JUDGMENT OF THE COURT

6 June 2000

(Free movement of capital - Direct taxation of share dividends - Exemption - Limitation to shares in companies whose seat is within national territory)

In Case C-35/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Hoge Raad der Nederlanden (Netherlands) for a preliminary ruling in the proceedings pending before that court between

Staatssecretaris van Financiën

and

B.G.M. Verkooijen,

on the interpretation of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn, C. Gulmann, J.-P. Puissochet, P. Jann, H. Ragnemalm, M. Wathelet (Rapporteur) and F. Macken, Judges,

Advocate General: A. La Pergola,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Verkooijen, by F.E. Dekker, tax adviser,

- the Netherlands Government, by J.G. Lammers, Acting Legal Adviser, acting as Agent,

- the Italian Government, by G. De Bellis, Avvocato dello Stato,

- the United Kingdom Government, by J.E. Collins, Assistant Treasury Solicitor, acting as Agent, and R. Singh, Barrister,

- the Commission of the European Communities, by E. Mennens, Principal Legal Adviser, and H. Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

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after hearing the oral observations of the Netherlands Government, represented by M.A. Fierstra, Head of the European Law Department of the Ministry of Foreign Affairs, acting as Agent; of the French Government, represented by S. Seam, Secretary for Foreign Affairs in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent; of the Italian Government, represented by G. De Bellis; of the United Kingdom Government, represented by J.E. Collins and R. Singh; and of the Commission, represented by E. Mennens and H. Michard, at the hearing on 23 March 1999,

after hearing the Opinion of the Advocate General at the sitting on 24 June 1999,

having regard to the order reopening the procedure of 17 September 1999,

after hearing the oral observations of Mr Verkooijen, represented by F.E. Dekker; of the Netherlands Government, represented by M.A. Fierstra; of the French Government, represented by S. Seam; of the Italian Government, represented by G. De Bellis; of the United Kingdom Government, represented by J.E. Collins and R. Singh; and of the Commission, represented by E. Mennens and H. Michard, at the hearing on 30 November 1999,

after hearing the Opinion of the Advocate General at the sitting on 14 December 1999,

gives the following

Judgment

1.

By order of 11 February 1998, received at the Court on 13 February 1998, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5) and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC).

2.

Those questions were raised in proceedings between the Staatssecretaris van Financiën (State Secretary for Finance) and Mr Verkooijen, a Netherlands national, concerning the refusal to grant him exemption from income tax on share dividends received from a company established in a Member State other than the Kingdom of the Netherlands.

The national legislation

3.

At the material time, income tax in the Netherlands was governed by the Wet op de Inkomstenbelasting 1964 (1964 Law on income tax, as in force prior to 1997, hereinafter 'the Income Tax Law').

4.

Under Article 24 of the Income Tax Law, income from assets, including dividends and other payments associated with the holding of shares, was subject to income tax. Any taxpayer completing a Netherlands tax return was therefore obliged to include dividends as income from assets forming part of his taxable income.

5.

Only natural persons are subject to Netherlands income tax ('inkomstenbelasting') and this case is therefore concerned only with the distribution of dividends to natural persons.

6.

When they are distributed by companies established in the Netherlands, dividends are subject to a deduction at source by way of income tax: the tax collected in that way is known as dividend tax. The rules for deduction of that tax are laid down in Article 1(1) of the Wet op de Dividendbelasting 1965 (1965 Law on the taxation of dividends, Stbl. 1965, p. 621, hereinafter 'the Dividend Tax Law'), according to which:

'A direct tax known as "dividend tax" shall be charged to any person who, directly or on the basis of certificates, receives income from shares, participation certificates, profit-sharing bonds of public limited companies, private limited companies, partnerships limited by shares and other companies all or part of whose capital is divided into shares, established in the Netherlands.'

7.

The dividend tax may be a definitive tax. In particular, that is so where dividends on shares in a company established in the Netherlands are paid to a person who is not subject to Netherlands income tax.

8.

Conversely, where such dividends are paid to a person who is subject to Netherlands income tax, the dividend tax constitutes, by virtue of Article 63(1) of the Income Tax Law, a payment on account ('voorheffing') of income tax. Under Article 15 of the Algemene Wet inzake Rijksbelastingen (General Law on State Taxes), when income tax on aggregate income is assessed, that payment on account is set off against the tax payable on aggregate income.

9.

Article 47b of the Income Tax Law exempts income from shares, up to a specified amount, from income tax. That exemption applies to income from shares on which Netherlands dividend tax has been levied, which, under Article 1(1) of the Dividend Tax Law, is equivalent to income from shares in companies established in the Netherlands. The initial exemption of NLG 500 was raised to NLG 1 000 (an exemption of NLG 2000 being available for married persons) pursuant to the Law of 6 September 1985 (Stbl. 1985, p. 504).

10.

As in force at the material time, Article 47b of the Income Tax Law provided:

'1. The dividend exemption shall apply to income from shares in companies treated as income for the purpose of determining aggregate income from which a deduction for dividend tax has been made or has not been made pursuant to Article 4(1) of the Wet op de Dividendbelasting 1965. Dividends shall be exempted up to NLG 1 000, provided that they do not exceed the amount of the income indicated above, less the costs relating thereto other than interest on debts and costs relating to loans.

...

3. The sum of NLG 1 000 mentioned in paragraphs 1 and 2 shall be increased to NLG 2 000 for any taxpayer to whom his spouse's income, referred to in Article 5(1), is attributed.'

11.

It is clear from the legislative history of that provision that the dividend exemption (and its limitation to dividends paid by companies established in the Netherlands) fulfilled a twofold objective: first, the exemption was intended to raise the level of undertakings' equity capital and to stimulate interest on the part of private individuals in Netherlands shares; second, in particular for small investors, the exemption was intended to compensate in some measure for the double taxation which would otherwise result, under the Netherlands tax system, from the levying both of corporation tax on profits accruing to companies and of tax on the income of private shareholders imposed on the dividends distributed by those companies.

The main proceedings

12.

In 1991 Mr Verkooijen resided in the Netherlands and was employed there by Fina Nederland BV, a distributor of petroleum products indirectly controlled by Petrofina NV, a public limited liability company established in Belgium and quoted on the stock exchange.

13.

In the context of an employees' savings plan ('werknemersspaarplan‘) open to all employees of the group, Mr Verkooijen acquired shares in Petrofina NV. In 1991 a dividend was distributed in respect of those shares of about NLG 2 337 (after conversion into Netherlands gilders) which was subject to a deduction at source of 25% in Belgium. In his Netherlands tax return for 1991, Mr Verkooijen included that dividend as part of his taxable income.

14.

For the purpose of taxing Mr Verkooijen's income, the tax inspector did not apply the dividend exemption on the ground that Mr Verkooijen was not entitled to it since the dividends received by him from Petrofina had not been subject to the Netherlands dividend tax. The notice informing Mr Verkooijen of his liability to income tax and his contribution to the general social insurance scheme ('volksverzekeringen‘) for 1991 therefore indicated taxable income of NLG 166 697, including the entire dividend paid to him by Petrofina.

15.

Mr Verkooijen objected to that notice, contending that the first NLG 2 000 (he being married) of the dividend received by him should have been exempt from income tax under Article 47b(1) and (3) of the Income Tax Law.

16.

The tax inspector dismissed that objection, whereupon Mr Verkooijen appealed against that decision to the Gerechtshof te 's-Gravenhage. That court held that the limitation of the dividend exemption to income from shares from which Netherlands dividend tax had been withheld was contrary to Articles 52 and 58 of the EC Treaty (now Article 48 EC) and to Directive 88/361. It therefore annulled the tax inspector's decision and amended the tax notice, so that the tax was then calculated on taxable income of NLG 164 697.

17.

The Staatssecretaris van Financiën applied for review of the judgment of the Gerechtshof te 's-Gravenhage to the court making the present reference.

The relevant Community legislation

18.

The dispute in the main proceedings arose before the entry into force of the Treaty on European Union and therefore the Treaty provision concerning the free movement of capital which was applicable at the material time was Article 67 of the EEC Treaty (repealed by the Treaty of Amsterdam). It was worded as follows:

'During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in the Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested.'

19.

That provision was implemented by various directives, including Directive 88/361, which was applicable at the material time.

20.

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. To facilitate application of this directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.'

21.

The capital movements listed in Annex I to Directive 88/361 include:

'I. Direct investment

...

2. Participation in new or existing undertaking with a view to establishing or maintaining lasting economic links.

...

III. Operations in securities normally dealt in on the capital market (not included under I, IV and V)

...

A - transactions in securities on the capital market

...

2. Acquisition by residents of foreign securities dealt in on a stock exchange.

...'

22.

The last paragraph of the introduction to Annex I states that the list of capital movements is not exhaustive:

'This nomenclature is not an exhaustive list for the notion of capital movements - whence a Heading XIII - F. ”Other capital movements - Miscellaneous”. It should not therefore be interpreted as restricting the scope of the principle of full liberalisation of capital movements as referred to in Article 1 of the directive.‘

23.

Article 6(1) of Directive 88/361 provides:

'Member States shall take the measures necessary to comply with this directive no later than 1 July 1990. They shall forthwith inform the Commission thereof. They shall also make known, by the date of their entry into force at the latest, any new measure or any amendment made to the provisions governing the capital movements listed in Annex I.‘

The questions referred to the Court

24.

In those circumstances, the Hoge Raad der Nederlanden stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Is Article 1(1) of Directive 88/361/EEC in conjunction with Heading I(2) in Annex I to that directive to be interpreted as meaning that a restriction arising from a provision of the income tax legislation of a Member State which exempts shareholders, up to a certain amount, from liability to income tax on dividends, but restricts that exemption to dividends paid in respect of shares in companies established in that Member State, has been prohibited since 1 July 1990 pursuant to Article 6(1) of that directive?

2. If the answer to Question 1 is in the negative, are Articles 6 and/or 52 of the EC Treaty to be interpreted as meaning that a restriction of the kind referred to in that question is incompatible with one or both of those articles?

3. Do the answers to the questions set out above differ depending on whether the person seeking the benefit of such an exemption is an ordinary shareholder or an employee (of a subsidiary company) who holds the shares in question in the context of an employees' savings plan (”werknemersspaarplan”)?‘

The first question

25.

By its first question, the national court seeks essentially to ascertain whether Article 1(1) of Directive 88/361 precludes a legislative provision of a Member State which, like the provision at issue in the main proceedings, makes the grant of exemption from income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

26.

It is necessary first to consider whether the fact that a national of a Member State residing in that Member State receives dividends on shares in a company whose seat is in another Member State is covered by Directive 88/361, which implements Article 67 of the Treaty.

27.

Although the Treaty does not define the term capital movements, Annex I to Directive 88/361 contains a non-exhaustive list of the operations which constitute capital movements within the meaning of Article 1 of the directive.

28.

Although receipt of dividends is not expressly mentioned in the nomenclature annexed to Directive 88/361 as 'capital movements‘, it necessarily presupposes participation in new or existing undertakings referred to in Heading I(2) of the nomenclature.

29.

Moreover, since, in the main proceedings, the company distributing dividends has its seat in a Member State other than the Kingdom of the Netherlands and is quoted on the stock exchange, receipt of dividends on shares in that company by a Netherlands national may also be linked to 'Acquisition by residents of foreign securities dealt in on a stock exchange‘ as referred to in Heading III.A(2) of the nomenclature annexed to Directive 88/361, as Mr Verkooijen, the United Kingdom Government and the Commission contend. Such an operation is thus indissociable from a capital movement.

30.

Consequently, the receipt by a national of a Member State residing in that Member State of dividends on shares in a company whose seat is in another Member State is covered by Directive 88/361.

31.

Second, it is necessary to consider whether the fact that a Member State refuses to exempt its taxpayers who receive dividends on shares in a company whose seat is in another Member State from liability to tax on those dividends constitutes a restriction of capital movements within the meaning of Article 1 of Directive 88/361.

32.

It must be borne in mind at the outset that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-264/96 *ICI* v *Colmer (HMIT)* [1998] ECR I-4695, paragraph 19; and Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19).

33.

Second, Directive 88/361, which applied at the material time, brought about complete liberalisation of capital movements and to that end Article 1(1) thereof required the Member States to abolish all restrictions on such movements. The direct effect of that provision was recognised by the Court in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraph 33.

34.

A legislative provision such as the one at issue in the main proceedings has the effect of dissuading nationals of a Member State residing in the Netherlands from investing their capital in companies which have their seat in another Member State. It is also clear from the legislative history of that provision that the exemption of dividends, accompanied by the limitation of that exemption to dividends on shares in companies which have their seat in the Netherlands, was intended specifically to

promote investments by individuals in companies so established in the Netherlands in order to increase their equity capital.

35.

Such a provision also has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital in the Netherlands since the dividends which such companies pay to Netherlands residents receive less favourable tax treatment than dividends distributed by a company established in the Netherlands, so that their shares are less attractive to investors residing in the Netherlands than shares in companies which have their seat in that Member State.

36.

It follows that to make the grant of a tax advantage, such as the dividend exemption, relating to taxation of the income of natural persons who are shareholders subject to the condition that the dividends are paid by companies established within national territory constitutes a restriction on capital movements prohibited by Article 1 of Directive 88/361.

37.

According to the governments which have submitted observations, even if a national provision such as that relating to the dividend exemption were assumed to constitute a restriction within the meaning of Directive 88/361, it would be necessary to take account, in interpreting the Community law applicable at the material time, of the Community rules which entered into force on 1 January 1994, in particular Article 73d(1)(a) of the EC Treaty (now Article 58(1)(a) EC).

38.

The Netherlands Government states, first, that that provision grants the Member States, by way of exception to the prohibition of any restriction of capital movements between Member States laid down in Article 73b of the EC Treaty (now Article 56 EC), the right 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 or with regard to the place where their capital is invested. It is clear from Declaration No 7 annexed to the Final Act of the Treaty on European Union that Article 73d(1)(a) of the Treaty allows national tax provisions which were in force in the Member States before it came into effect to continue to distinguish between taxpayers according to their place of residence or the place where their capital is invested.

39.

Next, both the Netherlands Government and the United Kingdom Government maintain that Articles 73b to 73g of the EC Treaty (Article 73c of the EC Treaty has become Article 57 EC, Article 73e of the EC Treaty was repealed by the Treaty of Amsterdam and Articles 73f and 73g of the EC Treaty have become Articles 59 EC and 60 EC) which were introduced by the Treaty on European Union must be regarded as marking an advance in the process of liberalisation of capital or, at least, as reproducing the law as it was by 'constitutionalising‘ or 'codifying‘ the existing principles; they cannot be a step backwards.

40.

Consequently, according to those same governments, the possibility under Article 73d(1)(a) of the Treaty of applying national tax provisions distinguishing between taxpayers according to their place of residence or the place where their capital is invested existed before that provision entered into force, in particular by virtue of Directive 88/361.

41.

According to those same governments, a legislative provision of the kind at issue in the main proceedings which, for the purpose of exempting dividends, draws a distinction between taxpayers who are not in the same situation with regard to the place where their capital is invested is not contrary to Community law.

42.

In that connection, since the facts of the main proceedings antedate the entry into force of the Treaty on European Union, it is necessary to consider the compatibility of a legislative provision of the kind at issue in the main proceedings solely with reference to the provisions of the EEC Treaty and Directive 88/361.

43.

In addition, the possibility granted to the Member States by Article 73d(1)(a) of the Treaty of applying the relevant provisions of their tax legislation which distinguish between taxpayers according to their place of residence or the place where their capital is invested has already been upheld by the Court. According to that case-law, before the entry into force of Article 73d(1)(a) of the Treaty, national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225) or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system (Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305).

44.

In any event, Article 73d(3) of the Treaty states specifically that the national provisions referred to by Article 73d(1)(a) are not to constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments, as defined in Article 73b.

45.

Furthermore, the argument that 'the measures and procedures‘ referred to in Article 73 (d) (3) of the Treaty do not relate to Article 73 (d) (1)(a), in which the term 'provisions‘ is used, is irrelevant. Apart from the fact that it is difficult to distinguishbetween 'measures‘ and 'provisions‘, the term 'measures and procedures‘ does not appear at all in paragraph 2 even though Article 73d(3) refers expressly to that paragraph.

46.

Accordingly, it is necessary to examine whether the restriction on capital movements arising from a legislative provision such as that at issue in the main proceedings may be objectively justified by any overriding reason in the general interest.

47.

The United Kingdom Government submits, first, that a legislative provision such as the one at issue in the main proceedings may be objectively justified by the intention to promote the economy of the country by encouraging investment by individuals in companies with their seat in the Netherlands.

48.

In that connection, it need merely be pointed out that, according to settled case-law, aims of a purely economic nature cannot constitute an overriding reason in the general interest justifying a restriction of a fundamental freedom guaranteed by the Treaty (Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831,

paragraph 39, and Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 41).

49.

Second, all the governments which submitted observations maintain that the fact of restricting the exemption of dividends to those distributed by companies with their seat in the Netherlands was justified by the need to preserve the cohesion of the Netherlands tax system.

50.

In their submission, the exemption of dividends is intended to mitigate the effects of double taxation - in economic terms - resulting from the levying on the company of corporation tax in respect of its profits and the taxation of the same profits distributed in the form of dividends borne by natural persons who are shareholders, by way of income tax.

51.

The exemption of dividends is, they say, reserved to those shareholders who receive dividends on shares in companies with their seat in the Netherlands because only the latter are taxed in the Netherlands on the profits they have realised. Where the company which distributes the dividends is established in another Member State, profits are taxed in that Member State with the result that, in the Netherlands, there is no double taxation to be compensated for.

52.

The Netherlands Government also submitted at the hearing that the tax levied on company profits by the tax authorities of a State other than the Kingdom of the Netherlands cannot be offset by granting an exemption in respect of dividends to persons residing in the Netherlands who are shareholders of such companies since that would automatically entail a loss of revenue for the Netherlands tax authorities in that they would not receive any tax on the profits of the companies distributing dividends.

53.

Similarly, the United Kingdom Government argued that if the Netherlands tax authorities were to grant an exemption for dividends on shares in a company established outside the Netherlands, such dividends would entirely escape taxation in the Netherlands.

54.

The Netherlands Government added that to apply the dividend exemption to taxpayers who are shareholders in companies with their seat in other Member States would enable such taxpayers to secure a twofold advantage since they could enjoy tax reliefs both in the Member State in which the dividend was paid and in the Member State where it was received, namely the Netherlands.

55.

Those arguments cannot be upheld.

56.

As regards the need to preserve the cohesion of the Netherlands tax system, although the Court has held that the need to ensure the cohesion of a tax system may justify rules liable to restrict fundamental freedoms (*Bachmann* and *Commission* v *Belgium*, cited above), that is not the position here.

57.

In *Bachmann* and *Commission* v *Belgium*, a direct link existed, in the case of one and the same taxpayer, between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which related to the same tax. In those cases, there was a link between the deductibility of contributions and the taxation of sums payable

by insurers under old-age insurance and life assurance policies, which it was necessary to preserve in order to safeguard the cohesion of the tax system at issue.

58.

No such direct link exists in this case between the grant to shareholders residing in the Netherlands of income tax exemption in respect of dividends received and taxation of the profits of companies with their seat in another Member State. They are two separate taxes levied on different taxpayers.

59.

As regards the arguments concerning the loss of revenue for the Kingdom of the Netherlands that would result from exemption of dividends received by its residents who are shareholders of companies with their seat in other Member States, it need merely be pointed out that reduction in such tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (see, to that effect, in relation to Article 52 of the Treaty, the *ICI* judgment cited above, paragraph 28).

60.

Moreover, as regards the United Kingdom Government's argument mentioned in paragraph 53 of this judgment, the income received by a natural person residing in the Netherlands from shares in companies having their seat in another Member State does not systematically escape Netherlands taxation as a result of exemption of dividends; that would be the case only if the shareholder subject to Netherlands income tax received from a company established in another Member State dividends of an amount which, after conversion if necessary, did not exceed the exempted NLG 1 000 or 2000, which would place him in the same situation as if he had received dividends from companies established in the Netherlands.

61.

As regards, finally, the argument based on a possible tax advantage for taxpayers receiving in the Netherlands dividends from companies with their seat in another Member State, it is clear from settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist (see to that effect, in relation to Article 52 of the Treaty, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 21; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 53; and Case C-307/97 *Saint-Gobin ZN* [1999] ECR I-0000, paragraph 54; see, in relation to Article 59 of the EC Treaty (now, after amendment, Article 49 EC), Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-0000, paragraph 44).

62.

The answer to the first question must therefore be that Article 1(1) of Directive 88/361 precludes a legislative provision of a Member State which, like the provision at issue in the main proceedings, makes the grant of exemption from income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

The second question

63.

In view of the answer given to the first question, it is unnecessary to answer the second.

The third question

64.

By its third question, the national court seeks essentially to ascertain how the answer given to the first question might be affected by the fact that the taxpayer seeking the benefit of such a tax exemption is an ordinary shareholder or an employee holding shares on which dividends are received under an employees' savings plan.

65.

All the parties which have submitted observations maintain that the fact that a natural person applying for a tax advantage such as the dividend exemption is an ordinary shareholder or an employee who has acquired shares on which dividends are payable under a company employees' savings plan ('werknemersspaarplan‘) does not affect the answer given to the first two questions.

66.

A national legislative provision of the kind at issue in this case withholds the exemption of dividends from all taxpayers subject to income tax in the Netherlands in respect of dividends received from a company established in another Member State, without distinguishing between taxpayers who are ordinary shareholders and those who are employees whose shares were acquired under an employees' savings plan.

67.

Since the answer to the first question is that such a provision constitutes a restriction on the free movement of capital contrary to Community law regardless of the status of the shareholder, the answer to the third question must be that the position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan.

Costs

68.

The costs incurred by the Netherlands, French, Italian and United Kingdom Governments and by the Commission, 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Hoge Raad der Nederlanden by order of 11 February 1998, hereby rules:

Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty precludes a legislative provision of a Member State which, like the one at issue in the main proceedings, makes the grant of an exemption from the income tax payable on dividends paid to natural persons who are shareholders subject to the condition that those dividends are paid by a company whose seat is in that Member State.

The position is not in any way changed by the fact that the taxpayer applying for such a tax exemption is an ordinary shareholder or an employee who holds shares giving rise to the payment of dividends under an employees' savings plan.

Rodríguez Iglesias

Moitinho de Almeida

Sevón

Schintgen

Kapteyn

Gulmann

Puissochet Jann Ragnemalm

Wathelet Macken

Delivered in open court in Luxembourg on 6 June 2000.

R. Grass G.C. Rodríguez Iglesias

Registrar President