



**DOUBLE TAXATION OF FRENCH DIVIDENDS
IN BELGIUM IN THE LIGHT OF THE D JUDGMENT :
“ALLOCATING POWERS OF TAXATION”
BY WAY OF A DOUBLE TAX TREATY DOES NOT
MEAN “CARTE BLANCHE TO DOUBLE TAX”**

BY

MARC DASSESSE

PROFESSOR AT THE FREE UNIVERSITY OF BRUSSELS (ULB) (1)

**I. – PRELIMINARY REMARK : BELGIAN LAW
IS AT ODDS WITH THE COMMISSION’S COMMUNICATION
ON DIRECT TAXATION**

1. In its Communication of 19 December 2003 on “dividend taxation of individuals in the Internal Market” (2) the European Commission described “international juridical double taxation” as follows : (3)

“International juridical double taxation arises when two States tax the same taxpayer on the same income. In the case of dividends, international juridical double taxation may occur when the shareholder first suffers a withholding tax on his dividend in one State and then income tax in another State. Distributed profits of companies may suffer both economic and juridical double taxation.

Widely accepted guidelines for the elimination of international juridical double taxation of dividends are provided by the OECD Model Tax Convention on Income and Capital. According to Article 10 of the OECD Model Tax Convention dividends may be taxed in the state of residence of the shareholder, but also in the source state. However, the tax levied by the source state is limited to 15 % if the shares are held by an individual shareholder. In their

(1) mdassess@ulb.ac.be.

(2) COM (2003) 810 final.

(3) See paragraph 2.1.3.



bilateral tax treaties Member States can agree to either levy lower source taxation or none at all (and outside the treaty context they can, of course, provide unilaterally for lower or no source taxation).

Articles 23 A and 23 B of the OECD Model deal with methods for elimination of double taxation. The combined effect of articles 10 and 23 A and 23 B of the OECD Model is that in the case of individuals, the State of residence of the shareholder is allowed to tax dividends arising in the other State. However, it *must* credit against its own tax on such dividends the tax which has been collected by the State where the dividends arise (4). *No Member State has made a reservation on this part of the OECD Model.*

The credit under the OECD Model is only an ordinary credit, as opposed to a full credit. Ordinary credit means that the resident State limits the credit to its own tax on the dividend. So if the residence State does not tax the dividend, or taxes it at a lower rate than the source State, the OECD Model does not oblige the residence State to pay out the part of the foreign withholding tax in excess of the tax charged by the residence State itself.

Furthermore, articles 10 and 23 A and 23 B of the OECD Model deal only with credits for tax levied directly on the dividend by the source state, i.e. the withholding tax paid by the company on behalf of the shareholder, and not with credits for the underlying tax, i.e. the corporation tax, as is the case in imputation systems (5).

Finally it should be noted that the credit system of the OECD Model applies regardless of the applicable dividend system (classical, schedular, imputation, exemption).”

2. This description rests on the assumption that Member States are bound to abide by the OECD model convention.

It is (reportedly) accurate for all Member States...except for Belgium.

Belgium takes the view that the OECD model convention is but a *model*, and that it may therefore derogate from this model in its

(4) Paragraph 49 of the Commentary on articles 23 A and 23 B of the OECD Model Tax Convention.

(5) Paragraph 1 of the Commentary on articles 23 A and 23 B.

double tax treaties (hereafter DTT's), even though it has not made a reservation in this respect at the OECD level.

This position is best exemplified, in the context of past and currently planned takeovers of Belgian companies by French companies, by article 15 of the DTT between France and Belgium.

This DTT, which in its present version goes back to 1964, allocates to the State of residence of the shareholder the power to tax dividends received from the source State, while providing that the source State, by way of exception to that general principle, *may* levy on outgoing dividends a maximum tax of 15 %.

As a result, France may, and as a rule does, apply a withholding tax on outgoing dividends paid to Belgian individual or corporate shareholders of French companies.

However, the DTT does not, in that case, impose a corresponding, *unconditional* obligation on Belgium to grant to the resident Belgian shareholders a foreign tax credit in respect of the tax withheld by France.

Instead, article 19 of the DTT provides that Belgium will grant to Belgian corporate or individual shareholders a minimum foreign tax credit ("quotité forfaitaire d'impôt étranger") *under the conditions laid down by Belgian law*. Alternatively, Belgian individual shareholders may apply for a "Belgian tax credit", equivalent to the tax credit available *under the conditions laid down by Belgian law* in respect of dividends from Belgian sources.

Belgian law has however discontinued for several years the availability of both remedies ... but the DTT has not been amended to remove the option granted to France pursuant to article 15 to apply a maximum withholding tax of 15 % on outgoing dividends.

As a result, the French dividends received by Belgian shareholders (6) will be subject to *juridical* double taxation in (at least) three cases (7):

- a) French dividends received by individuals resident in Belgium;

(6) Reference hereafter to Belgian shareholders, to Belgian companies or to French companies or to French shareholders must be understood as referring to the place of residence for individuals, or the place of the head office ("siège social") for companies.

(7) We will not address the position of Belgian dividends received by French shareholders.

b) French dividends received by Belgian companies whenever the level of their shareholding in the relevant French company does not reach the minimum percentage required by French law (8) for the exemption of withholding tax provided for by the parent – subsidiary directive (9) to “kick in” (10).

c) French dividends received by Belgian legal entities not subject to corporation tax, but subject to a flat rate tax in respect of their dividend income; (11)

The purpose of the present contribution is *not to examine* whether Belgium, in the above examples, is required in terms of Community law to grant to Belgian shareholders of French companies a tax credit in respect of the withholding tax suffered in France (12).

Instead, its purpose is to examine whether the provision of the DTT between France and Belgium pursuant to which France *may* apply a withholding tax on outgoing dividends without imposing in

(8) 20% at the time of writing.

(9) Council Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (90/435/EEC), as amended.

(10) It will be observed that this situation can create an obstacle to attempts by a French company having a large Belgian shareholder (20% or more of the outstanding capital of the French company) to gain Belgian shareholders' approval for the takeover of another company (“the target company”) by way of a share swap. Namely, if the Belgian shareholder approves of the plans, the result may be that the percentage of his shareholding in the French company, after the takeover of the target company, falls below the 20% minimum percentage required by French law for the exemption of withholding tax on outbound dividends to apply. In other words, by giving his approval to the proposed takeover, the Belgian shareholder may make himself subject to juridical double taxation.

(11) This will be the case for private sector non-profit organisations such as certain types of pension funds, charities and the like. It will also be the case for public entities owning shares in French companies. At the time of writing (September 2005) a highly publicised example is the position of the Belgian boroughs (“communes”) which own shares in Electrabel, the largest electricity producer in Belgium. The public shareholders of Electrabel are faced with double juridical taxation if they accept the offer of the French company Suez to swap their shares in Electrabel (in part) against shares in Suez. The same is true for all other shareholders of Electrabel, including corporate shareholders. Because of the size of Suez, no (potential) Belgian corporate shareholder of Suez can reach the 20% minimum participation required to be exempted from French withholding tax.

The same kind of difficulty arose in 2004 when the French based management of the Belgian bank Dexia sought shareholders' support for the takeover of Dexia by a large Italian bank. A number of Belgian public entities, which own a very large percentage of Dexia's shares, pointed out that, if the deal went through, they would incur juridical double taxation, first in Italy, and thereafter in Belgium. Eventually the deal did not go through.

(12) That issue is presently the subject of a request for a preliminary ruling addressed by a Belgian Court to the European Court of Justice (ECJ). See case C-513/04 Kerckaert and Morres v Kingdom of Belgium. (JO.C-57/14). The request for a preliminary ruling does not however ask the Court to say whether Belgium has introduced a new (forbidden) restriction on the free movement of capital and payments by discontinuing several years ago the foreign tax credit which was previously available to Belgian shareholders in respect of the withholding tax applied by the source State.

that case a corresponding obligation on Belgium to grant a tax credit in this respect to Belgian shareholders is in breach of Community law (13).

In other words, may two Member States agree by way of a DTT to apply juridical double taxation to an outgoing dividend without breaching Community law?

3. Our analysis will be comprised of three parts.

a) A short reminder of the present state of the freedom of movement of capital and payments in Community law;

b) The lessons which can be drawn from the Manninen judgment (14) in respect of the question considered here;

c) The potential implications of the D judgment (15) for the question considered here.

II. – THE PRESENT COMMUNITY REGIME ON FREE MOVEMENT OF CAPITAL AND PAYMENTS

It is only since the coming into force of the Maastricht Treaty on 3 January 1994 that the freedom of movement of capital and pay-

(13) It should be pointed out in this connection that, prior to 1 January 2005, there was generally no significant (economic) justification for Belgian individual shareholders of French companies to raise that issue. Indeed, pursuant to the DTT with Belgium, France granted, upon request, to Belgian shareholders reimbursement of the so-called "avoir fiscal" granted to French shareholders of French companies with a view to off-setting the double economic taxation of dividends, at the level of the French companies first, and thereafter at the level of its shareholders. (A different – and less generous – system applied for Belgian corporate shareholders of French companies if the latter derived a large part of their profits from operations outside France).

The regime of the "avoir fiscal" has however been discontinued with effect from 1 January 2005. One of the reasons for this decision was the potential impact of the Manninen case reviewed below: Could France be required to grant the benefit of "avoir fiscal" to French taxpayers not only in respect of dividends received from French companies, but also in respect of dividends received from companies established in other Member States of the European Community, or of the European Economic Area (EEA)? For more details see, among others, M. DASSESE, "Taxation des dividendes transfrontaliers après l'arrêt Manninen – Etat des lieux et perspectives", *Cahiers de Droit Européen*, 3/2005; also published in *Journal de droit fiscal*, 2004 (published 2005), p. 258 sq. We will not examine here the question whether France, by discontinuing the "avoir fiscal" system, which it had previously extended to (certain) foreign shareholders to encourage foreign investment in French companies, has introduced a new, and forbidden, restriction to the freedom of movement of capital and payments.

(14) Judgment of 7 September 2004, case C-319/02.

(15) Judgment of 5 July 2005, case C-376/03. Pursuant to the rectifying order of the ECJ of 15 July 2005 in the D case, the term "nationals" is replaced by "residents" in paragraph 62 and in No.2 of the operative part of the judgment of 5 July 2005.

ments has become a full-fledged freedom, on a par with the other freedoms (16).

The key provisions to that effect are articles 56 and 58 EC which read as follows (17).

Article 56 EC :

"1. Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited".

Article 58 EC :

"1. The provisions of Article 56 shall be without prejudice to the right of Member States :

(a) 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;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

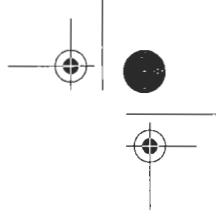
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56."

1. In other words, Member States may, among others, differentiate in their tax laws between taxpayers who are resident and who are non-resident, as well as in respect of the place where the capital of their taxpayers is invested.

This discretion is however subject to an important proviso : The possibilities of differentiation provided for by article 58 (1)(a) and (b) EC may not constitute the means of arbitrary discrimination or a disguised restriction of the free movement of capital and payments as defined in article 56 EC.

(16) It can, in some respects, even be called a super freedom : namely, contrary to what is the case of the other freedoms, the freedom of movement of capital and payments is applicable, as a rule, not only as between Member States but also as between Member States and third countries.

(17) Previously articles 73(b) to 73(h) of the EC Treaty. Since the ratification of the Amsterdam Treaty, the numbering of these articles has been changed to articles 56 to 60 EC reviewed above.



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Thus, the measures taken pursuant to article 58 (1) (a) or (b) must be proportionate to the objectives pursued, and these objectives must themselves be compatible with the provisions of the Treaty (18).

2. In contrast to what was provided by the pre-Maastricht Treaty regime, the provisions of articles 56 to 60 EC are "directly applicable".

In order to clarify the extent to which national laws and regulations restricting directly or indirectly the cross-border flows of capital and payments could be viewed as incompatible with the new Community regime embodied by articles 56 to 60 EC, the European Commission adopted in 1996 a "Communication on certain legal aspects concerning intra-EU investments" (19) (hereafter the Communication). The objective of the Communication is to indicate to national authorities and economic operators how the Commission construes these articles, on the basis essentially of the case law of the ECJ.

By its very nature, however, the Communication has no binding authority, except for the Commission itself. It is the ECJ which, in the Community's legal order, has the final say in terms of the proper construction of articles 56 to 60 EC.

In addition, attention must be paid to the fact that in as far as the Communication bases itself on the case law of the ECJ, it is basing itself on case law which predates the coming into force of articles 56 to 60 EC.

In other words, the ECJ case law to which reference is made in the Communication essentially relates to the pre-Maastricht capital movements regime, which regime was not qualified by the "fiscal

(18) Article 58 (1)(a) must be read in conjunction with the Explanatory Declaration which was included in the Maastricht Treaty, and which reads as follows:

"The Conference affirms that the right of Member States to apply the relevant provisions of their tax law as referred to in Article 58 (1)(a) of this Treaty will apply only to the relevant provisions which exist at the end of 1993. However, this Declaration shall apply only to capital movements between Member States and to payments effected between Member States."

For a comprehensive review, see, J.P. RAES, "The European Community Regime on the Free Movement of Capital". A Turkish version of that paper has been published in January 2002 by the Economic Development Foundation (Istanbul) under the following title: "EU legislation on the free movement of capital and Turkey's harmonisation", in the series "The process of Turkey's accession to the EU" (Book no.9); also, Marc DASSESE, "Does the EU Directive «on taxation of savings» violate the freedom of movement of capital?", *Butterworths Journal of International Banking and Financial Law*, January 2004, pages 12 sq.

(19) OJ C 220/15 dated 19 July 1997.



carve-out” introduced by article 58 EC with effect from 1 January 1994.

3. Since then however, a number of judgments have been handed down by the ECJ with regard to the proper construction of articles 56 to 60 EC, and in particular in regard to the scope of the “fiscal carve-out”.

Having regard to the scope of the present contribution, those cases will not be reviewed here, save for the recent *Manninen* and *D* judgments. Suffice it to say that, contrary to the expectation of the Member States which had lobbied for the introduction of a “fiscal carve-out” in the Maastricht Treaty, the freedom to differentiate granted to the Member States pursuant to article 58 (1)(a) and (b) EC has proved largely illusory. Attempts to use it as a justification for tax measures restricting the fundamental freedoms, including the freedom of movement of capital, have not met with success so far before the ECJ (20).

It is for this reason that, at the instigation of France, an attempt was made in the last days of the preparation of the so-called “European Constitution” to strengthen the “fiscal carve-out” contained in the Maastricht Treaty. Luckily, in our view, that attempt has only very marginally succeeded.

The “European Constitution”, the future of which is still very much uncertain at the time of writing, only allows individual Member States, in deliberately ambiguous terms, to restrict (to some extent) the scope of the freedom of movement of capital and payments in their relationship with *third countries* (21).

(20) Query however what will be the outcome of case C-265/04 *Bouanich* presently pending before the ECJ. See also the judgment dated 8 September 2005 in case C-512/03 *Blanckaert* dealing, however with tax issues connected with social security regimes.

(21) See article 111-158/paragraph 4. For a detailed commentary, see Ph. VIGNERON and Ph. STEINFELD, “L’effet ‘erga omnes’ de la libre circulation des capitaux dans la Constitution européenne: Un retour en arrière?”, *Revue Européenne de Droit Bancaire et Financier/European Banking & Financial Law Journal-Euredia* 2004/3, pp. 365 sq.

III. – THE LESSONS TO BE DRAWN FROM THE MANNINEN CASE

1. The key lesson to be drawn from the Manninen judgment (22), for the purposes of the question at issue, is the finding by the ECJ that (23) :

“...shareholders fully taxable in Finland find themselves in a comparable situation, whether they receive dividends from companies established in [Finland] or from companies established in [Sweden, in the instant case]. (See to that effect, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 41 to 49 and Case C-234/01 *Gerritse* [2003] ECR I05933, paragraphs 47 to 54)”.

The Finnish legislation at issue in the main proceedings refused to grant to Finnish shareholders of Swedish companies the benefit of the tax credit granted to Finnish shareholders of Finnish companies in order to prevent the double *economic* taxation of dividends received by Finnish shareholders from Finnish companies, first at the level of the Finnish company concerned and, thereafter, at the hands of the Finnish shareholder.

The ECJ held that this restriction infringed the freedom of movement of capital and payments (24) :

“...at the time when the shareholder fully taxable in Finland receives dividends, the profits thus distributed have already been subject to taxation by way of corporation tax, irrespective of whether those dividends come from Finnish or from Swedish companies. The objective pursued by the Finnish tax legislation, which is to eliminate the double [economic] taxation of profits distributed in the form of dividends, may be achieved by also granting the tax credit in favour of profits distributed in that way by Swedish companies to persons fully taxable in Finland”.

In other words, if economic double taxation is viewed as undesirable *by the legislator of the taxpayer's country of residence*, the tax credit granted to that taxpayer to prevent or mitigate economic double taxation may not be available only in respect of dividends received from domestic companies. It must also be available in

(22) For a detailed analysis see, among others, M. DASSESE, “Taxation des dividendes transfrontaliers après l'arrêt Manninen – Etat des lieux et perspectives”, *Cahiers de Droit Européen*, 3/2005; also published in *Journal de droit fiscal*, 2004 (published 2005), pp. 258 sq.

(23) See paragraph 37.

(24) See paragraph 48.

respect of dividends received from companies headquartered in other Member States of the EC.

2. What has been stated by the ECJ in the Manninen judgment is also applicable when the shareholder receiving the dividends is resident in a State which is a member of the European Economic Area Agreement (hereafter EEA). Indeed, the provisions of the EEA dealing with capital and payments are similar to the corresponding provisions of Community law.

It is interesting therefore to note that in its Fokus Bank judgment dated 23 November 2004 (25) the EFTA Court came to the same conclusion as the ECJ in a case where the discriminatory legislation was that of the source Member State and not of the Member State of residence of the shareholder.

It took the view that if economic double taxation is viewed as undesirable *by the legislator of the Member State of the company paying the dividend*, the tax credit granted to prevent it or mitigate it must be available not only in respect of dividends of local companies paid to local shareholders, but also in respect of dividends of local companies paid to foreign EC/EEA shareholders (26).

3. It should be stressed that the Manninen judgment was not concerned with the question whether the Member State of residence (namely, Finland) had to give a tax credit to Finnish shareholders of Swedish companies to avoid the *juridical* double taxation of dividends received from Swedish companies, which are subject to a withholding tax of 15%.

Namely, as expressly noted by the ECJ (27) "... in accordance with [the so-called Nordic Council Convention], the tax deducted at source in Sweden ... is deductible from the tax due by way of income tax on revenue from capital [by] the fully taxable shareholder in Finland".

(25) Case E-1/04 Fokus Bank v Kingdom of Norway.

(26) See Fokus Bank judgment at paragraph 38: "...[the freedom of movement of capital and payments] precludes legislation whereby shareholders resident in [Norway in the instant case] are granted a tax credit on dividends paid by a [local] company..., whereas non-resident shareholders [resident in another EC/EEA Member State] are not granted such a tax credit. Whether the taxpayer is resident in another [EC/EEA Member State] which, in a tax agreement with the [Member State of the company paying the dividend] has undertaken to grant credit for withholding tax, or whether the taxpayer in the specific case actually is granted, or will be granted, credit for the withholding tax [by his Member State of residence] is of no legal significance".

(27) See judgment at paragraph 13.

IV. — THE POTENTIAL IMPLICATIONS
OF THE D JUDGMENT
FOR THE QUESTION AT ISSUE

1. The relevant facts of the main proceedings in the D case can be summarised as follows :

Mr D is resident in Germany. He owns real estate in the Netherlands. Germany, at the relevant time, does not (any longer) levy a wealth tax.

The Netherlands do (still, at the relevant time) levy a wealth tax :

- a) on the worldwide assets of Dutch residents; and
- b) on the assets of non-residents localised in the Netherlands.

Residents of the Netherlands are entitled to a tax-free exemption of 193,000 Euros.

Non-residents of the Netherlands are entitled to the same tax-free allowance if 90 % or more of their worldwide assets are localised in the Netherlands.

Mr D has less than 90 % of his worldwide assets in the Netherlands. Accordingly, he is liable to pay wealth tax on his Dutch real estate assets, without deduction of the tax-free allowance available to Dutch residents.

Yet, if, all things being equal, Mr D was resident in Belgium instead of Germany, he would not be liable to pay wealth tax in the Netherlands.

Indeed, the DTT between the Netherlands and Belgium provides that residents of Belgium are entitled to the tax-free allowance available to Dutch residents, irrespective of the proportion of their total assets localised in the Netherlands.

Like Germany, Belgium does not levy a wealth tax.

As a result of judicial proceedings in the Netherlands, the ECJ was apprised of a request for a preliminary ruling by a Dutch court, which request included the following question : Does the refusal of the Dutch tax authorities to extend to Mr D the benefit of the wealth tax exemption to which he would be entitled if he was resident in Belgium, constitute an unjustified restriction of the freedom of movement of capital enshrined in article 56 EC et seq ?

2. According to the ECJ, the question must be answered in the negative for the following reasons :

“Under article 293 EC, Member States are, so far as is necessary, to enter into negotiations with each other with a view to securing for the benefit of their nationals the *abolition of double taxation* within the Community.

The Court noted in case C-336/96 *Gilly* [1998] ECR I-2793, at paragraph 23, that apart from Convention 90/436/EEC on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10), no unifying or harmonising measure for the elimination of double taxation had yet been adopted at Community level and that the Member States had not yet concluded any multilateral convention to that effect under article 293 EC.

In the absence of other Community measures or conventions involving all the Member States, numerous bilateral conventions have been concluded between the latter.

As the Court has already pointed out, the Member States are at liberty, in the framework of those conventions, to determine the connecting factors for the purposes of allocating powers of taxation (see case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 57). The Court has also accepted that a difference in treatment between nationals of the two Contracting States that results from that allocation cannot constitute discrimination contrary to article 39 EC (see *Gilly*, cited above, paragraph 30).

The main proceedings do not, however, relate to the consequences of allocating powers of taxation in relation to nationals or residents of Member States that are party to a convention, but are concerned with drawing a comparison between the situation of a person resident in a State not party to such a convention and that of a person covered by the convention.

The scope of a bilateral tax convention is limited to the natural or legal persons referred to in it...

....

[The question] asked by the national court is based on the premise that a non-resident such as Mr D. is not in a situation comparable to that of a resident of the Netherlands. The question is designed to ascertain whether Mr D.'s situation can be compared to

that of another non-resident who receives special treatment under a double taxation convention.

Similar treatment with regard to wealth tax in the Netherlands of a taxable person, such as Mr D., resident in Germany and a taxable person resident in Belgium presupposes that those two taxable persons are regarded as being in the same situation.

It is to be remembered that, *in order to avoid the same income and assets being taxed in both the Netherlands and Belgium*, article 24 of the Belgium-Netherlands Convention allocates powers of taxation between those two Member States and article 25(3) lays down a rule under which a natural person resident in one of those two States is entitled in the other to the personal allowances which are granted by it to its own residents.

The fact that those reciprocal rights and obligations apply only to persons resident in one of the two Contracting Member States is an inherent consequence of bilateral double taxation conventions. It follows that a taxable person resident in Belgium is not in the same situation as a taxable person resident outside Belgium so far as concerns wealth tax on real property situated in the Netherlands.

A rule such as that laid down in article 25(3) of the Belgium-Netherlands Convention cannot be regarded as a benefit separable from the remainder of the Convention, but is an integral part thereof and contributes to its overall balance.

Having regard to the foregoing considerations, the answer to the ... question asked must be that articles 56 EC and 58 EC do not preclude a rule laid down *by a bilateral convention for the avoidance of double taxation* such as the rule at issue in the main proceedings from not being extended, in a situation and in circumstances such as those in the main proceedings, to [residents] of a Member State which is not party to that convention.” (28)

3. It is submitted that the rationale underlying this line of reasoning is the following :

a) Member States are free to enter into bilateral tax treaties to *eliminate* double taxation by allocating powers of taxation, even if

(28) See judgment at paragraph 49 to 54 and 58 to 63.

such allocation results in a difference in treatment between nationals or residents of the two contracting states (29).

b) Member States are, on the other hand, breaching Community law if they agree in a DTT ostensibly designed to “eliminate double taxation” that, instead, a specific taxable event will be taxed twice.

Indeed, “...Member States are free to exercise their tax sovereignty, but both where they do so alone and where they act in concert, they must comply with Community law” (30).

A parallel may be made in this respect with the position taken by the Commission in the celebrated in the Lankhorst-Hohorst GmbH case (31).

Before the ECJ, the Commission took the view that Germany could be justified in applying a thin capitalisation rule which resulted in re-qualifying as non-deductible dividends interest payments made by a German company to its Dutch parent company. It went on however to add the following :

“...the Commission points to the existence, in the present case, of a risk of double taxation since the German subsidiary is subject to German taxation on interest paid, whereas the non-resident parent company must still declare the interest received as income in the Netherlands. The principle of proportionality requires that the two Member States in question reach an agreement in order to avoid double taxation.” (32)

(29) Thus, in the celebrated Gilly case (C-336/96), it was held that Member States were free to agree on a bilateral basis that public servants having the nationality of the Member State of employment and resident in the other Member State were to be taxed on their salary in the Member State of employment, whereas public servants not having the nationality of the Member State of employment would be taxed in the other Member State if resident therein.

(30) See Opinion of Advocate General Colomer in the D case at paragraph 85. The ECJ has upheld that view since its judgment in case C-270/83, *Commission v France* [1986], the “tax credit case” (see paragraph 26).

(31) Case C-324/00, judgment of 12 December 2002. See also the judgment delivered the same day by the ECJ in the *De Groot* case (C-385/00), at paragraph 101 and n° 1 of the operative part of the judgment).

(32) See judgment, at paragraph 35. See further, the Opinion of Advocate General Mischo at paragraph 68. The ECJ did not address the double tax issue in its judgment. It held that the thin capitalization rule at issue amounted to an unjustified restriction on the freedom of establishment of foreign EC parent companies in Germany. It was common ground that under the German legislation at issue, “interest paid by a resident [Germany] subsidiary on loan capital provided by a non-resident parent company is taxed as a covert dividend at a rate of 30 %, whereas, in the case of a resident subsidiary whose parent company is also resident and receives a tax credit, interest paid is treated as expenditure and not as a covert dividend.” See judgment at paragraph 29.

V. – CONCLUSION

In order to avoid the double juridical taxation of French dividends received by Belgian shareholders, the DTT provides, as a general rule, that such dividends may only be taxed by Belgium.

By way of exception to this general rule, the DTT provides that France may apply a maximum withholding tax of 15% on such dividends.

The current use of this exception by France is contrary to the free movement of capital as it results in double juridical taxation of outgoing French dividends.

It can only be remedied if the DTT is renegotiated to impose on Belgium an unconditional obligation to grant to Belgian shareholders a foreign tax credit equal to the French withholding tax.

As long as this has not come about, the French withholding tax currently applied is contrary to Community law, notwithstanding the fact that it is expressly authorised by the DTT.

Indeed, as stated bluntly by Advocate General Colomer in his opinion in the D case “the fact that a taxable event might be taxed twice is the most serious obstacle there can be to people and their capital crossing internal borders” (33).

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(33) See opinion at paragraph 85.