of other Member States and States of the European Economic Area (‘the EEA’), and that the Kingdom of the Netherlands was not therefore complying with its obligations under Article 56 EC and Article 40 of the EEA Agreement, the Commission sent a letter of formal notice to the Netherlands dated 18 October 2005, requesting explanations.

11 The Kingdom of the Netherlands having given only holding replies, without any comment on the substance, the Commission issued a reasoned opinion on 6 July 2006, setting out the same complaints and calling upon the Netherlands to take the necessary compliance measures within a time-limit of two months from receipt of that opinion.

12 The Netherlands replied by letter of 7 September 2006 that the Wet DB would be adapted as from 1 January 2007, as regards dividends paid to companies established in one of the other Member States of the Community. That amendment, which took place before the present application was brought, led to the adoption of Article 4(2) of the Wet DB as reproduced in paragraph 7 of this judgment.

13 By contrast, the Kingdom of the Netherlands maintained, as regards the alleged infringement of Article 40 of the EEA Agreement, that the Netherlands legislation concerned did not constitute an obstacle to the free movement of capital, and that, even if it did, this was a justified obstacle.

14 Whilst acknowledging that the amendment of Article 4 of the Wet DB had ensured the compatibility of Netherlands legislation with the Treaty as regards companies established in other Member States, the Commission decided to pursue the procedure for failure to fulfil obligations and to bring the present action as regards the complaint of failure to fulfil obligations under Article 40 of the EEA Agreement.

The action

Arguments of the parties

15 The Commission argues that the Court has held, in its judgment in Case C-452/01 *Ospelt en Schlössle Weissenberg* [2003] ECR I-9743, paragraphs 28, 29 and 32, that Article 40 of the EEA Agreement and Annex XII to that Agreement have the same legal scope as the substantially identical provisions of Article 56 EC. It further indicates that the EFTA Court held the same in its judgments of 23 November 2004, *Fokus Bank* (E?1/04, EFTA Court Report p. 22, paragraph 23), and 1 July 2005, *Paolo Piazza* (E?10/04, EFTA Court Report p. 100, paragraph 33).

16 It considers that the Netherlands legislation creates discrimination between the tax treatment of dividends paid to a company established in the Netherlands, or, henceforth, in another Member State of the Community, and that of dividends paid to a company established in Iceland or Norway.

17 It points out that the dividends of a Netherlands company paid to another Netherlands company or to a company of another Member State are exempted from deduction at source of tax on the first company's dividends if the second company holds at least 5% of the capital of the first, whereas the dividends of a Netherlands company paid to a company established in Iceland or Norway are exempted only if the latter holds at least 10% (in the case of Icelandic companies) or 25% (in the case of Norwegian companies) of the capital of the Netherlands company concerned.

18 That discrimination, it argues, infringes the principle of the free movement of capital because it has the effect of making investment in Netherlands companies less advantageous for companies established in Iceland or Norway than for companies established in the Netherlands or other Member States of the Community. It also makes it more difficult for a Netherlands company to attract capital from Iceland and Norway than from the Netherlands or another Member State of the Community.

19 The Commission emphasises that the Court has already held such discrimination to be contrary to Article 56 EC in Case C?379/05 *Amurta* [2007] ECR I?9569, paragraph 28, concerning dividends paid to companies of other Member States which, at the time of the facts in that case, were not exempted in the same way as those paid to Netherlands companies.

20 As in that case, the Commission submits, the tax legislation at issue here cannot be regarded as compatible with Community law, and thus with the EEA Agreement, unless the difference in treatment which it involves concerns situations which are not objectively comparable or is justified by an overriding reason in the public interest.

21 The Commission maintains, but the Kingdom of the Netherlands denies, that the situation of Icelandic and Norwegian companies is objectively comparable to that of Netherlands companies with regard to the risks of double taxation on the profits of Netherlands companies of which they hold part of the capital.

22 The case-law of the Court shows that measures seeking, in such a situation, to prevent double taxation must be extended to all foreign companies which may benefit from the provisions on the free movement of capital. The Commission refers in that respect to Case C?170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I?11949, paragraph 37.

23 The Commission acknowledges that the national legislature may adopt measures to combat abuses of the freedoms of the internal market, particularly, as regards the free movement of capital, by virtue of Article 58 EC and, in this case, by virtue of Article 4 of Directive 88/361, mentioned in Annex XII to the EEA Agreement, whereby Member States have the right 'to take all requisite measures to prevent infringements of their laws and regulations, inter alia in the field of taxation'.

24 However, such measures must be proportionate to the objective pursued. In this case, the Kingdom of the Netherlands has not indicated what abuses were to be combated by the refusal to exempt the payment of dividends to companies established in Iceland or Norway from the deduction at source of the tax on dividends.

25 The Kingdom of the Netherlands argues that the obligations which flow from the free

movement of capital between Member States of the Community cannot be purely and simply transposed to the relations between the latter and the EFTA Member States of Iceland and Norway. That, it argues, follows from the fact that, in those two latter States, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15; ‘Directive 77/799’) does not apply.

26 The Kingdom of the Netherlands argues that the fight against the risks of tax evasion and abuse does not constitute the only justification set out in its legislation for the difference in treatment of dividends paid to companies established in Member States of the Community and those paid to companies established in Iceland or Norway.

27 In accordance with that legislation, in addition to the condition requiring the holding to account for at least 5% of capital, the beneficiary of the dividends itself must also satisfy two conditions in order to be entitled to the exemption in question, conditions which apply also to purely national situations and which are not discriminatory, being that the beneficiary must, first, be subject to a tax on profits and, second, be the final beneficiary of the dividends.

28 Compliance with those conditions can easily be monitored between Member States, thanks to the binding nature of Directive 77/799, whereas the bilateral conventions concluded with Iceland and Norway, not being Community legal instruments, do not allow a Member State or the Commission to demand before the Court of Justice that the resulting obligations be performed.

29 The Kingdom of the Netherlands therefore considers that the absence of a Community legal instrument in its relations with the Republic of Iceland and the Kingdom of Norway justifies the differences in the conditions for granting exemption from the deduction at source of tax on dividends in respect of the stakes held by companies established in those two States.

30 On that point, the Commission insists on the contrary that the bilateral conventions concerned are legally binding for those States. Even if it were more difficult to obtain compliance with obligations of international law than compliance, within the Community framework, with obligations arising under Community law, that does not mean that those conventions are irrelevant when answering the question whether the discrimination practised against Icelandic and Norwegian companies is proportionate to the objective pursued, namely the recovery of the tax on dividends.

31 Moreover, the Kingdom of the Netherlands has not demonstrated or even argued that the Republic of Iceland or the Kingdom of Norway have not complied with the obligations arising under those conventions, or that difficulties or unjustified delays have been encountered in applying them.

Findings of the Court

32 One of the principal aims of the EEA Agreement is to provide for the fullest possible realisation of the free movement of goods, persons, services and capital within the whole European Economic Area, so that the internal market established within the European Union is extended to the EFTA States. From that angle, several provisions of the abovementioned Agreement are intended to ensure as uniform an interpretation as possible thereof throughout the EEA (see Opinion 1/92 [1992] ECR I-2821). It is for the Court, in that context, to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly within the Member States (*Ospelt en Schlössle Weissenberg*, paragraph 29).

33 It follows that, if restrictions on the free movement of capital between nationals of States

party to the EEA Agreement must be assessed in the light of Article 40 of and Annex XII to that Agreement, those stipulations have the same legal scope as those of the substantially identical provisions of Article 56 EC (see, to that effect, *Ospelt en Schlössle Weissenberg*, paragraph 32).

34 Moreover, in the absence of any unifying or harmonising Community measures, Member States retain the power to define, by treaty or unilaterally, the criteria for allocating their powers of taxation, particularly with a view to eliminating double taxation (see, to that effect, *Amurta*, paragraphs 16 and 17).

35 That power does not permit them to apply measures contrary to the freedoms of movement guaranteed by the Treaty or similar provisions of the EEA Agreement (see, to that effect, *Amurta*, paragraph 24).

36 In this case, Articles 4 and 4a of the Wet DB, combined with Article 13 of the Wet Vpb provide for exemption from deduction at source of the tax on dividends for beneficiary companies having their seat in a Member State. In accordance with Article 4(2)2 of the Wet DB, that exemption applies to dividends distributed to companies having their seat in another Member State which hold shares representing at least 5% of the paid-up nominal capital of the resident distributing company.

37 By contrast, on the basis of the agreements for the avoidance of double taxation which the Kingdom of the Netherlands has concluded with the Republic of Iceland and the Kingdom of Norway, which are Member States of the EEA, exemption from deduction at source of the tax on dividends cannot be applied to dividends distributed to Icelandic or Norwegian companies unless the latter hold at least, respectively, 10% or 25% of the shares of the distributing Netherlands company. Thus, unlike companies having their seat in a Member State, those companies are not protected against the risk of double taxation when they hold more than 5%, but less than 10% or 25% respectively, of the shares of the distributing Netherlands company.

38 That difference between the tax rules applicable, on the one hand, to companies of Member States and, on the other hand, to those of the two EEA States in question, which benefit from Article 40 of the EEA Agreement in the same way as the former benefit from Article 56 EC, disadvantages, as regards the taxation of dividends, Icelandic companies which hold between 5 and 10% of the capital of a Netherlands company and Norwegian companies which hold between 5 and 25% thereof.

39 Such a difference in treatment as regards the method of taxing dividends paid to beneficiary companies established in Iceland and Norway, compared with those paid to beneficiary companies established in the Member States is likely to deter companies established in the former two States from making investments in the Netherlands. Moreover, it makes it more difficult for a Netherlands company to raise capital from Iceland and Norway than from the Netherlands or another Member State of the Community. It thus constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 40 of the EEA Agreement.

40 It needs to be examined, however, whether that restriction on the free movement of capital can be justified having regard to the provisions of the Treaty which are repeated in substance in the EEA Agreement.

41 The Kingdom of the Netherlands considers that beneficiary companies established in Iceland and Norway are in one of the various situations referred to in Article 58(1)(a) EC, pursuant to which Article 56 EC is without prejudice to the right which Member States have to apply the relevant provisions of their tax legislation which establish a distinction between taxable persons who are not in the same situation as far as their residence is concerned.

42 According to consistent case-law, for a national tax provision to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the resulting difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the public interest (*Amurta*, paragraph 32 and case-law cited).

43 It therefore needs to be verified whether, with regard to exemption from the deduction at source of the tax on dividends, beneficiary companies established in a Member State and beneficiary companies established in Iceland and Norway are in comparable situations.

44 The Kingdom of the Netherlands maintains that the difference in situation on which it rests its argument resides in the fact that it is not possible, by virtue of the bilateral conventions concluded with the two EEA States in question, to be certain that the beneficiary companies concerned do in fact fulfil the conditions imposed on companies of Member States by Article 4(2) of the Wet DB: namely to take one of the legal forms set out in the Annex to Directive 90/435 or a legal form indicated by ministerial decree, and, secondly, to be subject, in their State of establishment, without the possibility of an option or of being exempt, to tax on profits.

45 The Kingdom of the Netherlands bases its reasoning on the provisions of Directive 77/799. In accordance with that directive, designed to combat international tax evasion and avoidance, the competent authorities of the Member States must exchange any information that may enable them to effect a correct assessment of taxes on, in particular, income.

46 Since that directive does not apply to the Republic of Iceland and the Kingdom of Norway, the Kingdom of the Netherlands maintains that there is no binding rule enabling it to obtain information to verify whether the conditions laid down by Article 4(2) of the Wet DB are fulfilled.

47 It should, however, be noted that, even if such a difference in the system of legal obligations of the States in question in the tax area, in comparison with those of the Member States of the Community, is capable of justifying the Kingdom of the Netherlands in making the benefit of exemption from deduction at source of the tax on dividends subject, for Icelandic and Norwegian companies, to proof that those companies do in fact fulfil the conditions laid down by Netherlands legislation, it does not justify that legislation in making the benefit of that exemption subject to the holding of a higher stake in the capital of the distributing company.

48 That latter requirement bears no relation to the conditions otherwise required from all companies in order to be entitled to that exemption, namely that the company take a certain legal form, that they be subject to tax on profits and that they be the final beneficiary of the dividends paid, those being conditions with which the Netherlands tax authorities must indeed be able to verify compliance.

49 On that latter point, there is no evidence on the Court’s file, and the Kingdom of the Netherlands has not demonstrated, that the requirement that a stake of less than 10% or 25% in a company’s capital be held has any impact on the risk that the competent administration might be given erroneous information, particularly as regards the tax treatment of companies established in the two States in question, and that, therefore, the requirement for stakes of that size is justified, whereas there is no such requirement for companies established in Member States of the

Community.

50 Therefore, the Court cannot accept the argument of the Kingdom of the Netherlands based on the different situations of, on the one hand, companies having their seat in Member States of the Community and, on the other hand, Icelandic and Norwegian companies in order to justify the requirement that the latter companies hold a higher stake in the capital of the Netherlands companies distributing the dividends in order for them to benefit, like the former companies, from exemption from the deduction of tax at source on the dividends which they receive from Netherlands companies.

51 That conclusion is implicitly confirmed by the fact that the bilateral conventions concluded by the Kingdom of the Netherlands with the Republic of Iceland and the Kingdom of Norway make exemption from deduction at source of tax on the dividends paid to Icelandic and Norwegian companies subject only to the condition that a stake of a certain amount exists in the capital of the distributing Netherlands company, without requiring that they also satisfy the other conditions laid down by Article 4(2) of the Wet DB.

52 It follows from the above that, by not exempting dividends paid by Netherlands companies to companies established in Iceland or Norway from deduction at source of the tax on dividends under the same conditions as dividends paid to Netherlands companies or companies of other Member States of the Community, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 40 of the EEA Agreement.

Costs

53 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. As the Commission has applied for costs against the Kingdom of the Netherlands and the latter has been unsuccessful, the Kingdom of the Netherlands must be ordered to pay the costs.

On those grounds, the Court (Second Chamber) hereby rules:

1. By not exempting dividends paid by Netherlands companies to companies established in Iceland or Norway from deduction at source of the tax on dividends under the same conditions as dividends paid to Netherlands companies or companies of other Member States of the Community, the Kingdom of the Netherlands has failed to fulfil its obligations under Article 40 of the Agreement on the European Economic Area.

2. The Kingdom of the Netherlands is ordered to pay the costs.

[Signatures]

* Language of the case: Dutch.