EUJ

EU Court of Justice, 20 December 2017*

Joined Cases C-504/16 and C-613/16

Deister Holding AG, formerly Traxx Investments NV (C-504/16), Juhler Holding A/S (C-613/16) v Bundeszentralamt für Steuern

Sixth Chamber: *C. G. Fernlund (Rapporteur), President of the Chamber, J.-C. Bonichot and E. Regan, Judges*

Advocate General: *M. Campis Sánchez-Bordona*

1. These requests for a preliminary ruling concern the interpretation of Article 49 TFEU and of Article 1(2) and Article 5 of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) ('the Parent-Subsidiary Directive').

2. The requests have been made in proceedings between Deister Holding AG, formerly Traxx Investments NV ('Traxx'), and Juhler Holding A/S, on the one hand, and the Bundeszentralamt für Steuern (Federal Central Tax Office, Germany) on the other, concerning the latter's refusal to exempt dividends received from those companies' German subsidiaries from withholding tax.

Legal context

European Union law

3. The third and fifth recitals of the Parent-Subsidiary Directive state:

> 'Whereas the existing tax provisions which govern the relations between parent companies and subsidiaries of different Member States vary appreciably from one Member State to another and are generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State; whereas cooperation between companies of different Member States is thereby disadvantaged in comparison with cooperation between companies of the same Member State; whereas it is necessary to eliminate this disadvantage by the introduction of a common system in order to facilitate the grouping together of companies;
> …
> Whereas it is furthermore necessary, in order to ensure fiscal neutrality, that the profits which a subsidiary distributes to its parent company be exempt from withholding tax …'

4. Article 1 of that directive provides:

> '1. Each Member State shall apply this Directive:
> – to distributions of profits received by companies of that State which come from their subsidiaries of other Member States,
> – to distributions of profits by companies of that State to companies of other Member States of which they are subsidiaries,
> …
> 2. This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.'

5. Article 2 of the directive provides:

> 'For the purposes of this Directive "company of a Member State" shall mean any company which:
> a. takes one of the forms listed in the Annex hereto;
> b. according to the tax laws of a Member State is considered to be resident in that State for tax purposes and, under the terms of a double taxation agreement concluded with a third State, is not considered to be resident for tax purposes outside the Community;
> c. moreover, is subject to one of the following taxes, without the possibility of an option or of being exempt:
> …
> – selskabsskat in Denmark,

* Language of the case: German.

– Körperschaftsteuer in the Federal Republic of Germany,

…

– vennootschapsbelasting in the Netherlands,

…'

6. Article 3 of the directive states:

'1. For the purposes of applying this Directive:
a. the status of parent company shall be attributed at least to any company of a Member State which fulfils the conditions set out in Article 2 and has a minimum holding of 20% in the capital of a company of another Member State fulfilling the same conditions;
such status shall also be attributed, under the same conditions, to a company of a Member State which has a minimum holding of 20% in the capital of a company of the same Member State, held in whole or in part by a permanent establishment of the former company situated in another Member State.
from 1 January 2007 the minimum holding percentage shall be 15%;
from 1 January 2009 the minimum holding percentage shall be 10%;
b. "subsidiary" shall mean that company the capital of which includes the holding referred to in (a).
2. By way of derogation from paragraph 1, Member States shall have the option of:
– replacing, by means of bilateral agreement, the criterion of a holding in the capital by that of a holding of voting rights,
– not applying this Directive to companies of that Member State which do not maintain for an uninterrupted period of at least two years holdings qualifying them as parent companies or to those of their companies in which a company of another Member State does not maintain such a holding for an uninterrupted period of at least two years.'

7. Under Article 5(1) of the directive:

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

8. The annex to that directive, headed 'List of companies referred to in Article 2(1)(A)', includes:

'a. companies incorporated under Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE) [(OJ 2001 L 294, p. 1)] and Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees [(OJ 2001 L 294, p. 22)] and cooperative societies incorporated under Council Regulation (EC) No 1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) [(OJ 2003 L 207, p. 1)] and Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees [(OJ 2003 L 207, p. 25)];
…
e. companies under Danish law known as "aktieselskab" and "anpartsselskab". Other companies subject to tax under the Corporation Tax Act, insofar as their taxable income is calculated and taxed in accordance with the general tax legislation rules applicable to "aktieselskaber";
f. companies under German law known as "Aktiengesellschaft", "Kommanditgesellschaft auf Aktien", "Gesellschaft mit beschränkter Haftung", "Versicherungsverein auf Gegenseitigkeit", "Erwerbs- und Wirtschaftsgenossenschaft", "Betriebe gewerblicher Art von juristischen Personen des öffentlichen Rechts", and other companies constituted under German law subject to German corporate tax;
…
s. companies under Dutch law known as "naamloze vennnootschap", "besloten vennootschap met beperkte aansprakelijkheid", "Open commanditaire vennootschap", "Coöperatie", "onderlinge waarborgmaatschappij", "Fonds voor gemene rekening", "vereniging op coöperatieve grondslag" and "vereniging welke op onderlinge grondslag als verzekeraar of keredietinstelling optreed", and other companies constituted under Dutch law subject to Dutch corporate tax;
…'

German law

9. Paragraph 36 of the Einkommensteuergesetz (Law on Income Tax), in the version in force at the time of the relevant facts in the main proceedings ('the EStG'), provides:

'1. Save as otherwise provided for in this law, income tax shall be charged at the end of the tax period.
2. The following shall be set off against income tax:
1. advance payment of income tax in respect of the tax period (Paragraph 37);

2. income tax charged by way of tax deduction, in so far as it is chargeable on the income included for the assessment of that tax or income which, under Paragraph 3(40) of this law or Paragraph 8b(1) and (6), second sentence, of the Körperschaftssteuergesetz [Law on corporation tax], is not taken into account when calculating income and a refund has not been applied for or carried out. The income tax charged by way of tax deduction is not set off if the certificate referred to in Paragraph 45a(2) and (3) has not been produced. In the cases referred to in Paragraph 8b(6), second sentence, of the Law on corporation tax, it is sufficient, for the purposes of set off, to produce the certificate referred to in Paragraph 45a(2) and (3) as delivered to the creditor of the income from capital income from capital.
3. The amount of tax referred to in subparagraph (2)(2) shall be rounded to the nearest Euro. As far as concerns withholding tax, the sum of the amounts of each deduction shall be rounded to the nearest Euro.
4. If, after the set off, there is an excess to the detriment of the taxable person, the latter (the tax debtor) must pay this amount immediately in so far as it corresponds to chargeable advance payment of income tax not yet been made, and otherwise within a month from notification of the tax assessment (final payment). If, after the set off, there is an excess in favour of the taxable person, it shall be paid to the taxable person after notification of the tax assessment. …'

10. Paragraph 43(1), first sentence, of the EStG provides:

'The following categories of income from capital from domestic and, in the cases set out in subparagraphs (6), (7)(a) and (8) to (12) as well as in the second sentence, foreign sources shall be charged by way of tax deduction:
1. income from capital within the meaning of Paragraph 20(1), points 1 and 2. The same shall apply mutatis mutandis to income from capital within the meaning of Paragraph 20(2), point (2)(a), and the second sentence of Paragraph 20(2), point 2;
…'

11. Under Paragraph 43b(1) of the EStG, on application by the taxable person, the tax on income from capital tax shall not be charged on income from capital, within the meaning of Paragraph 20(1)(1) of that law, received from a subsidiary's distribution of dividends by a parent company which has neither its registered office nor its management in national territory.

12. According to Paragraph 43b(2)(1) of the EStG, a 'parent company' is defined for the purposes of Paragraph 43b(1) as a company which satisfies the conditions set out in Annex 2 to that law and which, in accordance with Article 3(1)(a) of Directive 90/435, as amended by Directive 2006/98, can, at the time when the tax on income from capital tax is triggered under Paragraph 44(1)(2) of the EStG, be shown to have a direct holding of at least 15% in the capital of the subsidiary.

13. The fourth sentence of Paragraph 43b(2) of the EStG provides that it must also be shown that the holding has been maintained for an uninterrupted period of twelve months.

14. Paragraph 50d(3) of the EStG provides:

'A foreign company has no entitlement to complete or partial relief under subparagraphs 1 or 2 to the extent that persons have holdings in it who would not be entitled to the refund or exemption if they earned the income directly, and
1. there are no economic or other substantial reasons for the involvement of the foreign company or
2. the foreign company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity or
3. the foreign company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose.
The circumstances of the foreign company shall be the sole decisive factor; organisational, economic or other substantial features of undertakings that are affiliated with the foreign company (Paragraph 1(2) of the Außensteuergesetz (Foreign Transaction Tax Law)) shall not be considered. A foreign company does not have its own economic activity if it earns its gross income from the management of assets or assigns its main business activities to third parties. …'

15. Paragraph 42 of the Abgabenordnung (General Tax Code) states:

'1. It shall not be possible to circumvent tax legislation by abusing arrangements that are possible under the law. Where the conditions set by a provision of tax law to prevent tax evasion are satisfied, the legal consequences shall be determined under that provision. If not specified, tax shall, in the event of abuse within the meaning of subparagraph 2, be charged to the same extent as if a loyal arrangement appropriate to the economic transactions concerned had been used.

> 2. An abuse shall exist where an inappropriate loyal arrangement is selected which, in comparison with an appropriate arrangement, leads to a tax advantage unintended by law for the taxable person or a third party. This shall not apply where the taxable person demonstrates non-tax reasons for the arrangement selected which are relevant in view of the overall situation.'

The disputes in the main proceedings and the questions referred for a preliminary ruling

16. According to the order for reference in Case C-504/16, Deister Holding is the successor in title of Traxx, which had its registered office in the Netherlands. Traxx principally had holdings in several companies established in various States and financed those companies, inter alia, by making loans to the companies of the group in question.

17. From 2005, Traxx had a holding amounting to at least 26.5% of the capital in Deister electronik GmbH, a company incorporated under German law. From March 2007, Traxx had a rented office in the Netherlands and two employees there in 2007 and 2008. Traxx's sole shareholder, Mr Stobbe, was resident in Germany.

18. On 19 November 2007, Deister electronik paid dividends to Traxx, on which Deister electronik withheld the tax on income from capital tax and the solidarity surcharge, and remitted the amounts to the tax authorities. On 16 May 2008, Traxx applied for an exemption from the tax and surcharge in respect of that distribution of dividends.

19. Following decisions in which the tax authority rejected that application and the complaint made against the rejection, Deister Holding, as the successor in title of Traxx, brought an action against those decisions before the Finanzgericht Köln (Finance Court, Cologne, Germany) on the ground that the relevant legislation in the main proceedings is incompatible with the freedom of establishment and the Parent-Subsidiary Directive.

20. According to the order for reference in Case C-613/16, Juhler Holding is a holding company with its registered office in Denmark. Juhler Services Limited, a company incorporated under Cypriot law, holds 100% of the capital in Juhler Holding. Juhler Services Limited's sole shareholder is a natural person resident in Singapore.

21. Juhler Holding has holdings in more than 25 subsidiaries, some of which also have their registered office in Denmark, the Member State in which it is established. The group in question supplies personnel procurement services to the extent of a third of the volume of such services in Denmark. Since 2003, Juhler Holding has held 100% of the capital in temp-team Personal GmbH, a company established in Germany.

22. It is also stated in that order for reference that Juhler Holding has, in addition, a property portfolio, exercises financial control within the group so as to optimise the group's interest costs, is responsible for supervising and monitoring the performance of the individual subsidiaries and has a phone line and an email address. Juhler Holding is listed as a contact partner on the group's homepage. Juhler Holding does not, however, have its own offices. If necessary, it uses the premises, as well as the other facilities and staff, of other companies within the group. Lastly, Juhler Holding's chief executive is also on the boards of various companies in the group.

23. In 2011, Juhler Holding received dividends from temp-team Personal. Since those dividends were subjected to withholding tax and the solidarity surcharge, Juhler Holding applied for those taxes to be refunded. Following decisions in which the tax authority rejected that application and the complaint made against the rejection, Juhler Holding brought an action against those decisions before the Finanzgericht Köln (Finance Court, Cologne), on the ground that the relevant legislation in the main proceedings is incompatible with the freedom of establishment and the Parent-Subsidiary Directive.

24. As far as concerns the legislation at issue in the two cases in the main proceedings, the referring court states, in the first place, that contrary to the view of the tax authority, it is in fact Paragraph 50d(3) of the EStG as amended by the Jahressteuergesetz 2007 (Annual Tax Law 2007) of 13 December 2006 (BGBl. 2006 I, p. 2878) which is applicable. Furthermore, if that paragraph is incompatible with EU law, notwithstanding Paragraph 42 of the General Tax Code, on the prevention of abuse in domestic situations, the withholding tax at issue in the main proceedings would need to be refunded.

25. That court explains, in the second place, that under national law dividends distributed by a German subsidiary to a non-resident parent company are either, on application by the taxable person, exempt from income tax, or subject to withholding tax, which can, on application by the taxable person, be refunded.

26. However, under Paragraph 50d(3) of the EStG, the entitlement to exemption or a refund is precluded where, first, the non-resident parent company's shareholders would not have been entitled to the exemption or a refund if they had received those dividends directly, and, second, one of the following three conditions is

satisfied, namely, if there are no economic or other substantial reasons for the involvement of the non-resident parent company, the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity (there being no such activity, inter alia, if the company earns its gross income from the management of assets) or if the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose.

27. The referring court adds that, in determining whether the non-resident parent company has its own economic activity, that legislation takes account only of the circumstances of the non-resident parent company. The organisational, economic or other substantial features of undertakings that are affiliated with that company are not to be considered. The structure and strategy of the group to which such a company belongs are therefore not taken into account. Consequently, situations in which, within that group, holdings are permanently spun off into a non-resident parent holding company and in which that corresponds to a genuine strategy of the group in question fall within the scope of Article 50d(3) of the EStG.

28. However, in the case of a resident parent holding company, the activity of which is marginal, the existence of a permanent involvement is sufficient for such a company to be granted set off or a refund of the tax.

29. Furthermore, in addition to the purely passive management of assets, the active management of a leasing, letting, investment, financing or holding company would, in the case of a non-resident parent company, is also not regarded as amounting to own economic activity within the meaning of Paragraph 50d(3) of the EStG.

30. Moreover, as grounds for refusing the exemption or refund, it is sufficient, according to the referring court, that a non-resident parent company satisfy one of the conditions set out in Paragraph 50d(3) of the EStG. If so, the German legislature presumes, without it being possible to rebut such a presumption, that the arrangement is abusive.

31. The referring court has doubts as to the compatibility of the national legislation with the freedoms of movement and the Parent-Subsidiary Directive. In that context, it takes the view that the two cases in the main proceedings concern freedom of establishment, given that the parent companies in question have holdings which afford them a definite influence on the decisions of their German subsidiaries.

32. The referring court considers that Paragraph 50d(3) of the EStG restricts freedom of establishment and it doubts whether the ground of the public interest in preventing tax avoidance is capable of justifying that restriction on the basis, first, that a non-resident company which is not the result of a wholly artificial arrangement which does not reflect economic reality falls within the scope of that paragraph and, second, that the paragraph introduces an irrebuttable presumption of abuse or fraud.

33. As far as concerns the Parent-Subsidiary Directive, the referring court points to the fact that the various language versions of Article 1(2) thereof differ in that the German language version – unlike other language versions such as the Spanish, English, French or Italian versions – does not contain the word 'necessary'. The referring court takes the view that, notwithstanding that difference, the concept of abuse, within the meaning of Article 1(2) of the Parent-Subsidiary Directive, must in any event be interpreted in the light of primary EU law.

34. In those circumstances, the Finanzgericht Köln (Finance Court, Cologne) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, in essence identical in both cases:

> '1. Does Article 49 in conjunction with Article 54 TFEU preclude national tax legislation such as that at issue in the main proceedings which denies relief from tax on income from capital tax on distributions of profits made to a non-resident parent company whose sole shareholder is resident within the country [Case C-504/16] or to a non-resident parent company which, within an actively trading group resident in the Member State in which the parent company is resident, is permanently spun off as a holding company [Case C-613/16], to the extent that persons have holdings in it who would not be entitled to the refund or exemption if they earned the income directly, and
>
> – there are no economic or other substantial reasons for the involvement of the non-resident parent company, or
>
> – the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity (there being no such activity, inter alia, if the foreign company earns its gross income from the management of assets), or
>
> – the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose,

whereas parent holding companies are granted relief from tax on income from capital tax without regard to the aforementioned requirements?

2. Does Article 5(1) in conjunction with Article 1(2) of Directive 90/435/EEC preclude national tax legislation such as that at issue in the main proceedings which denies relief from tax on income from capital tax on distributions of profits made to a non-resident parent company whose sole shareholder is resident within the country [Case C-504/16] or to a non-resident parent company which, within an actively trading group resident in the Member State in which the parent company is resident, is permanently spun off as a holding company [Case C-613/13]), to the extent that persons have holdings in it who would not be entitled to the refund or exemption if they directly earned the income, and

– there are no economic or other substantial reasons for the involvement of the non-resident parent company, or

– the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity (there being no such activity, inter alia, if the foreign company earns its gross income from the management of assets), or

– the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose,

whereas resident parent companies are granted relief from tax on income from capital tax without regard to the aforementioned requirements?'

35. By decision of the President of the Court of 6 April 2017, Cases C-504/16 and C-613/16 were joined for the purposes of the oral part of the procedure and the judgment.

Consideration of the questions referred

Admissibility

36. The German Government submits that the questions referred in the two cases, in so far as they concern Paragraph 50d(3) of the EStG as a whole, go beyond what is necessary for the purposes of determining the cases pending before the referring court.

37. As regards Case C-504/16, the German Government takes the view that the Court should address only whether freedom of establishment and Article 1(2) in conjunction with Article 5(1) of the Parent-Subsidiary Directive preclude 'national tax legislation which denies a non-resident parent company whose sole shareholder is resident within the country, but not resident parent companies, relief from income from capital tax on distributions of profits on the ground that the non-resident parent company does not have its own economic activity extending beyond merely possessing holdings, and that, in addition, there are no economic or other substantial reasons for its involvement between the national shareholder and the national subsidiary'.

38. As regards Case C-613/16, according to the German Government, the Court should address only whether freedom of establishment and Article 1(2) in conjunction with Article 5(1) of the Parent-Subsidiary Directive preclude 'national tax legislation which denies relief from tax on income from capital tax on distributions of profits to a non-resident parent company which, within an actively trading group resident in the Member State in which the parent company is resident, is permanently spun off as a holding company, contrary to the case of resident parent companies, on the ground that that non-resident parent company does not have its own economic activity extending beyond merely possessing holdings, that, in addition, does not have its own offices or personnel'.

39. It is appropriate to note that, in accordance with settled case-law, the procedure provided for by Article 267 TFEU is an instrument of cooperation between the Court and national courts by means of which the former provides the latter with interpretation of such EU law as is necessary for them to give judgment in cases upon which they are called to adjudicate (judgment of 8 December 2016, Eurosaneamientos and Others, C-532/15 and C-538/15, EU:C:2016:932, paragraph 26 and the case-law cited).

40. In the context of that cooperation, it is solely for the national court hearing the case, which must assume responsibility for the subsequent judicial decision, to determine, with regard to the particular aspects of the case, both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it refers to the Court. Consequently, where the questions submitted concern the interpretation of EU law, the Court is in principle bound to give a ruling (judgment of 8 December 2016, *Eurosaneamientos and Others*, C-532/15 and C-538/15, EU:C:2016:932, paragraph 27 and the case-law cited).

41. It follows that questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining and the accuracy of which is not a matter for the

Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought is unrelated to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 8 December 2016, *Eurosaneamientos and Others*, C-532/15 and C-538/15, EU:C:2016:932, point 28 and the case-law cited).

42. The Court notes, in that regard, that, in both cases in the main proceedings, the referring court explained in detail the reason why it considered it necessary to address the issue of the compatibility of Paragraph 50d(3) of the EStG as a whole in order to deliver judgment in the two cases before it. Consequently, it is not obvious that the questions referred are irrelevant to the outcome of those cases.

43. In those circumstances, it is necessary to reply to the questions referred by the Finanzgericht Köln (Finance Court, Cologne).

Substance

44. By its questions, which it is appropriate to consider together, the referring court asks, in essence, whether Article 1(2) in conjunction with Article 5(1) of the Parent-Subsidiary Directive and Article 49 TFEU must be interpreted as precluding a Member State's tax legislation, such as that at issue in the main proceedings, which, where persons have holdings in a non-resident parent company who would not be entitled to the refund of or exemption from withholding tax if they received the dividends from a resident subsidiary directly, denies, provided one of the conditions set by that legislation is satisfied, relief from tax on income from capital tax on distributions of profits to that parent company.

The applicability of the provisions of the FEU Treaty

45. Given that the questions referred concern both the provisions of the Parent-Subsidiary Directive and those of the FEU Treaty and that, according to settled case-law, any national measure in an area which has been the subject of exhaustive harmonisation at the level of the European Union must be assessed in the light of the provisions of that harmonising measure, and not in the light of the provisions of primary law, it should be noted that the Court has held that Article 1(2) of that directive does not carry out such harmonisation (see, to that effect, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, points 15 to 17).

46. It follows that legislation such as that at issue in the main proceedings may be assessed not only in the light of the provisions of that directive, but also in the light of the relevant provisions of primary law.

Article 1(2) in conjunction with Article 5 of the Parent-Subsidiary Directive

47. As a preliminary matter, it should be noted that, in the present case, it has not been contested, first, that the companies at issue in both cases in the main proceedings are covered by the Parent-Subsidiary Directive and, secondly, that the dividends Deister electronik distributed to Traxx and those distributed by temp-team Personal to Juhler Holding fall within the scope of Article 5(1) of that directive.

48. As is apparent from the third recital of the Parent-Subsidiary Directive, that directive seeks, by the introduction of a common tax system, to eliminate any disadvantage to cooperation between companies of different Member States as compared with cooperation between companies of the same Member State and thereby to facilitate the grouping together of companies at EU level. That directive thus seeks to ensure the neutrality, from the tax point of view, of the distribution of profits by a company established in one Member State to its parent company established in another Member State (judgment of 8 March 2017, *Wereldhave Belgium and Others*, C-448/15, EU:C:2017:180, paragraph 25 and the case-law cited).

49. For that purpose, the fifth recital of that directive states that it is necessary, in order to ensure fiscal neutrality, to exempt profits which a subsidiary distributes to its parent company from withholding tax.

50. On that basis, in order to avoid double taxation, Article 5(1) of that directive establishes the principle that withholding tax on profits distributed by a subsidiary established in one Member State to its parent company established in another Member State is prohibited (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 22 and the case-law cited).

51. By precluding Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, that article of the Parent-Subsidiary Directive limits the powers of the Member States regarding the taxation of profits distributed by companies established in their territory to

companies established in another Member State (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 23 and the case-law cited).

52. Thus, given that the Parent-Subsidiary Directive is intended to streamline the tax arrangements governing cross-border cooperation within the European Union, the Member States cannot unilaterally introduce restrictive measures and subject the right to exemption from withholding tax under Article 5(1) of that directive to various conditions (see, to that effect, judgments of 17 October 1996, *Denkavit and Others*, C-283/94, C-291/94 and C-292/94, EU:C:1996:387, paragraph 26, and of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 24 and the case-law cited).

53. Nevertheless, Article 1(2) of the Parent-Subsidiary Directive, by giving the Member States the possibility of applying domestic or agreement-based provisions required for the prevention of fraud and abuse, establishes a derogation from the tax rules provided for by that directive.

54. As far as concerns Article 1(2) of the Parent-Subsidiary Directive, the referring court referred to a difference between the various language versions of that directive in so far as the German language version of Article 1(2) does not, as opposed inter alia to the versions in Spanish, English, French or Italian, use the word 'necessary'.

55. In that regard, it must be found that, in interpreting Article 1(2) of the Parent-Subsidiary Directive, it is irrelevant that the word 'necessary' does not appear expressly in the German language version of the provision. The Member States may, in any event, exercise the option provided for in that article only whilst observing the general principles of EU law and, more specifically, the principle of proportionality (see, by analogy, judgment of 17 July 1997, *Leur-Bloem*, C-28/95, EU:C:1997:369, paragraphs 38 and 43).

56. Observance of that principle requires that the measures taken by the Member States for the prevention of fraud and abuse must be appropriate for attaining that objective and must not go beyond what is necessary to attain it (see, to that effect, judgments of 18 November 1987, *Maizena and Others*, 137/85, EU:C:1987:493, paragraph 15, and of 30 June 2011, *Meilicke and Others*, C-262/09, EU:C:2011:438, paragraph 42 and the case-law cited).

57. It follows that, regardless of the linguistic difference referred to, the option left to the Member States under Article 1(2) of the Parent-Subsidiary Directive can cover only domestic or agreement-based provisions necessary for that purpose.

58. That interpretation is also borne out by the aim of that directive which, as is clear from paragraphs 48 and 52 above, is intended, by streamlining the tax arrangements governing cross-border cooperation within the European Union, to facilitate the grouping together of companies at EU level.

59. As regards measures for the prevention of fraud and abuse within the meaning of Article 1(2) of the Parent-Subsidiary Directive, it should be noted that, since that provision provides for an exception to the general rules laid down by the directive, namely the common tax rules applicable to parent companies and subsidiaries coming within the scope of the directive, it must be subject to strict interpretation (see, to that effect, judgments of 24 June 2010, P. *Ferrero e C. and General Beverage Europe*, C-338/08 and C-339/08, EU:C:2010:364, paragraph 45, and of 8 March 2017, *Euro Park Service*, C-14/16, EU:C:2017:177, paragraph 49 and the case-law cited).

60. The Court has stated that, in order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its specific objective must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 30 and the case-law cited).

61. Therefore, a general presumption of fraud and abuse cannot justify either a fiscal measure which compromises the objectives of a directive or a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 31 and the case-law cited).

62. In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue. The imposition of a general tax measure automatically excluding certain categories of taxable person from the tax advantage, without the tax authorities being required to provide even prima facie evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 32 and the case-law cited).

63. As regards the legislation at issue in the main proceedings, it is apparent from the documents before the Court that, where shares in a non-resident parent company are held by persons who would not be entitled to exemption from withholding tax if they received dividends directly from a subsidiary established in Germany, that legislation subjects the exemption from the tax advantage in the form of the exemption from withholding tax provided for in Article 5(1) of the Parent-Subsidiary Directive to the requirement that none of the three conditions laid down in that legislation is fulfilled, namely, if there are no economic or other substantial reasons for the involvement of the non-resident parent company, if the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity or if the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose, and the organisational, economic or other substantial features of undertakings that are affiliated with the non-resident parent company are not to be considered. In addition, a non-resident parent company is not considered to have its own economic activity if it earns its gross income from the management of assets or assigns its main business activities to third parties.

64. In that regard, it should be noted, in the first place, that the legislation at issue in the main proceedings is not specifically designed to exclude from the benefit of a tax advantage wholly artificial arrangements the purpose of which is unduly to obtain that advantage, but covers, in general, any situation where persons who would not have been entitled to such an exemption if they received the dividends directly have holdings in a non-resident parent company.

65. However, the mere fact that such persons have such holdings does not in itself indicate the existence of a wholly artificial arrangement which does not reflect economic reality and whose purpose is unduly to obtain a tax advantage.

66. In that context, it cannot be inferred from any provision of the Parent-Subsidiary Directive that the tax treatment of persons with holdings in parent companies resident in the European Union or the origin of such persons affects in any way the right of those companies to rely on tax advantages provided for by that directive.

67. Moreover, it should be noted that the non-resident parent company is in any event subject to the tax legislation of the Member State in which it is established (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 35 and the case-law cited).

68. In the second place, the legislation at issue in the main proceedings subjects the grant of the exemption from withholding tax provided for by Article 5(1) of the Parent-Subsidiary Directive to the requirement that none of the three conditions provided for by that legislation, referred to in paragraph 63 above, is satisfied.

69. In that regard, the Court notes, first, that, by subjecting the grant of that exemption to such a requirement, without the tax authorities being required to provide prima facie evidence of the absence of economic reasons or of fraud or abuse, the legislation introduces, as is clear from paragraph 62 above, a general presumption of fraud or abuse and thus undermines the objective pursued by the Parent-Subsidiary Directive, in particular Article 5(1) thereof, to prevent double taxation of dividends distributed by a resident subsidiary to its non-resident parent company by the Member State of that subsidiary's residence, in order to facilitate the cooperation and grouping together of companies at EU level.

70. Second, in so far as that legislation, where one of the conditions laid down by it is satisfied, does not allow a non-resident parent company to provide evidence demonstrating the existence of economic reasons, it also establishes an irrebuttable presumption of fraud or abuse.

71. Third, those conditions, whether taken individually or as a whole, cannot per se imply the existence of fraud or abuse.

72. In that regard, it should be noted that the Parent-Subsidiary Directive does not contain any requirement as to the nature of the economic activity of companies falling within its scope or the amount of turnover resulting from those companies' own economic activity.

73. The fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries' assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality. In that context, the fact that the management of assets is not considered to constitute an economic activity for the purposes of value-added tax is irrelevant, since the tax at issue in the main proceedings and value-added tax are governed by distinct legal regimes, each pursuing difference objectives.

74. In addition, contrary to what the legislation at issue in the main proceedings provides, the finding of such an arrangement requires that, on a case-by-case basis, an overall assessment of the relevant situation be conducted, based on factors including the organisational, economic or other substantial features of the group of companies to which the parent company in question belongs and the structures and strategies of that group.

75. In the light of the foregoing considerations, it must be found that Article 1(2) in conjunction with Article 5(1) of the Parent-Subsidiary Directive must be interpreted as precluding national tax legislation such as that at issue in the main proceedings.

The applicable freedom

76. It is apparent from the Court's case-law that the issue of the tax treatment of dividends equally may fall within the scope of freedom of establishment as well as within the free movement of capital (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 39 and the case-law cited).

77. As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 40 and the case-law cited).

78. In that regard, the Court has already held that national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities falls within the provisions of the Treaty on freedom of establishment. However, national provisions which apply to shareholdings acquired solely with the intention of making a financial investment without any intention to influence the management and control of the undertaking must be examined exclusively in light of the free movement of capital (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 41 and the case-law cited).

79. In the present case, according to the order for reference the tax legislation at issue in the main proceedings was applicable to companies holding at least 15% of the capital of their subsidiaries. By contrast, that order contains no information concerning the purpose of that legislation.

80. That shareholding does not necessarily imply that the company holding those shares exercises a definite influence over the decisions of the company distributing the dividends (see, to that effect, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 43 and the case-law cited).

81. In those circumstances, it is necessary to take account of the facts of the case in point in order to determine whether the situation to which the dispute in the main proceedings relates falls within the scope of one or other of those freedoms of movement (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 44 and the case-law cited).

82. As regards, in the first place, Case C-504/16, it is apparent from the documents before the Court that, at the time of the facts at issue in the main proceedings, Traxx had a holding of at least 26.5% in Deister electronik. In the present case, it has not been disputed that such a holding granted Traxx a definite influence over the decisions of Deister electronik, allowing it to determine its activities. Therefore, the national legislation at issue in the main proceedings must be examined in the light of freedom of establishment.

83. As regards, in the second place, Case C-613/16, it is apparent from the documents before the Court that, at the date of the facts in the main proceedings, Juhler Holding held all of the share capital in temp-team Personal. It must therefore be concluded that that holding granted Juhler Holding a definite influence over the decisions of temp-team Personal, allowing it to determine its activities. Consequently, the national legislation applicable to those holdings must be examined in this case too in the light of freedom of establishment.

84. In that context, it must be added that the origin of the shareholders of the companies at issue in the main proceedings does not affect the right of those companies to rely on freedom of establishment. In that regard, it is clear from the Court's case-law that it does not follow from any provision of EU law that the origin of the shareholders, be they natural or legal persons, of companies resident in the European Union affects the right of those companies to rely on that freedom (see, to that effect, judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 48 and the case-law cited). In the cases in the main proceedings, it is common ground that the parent companies in question are companies established in the European Union. Accordingly, those companies may rely on that freedom.

85. It follows that it is necessary to answer the questions referred in the light of freedom of establishment.

Freedom on establishment

86. Freedom of establishment, which Article 49 TFEU grants to EU nationals, includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected. It entails, in accordance with Article 54 TFEU, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, a branch or an agency (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 52 and the case-law cited).

87. As regards treatment in the host Member State, the case-law of the Court holds that since the second sentence of the first paragraph of Article 49 TFEU expressly leaves economic operators free to choose the appropriate legal form in which to pursue their activities in another Member State, that freedom of choice must not be limited by discriminatory tax provisions (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 53 and the case-law cited).

88. Moreover, all measures which prohibit, impede or render less attractive the exercise of freedom of establishment must be considered to be restrictions on that freedom (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 54 and the case-law cited).

89. In the present case, it is apparent from the documents before the Court that it is solely where a resident subsidiary distributes profits to a non-resident parent company that the grant of the exemption from withholding tax provided for by Article 5(1) of the Parent-Subsidiary Directive is subject to the condition laid down in the legislation at issue in the main proceedings.

90. That difference in treatment is, as noted by the referring court, likely to dissuade a non-resident parent company from exercising an economic activity in Germany through a subsidiary established in that Member State and therefore constitutes an impediment to the freedom of establishment.

91. That restriction is permissible only if it relates to situations which are not objectively comparable or if it is justified by overriding reasons in the public interest recognised by EU law. It is further necessary, in such a case, that the restriction be appropriate for ensuring the attainment of the objective that it pursues and not go beyond what is necessary to attain it (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 57 and the case-law cited).

92. As regards the comparability of the situation of a resident company and that of a non-resident company in receipt of dividends from a resident subsidiary, it should be noted that the exemption of profits distributed by a subsidiary to its parent company from withholding tax seeks, as was mentioned in paragraph 50 above, to avoid double taxation or a series of charges to tax on those profits.

93. Although the Court considered, as regards measures provided for by a Member State in order to prevent or mitigate a series of charges to tax or the double taxation of profits distributed by a resident company, that resident shareholders receiving dividends are not necessarily in a situation which is comparable to that of shareholders receiving dividends who are resident in another Member State, it also stated that, since a Member State exercises its power to tax not only over the income of resident shareholders, but also over that of non-resident shareholders, from dividends which they receive from a resident company, the situation of those non-resident shareholders becomes comparable to that of the resident shareholders (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 59 and the case-law cited).

94. In the cases in the main proceedings, since the Federal Republic of Germany has chosen to exercise its tax jurisdiction over the profits distributed by the resident subsidiary to the non-resident parent company, it must be concluded that that non-resident parent company is, as far as concerns those dividends, in a situation comparable to that of a resident parent company.

95. As regards the justification for and the proportionality of the impediment, the Federal Republic of Germany contends that it is justified both by the objective of combating tax evasion and avoidance and by that of safeguarding a balanced allocation of taxation powers between the Member States.

96. In that regard, it should be noted, first, that the objectives of combating tax evasion and avoidance and of seeking to safeguard a balanced allocation of taxation powers between the Member States are connected and, secondly, because they constitute overriding reasons in the public interest, they are capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 63 and the case-law cited).

97. However, it must be noted that the objective of combating tax evasion and avoidance, whether it is relied on under Article 1(2) of the Parent and Subsidiaries Directive or as justification for an exception to primary law, has the same scope (judgment of 7 September 2017, *Eqiom and Enka*, C-6/16, EU:C:2017:641, paragraph 64). Therefore, the findings set out in paragraphs 60 to 74 above also apply with regard to that freedom.

98. Furthermore, as regards the balanced allocation of taxation powers between the Member States, by precluding Member States from imposing withholding tax on the profits distributed by a resident subsidiary to its non-resident parent company, the Parent-Subsidiary Directive governs the issue of that allocation.

99. Therefore, the objective of combating tax evasion and avoidance and that of safeguarding a balanced allocation of taxation powers between the Member States cannot in the present case justify an impediment to the freedom of establishment.

100. Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 1(2) in conjunction with Article 5(1) of the Parent-Subsidiary Directive and Article 49 TFEU must be interpreted as precluding a Member State's tax legislation, such as that at issue in the main proceedings, which, where persons have holdings in a non-resident parent company who would not be entitled to the refund of or exemption from withholding tax if they received the dividends from a resident subsidiary directly, denies, provided one of the conditions set by that legislation is satisfied, relief from the tax income from capital tax on distributions of profits to that parent company.

Costs

101. …

On those grounds,

the Court (Sixth Chamber)

hereby rules:

Article 1(2) in conjunction with Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2006/98/EC of 20 November 2006 and Article 49 TFEU must be interpreted as precluding a Member State's tax legislation, such as that at issue in the main proceedings, which, where persons have holdings in a non-resident parent company who would not be entitled to the refund or exemption from withholding tax if they received the dividends from a resident subsidiary directly, denies, provided one of the conditions set by that legislation is satisfied, relief from tax on income from capital tax on distributions of profits to that parent company.