OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 14 December 1999 *

1. The present case was referred by the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) under Article 177 of the EC Treaty (now Article 234 EC) which has asked the Court to determine whether tax legislation granting to natural persons an exemption, up to a certain amount, from income tax on dividends paid to shareholders, on condition that the companies to which the dividends relate are established in the Member State where the taxpayer is resident, is compatible with the rules of Community law guaranteeing free movement of capital and freedom of establishment. The main proceedings arise because the tax authorities in the Netherlands did not grant Mr Verkooijen the exemption in respect of dividends he received in 1991 from a company established in Belgium.

2. By order of 17 September 1999 the Court reopened the oral stage of the proceedings which had been closed with my Opinion of 24 June 1999, being of the view that it was appropriate to clarify certain elements of the Netherlands tax system that had been raised by Mr Verkooijen and the Netherlands Government in letters received at the Court Registry on 29 and 30 June 1999. I had not considered these matters beforehand as there was no reference to them in the case file. I had given my Opinion at the time on the premiss that at the point at which the income tax of natural persons was assessed, there was in the Netherlands no provision for the deduction of the amount of the dividend tax levied at source on dividends paid by companies established in that Member State (see point 3). While I recognised that there was in this case an obstacle to free movement of capital and freedom of establishment, I had concluded that restricting the exemption to natural persons who received dividends from companies established in the Netherlands did not infringe Community law. In my opinion it was a solution justified by the necessity of preserving the cohesion of the Netherlands tax system (see points 23 to 27 and 44 of my Opinion, as well as point 1 of the conclusions thereto).

3. On the basis of the information given by Mr Verkooijen and the Netherlands Government following the reading of my Opinion it appears that the tax legislation of the Netherlands provides that, when income tax on the aggregate income of natural persons is assessed, the amount deducted from dividends when the dividend tax was levied is taken into account. I have now taken account of this and I believe that my earlier Opinion still applies as regards the existence of an obstacle to free move-

* Original language: Italian.

ment of capital and freedom of establishment. [120] However, now that the description of the legal framework is complete, I must reconsider whether, in relation to the first two questions referred, the justification based on the need to preserve the cohesion of the Netherlands tax system is still valid.

4. First of all, the underlying objective of the exemption designed to reduce the weight of double taxation cannot be understood as meaning that the Netherlands legislature took account of the fact that in our case two taxes (dividend tax and tax on the income of natural persons) are charged on one and the same dividend, as income accruing to one and the same taxpayer (see points 4 and 21 of the Opinion of 24 June 1999). In fact, by virtue of the mechanism outlined in the preceding paragraph, the dividend tax constitutes simply a payment on account, withheld at source by the company distributing the dividends, of part of the tax on aggregate income to which a shareholder is subject. The double taxation referred to by the Netherlands Government does not therefore exist other than in an *economic sense*, that is, resulting from a first levy of the tax on profits accruing to the companies distributing dividends and a second levy — when the income tax of natural persons is assessed — on the same profits when they are distributed in the form of dividends to the shareholder.

5. According to all the governments present at this stage of the proceedings the extension of the exemption to dividends received by shareholders resident in the Netherlands from companies established in other Member States would undermine the cohesion of the Netherlands tax system. These governments assert that to grant an exemption (albeit partial) from income tax to natural persons in respect of dividends distributed by companies established in Member States other than the Netherlands would mean that the Netherlands had to exempt a part of the income of the shareholder resident there for tax purposes without being able to render the distributing company liable to a tax on profits.

6. The justification based on the need to preserve the cohesion of a Member State's tax system has been argued before the Court on a number of occasions [121] but accepted only in *Bachmann*. [122] That case concerned Belgian legislation which granted a tax deduction in respect of pension and life assurance contributions on condition that the premiums had been paid to insurance companies established in Belgium. In *Bachmann* the Court acknowledged that there was a *direct link* between the right to deduct contributions and the taxation of sums payable by the insurers

120 — The answer to the third question referred for a preliminary ruling also remains unchanged since the new elements of the national legal framework referred to by Mr Verkooijen and the Netherlands Government do not impinge upon it.

121 — See the case-law referred to in point 23 of the Opinion of 24 June 1999 to which can be added Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447 and Case C-55/98 *Vestergaard* [1999] ECR I-7641.

122 — Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249.

under pension and life assurance contracts. In that case, the Court later observed in *Asscher*, [123] '[t]axpayers had a choice between being able to deduct the assurance premiums but being taxed on the capital and pensions received when the contract matured and not being able to deduct the premiums but in that case not being taxed on the capital and pensions received at maturity' (paragraph 58). The Court justified the national legislation at issue in *Bachmann* specifically on the ground that the Belgian legislature would have been able to compensate for the possible deduction from income tax of insurance premiums paid in another Member State by taxing pensions, annuities or capital sums only, clearly, where the insurers paying them were established in Belgium. In the Court's view, the cohesion of the system required that the tax-deductible premium be paid in Belgium precisely because only in that case could the taxpayer who enjoyed the benefit of the deduction be subject to the other levy on income, capital or pensions. Essentially, as the Commission noted at the hearing of 30 November 1999, *Bachmann* concerned one and the same taxpayer being subject to a single levy on income, which might or might not be deferred. [124]

7. The present proceedings, however, involve two separate taxes — one on company profits, the other on the income of natural persons, to which the exemption applies — concerning two separate persons, the company distributing dividends and the recipient shareholder (see above, point 4). Anyone seeking to discern a link between the tax on companies, which affects the profits of the company distributing dividends, and the exemption from which the shareholder benefits would, in my view, have to recognise that such a link is only indirect. Here, therefore, the direct link identified by the Court in *Bachmann* on the basis of strict, but in my view sound, criteria does not apply. Those criteria prescribe that the legislature concerned must establish a specific link between the exemption, the tax deduction, and the subjection to tax, offsetting one of these fiscal choices against the other so that the tax authorities can tax one and the same person at different times or in different ways, but always in respect of the same taxable assets or income and always in order to ensure that each taxpayer is treated in a consistent manner. Hitherto, justifications, on the ground of the cohesion of the tax system, for tax provisions which constitute an obstacle to one or more of the fundamental freedoms but which lack this essential link, which must be direct purely in the sense set out above, between the different components of the tax system, have been rejected. [125] I see no reason here to depart from this clear and settled case-law.

123 — Case C-107/94 *Asscher* [1996] ECR I-3089.

124 — To the same effect, see the recent case of *Eurowings Luftverkehr* (paragraphs 20 and 42 of the judgment and point 46 of Advocate General Mischo's Opinion) and the Opinion of Advocate General Saggio in *Vestergaard* (points 38 and 39), to which the Court refers expressly in paragraph 24 of the judgment.

125 — See Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 40 to 42; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955 paragraph 18; *Asscher*, paragraph 58 et seq; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 29; *Eurowings*, paragraph 42; and *Vestergaard*, paragraph 24.

Conclusion

8. In the light of the foregoing, and with the answer to the third question submitted by the Hoge Raad remaining as indicated in point 2 of the conclusions to my Opinion of 24 June 1999, I propose that the Court give the following answer to the first two questions:

Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty and Article 52 of the EC Treaty (now, after amendment, Article 43 EC) must be interpreted as precluding legislation of a Member State which grants an exemption from the income tax payable on share dividends subject to the condition that those dividends are paid by a company established in that Member State.