Case C-540/07

Commission of the European Communities

v

Italian Republic

(Failure of a Member State to fulfil obligations – Free movement of capital – Article 56 EC – Articles 31 and 40 of the EEA Agreement – Direct taxation – Withholding at source on outgoing dividends – Set-off at the place of establishment of the recipient of the dividend, pursuant to a convention for the avoidance of double taxation)

Summary of the Judgment

1. *Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends*

(Art. 56(1) EC)

2. *International agreements – Agreement creating the European Economic Area – Freedom of establishment – Free movement of capital – Restrictions – Tax legislation – Corporation tax – Taxation of dividends*

(EEA Agreement, Arts 31 and 40)

1. A Member State which subjects dividends distributed to companies established in other Member States to a less favourable tax regime than that applied to dividends distributed to resident companies, by exempting from taxation, in the amount of 95%, dividends distributed to resident companies and subjecting dividends distributed to companies established in other Member States to a withholding at source at the rate of 27%, part of that sum being capable of being subsequently repaid on application, fails to fulfil its obligations under Article 56(1) EC.

Such a difference in treatment is not called into question by reason of the application of conventions for the avoidance of double taxation. Whilst the possibility cannot be excluded that a Member State might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation with another Member State, it is necessary for that purpose that application of the double taxation convention allow the effects of the difference in treatment under national legislation to be compensated for. The difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not totally disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation. Where such a set-off against the tax due in the other Member State of the tax withheld at source is not guaranteed by the legislation in question, and the choice as to whether to tax income from the Member State concerned in the other Member State, or the level at which it is to be taxed, depends not on that State but on the tax rules laid down by the other Member State, set-off of the tax withheld at source against the tax due in the other Member State, pursuant to the provisions of conventions for the avoidance of double taxation, does not allow in all cases for the difference in treatment arising from the application of national legislation to be compensated for.

Nor is that difference in treatment called into question on the ground that account must be taken of the national taxation system as a whole, the objective of which is to ensure that, directly or indirectly, the natural persons who are the final beneficiaries of dividends are taxed, and in particular of the fact that a natural person who is resident and a shareholder is subject to personal income tax, so that the level of taxation between a shareholder who is a natural person and a resident and a non-resident shareholder is in reality equivalent. Such an approach amounts to comparing regimes and situations which are not comparable, namely, on the one hand, physical persons who receive dividends and their income tax regime, and on the other, capital companies receiving outgoing dividends and the withholding at source which is levied by the Member State concerned. It is irrelevant in that respect that the legislation of that State is designed to correct a possible imbalance at the level of the taxation of physical persons who hold shares in the companies to which the dividends are paid.

Such a difference in treatment is likely to deter companies established in other Member States from making investments in the Member State in question and therefore constitutes a restriction on the free movement of capital, prohibited in principle by Article 56(1) EC.

It is true that, in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State. However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident shareholders, but also of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders becomes comparable to that of resident shareholders. It is solely because of the exercise by that State of its taxing powers that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 56 EC, the State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident shareholder companies are subject to the same treatment as resident shareholder companies. Thus, where that Member State has chosen to exercise its taxing power over dividends distributed to companies established in other Member States, non-resident recipients of those dividends find themselves in a situation comparable to that of residents as regards the risk of economic double taxation of dividends distributed by resident companies, so that non-resident recipients cannot be treated differently from resident recipients.

The less favourable treatment in question cannot be justified by the need to ensure coherence of the tax system or the maintenance of a balanced distribution of the power to tax. Nor can it be justified having regard to the fight against tax evasion. Such justification is permissible only if it concerns purely artificial contrivances, the aim of which is to circumvent tax law, so that any general presumption of evasion is excluded. In the present case, all dividends distributed to companies established in other Member States are generally made subject to a less favourable tax regime. Moreover, Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation may be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information necessary to enable it correctly to establish the amount of the taxes covered by that directive. The less favourable treatment which the national legislation in question imposes on dividends distributed to companies established in other Member States therefore constitutes a restriction on the free movement of capital incompatible with Article 56(1) EC.

(see paras 32, 36-40, 42-45, 51-54, 56, 58-61, 64, operative part 1)

2. There is no breach of obligations under Articles 31 and 40 of the Agreement on the European Economic Area (EEA) by a Member State which subjects dividends distributed to companies established in other Member States to a less favourable tax regime than that applied to dividends distributed to resident companies, by exempting from taxation, in the amount of 95%, dividends distributed to resident companies and subjecting dividends distributed to companies established in other Member States to a withholding at source at the rate of 27%, part of that sum being capable of being subsequently repaid on application.

It is true that the less favourable treatment which the national legislation in question accords to dividends distributed to companies established in States party to the EEA Agreement constitutes a restriction on the free movement of capital for the purposes of Article 40 of the EEA Agreement, and on the freedom of establishment for the purposes of Article 31 of that Agreement.

However, that restriction is justified by the overriding reason in the public interest regarding the fight against tax evasion. The case-law concerning restrictions on the exercise of freedom of movement within the Community cannot be transposed in its entirety to movements of capital between Member States and non-member countries, since such movements take place in a different legal context. In that respect, the framework of cooperation between the competent authorities of the Member States established by Directive 77/799 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation does not exist between the latter and the competent authorities of a non-member State when the latter has not entered into any undertaking of mutual assistance. In the absence of any provision for exchange of information with a State party to the EEA Agreement, and where conventions for the avoidance of double taxation signed with other States party to the EEA Agreement do not contain provisions laying down an obligation to supply information, the national legislation at issue must be regarded as justified in relation to States party to the EEA Agreement for the overriding reason in the public interest concerning the fight against tax evasion, and as appropriate to ensure the realisation of the objective in question without going beyond what it necessary in order to attain it.

(see paras 67-72, 74-75)

JUDGMENT OF THE COURT (Second Chamber)

19 November 2009 (*)

(Failure of a Member State to fulfil obligations – Free movement of capital – Article 56 EC – Articles 31 and 40 of the EEA Agreement – Direct taxation – Withholding at source on outgoing dividends – Set-off at the place of establishment of the recipient of the dividend, pursuant to a convention for the avoidance of double taxation)

In Case C?540/07,

ACTION for failure to fulfil obligations pursuant to Article 226 EC, brought on 30 November 2007,

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

applicant,

v

Italian Republic, represented by R. Adam, acting as Agent, assisted by P. Gentili, avvocato dello Stato, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of J.?C. Bonichot (Rapporteur), President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans, K. Schiemann and P. K?ris, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

having heard the Opinion of the Advocate General at the sitting on 16 July 2009,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, by maintaining in force, for dividends distributed to companies established in other Member States and States party to the Agreement on the European Economic Area of 2 May 1992

(OJ 1994 L 1, p. 3; ‘the EEA Agreement’), a tax regime less favourable than that applied to dividends distributed to resident companies, the Italian Republic has failed to fulfil its obligations under Article 56 EC and Article 40 of the EEA Agreement as regards the free movement of capital between Member States and the States party to that Agreement, and the obligations referred to in Article 31 of that Agreement in relation to freedom of establishment in the States party to that Agreement.

Legal background

The EEA Agreement

2 Article 6 of the EEA Agreement provides:

‘Without prejudice to future developments of case-law, the provisions of this Agreement, in so far as they are identical in substance to corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties, shall, in their implementation and application, be interpreted in conformity with the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement.’

3 Article 31(1) of the EEA Agreement reads:

‘Within the framework of the provisions of this Agreement, there shall be no restrictions on the freedom of establishment of nationals of a Member State of the [European Community] or a State of the [European Free Trade Association] in the territory of any other of these States. This shall also apply to the setting up of agencies, branches or subsidiaries by nationals of any EC Member State or EFTA State established in the territory of any of these States.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of Article 34, second paragraph, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of Chapter 4.’

4 Article 40 of the EEA Agreement reads:

‘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 EC Member States or 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.’

Community legislation

5 Article 3(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 (OJ 1990 L 225, p. 6), as amended by Council Directive 2003/123/EC of 22 December 2003 (OJ 2004 L 7, p. 41; Directive 90/435), provides:

‘...

(a) the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20% in the capital of a company of another Member State fulfilling the same conditions.

Such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20% in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State.

...'

6 Under Article 4(1) of Directive 90/435:

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

– refrain from taxing such profits, or,

– tax such profits while authorising the parent company and the permanent establishment to deduct from the amount of tax due that fraction of the corporation tax related to those profits and paid by the subsidiary and any lower-tier subsidiary, subject to the condition that at each tier a company and its lower-tier subsidiary meet the requirements provided for in Articles 2 and 3, up to the limit of the amount of the corresponding tax due.'

7 Article 5(1) of Directive 90/435 reads:

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

National legislation

The national dividends regime

8 The Italian regime for the taxation of national dividends paid to companies and commercial entities subject in Italy to corporation tax is based on Legislative Decree No 344 on the reform of corporation tax pursuant to Article 4 of Law No 80 of 7 April 2003 (decreto legislativo recante riforma dell'imposizione sul reddito delle società, a norma dell'articolo 4 della legge 7 aprile 2003, n. 80), of 12 December 2003 (Ordinary Supplement to the GURI No 291, of 16 December 2003), which entered into force on 1 January 2005.

9 Since that reform, the regime at issue has been determined by Article 89(2), headed 'Dividends and interest', of the Unified law on income tax (Testo unico delle imposte sui redditi), adopted by Decree No 917 of the President of the Republic of 22 December 1986, which reads:

'Profits distributed, in any form and under any name whatsoever, even in cases under Article 47(7), by companies and other entities referred to in Article 73(1)(a) and (b), shall not constitute income for the year in which they were made, as they are excluded as to 95% of their amount from the income of the recipient company or entity.'

10 According to Article 73(1)(a) and(b) of the said unified law:

‘Corporation tax shall be charged upon:

(a) public limited companies and partnerships partly limited by shares, private companies, cooperatives and mutual societies, which have their seat in Italy;

(b) private and public entities that are not companies but have their seat in Italy and whose objectives are wholly or principally the conduct of commercial transactions.’

Taxation of outgoing dividends

11 Article 27, headed Withholding tax on dividends, third paragraph, of Decree No 600 of the President of the Republic on common rules for the calculation of income tax (decreto del Presidente della Republica recante disposizioni comuni in materia di accertamento delle imposte sui redditi), of 29 September 1973, provides:

‘Tax of 27% shall be withheld from profits that are distributed to taxpayers not resident in Italy. The rate of tax withheld shall be reduced to 12.5% for profits that are paid to holders of savings shares. Non-resident taxpayers, with the exception of holders of savings shares, shall be entitled to reimbursement of tax proven to have ultimately been paid abroad on those profits in the maximum amount of four-ninths of the tax withheld. Proof shall be provided in the form of a certificate from the competent tax office in the foreign State.’

12 Article 27a that Decree provides for the repayment of withholding tax and, in certain cases, exemption from that tax for companies which are established in other Member States and which reach the thresholds for holdings and duration of holdings laid down in Directive 90/435.

Pre-litigation procedure

13 The Commission, taking the view that the tax regime for Italian-sourced dividends distributed to companies established in other Member States or EEA countries was incompatible with the free movement of capital and the freedom of establishment, decided to initiate the procedure under Article 226 EC and put the Italian Republic on formal notice by a letter of 18 October 2005.

14 Being unconvinced by the arguments put forward by the Italian Republic in its letter of 9 February 2006, the Commission delivered a reasoned opinion to that Member State by letter of 4 July 2006, calling upon it to take the necessary compliance measures within two months of receipt.

15 The Italian Republic replied to the reasoned opinion by letter of 30 January 2007. The Commission, taking the view that that Member State had not remedied the infringement complained of, decided to bring the present action.

The action

Admissibility

16 The Italian Republic argues that the action is inadmissible, since it is insufficiently precise in its subject-matter. The Commission merely brought together various legislative texts and found that they provided for higher withholding on outgoing dividends than the level of taxation established for dividends distributed to companies in Italy, without carrying out a precise and complete analysis of each of those legislative provisions and without specifically demonstrating the incompatibility of each of them with the principles which it invokes.

17 It should be recalled in that regard that Article 38(1)(c) of the Rules of Procedure provides that any application initiating proceedings must contain, in particular, the subject-matter of the proceedings and a summary of the pleas in law on which it is based. It is therefore the task of the Commission, in any application made pursuant to Article 226 EC, to indicate the complaints being made in a sufficiently precise and coherent manner, so as to enable the Member State to prepare its defence and the Court to verify the existence of the failure to fulfil obligations which is being claimed (see, to that effect, Case C?347/88 *Commission* v *Greece* [1990] ECR I?4747, paragraph 28; Case C?98/04 *Commission* v *United Kingdom* [2006] ECR I?4003, paragraph 18).

18 In this case, there is a sufficiently clear indication from the reasoning and the conclusions of the Commission's action that the latter concerns the compatibility with the principles of the free movement of capital and freedom of establishment of the difference between the tax regime for dividends distributed to Italian residents and that for dividends distributed to companies established in other Member States or States party to the EEA Agreement.

19 The action being free of ambiguity, the objection of admissibility raised by the Italian Republic must therefore be dismissed.

Merits

Arguments of the parties

20 La Commission maintains, essentially, that dividends paid to companies established in other Member States or in States party to the EEA Agreement are less favourably treated than those paid to companies resident in Italy. That, in its submission, discourages investments in companies established in Italy by companies established in other Member States or in States party to the EEA Agreement, and thereby hinders the free movement of capital.

21 Directive 90/435 not being applicable to companies established in States party to the EEA Agreement and inasmuch as the Italian tax regime for outgoing dividends also concerns controlling holdings in Italian companies held by companies established in States party to the EEA Agreement, the Commission maintains that Article 31 of the EEA Agreement, which prohibits any restriction on the freedom of establishment in a manner comparable with the corresponding provisions of the EC Treaty, has also been infringed.

22 The Italian Republic argues that exempting national dividends from taxation but charging a withholding tax on dividends leaving for other Member States is not necessarily and in all circumstances contrary to Community law. Incompatibility with Community law can be established only in the concrete situation in which, after applying the provisions of the bilateral convention for the avoidance of double taxation, the company of the other Member State receiving the dividends is not able, in the State in which it is established, to eliminate the double taxation, for example by setting off against its own taxable income at the national level the withholding made in the Member State of the company which distributed the dividends. Thus, in a situation in which the bilateral convention for the avoidance of double taxation provides, in the destination Member State, a set-off mechanism in that State for the withholding made in the source Member State, the Italian Republic considers that there cannot be discrimination contrary to Article 56 EC. The set-off clauses provided in those bilateral conventions correspond to the power which the Member States have to allocate their tax competence.

23 In that regard, the Italian Republic argues, the Commission has not adduced evidence that any of the bilateral conventions concluded by the Italian Republic does not permit elimination of the impact of the withholding made in Italy.

24 The Italian Republic also argues that the tax treatment of outgoing dividends must be assessed having regard to the whole of the system for taxing dividends distributed to recipients in Italy. In that latter case, distribution of a dividend to a shareholder who is a natural person, resident in Italy, is subject to the tax. The exemption of 95% of the dividends received by taxable persons is simply a stage preparatory to the taxation of shareholders who are natural persons. In the case in which the shareholder is a non-resident company, which will normally distribute the dividends to non-resident natural persons, there is no taxation of natural persons. The non-resident company is additionally taxed, the Italian Republic maintains, to take account of the fact that the level of taxation on the profits of companies must be coherent with that laid down for natural persons. In that way, the level of taxation between the natural person resident shareholder and the non-resident shareholder is equivalent.

25 The Italian Republic argues in the alternative that the difference in treatment is justified by the difference in situation consisting in the fact that non-resident companies are under no obligation to communicate to the Italian tax authorities the presence, within the capital of such companies, of natural persons resident in Italy.

26 Even if the situations were not different, the Italian Republic continues, the discrimination is justified by the requirements of the cohesion of the tax system and by the need to prevent tax evasion and avoidance.

27 Finally, the Italian Republic argues that the Commission cannot in any event blame it for not anticipating the development of the case-law of the Court of Justice and the judgments in Case C?170/05 *Denkavit Internationaal and Denkavit France* [2006] ECR I?11949 and Case C?379/05 *Amurta* [2007] ECR I?9569, which were delivered after the expiry of the time-limit assigned to it by the reasoned opion.

Findings of the Court

– Infringement of Article 56(1) EC

28 As a preliminary observation, it should be noted that, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law (see, for example, Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 29).

29 Thus, 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 (Case C?336/96 *Gilly* [1998] ECR I?2793, paragraphs 24 and 30; Case C?470/04 *N* [2006] ECR I?7409, paragraph 44).

30 Directive 90/435 seeks, by the introduction of a common system of taxation, 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 the grouping together of companies at Community level (Case C?446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I?11753, paragraph 103).

31 For holdings not falling under Directive 90/435, it is for the Member States to determine

whether, and to what extent, the economic double taxation of distributed benefits must be avoided, and to introduce, for that purpose, unilaterally or by means of conventions concluded with other Member States, mechanisms to prevent or attenuate that economic double taxation. However, that mere fact does not authorise them to apply measures contrary to the freedoms of movement guaranteed by the EC Treaty (see, to that effect, Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I?11673, paragraph 54).

32 In this case, the Italian legislation exempts from taxation, in the amount of 95%, dividends distributed to resident companies and taxes the remaining 5% at the normal rate of corporation tax, which is 33%. Dividends distributed to companies established in other Member States are subject to a withholding at source at the rate of 27%, four-ninths of that sum at most being capable of being subsequently repaid on application. A withholding at source at a reduced rate may also be applied, by virtue of the provisions of the various conventions for preventing double taxation, where certain conditions as to the size and duration of the holding are fulfilled, but that rate remains higher than that imposed on dividends distributed to resident companies.

33 It is undisputed that the Italian legislation subjects dividends distributed to companies established in other Member States to a higher rate of taxation than that imposed on dividends distributed to resident companies.

34 The Italian Republic argues, however, that that difference in treatment is apparent only, since account must be taken, first, of conventions for preventing double taxation, and, secondly, of the whole of the Italian tax system.

35 On the first point, the Italian Republic argues that dividends distributed to companies in other Member States are not in reality treated differently from dividends distributed to resident companies, since conventions for the avoidance of double taxation allow the tax withheld at source in Italy to be set off against that due in the other Member State.

36 In that respect, it is true that the Court has held that the possibility cannot be excluded that a Member State might succeed in ensuring compliance with its obligations under the Treaty by concluding a convention for the avoidance of double taxation with another Member State (see, to that effect, *Test Claimants in Class IV of the ACT Group Litigation*, paragraph 71, and *Amurta*, paragraph 79).

37 It is, however, necessary for that purpose that application of the double taxation convention allow the effects of the difference in treatment under national legislation to be compensated for. The difference in treatment between dividends distributed to companies established in other Member States and those distributed to resident companies does not totally disappear unless the tax withheld at source under national legislation can be set off against the tax due in the other Member State in the full amount of the difference in treatment arising under the national legislation.

38 In this case, such a set-off against the tax due in the other Member State of the tax withheld at source in Italy is not guaranteed by Italian legislation. Set-off presupposes, in particular, that dividends coming from Italy are sufficiently taxed in the other Member State. As the Advocate General has pointed out in paragraphs 58 and 59 of her Opinion, if those dividends are not taxed, or are not sufficiently taxed, the sum withheld at source in Italy or a part thereof cannot be set off. In that case, the difference in treatment arising from the application of national legislation cannot be compensated for by applying provisions of the double taxation convention.

39 The choice as to whether to tax income from Italy in the other Member State, or the level at which it is to be taxed, depends not on the Italian Republic but on the tax rules laid down by the

other Member State. The Italian Republic is therefore wrong to argue that set-off of the tax withheld at source in Italy against the tax due in the other Member State, pursuant to the provisions of conventions for the avoidance of double taxation, allows in all cases for the difference in treatment arising from the application of national legislation to be compensated for.

40 The Italian Republic cannot therefore argue that, by reason of the application of conventions for the avoidance of double taxation, dividends distributed to companies established in other Member States are not, in the final analysis, treated differently from dividends distributed to resident companies.

41 Moreover, the Italian Republic indicated in the course of the proceedings that it has not concluded a convention for the avoidance of double taxation with Slovenia. Its arguments can therefore not in any event succeed in relation to dividends distributed to companies established in Slovenia.

42 On the second point, the Italian Republic cannot argue either that the difference in treatment found in paragraph 33 of this judgment does not exist on the ground that account must be taken of the Italian taxation system as a whole, the objective of which is to ensure that, directly or indirectly, the natural persons who are the final beneficiaries of dividends, and in particular of the fact that a natural person who is resident and a shareholder is subject to personal income tax, so that the level of taxation between a shareholder who is a natural person and a resident and a non-resident shareholder is in reality equivalent.

43 In dismissing that argument, it is sufficient to point out that it amounts to comparing regimes and situations which are not comparable, namely, on the one hand, physical persons who receive dividends and their income tax regime, and on the other, capital companies receiving outgoing dividends and the withholding at source which is levied by the Italian Republic. It is irrelevant in that respect that, according to the Italian Republic, the Italian legislation is designed to correct a possible imbalance at the level of the taxation of physical persons who hold shares in the companies to which the dividends are paid.

44 That Member State cannot therefore argue that there is no difference in treatment between the method of taxation of dividends distributed to companies established in other Member States and that in relation to those distributed to resident companies.

45 Such a difference in treatment is likely to deter companies established in other Member States from making investments in Italy. It therefore constitutes a restriction on the free movement of capital, prohibited in principle by Article 56(1) EC.

46 It needs to be examined, however, whether that restriction on the free movement of capital is capable of being justified, having regard to the provisions of the Treaty.

47 According to Article 58(1) EC, ‘Article 56 shall be without prejudice to the right of Member States … to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence …’.

48 The derogation laid down in that provision is itself limited by Article 58(3) EC, which provides that the national provisions referred to in Article 58(1) ‘shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56’.

49 The differences in treatment authorised by Article 58(1)(a) must thus be distinguished from the forms of discrimination prohibited by Article 58(3). The case-law shows that, for national tax

legislation such as that at issue here to be capable of being regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by an overriding reason in the public interest (Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 43; Case C?319/02 *Manninen* [2004] ECR I?7477, paragraph 29; and Case C?512/03 *Blanckaert* [2005] ECR I?7685, paragraph 42).

50 It therefore needs to be verified whether, having regard to the objective of the national legislation at issue, companies receiving dividends which are resident in Italy and those established in another Member State are or are not in comparable situations.

51 The Court has already held that in the context of measures laid down by a Member State in order to prevent or mitigate the imposition of a series of charges to tax on, or the economic double taxation of, profits distributed by a resident company, resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State (*Denkavit Internationaal and Denkavit France*, paragraph 34).

52 However, as soon as a Member State, either unilaterally or by way of a convention, imposes a charge to tax on the income, not only of resident shareholders, but also of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders becomes comparable to that of resident shareholders (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 68; *Denkavit Internationaal and Denkavit France*, paragraph 35; and *Amurta*, paragraph 38).

53 It is solely because of the exercise by that State of its taxing powers that, irrespective of any taxation in another Member State, a risk of a series of charges to tax or economic double taxation may arise. In such a case, in order for non-resident companies receiving dividends not to be subject to a restriction on the free movement of capital prohibited, in principle, by Article 56 EC, the State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident shareholder companies are subject to the same treatment as resident shareholder companies (*Test Claimants in Class IV of the ACT Group Litigation*, paragraph 70; *Amurta*, paragraph 39).

54 In this case, the Italian legislature chose to exercise its taxing power over dividends distributed to companies established in other Member States.
Non-resident recipients of those dividends thus find themselves in a situation comparable to that of residents as regards the risk of economic double taxation of dividends distributed by resident companies, so that non-resident recipients cannot be treated differently from resident recipients.

55 In that respect, the Italian Republic maintains that the difference in treatment is justified by imperative reasons in the public interest relating to the coherence of the tax system, the maintenance of a balanced distribution of the power to tax and the fight against tax evasion, which are grounds that the Court has recognised as being capable of justifying such differences (see, to that effect, *Marks & Spencer*, paragraph 51; Case C?414/06 *Lidl Belgium* [2008] ECR I?3601, paragraph 42; and, regarding justification based on coherence of the tax system, Case C?204/90 *Bachmann* [1992] ECR I-249, paragraph 28, and Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 68).

56 Concerning justification based on coherence of the tax system and the maintenance of a balanced distribution of the power to tax, it is sufficient, in dismissing those arguments, to point out that the Italian Republic repeats in substance the arguments put forward in order to defend the

contention that the difference in treatment referred to in paragraph 33 of this judgment does not exist on the ground that account must also be taken of the fact that resident shareholders who are physical persons are subject in Italy to income tax. For the reasons given in paragraph 43 of this judgment, such an argument cannot succeed.

57 Concerning the justification based on the fight against tax evasion, it should be noted that a restriction on the free movement of capital is permissible on that ground only if it is appropriate to ensuring the attainment of the objective thus pursued and does not go beyond what is necessary to attain it (*Marks & Spencer*, paragraph 35; Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraph 47; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 64).

58 Thus a justification based on the fight against tax evasion is permissible only if it concerns purely artificial contrivances, the aim of which is to circumvent tax law, so that any general presumption of evasion is excluded. Thus, a general presumption of tax avoidance or evasion is insufficient to justify a tax measure which adversely affects the objectives of the Treaty (see, to that effect, Case C?478/98 *Commission* v *Belgium* [2000] ECR I?7587, paragraph 45, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 50 and case-law cited).

59 In this case, all dividends distributed to companies established in other Member States are generally made subject to a less favourable tax regime. Such less favourable treatment cannot therefore be justified by reference to the fight against tax evasion.

60 Moreover, 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), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1; 'Directive 77/799'), may be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information necessary to enable it correctly to establish the amount of the taxes covered by that directive (*Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 71).

61 The less favourable treatment which the Italian legislation imposes on dividends distributed to companies established in other Member States therefore constitutes a restriction on the free movement of capital incompatible with Article 56(1) EC.

62 Finally, the Italian Republic cannot maintain that the action for failure to fulfil obligations should in any event be dismissed on the ground that the incompatibility of its legislation with Article 56(1) EC has arisen from the interpretation of that article made by the Court of Justice in judgments given on references for a preliminary ruling on a date later than that of the reasoned opinion in this case.

63 The interpretation which, in the exercise of its jurisdiction under Article 234 EC, the Court of Justice gives to a rule of Community law, illuminates and explains the significance and the scope of that rule, such as it must or should have been applied from the moment of its entry into force (see, to that effect, Case 61/79 *Denkavit Italiana* [1980] ECR 1205, paragraph 16), unless the Court has limited for the past the possibility of invoking the provision thus interpreted (see, to that effect, *Denkavit Italiana*, paragraph 17).

64 It follows from the whole of the above that, by imposing on dividends distributed to companies established in other Member States a tax regime less favourable than that applied to dividends distributed to resident companies, the Italian Republic has failed to fulfil its obligations under Article 56(1) EC.

– Infringement of the EEA Agreement

65 One of the main objectives of the EEA Agreement is to realise as completely as possible the free movement of goods, persons, services and capital throughout the whole of the European Economic Area (EEA), so that the internal market realised in the territory of the Community is extended to the EFTA States. In that regard, many provisions of the said agreement are designed to ensure as uniform an interpretation as possible of the latter over the whole of the EEA (see Opinion 1/92 of 10 avril 1992, [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 with those of the Treaty are interpreted in a uniform manner within the Member States (Case C?452/01 *Ospelt and Schlössle Weissenberg* [2003] ECR I?9743, paragraph 29).

66 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 (Case C?521/07 *Commission* v *Netherlands* [2009] ECR I-0000, paragraph 33).

67 Consequently, and for the reasons set out when examining the action in the light of Article 56(1) EC, the less favourable treatment which the Italian legislation accords to dividends distributed to companies established in States party to the EEA Agreement constitutes a restriction on the free movement of capital for the purposes of Article 40 of the EEA Agreement.

68 The Court finds, however, that that restriction is justified by the overriding reason in the public interest regarding the fight against tax evasion.

69 As the Court has already held, the case-law concerning restrictions on the exercise of freedom of movement within the Community cannot be transposed in its entirety to movements of capital between Member States and non-member countries, since such movements take place in a different legal context (see, to that effect, Case C?101/05 *A* [2007] ECR I?11531, paragraph 60).

70 In this case, it should first be noted that the framework of cooperation between the competent authorities of the Member States established by Directive 77/799 does not exist between the latter and the competent authorities of a non-member State when the latter has not entered into any undertaking of mutual assistance.

71 The Italian Republic has maintained, without being contradicted, that no provision for exchange of information exists between it and the Prinicipality of Liechtenstein. It has also maintained, without being contradicted on the point, that the conventions for the avoidance of double taxation which it has signed with the Republic of Iceland and the Kingdom of Norway do not contain provisions laying down an obligation to supply information.

72 In those circumstances, the Italian legislation at issue must be regarded as justified in relation to States party to the EEA Agreement for the overriding reason in the public interest concerning the fight against tax evasion, and as appropriate to ensure the realisation of the objective in question without going beyond what is necessary in order to attain it.

73 The action must therefore be dismissed in so far as it claims infringement by the Italian Republic of its obligations under Article 40 of the EEA Agreement.

74 The Commission also argues that the Italian legislation constitutes an unjustified restriction on the freedom of establishement guaranteed by Article 31 of the EEA Agreement.

75 However, and for the reasons set out in relation to Article 40 of the EEA Agreement, the Italian legislation at issue must be regarded as justified in relation to States party to the EEA Agreement for the overriding reason in the public interest concerning the fight against tax evasion, and as appropriate to ensure the realisation of the objective in question without going beyond what is necessary in order to attain it.

76 The action must therefore also be dismissed in so far as it claims infringement by the Italian Republic of its obligations under Article 31 of the EEA Agreement.

Costs

77 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. Under Article 69(3) of the Rules of Procedure, the Court may, where each party succeeds on some and fails on other heads, or where the circumstances are exceptional, order that the costs be shared or that the parties bear their own costs.

78 In this dispute, account must be taken of the fact that some of the Commission's claims have not been upheld.

79 Therefore, the Italian Republic must be ordered to pay three quarters of the costs, and the Commission to pay the remaining quarter.

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

1) **By making dividends distributed to companies established in other Member States subject to a less favourable tax regime than that applied to dividends distributed to resident companies, the Italian Republic has failed to fulfil its obligations under Article 56(1) EC.**

2) **The action is dismissed as to the remainder.**

3) **The Italian Republic is ordered to pay three quarters of the costs. The Commission of the European Communities is ordered to pay the remaining quarter.**

[Signatures]

* Language of the case: Italian.