Opinion of Advocate General Kokott, 8 February 2007[1]

Case C-321/05

Hans Markus Kofoed v Skatteministeriet

I – Introduction

1. The present case raises an interesting tax-law issue in connection with the restructuring of enterprises.[2]

2. The Court is asked to consider the Community-law requirements regarding the tax treatment of a *distribution of profits* which is closely connected with a cross-border exchange of shares effected shortly beforehand. May the competent tax authority treat such a distribution of profits as partial consideration and, thus, as a cash payment made by the acquiring company in exchange for shares it has acquired as assets, an approach which would result in tax disadvantages for the taxpayers concerned?

3. The background to this case concerns a transaction in which two Danish taxpayers transferred their shares in a Danish company to an Irish company and in return acquired shares in that Irish company. A few days later, as planned from the outset, the Irish company effected a distribution of profits in favour of the two Danish taxpayers.

4. Both the exchange of shares and the resolution concerning the distribution of profits were effected shortly before the entry into force of a new Danish-Irish double taxation convention, by which it was intended to introduce less favourable rules on the taxation of dividends than those applying to Danish taxpayers under the convention in force at that time.

II – Legal framework

A – Community law

5. The Community law framework for this case is determined by Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States.[3]

6. The general provisions of Title I of Directive 90/434 include in Article 2 definitions with, inter alia, the following wording:

'For the purposes of this Directive:
…
d. "exchange of shares" shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange;
…
g. "acquired company" shall mean the company in which a holding is acquired by another company by means of an exchange of securities;
h. "acquiring company" shall mean the company which acquires a holding by means of an exchange of securities;
…'

7. In Title II of Directive 90/434, Article 8 provides, in particular:

'1. On a merger, division or exchange of shares, the allotment of securities representing the capital of the receiving or acquiring company to a shareholder of the transferring or acquired company in exchange for securities representing the capital of the latter company shall not, of itself, give rise to any taxation of the income, profits or capital gains of that shareholder.
…
4. Paragraphs 1, 2 and 3 shall not prevent a Member State from taking into account, when taxing shareholders, any cash payment that may be made on the merger, division or exchange.'

8. The final provisions set out in Title V of Directive 90/434 include in Article 11, inter alia, the following provision:

'1. A Member State may refuse to apply or withdraw the benefit of all or any part of the provisions of Titles II, III and IV where it appears that the merger, division, transfer of assets or exchange of shares:

1. Original language: German.

2. For reasons of simplicity, the expression 'restructuring' will be used hereinafter as a generic concept to denote mergers and divisions of companies, transfers of assets thereto and exchanges of shares thereof.

3. OJ 1990 L225, p.1.

a. has as its principal objective or as one of its principal objectives tax evasion or tax avoidance; the fact that one of the operations referred to in Article 1 is not carried out for valid commercial reasons such as the restructuring or rationalisation of the activities of the companies participating in the operation may constitute a presumption that the operation has tax evasion or tax avoidance as its principal objective or as one of its principal objectives;
…'

9. By means of Directive 2005/19[4] the title and various provisions of Directive 90/434 were amended. Those amendments first entered into force, however, on 24 March 2005[5] and Member States were required to ensure the transposition thereof with effect from 1 January 2006 or 1 January 2007;[6] consequently, they are not relevant to the present case.

B – National law

1. Tax treatment of exchanges of shares

10. Under Danish law, at the date relevant for these proceedings, the tax treatment of exchanges of shares was governed by the provisions of the Aktieavancebeskatningslov (Law on the taxation of gains on the disposal of shares etc.) and the Fusionsskattelov (Law on the tax treatment of mergers).[7]

11. In transposing Directive 90/434 into Danish law, Paragraph 13 of the Aktieavancebeskatningslov[8] was – as regards its first two subparagraphs[9] – amended to read as follows:

'1. In the case of exchange of shares, where both the acquiring and the acquired company are included in the definition of a "company from a Member State" set out in Article 3 of Directive 90/434/EEC, shareholders in the acquired company shall have the right to be taxed under Paragraphs 9 and 11 of the Fusionsskattelov. In this connection the date of the exchange of shares shall be regarded as the date of merger. It shall be a precondition that the exchange of shares be effected within a period of no more than six months from the first day of the exchange.
2. "Exchange of shares" (within the meaning of subparagraph 1) shall mean an operation whereby a company acquires a holding in the capital of another company such that it obtains a majority of the voting rights in that company in exchange for the issue to the shareholders of the latter company, in exchange for their securities, of securities representing the capital of the former company, and, if applicable, a cash payment not exceeding 10% of the nominal value or, in the absence of a nominal value, of the accounting par value of the securities issued in exchange.'

12. It appears from the preparatory documents relating to the legislation that the concept of an 'exchange of shares' within the meaning of Paragraph 13 of the Aktieavancebeskatningslov is intended to correspond with the definition contained in Article 2(d) of Directive 90/434.[10]

13. Paragraphs 9 and 11 of the Fusionsskattelov,[11] to which Paragraph13(1) of the Aktieavancebeskatningslov refers, provide, inter alia, as follows:

'Paragraph9
1. Where in respect of shares in the acquired company consideration provided is other than by way of shares in the acquiring company, the shareholder shall be deemed to have effected a third-party sale of the shares in the acquired company. The sale shall be deemed to be effected at the price prevailing at the time of the merger as determined in accordance with Paragraph 5.
…
Paragraph 11
1. In determining general or special taxable income, shares of the acquiring company acquired by its shareholders as consideration for the acquired company shall be treated as if they had been acquired on the same date and at the same price as the shares for which they were exchanged. …'

14. According to information provided by all parties to the same effect, no specific provision transposing Article 11 of Directive 90/434 as regards exchanges of shares was initially included in Danish law. Rather, corresponding legislation, which henceforth introduced the requirement of approval by the Ligningsråd, was not proposed until the end of 1994 and was adopted in 1995.[12]

4. Council Directive 2005/19/EC of 17 February 2005 amending Directive 90/434/EEC 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 2005 L58, p.19).

5. 24 March 2005 constitutes the twentieth day following that of the publication of Directive 2005/19 in the *Official Journal of the European Union*. In that regard, see Article 254(1) EC.

6. Article 2 of Directive 2005/19.

7. The following citation of legislative provisions is based upon information provided by the referring court in its reference for a preliminary ruling and on supplements thereto contributed by the Danish Government at the Court's request.

8. *Lovtidende* 1993, p.4171.

9. Paragraph 13(3), in conjuncation with Paragraph 4, of the Aktieavancebeskatningslov provides for special rules governing exchanges of shares in companies listed on a stock exchange; these are not relevant in the present case.

10. According to the information provided by the Østre Landsret, with reference to the explanatory notes to the draft law (*Folketingstidende*, SupplementA, 1991/92, column 517).

11. *Lovtidende* 1992, p.3374.

12. According to the information provided by the referring court, supplemented by information from Mr Kofoed, the measure concerned took the form of a draft law of 2 November 1994, approved on 25 April 1995.

2. axation of dividends

a. Danish domestic law

15. Dividends which are distributed to natural persons resident in Denmark are subject to tax in that State in accordance with Paragraph16a(1) of the Ligningslov (Law on tax assessment) [13] and Paragraph 4a of the Personskattelov (Law on income tax).[14] The same rules apply also to any cash payment made within the context of an exchange of shares. [15]

16. Paragraph 16a(1) of the Ligningslov provides as follows:

> 'In determining general taxable income, profits from shares and similar securities shall be taken into account. Profits shall include all amounts distributed by a company to its shareholders with the exception of free shares and liquidation proceeds which are paid out in the calendar year in which the company is finally wound up.'

17. Paragraph 4a of the Personskattelov has, inter alia, the following wording:

> '1. Income derived from profits shall constitute the total amount arising from:
> 1.Dividends from shares, as provided for by Paragraph 16a of the Ligningslov, which taxable companies within the meaning of ... distribute,
> ...
> 2. Income derived from profits shall not be considered as taxable income.'

18. By way of supplement, reference must be made to Paragraph 8a of the Personskattelov, which provides, inter alia, as follows:

> '1. On dividend income not exceeding a basic amount of DKK 26400, tax in the amount of 30% shall be exhaustively assessed. The dividend tax on dividend income not exceeding the basic amount, withheld in accordance with Paragraph 65 of the Law on withholding tax, shall constitute exhaustive payment of the tax and the dividend tax shall not be set off as provided for by Paragraph 67 of the Law on withholding tax against the final tax debt.
> 2. On dividend income exceeding a basic amount of DKK 26400, tax in the amount of 45% shall be assessed. Tax on dividend income exceeding the basic amount shall be included in the final tax debt and the dividend tax withheld in accordance with Paragraph 65 of the Law on withholding tax on this portion of dividend income shall be set off against the final tax debt.
> ...'

b. The Danish-Irish double taxation convention

19. The double taxation convention between the Kingdom of Denmark and Ireland, [16] applicable to the facts of the main proceedings, was ratified in Denmark on 15 April 1964.

20. Under Article VI(1)(a) of that double taxation convention, Ireland was entitled to tax a dividend paid by an Irish company to a Danish resident; imposition of a surtax was, however, excluded.

21. Article XXIII(2) of the double taxation convention provided :

> 'Where a person being resident in Denmark for the purposes of Danish tax (whether or not such person is also resident in Ireland for the purposes of Irish tax) derives income from or owns capital in Ireland and that income or capital, in accordance with the provisions of this Convention, may be taxed in Ireland, Denmark shall allow as a deduction from the income tax or capital tax that part of the income tax or capital tax, respectively, which is appropriate, as the case may be, to the income derived from or the capital owned in Ireland.'

22. According to the information provided by the Østre Landsret (Eastern Regional Court, hereinafter also: referring court), the provisions cited were interpreted consistently by the Danish courts as meaning that dividends paid by an Irish company to a Danish resident were to be granted tax relief in accordance with the exemption principle (new method).

23. In the course of the period 1992-93, the Danish-Irish double taxation convention was renegotiated, with the result that henceforth a dividend paid by an Irish company to a Danish resident could be taxed both in Ireland and in Denmark and tax paid in Ireland would be set off by Denmark. According to information provided by the referring court, inasmuch as it concerns dividends, that new double taxation convention entered into force with respect to Denmark on 7 November 1993.

III – Facts and main proceedings

24. Mr Hans Markus Kofoed originally owned a 50% stake in Cosmopolit Holding ApS, a Danish limited company. The remaining 50% of that company's share capital was held by Mr Niels Toft.

13. *Lovtidende* 1992, p.5478.
14. *Lovtidende* 1992, p.3914.
15. According to the information provided by Mr Kofoed, uncontested by the other parties.
16. Signed in Copenhagen on 4 February 1964.

25. On 26 October 1993, both of those individuals each acquired a share at the price of IEP 1 in Dooralong Ltd, a 'shell company' established under Irish law with a total paid-up capital of IEP 2.

26. On 29 October 1993, an exchange of shares took place in which Mr Kofoed and Mr Toft exchanged their respective shares in Cosmopolit Holding with a nominal value of DKK 120000 in return for newly-issued shares in Dooralong with a nominal value of IEP 10500. As a result of that exchange, Mr Kofoed and Mr Toft henceforth each owned a holding with a nominal value of IEP 10501 or 50% of Dooralong, whilst Dooralong, in turn, now held the entire share capital of Cosmopolit Holding. Henceforth, Mr Kofoed and Mr Toft thus no longer exercised control over Cosmopolit Holding directly, but rather by way of the intermediate company, Dooralong.

27. At the annual general meeting of Dooralong, held on 3 November 1993, its annual accounts as of 2 November 1993 were presented and approved. Those accounts showed a total profit in the amount of IEP 2742616 (approximately DKK 26 million) arising from the activities of its newly acquired subsidiary, Cosmopolit Holding, which in turn had presented its annual accounts on 31 October 1993. The assets of Dooralong consisted of the entire company capital of Cosmopolit Holding, which – as was stated in its own accounts as of 31 October 1993 – following distribution of its profits to Dooralong retained equity to the value of DKK 1709806, whereas previously there had been equity to a value of approximately DKK 28 million.

28. At the annual general meeting of Dooralong on 3 November 1993 it was resolved also to distribute profits in the amount of IEP 2742116.[17] Of that distribution, 50%, that is to say, IEP 1371058, was paid to Mr Kofoed.

29. According to the findings made in the main proceedings, on which the referring court relies, no commercial reasons existed for those transactions, rather the objective thereby was to save tax. Thus, at the date of the exchange of shares Mr Kofoed and Mr Toft merely had vague plans to conduct business through Dooralong.

30. Even though no binding agreement had been made concerning the profit distribution effected by Dooralong, it had been from the outset the joint intention of Mr Kofoed and Mr Toft, nevertheless, at the first general meeting following execution of the exchange of shares to distribute a substantial share of Dooralong's profit. The parties acted with knowledge of the double taxation convention in force at that time and were also aware that that convention was to be amended.

31. In his Danish tax return for 1993 Mr Kofoed relied upon the double taxation convention in force at the relevant time, according to which Dooralong's distribution of profits to him was to be considered in his case as tax-exempt in Denmark. According to the Danish legislation in force at that time, exchange of his shares in Cosmopolit Holding in return for shares in Dooralong was considered also to be tax-exempt.

32. By contrast, the Danish tax authorities treated the exchange of Mr Kofoed's shares in Cosmopolit Holding in return for shares in Dooralong and Dooralong's subsequent distribution of profits as being elements of a single transaction. Accordingly, the distribution of profits effected constituted in reality part of the proceeds of sale and thus a cash payment within the framework of an exchange of shares. Since that cash payment exceeded 10% of the nominal value of the shares transferred, the provisions on the tax-exempt exchange of shares were in his case inapplicable.

33. The fact that those views differ as to the tax treatment of the profit distribution and of the exchange of shares constitutes the reason for the main proceedings now pending before the Østre Landsret.

IV – Reference for a preliminary ruling and procedure before the Court

34. By order of 3 August 2004, received at the Court Registry on 23 August 2005, the Østre Landsret stayed proceedings and asked the Court to deliver a preliminary ruling on the following question:

> 'Is Article 2(d) of Directive 90/434 to be interpreted as meaning that there is no exchange of shares within the meaning of that directive where the persons involved in the exchange of shares, at the same time as agreeing to exchange the shares, in a non-legally binding manner, declare it to be their common intention to vote, at the first general meeting of the acquiring company after the exchange, in favour of distributing a profit in excess of 10% of the nominal value of the security transferred by way of the exchange of shares and such a profit is in fact distributed?'

35. In addition to the observations made by Mr Kofoed, in the proceedings before the Court, the Danish Government, the Government of the United Kingdom and the Commission of the European Communities submitted written and oral observations.

V – Appraisal

A – Introductory observations

36. The objective of Directive 90/434 is to remove tax disadvantages connected with the cross-border restructuring of enterprises by creating a common Community tax regime for particular operations such as mergers or exchanges of shares.[18] That regime includes tax advantages. In particular, Article 8(1) of Directive 90/434 provides that the allocation of shares to the acquiring company by reason of the exchange

17. According to the information provided by the referring court, the parties to the main proceedings agree on the fact that that distribution of profits was effected in accordance with the applicable provisions of Irish law.

18. First, second and third recitals in the preamble to Directive 90/434.

of shares may not of itself constitute a reason for taxing the proceeds of sale. It is intended by means of that provision to ensure tax neutrality as regards such restructuring operations and to prevent the taxation of hidden reserves or other asset gains before the actual realisation thereof.

37. It follows from Article 2(d) of Directive 90/434, however, that an operation may be regarded as an exchange of shares within the meaning of that directive only where any cash payment made by the acquiring company does not exceed 10% of the nominal value, or, in the absence of such a nominal value, 10% of the accounting par value of the securities acquired. The purpose of that provision is to prevent profits from being realised on a large scale – taking advantage of the tax advantages applicable in the course of a reconstruction – as if the shares in the acquired company had been sold in the market. The intention is that profits, which would be taxable on a market sale of t he shares, should not be able to escape taxation at will, simply because they have been realised in the context of a restructuring. By way of the 10% threshold, the parties to the restructuring retain, however, a certain scope for effecting cash payments by way of compensation, as may be necessary on an exchange of shares.

38. The referring court's question ultimately concerns the interpretation of the concept of a 'cash payment' under Article 2(d) of Directive 90/434. In essence, it wishes to know whether a profit distribution effected by the acquiring company at a time closely connected to its acquisition of the acquired company and which, although not agreed in a binding manner, was, nevertheless, from the outset intended as such may be regarded also as a cash payment within the meaning of that provision.

39. In the present case the answer to that question is crucial in order to determine whether the transaction effected on 29 October 1993, in which Mr Kofoed and Mr Toft transferred their shares in Cosmopolit Holding (the acquired company) to Dooralong, as acquiring company, and in return for which they themselves acquired shares in Dooralong, may still be regarded as an exchange of shares within the meaning of Directive 90/434 such that the parties may benefit from the tax exemptions set out in that legislation.

40. If, namely, the profit distribution effected by Dooralong –when the transactions executed between 29 October 1993 and 3 November 1993are viewed as a whole – were to be treated as a cash payment within the meaning of Article 2(d) of Directive 90/434, given the fact that it exceeds the 10% threshold provided for in that provision, the result would be that the transaction no longer constituted an e xchange of shares within the meaning of that provision, nor, therefore, from the outset would the prohibition of Article 8(1) of Directive 90/434 on the taxation of realised profits be applicable to the present case. The profit distribution of 3 November 1993 corresponded, namely, in value terms to an amount exceeding 10% of the nominal value of the shares in Dooralong acquired by Mr Kofoed and Mr Toft on 29 October 1993.

41. The practical consequences of the present case go beyond, however, simply clarifying the meaning of the concept of a 'cash payment'. Behind that matter of interpretation, the question ultimately at issue concerns the manner in which, in the event of company restructuring, national authorities are permitted as a matter of Community law to take intentional tax avoidance into account.

42. Within the framework of Directive 90/434 there are essentially two conceivable routes in cases such as the present – as set out below – to respond adequately to tax avoidance. First, a comparatively broad interpretation of the concept of a cash payment within the meaning of Article 2(d) of Directive 90/434 falls to be considered,[19] second, recourse to the possibility granted by Article 11(1)(a) of that directive, in an individual case to withdraw or refuse to apply all or any part of the applicable tax benefits.[20] The Danish authorities' preference for the former approach appears not least to be connected to the fact that at the time relevant for these proceedings no specific provision existed in Danish law that transposed Article 11 of Directive 90/434.

B – The concept of a cash payment

43. The parties to these proceedings disagree as to whether the concept of a cash payment within the meaning of Article 2(d) of Directive 90/434 may also include a distribution of profits by the acquiring company, as was effected in the present case. The Danish Government and the Government of the United Kingdom answer that question in the affirmative, whereas Mr Kofoed and the Commission take the opposite view.

44. The concept of a cash payment has not been defined more specifically by the Community legislature. Its meaning and scope must be determined, therefore, by reference to the context of the provision and to the objectives pursued by Directive 90/434.[21]

45. As regards, first, the context of the provision, consideration must be given to the fact that, according to Article 2(d) of Directive 90/434, the cash payment and acquisition of a holding by which the majority of the voting rights in the acquired company[22] are acquired constitute elements of the same operation. Thus, even if the cash payment and acquisition of the majority holding do not necessarily have to constitute the subject-matter of the same legal transaction,[23] there is, nevertheless, a close connection between them. The cash payment constitutes an

19. On that possibility, see below, points43 to 54 of this Opinion.

20. On that possibility, see below, points55 to 68 of this Opinion.

21. See, to that effect, Case C-17/03 *VEMWand Others* [2005] ECR I-4983, paragraph 41, Case C-212/04 *Adeneler and Others* [2006] ECR I-0000, paragraph 60, and Case C-36/05 Commission v *Spain* [2006] ECR I-0000, paragraph 25.

22. For reasons of simplicity, reference will be made hereinafter only to (acquisition of) the *majority holding*

23. Among the different language versions of Article 2(d) of Directive 90/434 only the Dutch appears to use the relatively narrow term of 'rechtshandeling', whereas in the Czech ('operace'), Danish ('transaktion'), Greek ('p????'), English ('operation'), Spanish ('operación'), Estonian ('tehing'), Finnish ('liiketoimi'), French ('opération'), Hungarian ('mûvelet'), Italian ('operazione'), Lithuanian ('operacija'), Latvian ('operâcija'), Maltese ('hidma'), Polish ('operacja'), Portuguese ('operação'), Slovakian ('operácia'), Slovene ('operacija') and Swedish ('förfarande') versions open-ended formulations, comparable with the German term 'Vorgang', are used throughout.

integral element of the consideration provided by the acquiring company in order to acquire the majority holding in the acquired company.[24]

46. Accordingly, not every payment of money made by the acquiring company to the shareholders of the acquired company, notwithstanding the fact that such payment had from the outset been planned by the parties and was effected at a time closely connected to the acquisition of the majority holding, can be treated as a cash payment. Instead, what is decisive is whether such a payment of money also has the characteristics of consideration for the acquisition of the majority holding and, thus, in addition to the actual consideration, consisting of shares in the acquiring company, was agreed in binding terms. In determining this, a general appraisal in objective terms of all the circumstances of the individual case is required.[25]

47. It must be examined, therefore, also in the case of a subsequent distribution of profits, as in the present proceedings, whether there are specific indications pointing to such payment as constituting an element of the consideration agreed in binding terms for the acquisition of the majority holding. Such indications may be derived, in particular, from the parties' written agreements, but also from all other circumstances of the individual case. If, on the contrary, as the referring court appears to presume in the present case, it cannot be shown with a sufficient degree of certainty that the payment of money effected at a later time was intended to be a component – agreed in binding terms – of the consideration, then the characterisation ascribed by the parties themselves must be assumed to be correct; the payment of money must be treated then as a distribution of profits and may not, for example, be interpreted as a cash payment.

48. The objective of Directive 90/434, too, points in favour of restricting the concept of a cash payment to genuine consideration for the acquisition of a majority holding. That directive seeks, namely, to remove tax disadvantages to cross-border restructuring of enterprises – for example, by way of a merger or the exchange of shares – such as to permit the enterprises concerned to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength.[26] In order effectively to realise that aim of the directive, it is essential that cross-border restructuring is not merely subjected to a common tax system,[27] but also that the provisions of that system are foreseeable for the economic players concerned.

49. Moreover, the requirement that the applicable tax rules be foreseeable also follows from the principle of legal certainty,[28] which is a fundamental principle of Community law and as such must be respected both by Community institutions and Member States when exercising the respective powers conferred on them by Community law.[29] According to the Court's consistent case-law, that principle of legal certainty must be observed all the more strictly in the case of a measure liable to have financial consequences;[30] that requirement applies indeed as regards Directive 90/434, the provisions of which have a crucial bearing on the tax treatment of cross-border restructuring of enterprises.

50. Thus, where an exchange of shares is planned, the parties must be able to foresee with a sufficient degree of certainty what the consequences of the transaction will be in terms of their tax position. Only in those circumstances are they at all capable of reaching a meaningful assessment as to whether such a measure makes sense for them in economic terms. The tax consequences would be incalculable, on the contrary, if, on an exchange of shares, there might be a risk that monetary payments effected merely at a time closely connected thereto but which the parties had not agreed in binding terms as consideration for the share transfer would susbsequently have to be included also in the tax assessment of the transaction.

51. First, in those circumstances, the parties would have to fear lest the exchange of their shares were to fall completely outside the scope of the tax exemption on proceeds of sale set out in Article 8(1) of Directive 90/434. Second, the fact must be considered that on profit distributions effected shortly thereafter the tax charge under national law may vary also in its amount depending on whether that payment is taxed as a dividend or remains to be treated as a cash payment and, thus, is taxed in accordance with the possibility provided for by Article 8(4) of the Directive.

52. Nor can a wider interpretation of the concept of a cash payment be justified by the aim – pursued by Directive 90/434 – of safeguarding the Member States' financial interests and affording them the opportunity to prevent tax evasion and tax avoidance.[31] First, the Community legislature adopted for that very purpose a specific provision in Directive 90/434, as a glance at Article 11(1)(a) indicates. Second, a general broadening of the concept of cash payment would go beyond what is necessary to safeguard the Member States' financial interests and to prevent tax evasion and tax avoidance without at the same time putting at risk the foreseeability of the common system of taxation for the undertakings concerned.

24. Since the entry into force of Directive 2005/19, a cash payment within the meaning of Article 2(d) of Directive 90/434 may be effected also in consideration for the acquisition of further securities by means of which existing control of the acquired company is strengthened. The following observations apply also to such cases.

25. The need to examine in their entirety all the circumstances of an individual case is emphasised also in Case C-43/00 *Andersen og Jensen* [2002] ECR I-379, paragraphs 25, 26 and 37, which is concerned likewise – though with regard to Article 2(c) and (i) – with the interpretation of Directive 90/434.

26. See the first and second recitals in the preamble to Directive 90/434.

27. See the fourth recital in the preamble to Directive 90/434.

28. To that effect, the Court's consistent case-law, see only Case C-110/03 *Belgium* v *Commission* [2005] ECR I-2801, paragraph 30, Case C-248/04 *Koninklijke Coöperatie Cosun* [2006] ECR I-0000, paragraph 79, and Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 72.

29. Case C-376/02 *'Goed Wonen'* [2005] ECR I-3445, paragraph 32, and Joined Cases C-181/04 to C-183/04 *Elmeka* [2006] ECR I-0000, paragraph 31; similarly Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi* [2005] ECR I-3565, paragraph 69, and Case C-13/05 *Chacón Navas* [2006] ECR I-0000, paragraph 56.

30. *Koninklijke Coöperatie Consun*, cited in footnote 28, paragraph 79; see also Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, paragraph 24, Case C-236/02 *Slob* [2004] ECR I-1861, paragraph 37, and Case C-94/05 *Emsland-Stärke* [2006] ECR I-2619, paragraph 43.

31. Fourth and ninth recitals in the preamble to Directive 90/434.

53. To similar effect, the Court held in Leur-Bloem that the common system of taxation provided for by Directive 90/434 applies irrespective of whether the reasons for an exchange of shares are financial, commercial or simply fiscal.[32] From that finding, it may be concluded that, on interpreting the concept of a cash payment, as such, the possible motives underlying the respective transaction ought not yet to play a part, but instead can become relevant only in an individual case within the context of a review aimed at detecting possible abuse in accordance with Article 11 of Directive 90/434.[33]

54. Therefore, both systemic and teleological considerations militate as a whole against a broad interpretation of the concept of a cash payment within the meaning of Article 2(d) of Directive 90/434 and point in favour of restricting it to genuine consideration for the acquisition of a majority holding. Against that background, I have reached the following interim conclusion:
Payments of money, for example, profit distributions, effected by an acquiring company, not agreed in a binding manner as consideration for the holding by which that company acquires a majority of the voting rights in the acquired company are not included within the concept of a cash payment within the meaning of Article 2(d) of Directive 90/434, even if those payments were from the outset planned by the parties and were effected at a time closely connected to the acquisition of that holding.[34]

C – Possibilities for dealing with intentional tax avoidance

55. The extent to which national authorities in a case such as the present may deal with any potential tax avoidance intended in connection with an exchange of shares remains to be examined.

56. As I have already outlined, the objectives of Directive 90/434 are, inter alia, to safeguard Member States' financial interests and to afford them the opportunity of taking effective measures to prevent tax avoidance and tax evasion.[35] The narrow interpretation I proposed concerning the concept of a cash payment[36] does not contradict that aim in any way. Rather, that is the very aim which Article 11(1)(a) of Directive 90/434 seeks to attain.

57. That provision constitutes ultimately an expression of the principle which is recognised also in consistent case-law: Community law cannot be relied on for fraudulent or abusive ends. The scope of Community law must in no case be extended to cover abuses on the part of economic operators, that is to say, activities not carried out in the context of normal commercial transactions, but solely for the purpose of wrongfully obtaining advantages provided for by Community law.[37]

58. Naturally, conduct merely taking advantage of the options presented by Community law – in this case by Directive 90/434– cannot by itself justify suspicion of abuse.[38] According to Article 11(1)(a) of Directive 90/434, Member States are permitted, however, to refuse to apply or withdraw the benefit of all or any part of the tax advantages provided by that directive in connection with an exchange of shares if such a transaction has tax evasion or tax avoidance as its principal objective or as one of its principal objectives.

59. As a general example of such an objective, the second sentence of Article 11(1)(a) of Directive 90/434 mentions the situation in which valid commercial reasons for the transaction concerned are absent. In a case such as the present, in which, according to the facts as found by the referring court, no specific commercial reason existed for the transaction, rather its objective was to save tax,[39] a refusal to apply the tax exemption provided by Article 8(1) of Directive 90/434 may certainly be considered. An exchange of shares by which it is sought purely to attain tax advantages does not serve a valid commercial purpose within the meaning of the Directive.[40] Leaving that matter to one side, the close connection in terms of time between the distribution of profits and the exchange effected may point also towards possible abuse of the options presented by Directive 90/434. The same can be said also of the fact that the parties acted with knowledge of the imminent amendment to the Danish-Irish double taxation convention.

60. Whether it is justified in an individual case to refuse to apply or to withhold all or any part of the tax advantages provided by Directive 90/434 in connection with an exchange of shares depends on a general assessment of all the circumstances of the individual case, which is for the relevant national authorities to perform and which must be open to judicial review.[41]

32. Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraph 36.

33. The fact that an appraisal of the motives for an exchange of shares is conditional on a comprehensive assessment of the individual case is also emphasised in *Leur-Bloem*, judgment cited in footnote 32, paragraphs 41 and 44.

34. Simply for the sake of completeness, I will mention the fact that since the entry into force of Directive 2005/19 my conclusion correspondingly applies also as regards the acquisition of further securities by means of which the acquiring company's existing control over the acquired company is strengthened.

35. See above, point52 and footnote 31 of this Opinion.

36. On that issue, see immediately above, points43 to 54 of this Opinion.

37. Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24, with further references therein; Case C-456/04 *Agip Petroli* [2006] ECR I-3395, paragraph 20; Case C-196/04 *Cadbury Schweppes*[2006] ECR I-0000, paragraph 35 and *Halifax*, cited in footnote 28, paragraphs 68 and 69.

38. To the same effect, with regard to taking advantage of the freedom of establishment (Article 43 EC), *Centros* (paragraph 27) and *Cadbury Schweppes* (paragraphs 36 to 38), cited in footnote 37.

39. The parties appear to have been aware that a new – for them less advantageous – Danish-Irish double taxation convention was about to enter into force, thus by means of an exchange of shares followed by a subsequent profit distribution effected by the Irish company they had at that time an incentive to save tax (see points29 and 30 of this Opinion).

40. *Leur-Bloem*, cited in footnote 32, paragraph 47.

41. *Leur-Bloem*, cited in footnote 32, paragraph 41.

61. The present case is distinguished by the peculiarity that at the time relevant for these proceedings Danish law did not contain any specific provision implementing Article 11(1)(a) of Directive 90/434. Mr Kofoed, in particular, takes the view, therefore, that he was wrongly denied the advantages of Directive 90/434.

62. However, it is not always necessary formally to enact the requirements of a directive in specific legal provisions; instead, depending on the directive's content, the general legal context – including general principles of national constitutional or administrative law – may suffice as implementation if it thereby guarantees full application of the directive in a sufficiently clear and precise manner.[42]

63. It will be the task of the referring court to determine, therefore, whether in the present case general provisions or principles of national law cannot also be applied, as a result of which, for example, sham transactions are disregarded for tax purposes or reliance on particular tax advantages for abusive ends is prohibited; likewise, recourse to the general provisions of national law on tax evasion or tax avoidance remains possible.[43] At the hearing before the Court the representatives of Mr Kofoed and the Danish Government disagreed as to the possibilities available in that regard under Danish law.

64. Naturally, all those provisions, whether adopted in transposition of Directive 90/434 or not, must respectively be interpreted and applied in accordance with Community law and, in particular, with the wording and objectives of Directive 90/434 and Article 11(1)(a) thereof.[44]

65. The fact that on interpreting national law in accordance with Community law detriment to an individual may result does not militate against such interpretation. It is lawful, by way of national law provisions, that is to say, indirectly, to apply Community law to the detriment of an individual.[45]

66. The Danish authorities would be precluded merely from directly applying Article 11(1)(a) of Directive 90/434 to the detriment of Mr Kofoed and Mr Toft. A Member State cannot rely against an individual on provisions of a directive which it itself has not transposed.[46] Consistent case-law provides that a directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual.[47]

67. The competent authorities would also be precluded from relying directly, against an individual, on any existing general principle of Community law prohibiting the misuse of law. Namely, in cases falling within the scope of Directive 90/434, such a principle has been given specific effect in Article 11(1)(a) of the Directive and has been expressed in a concrete manner.[48] If it were to be permitted, in addition, to have recourse to a general principle which in terms of content is much less clear and precise, there would be a danger, thus, that the harmonisation objective of Directive 90/434 would be undermined and the legal certainty surrounding the restructuring of companies[49] which it seeks to achieve would be jeopardised. Moreover, such an approach would undermine the prohibition, already mentioned, on directly applying untransposed provisions of directives to the detriment of individuals.[50]

68. In summary, therefore, it is appropriate to find that:

> A specific provision transposing Article 11(1)(a) of Directive 90/434 is not necessarily required in order to refuse to apply or withdraw the benefit of all or any part of the provisions of Title II of Directive 90/434 in an individual case. Instead, recourse may be had for that purpose also to general provisions of national law, including general provisions of national constitutional and administrative law, provided that such provisions are applied and interpreted in conformity with Community law and, in particular, with the wording and objectives of Directive 90/434 and Article 11(1)(a) thereof. By contrast, neither direct application of Article 11(1)(a) of Directive 90/434 to the detriment of an individual nor direct recourse to a general Community prohibition on the misuse of law is permitted.

42. Consistent case-law to that effect, see, for example, Case C-456/03 *Commission* v *Italy* [2005] ECR I-5335, paragraph 51, and Case C-428/04 *Commission* v *Austria* [2006] ECR I-3325, paragraph 99.

43. To the same effect, for example, Case 8/81 *Becker* [1982] ECR 53, paragraph 34.

44. On the obligation of national courts to interpret national law in accordance with directives, see consistent case-law and, in particular, Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, paragraph 26, Joined Cases C-397/01 to C-403/01 *Pfeiffer and Others* [2004] ECR I-8835, paragraphs 113 to 119, with further references, and *Adeneler*, cited in footnote 21, paragraphs 108, 109 and 111.

45. Thus it is recognised that the obligation to interpret national law in accordance with directives applies also as regards legal relationships in which a burden is necessarily imposed on a private individual: these are, first, horizontal legal relationships, that is to say, those between private individuals (see only Case C-106/89 *Marleasing* [1990] ECR I-4135, paragraphs 6 and 8, Case C-91/92 *Faccini Dori* [1994] ECR I-3325, paragraphs 20, 25 and 26), and, second, triangular situations (see Case C-201/02 *Wells* [2004] ECR I-723, paragraph 57, with further references). To the same effect, see also my Opinion in Joined Cases C-387/02, C-391/02 and C-403/02 *Berlusconi and Others* [2005] ECR I-3565, point 153.

46. Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR I-5357, paragraph 21; Case C-168/95 *Arcaro* [1996] ECR I-4705, paragraph 42; Case C-102/02 *Beuttenmüller* [2004] ECR I-5405, paragraph 63, and Case C-184/04 *Uudenkaupungin kaupunki* [2006] ECR I-3039, paragraph 28.

47. See, in particular, *Pfeiffer*, cited in footnote 44, paragraph 108, with further references, and *Berlusconi*, cited in footnote 29, paragraph 73; emphasis added.

48. In other respects, too, in matters which are *exhaustively* harmonised at Community level, national measures relating thereto must be assessed in the light of the provisions of that harmonising measure and not those of primary law (Case C-324/99 *DaimlerChrysler* [2001] ECR I-9897, paragraph 32, and Case C-210/03 *Swedish Match* [2004] ECR I-11893, paragraph 81). The possibility of reviewing the legality of secondary law in the light of higher norms of primary law in accordance with Article 220EC et seq. remains, of course, at all times unaffected.

49. On that matter, see, in particular, points 48 to 51 of this Opinion.

50. Unclear on this point, Case C-144/04 *Mangold* [2005] ECR I-9981, paragraphs 74 to 77.

VI – Conclusion

69. In the light of the foregoing observations, I propose that the Court should reply to the Østre Landsret as follows:

1. Payments of money, for example, profit distributions, effected by an acquiring company, not agreed in a binding manner as consideration for the holding by which that company acquires a majority of the voting rights in the acquired company are not included within the concept of a cash payment within the meaning of Article 2(d) of Directive 90/434/EEC, even if those payments were from the outset planned by the parties and were effected at a time closely connected to the acquisition of that holding.
2. A specific provision transposing Article 11(1)(a) of Directive 90/434/EEC is not necessarily required in order to refuse to apply or withdraw the benefit of all or any part of the provisions of Title II of Directive 90/434/EEC in an individual case. Instead, recourse may be had for that purpose also to general provisions of national law, including general provisions of national constitutional and administrative law, provided that such provisions are applied and interpreted in conformity with Community law and, in particular, with the wording and objectives of Directive 90/434/EEC and Article 11(1)(a) thereof. By contrast, neither direct application of Article 11(1)(a) of Directive 90/434/EEC to the detriment of an individual nor direct recourse to a general Community prohibition on the misuse of law is permitted.