

# Gaz de France: Dividends to Companies Not Listed in the Parent-Subsidiary Directive Are Not Exempt

**In *Gaz de France* the ECJ held that an SAS does not fall within the personal scope of the Parent-Subsidiary Directive, as it is not listed in the Annex thereto. Furthermore, it concludes that the exclusion of an SAS from that scope does not constitute unequal treatment. The authors closely examine, and criticize, the rather restrictive approach that led to those conclusions. Subsequently, an overview is provided of the potential implications of *Gaz de France*.**

## 1. Introduction

In *Gaz de France*,<sup>1</sup> the European Court of Justice (ECJ) was asked to interpret the term “company of a Member State” under the Parent-Subsidiary Directive (the Directive).<sup>2</sup> A company of a Member State falling within the scope of that Directive and fulfilling specific criteria is, inter alia, exempt from withholding tax when it receives a dividend. The ECJ applied a very “restrictive” – in the authors’ view too restrictive – approach in determining which companies can be regarded as “companies of a Member State”. This resulted in an outcome that was, at the very least, arbitrary, if not discriminatory (see especially 4.2.). The ECJ, however, considers that outcome inherent to the gradual process of harmonization in the field of direct taxation. In this contribution the authors closely examine the ECJ’s reasoning in *Gaz de France*. In the authors’ view, the ECJ could have provided a more extensive and more satisfying interpretation, without exceeding its judicial powers. Finally, the implications of *Gaz de France* are discussed, in particular, the effect on dividend distributions to companies outside the scope of the Directive.

## 2. Factual and Legal Background

### 2.1. Facts, dispute and national proceedings

On 16 June 1999, *Gaz de France Deutschland GmbH* distributed a dividend to its 100% parent company *Gaz de France SAS* (*société par actions simplifiée*, a new form of company introduced in French company law in 1994). Upon the dividend distribution, *Gaz de France Deutschland GmbH* paid withholding tax to the *Bundeszentralamt für Steuern*, the competent German tax office.<sup>3</sup> Subsequently, *Gaz de France SAS* applied to the German tax office for a reimbursement of the withholding tax. The SAS was not listed in the Annex to the Directive, which lists the companies of Member States that fall

within the scope of the Directive. The SAS was not listed until the Directive was amended in 2003 (see 2.2.), four years after the tax year concerned in the *Gaz de France* case. The Directive was transposed into German national law in the German Income Tax Act (*Einkommensteuergesetz*, EStG 1999).<sup>4</sup> *Gaz de France SAS*’s application was rejected by the German tax office on the ground that *Gaz de France SAS* was not a “company of a Member State” within the meaning of the Directive. After its objection was dismissed, *Gaz de France SAS* appealed to the Cologne Tax Court (*Finanzgericht Köln*).<sup>5</sup> The Tax Court considered that, based on a literal reading of the relevant provisions, an SAS is not one of the forms of French companies listed in the Annex to the Directive.<sup>6</sup> As it was not sure whether or not it should restrict itself to such a literal interpretation of the relevant provisions, the Tax Court referred two questions to the ECJ:

- (1) Is it possible to interpret Art. 2(a) of the Directive in conjunction with point (f) of the Annex as meaning

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1. ECJ, 2 October 2009, Case C-247/08, *Gaz de France – Berliner Investissement SA v. Bundeszentralamt für Steuern*.

2. 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, L225/6), as amended by the Act of Accession of Austria, Sweden and Finland (OJ 1995, L1/1). As the case concerned the 1999 tax year, the amendments to the Parent-Subsidiary Directive by Council Directive 2003/123/EC (OJ 2004, L7/41), the Act of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and the Slovak Republic (OJ 2003, L263/33) and Council Directive 2006/98/EC of 20 November 2006 adapting certain Directives in the field of taxation, by reason of the accession of Bulgaria and Romania (OJ 2006, L363/129) were not relevant.

3. A “*Kapitalertragsteuer*”, an investment income tax, of DM 49,019.35 and a “*Solidaritätszuschlag*”, solidarity surcharge, of DM 2,696.06.

4. Para. 44d of the German Income Tax Act provides that: “On application, investment income tax shall not be charged on investment income within the meaning of Para. 20(1)(1) [...] accruing to a parent company where neither that company’s registered office nor its administration is located in the national territory, and deriving from the distribution of the profits of a capital company with unlimited liability to tax within the meaning of Para. 1(1)(1) of the Law on corporation tax, or from the refunding of corporation tax.”

5. Note that a typographical error occurs in Para. 14 of the English translation of the online version of the judgment, where the phrase “the defendant in the main proceedings” is used, instead of “the applicant”. This is incorrect as it was the defendant that rejected the reimbursement application. Furthermore, it is a deviation from the term “*demanderesse*” in the French version and the term “*Klägerin*” in the German version of the case.

6. The following companies were listed: “*société anonyme*”, “*société en commandite par actions*”, “*société à responsabilité limitée*” (until 2004 point (f), now point (j) of the Annex to the Directive).

that an SAS may be regarded as a “company of a Member State”?

- (2) Does Art. 2(a) of the Directive in conjunction with point (f) of the Annex infringe the freedom of establishment or the free movement of capital by providing an exemption from withholding tax for the three listed French legal forms but not for French companies taking the legal form of the SAS?<sup>7</sup>

## 2.2. The Parent-Subsidiary Directive

The Directive, inter alia, ensures that a dividend distributed by a subsidiary in one Member State to a parent company in another Member State is exempt from withholding tax.<sup>8</sup> The (personal) scope of the Directive is limited by the requirement that both the distributing company and the receiving company be regarded as a “company of a Member State”, as defined in Art. 2. Art. 2 provides that a company can be considered a “company of a Member State” if three cumulative requirements are met.<sup>9</sup> One requirement is that a company should have a qualifying legal form as listed in the Annex to the Directive. The Annex to the Directive listed the following French legal forms:

companies under French law known as “société anonyme”, “société en commandite par actions”, “société à responsabilité limitée”, and industrial and commercial public establishments and undertakings.<sup>10</sup>

Although the tax year concerned in *Gaz de France* is 1999, it is noteworthy that in 2003 the Annex to the Directive was extended to include “new” legal forms, including the French SAS.<sup>11</sup> Furthermore, in addition to specifically listing qualifying legal forms, a catch-all clause was introduced for the majority of the Member States, which ensured that a non-listed legal form constituted under the laws of a Member State that is subject to the corporate income tax in that Member State may also be considered a “company of a Member State.”<sup>12</sup>

## 3. Advocate General and the ECJ

### 3.1. Opinion of Advocate General Mazák

Advocate General Mazák assessed whether or not it was possible, by means of an interpretation of the relevant provisions of the Directive and its Annex, to conclude that an SAS also came within the scope of the Directive. He starts his analysis by acknowledging that the SAS was not listed in the initial version of the Directive, as it did not exist at that time. According to Mazák, a “purely literal interpretation of [the Directive] would result in a negative answer.”<sup>13</sup> In this respect, he follows the ECJ’s standard reasoning that if a literal interpretation does not suffice both “the wording of the provision on which a ruling on interpretation is sought, and the objective and the scheme of the directive” should be taken into account.<sup>14</sup> The objective of the Directive (the elimination of any penalties against companies of different Member States that cooperate in comparison to companies of the same Member State) was not intended to be extended to all companies of the Member States. According to the Advocate General, the legislative tech-

nique of listing specific legal forms of companies of the different Member States may be “imperfect” and not “sufficiently forward-looking”, as it “does not allow Community legislation to adapt to changes in national legislation.”<sup>15</sup> Nevertheless, Mazák is of the opinion that interpreting the relevant provisions of the Directive and its Annex as meaning that an SAS also falls within the scope of the Directive would “amount to replacing the legislative procedure by methods of interpretation.”<sup>16</sup> The suggestion of *Gaz de France* and the Commission that the SAS is a particular type of SA, and has, therefore, always been included in the Annex, was not further elaborated on by the Advocate General. Such a conclusion would require the ECJ to interpret French company law, which the ECJ is not competent to do. The Advocate General, therefore, concluded, with regard to the first question, that an SAS is not a “company of a Member State”.

As regards the second question, the Advocate General examined whether or not Art. 2(a) of the Directive resulted in an infringement of the freedom of establishment of Arts. 43 and 48 of the EC Treaty (now Arts. 49 and 54 of the Treaty on the Functioning of the European Union (TFEU)).<sup>17</sup> The Advocate General reiterated that

7. *Finanzgericht Köln*, 23 May 2008, 2 K 3527/02; reprinted in 17 *Internationales Steuerrecht* (2008), p. 595, with comments by H. Rehm and J. Nagler, p. 597 and comments by G. Jorewitz, p. 600; see also G.W. Kofler, “The Relationship between the Fundamental Freedoms and Directives in the Area of Direct Taxation”, *VI Diritto e Pratica Tributaria Internazionale* 2 (2009) p. 493.

8. Art. 5(1) of the Directive; on the condition that the parent company holds at least 25% of the capital of the subsidiary.

9. Art. 2 of the Directive provides that: “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 [Corporate income] taxes [which are enumerated in Art. 2(c) of that Directive], without the possibility of an option or of being exempt”.

10. For the purposes of this article, the application of the Directive to “industrial and commercial public establishments and undertakings” will not be discussed in further detail.

11. By 1 January 2005 at the latest, the SAS had to have been explicitly listed in national law in order to qualify for an exemption from withholding tax, provided that it also fulfilled the other criteria of the Directive. Although Council Directive 2003/123/EC entered into force on 2 February 2004 (Art. 3 of Directive 2003/123/EC provides that the Directive entered into force on the 20th day following the day of its publication in the Official Journal of the European Union and it was published on 13 January 2004), the Member States were obliged to transpose this Directive into national law by 1 January 2005 at the latest (Art. 2(1) of Council Directive 2003/123/EC).

12. Art. 1(6) of Council Directive 2003/123/EC of 22 December 2003, amending Council Directive 90/435/EEC (OJ 2004, L7/41).

13. ECJ, Advocate General Mazák’s Opinion, 25 June 2009, Case C-247/08, *Gaz de France – Berliner Investissement SA v. Bundeszentralamt für Steuern*, Paras. 28 and 29.

14. Advocate General Mazák’s Opinion, see note 13, Para. 29; ECJ, 3 April 2008, Case C-27/07, *Banque Fédérative du Crédit Mutuel*, Para. 36 and the case law cited therein.

15. For example, the introduction of a new legal form in national law after the entry into force of the Directive.

16. Advocate General Mazák’s Opinion, see note 13, Paras. 33-34.

17. It did not discuss whether or not there was an infringement under Art. 56 of the EC Treaty (now Art. 63 of the TFEU); the Advocate General concludes, by reference to ECJ, 10 May 2007, Case C-492/04, *Lasertec*, Paras. 20-26, that a minimum holding of 25% in the capital of a subsidiary falls within the scope of the freedom of establishment; see Advocate General Mazák’s Opinion, note 13, Para. 44.

the freedom of establishment prohibits discrimination based on the place in which a company has its seat.<sup>18</sup> In Mazák's view, no discrimination exists in this case if a dividend distributed to an SA is exempt from German withholding tax, whereas no exemption exists upon a dividend distribution to an SAS. After all, that distinction is not based on the seat of the company, but on its legal form.

### 3.2. The ECJ's judgment

After establishing the admissibility of the reference for a preliminary ruling,<sup>19</sup> the ECJ first discussed the two types of legislative techniques used in the Annex to define which companies may be considered "companies of a Member State". The first technique is to use general wording. For example, with regard to companies of the United Kingdom, the definition is: "companies incorporated under the law of the United Kingdom"; and for companies of Portugal the same technique is used.<sup>20</sup> The other technique, to explicitly list the applicable legal forms, is used for the remaining Member States, including, therefore, France. The latter legislative technique does not contain a catch-all clause that would enable it to be applied to other companies constituted in accordance with the laws of France. The ECJ concluded that this "implies that those legal forms are listed exhaustively".<sup>21</sup> This, according to the ECJ, is "apparent from both the wording and the scheme" of Art. 2(a) and the Annex. The ECJ held that viewing the list of point (f) as merely exemplary is precluded by the "fundamental principle of legal certainty", when such an interpretation cannot be based on a literal or systematic interpretation.

Furthermore, according to the ECJ, the interpretation that the list in the Annex should be viewed as merely exemplary can be analysed in light of legislative developments, in particular, the amendment of the Directive by Council Directive 2003/123/EC.<sup>22</sup>

The ECJ then addressed the second question: does the restriction on the scope of the Directive, i.e. the exclusion of certain companies that are created in accordance with national law, constitute an infringement of the freedom of establishment contained in Arts. 43 and 48 of the EC Treaty (now Arts. 49 and 54 of the TFEU)?<sup>23</sup> Such infringement would be based on "discrimination" between a dividend distribution to a shareholder having one of the three listed French legal forms (exempt from German withholding tax) and a dividend distribution to an SAS (not exempt). The ECJ first reiterated that the SAS falls outside the scope of the Directive, and that the Directive only contains obligations for Member States as regards profit distributions to companies within the meaning of the Directive. As regards companies outside the scope of the Directive, the ECJ held "that it is for the Member States to determine whether, and to what extent, economic double taxation of distributed profits is to be avoided", provided that they respect EC (now EU) law, and especially the free movement provisions.<sup>24</sup>

## 4. Comments

### 4.1. Interpretation methods with regard to a "company of a Member State"

The question as to whether or not an SAS may be regarded as a "company of a Member State" within the meaning of the Directive requires an interpretation of Art. 2(a) of the Directive, as well as the Annex thereto. When interpreting a directive, the ECJ not only considers the wording of the relevant provision (literal interpretation), it also takes into account the scheme of the Directive (schematic interpretation), as well its objective (teleological interpretation).<sup>25</sup> The ECJ may also apply the historical interpretation method. The ECJ took the literal interpretation as a starting point. The authors will comment on each of the interpretation methods in the following sections.

#### 4.1.1. Literal interpretation

Both the Advocate General and ECJ find support for their conclusion that an SAS is not covered by the Directive, as the Annex is exhaustive, in a literal interpretation of the wording of the Annex.<sup>26</sup> The linguistic research required in this respect is not restricted to "the ordinary meaning" of a provision, but may also encompass a survey of its "technical", "legal" or "economic" meaning.<sup>27</sup> The main obstacle of this method of interpretation is the existence of a multitude of official language versions, all being equally authentic. The ECJ, therefore, has to compare all the different language versions,<sup>28</sup> which will often lead the ECJ to conclude that "a comparison of the different versions of the provisions in question shows that [...] the other versions use different terms in each of the two articles, with the result that no

18. Advocate General Mazák's Opinion, see note 13, Para. 45; referring to ECJ, 22 December 2008, C-282/07, *État belge – SPF Finances v. Truck Center SA*, Para. 32 and the case law cited therein.

19. The Italian government had contended that the reference for a preliminary ruling was inadmissible on the grounds that the ECJ did not have the required information to assess the comparability of the SAS with the legal forms that had always been granted an exemption from withholding tax on dividends under Art. 5(1) of the Directive. The ECJ held that the reference for a preliminary ruling contained sufficient information on the basis of which useful answers could be provided to the questions of the referring judge. Furthermore, a comparison between an SAS and an SA would effectively entail an interpretation of national law, which is not within the competence of the ECJ; *Gaz de France*, see note 1, Paras. 22-23.

20. Until 2004: points (k) and (l), now points (v) and (ab) of the Annex to the Directive; for Portugal the definition is: "commercial companies or civil law companies having a commercial form, cooperatives and public undertakings incorporated in accordance with Portuguese law".

21. *Gaz de France*, see note 1, Para. 32.

22. *Gaz de France*, see note 1, Para. 40.

23. In Para. 62 the ECJ states that its conclusion is also valid as regards provisions concerning the free movement of capital (Art. 56 EC Treaty).

24. *Gaz de France*, see note 1, Para. 60, and the case law cited therein.

25. *Gaz de France*, see note 1, Para. 26.

26. The ECJ uses the literal interpretation method more often; see, inter alia, ECJ, 14 January 1982, Case 64/81, *Nicolaus Corman & Fils SA v. Hauptzollamt Gronau*, where the ECJ relied on a literal interpretation of the term "powder for the preparation of edible ices".

27. See, inter alia, J. Mertens de Wilmars, "Methodes van Interpretatie van het Hof van Justitie van de Europese Gemeenschappen", acceptance speech of the Jan Tinbergen-leerstoel of the Erasmus Universiteit Rotterdam in 1990.

28. See, inter alia, ECJ, 6 October 1982, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, Para. 18.

legal consequences can be based on the terminology used". The provision must then be interpreted "by reference to the purpose and general scheme of the rules of which it forms a part".<sup>29</sup> Moreover, it is settled case law that the ECJ will go beyond a literal interpretation if the outcome reached conflicts with the scheme and objective of the directive.<sup>30</sup> Both Advocate General Mazák (based on a literal interpretation) and the ECJ (based on the wording (and the scheme)) conclude that an SAS cannot be considered a "company of a Member State".

In the authors' view, the ECJ did not apply the literal interpretation method at all since the ECJ did not have recourse to the ordinary, technical, legal or economic meaning of a "term" used in secondary EU legislation. The ECJ had to interpret whether or not a "gap" in the Annex (the SAS was not listed and the French list did not contain a catch-all clause) could be viewed as also encompassing an SAS. The ECJ's "literal" interpretation in *Gaz de France* is, therefore, best regarded as a schematic interpretation.

#### 4.1.2. Legal certainty prohibits otherwise

The ECJ finds support for its "literal" (which the authors contend) or "restrictive" interpretation in the principle of legal certainty. The ECJ is not known for embracing the literal interpretation method. Instead, the ECJ seems to prefer the schematic and teleological methods of interpretation. The ECJ is, therefore, often – perhaps erroneously<sup>31</sup> – accused of being too active and pushing the boundaries of its competencies.<sup>32</sup> Even ECJ Judge Rosas confirms that:

it is common place to hold that the ECJ follows a "teleological" method of interpretation advancing the general objective of European integration and the more specific objectives of EU primary and secondary law.<sup>33</sup>

The advantage of such a liberal method of interpretation is that it can take into account the evolving nature of law and new needs that did not exist at the moment of legislating;<sup>34</sup> for instance, the introduction of the SAS as a new legal form. The disadvantage of such a liberal method of interpretation is that it gives rise to legal uncertainty.<sup>35</sup>

With regard to secondary EU law Judge Rosas indicates that:

with the development of secondary legislation, the methods of interpretation of the EU courts have become more textual. They often refer to a combination of textual (literal), contextual (systemic) and teleological interpretations.<sup>36</sup>

The ECJ has recognized the principle of legal certainty as a general principle of law.<sup>37</sup> The ECJ has ruled, in particular, that the provisions of Regulation 44/2001, which lays down rules governing the jurisdiction of courts in civil and commercial matters:<sup>38</sup>

must be strictly interpreted and cannot be given an interpretation going beyond the cases expressly envisaged, [as] the principle of legal certainty [...] is one of the objectives of [that] Regulation.<sup>39</sup>

Although legal certainty is not one of the objectives of the Directive, it still remains a general principle of law.<sup>40</sup> In that light it is not surprising that the ECJ interprets the Directive in a restrictive way. Perhaps it is correct to do so, given that the Directive involves detailed secondary EU legislation rather than primary EU law with open norms.

In *Gaz de France*, similar to cases such as *Kühne & Heitz*,<sup>41</sup> the Court confirmed that the principle of legal certainty may also be advantageous to the tax inspector. As Rasmussen puts it:

[a]lso governments who are subjects of the law on which the European Court expounds, should benefit [...] from the ideal of legal certainty.<sup>42</sup>

#### 4.1.3. Schematic interpretation

When the ECJ undertakes a schematic interpretation of a provision, it places the disputed provision within the system/scheme of rules of which it forms a part. In *Gaz de France*, the schematic interpretation of the ECJ revolved around a distinction between the two legislative techniques used in the Annex. The first technique

29. ECJ, 27 October 1977, Case 30/77, *Régina v. Pierre Bouchereau*.

30. ECJ, 28 February 1980, Case 67/79, *Waldemar Fellinger v. Bundesanstalt für Arbeit, Nuremberg*.

31. See A. Albers-Llorens, "The European Court of Justice: More than a Teleological Court", *The Cambridge yearbook of European legal studies* 2 (1999), p. 373.

32. See H.C.F.J.A. de Waele, "Tussen activisme en ongehoorzaamheid. Het Europese Hof op de grenzen van de rechtspleging", in L.E. de Groot-van Leeuwen, A.M.A.P. van den Bossche, Y. Buruma (eds.), *De ongehoorzame rechter: rechters versus andere rechters, de wetgever, de bevolking en het Europees recht* (Deventer: Kluwer, 2006), p. 207.

33. A. Rosas, Statement by Judge Rosas to the Committee of Legal Advisers on Public International Law (CAHDI) during their 30th meeting in Strasbourg, 19-20 September 2005 (Strasbourg, 15/09/05, CAHDI (2005) 15).

34. A. Kaczorowska, *European Union Law* (Oxford/New York: Routledge-Cavendish, 2008), p. 244.

35. P. Blok, *Patentretens Konsumtionsprincip* (Copenhagen: Juristforbundet, 1974); the translation and further analysis was given by C. Gulmann, "Methods of Interpretation of the Court of Justice", *Scandinavian Studies in Law* (1980), p. 198.

36. A. Rosas, see note 33.

37. ECJ, 16 June 2005, Case C-105/03, *Maria Pupino*, Para. 44.

38. Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

39. ECJ, 13 July 2006, C-103/05, *Reisch Montage AG v. Kiesel Baumaschinen Handels GmbH*, Paras. 23-24 and ECJ, 22 May 2008, Case C-462/06, *Glaxosmithkline, Laboratoires Glaxosmithkline v. Jean-Pierre Rouard*, Para. 33.

40. With the entry into force of the Treaty of Lisbon, the European Union has replaced and succeeded the European Community (Art. 1(3) EU Treaty (as amended by the Treaty of Lisbon)); in the authors' view, the ECJ will, therefore, switch from the use of the terminology "general principles of Community law" to the terminology "general principles of law"; the ECJ used the latter terminology already in cases under the former second and third pillars of the EU Treaty (see ECJ, 27 February 2007, *Segi, Aritz Zubimendi Izaga, Aritz Galaraga v. Council of the European Union*, Para. 51 (the former second pillar) and ECJ, 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Para. 45 (the former third pillar)); see W.W. Geursen, "Non-discriminatie onder het EU- en Euratom-Verdrag: de doorwerking van artikel 12 EG-Verdrag (thans art. 18 VWEU)", *Nederlands Tijdschrift voor Europees Recht* 1 (2010), p. 17, especially pp. 25-26.

41. ECJ, 13 January 2004, Case C-453/00, *Kühne & Heitz NV and Productschap voor Pluimvee en Eieren*, Para. 24.

42. H. Rasmussen, *On law and policy in the European Court of Justice: a comparative study in judicial policymaking* (Dordrecht: Martinus Nijhoff Publishers, 1986), p. 36; this study gives an extensive overview of the views of scholars on the tension between the 'active' role of the ECJ when 'making' law in its case law and the principle of legal certainty.

involves a reference to incorporation under the laws of the respective Member State, whereas the second legislative technique lists the qualifying legal forms. Under the main technique used in the initial version of the Directive to determine a “company of a Member State” no reference was made to incorporation under the laws of that Member State; the qualifying legal forms were explicitly listed.

Based on the distinction between the two legislative techniques, the ECJ deduces that the main technique implies that the list of legal forms is exhaustive, rather than exemplary, as *Gaz de France* had argued.

In the authors’ view, the mere observation that the initial version of the Annex did not refer to incorporation under the laws of France does not necessarily mean that the “French” list should be interpreted exhaustively. After all, such reasoning is based on the *a contrario* argument that, by not including a clause referring to incorporation under the laws of France, only a company with one of the three listed legal forms may qualify as a “company of France”. If, upon adoption of the Directive in 1990, the three listed legal forms were all non-transparent legal forms existing under French company law, the relevant provisions of the Directive may also be interpreted as encompassing *all* non-transparent legal forms under French law, including future non-transparent legal forms, such as the SAS. This view would be based on the (implicit) intention of the legislator to bring all non-transparent legal forms under the scope of the Directive.

Furthermore, although the preamble to Council Directive 2003/123/EC<sup>43</sup> states that the scope of the Directive should be extended to companies such as the SAS, this does not automatically imply that an SAS did not previously qualify as a “company of a Member State” under the Directive. Clearly, one may argue that the explicit inclusion of both the SAS and a clause referring to incorporation under the laws of France in Directive 2003/123/EC may be regarded as confirmation that, under the Directive, the SAS could not qualify as “a company of a Member State”. On the other hand, it may be argued that the amendments introduced by Directive 2003/123/EC merely clarify that an SAS, based on primary EC (now EU) law, could already be considered a “company of a Member State” under the Directive. Finally, as Wolvers argued, the fact that the SAS is included in Directive 2003/123/EC may also illustrate that the slow legislative process was the sole reason why the SAS was not previously listed in the Annex.<sup>44</sup> In the authors’ view, a simple solution would be to provide for a comitology procedure for amending the list in the Annex.<sup>45</sup>

#### 4.1.4. Interpretation in the light of the EC Treaty

An example of where secondary legislation was amended due to an infringement of primary EC (now EU) law is also found in Directive 2003/123/EC. Under the Directive, situations involving permanent establishments (PEs) were not explicitly covered, although on the basis of primary EC (now EU) law (the freedom of estab-

lishment under Arts. 43 or 48 of the EC Treaty (now Arts. 49 and 54 of the TFEU), as interpreted by the ECJ in *Avoir fiscal*<sup>46</sup> and *Saint-Gobain*,<sup>47</sup> it could be argued that these situations fell within the scope of the Directive. Directive 2003/123/EC, therefore, explicitly covers such situations.<sup>48</sup> Based on the codification of non-discrimination of PEs in Directive 2003/123/EC, it may, therefore, be argued that the words “and other companies constituted under French law subject to French corporate [income] tax” in Directive 2003/123/EC merely support the conclusion under primary EC (now EU) law that all companies subject to French corporation tax also had access to the Directive.

In this light, reference can be made to settled case law of the ECJ that if the wording of secondary legislation (i.e. the Directive) is open to more than one interpretation, preference should be given to the interpretation that is in conformity with primary EC (now EU) law, rather than an interpretation that is incompatible with the EC Treaty (TFEU).<sup>49</sup> On the basis of that rule, the ECJ should have interpreted the term “company of a Member State” in the light of Art. 48 of the EC Treaty (now Art. 54 of the TFEU), which provides that:

‘[c]ompanies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

In conjunction with Art. 2(c) of the Directive, the ECJ should then have interpreted the term “company of a Member State” as encompassing any profit-making company under civil or commercial law of that Member State that is subject to corporate income tax.

#### 4.1.5. Teleological interpretation

The ECJ commenced its teleological interpretation with the admission that *Gaz de France’s* argument (viewing the list as merely exemplary) would indeed extend the

43. Council Directive of 22 December 2003 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (2003/123/EC), which amended the Parent-Subsidiary Directive.

44. S. Wolvers, “Lijst van onder de Moeder-dochterrichtlijn vallende vennootschappen is uitputtend”, *Nederlands Tijdschrift voor Fiscaal Recht* (2009), p. 1555.

45. This was also the situation in regards to Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11), as amended by Council Directive 90/423/EEC of 26 June 1990 (OJ 1990 L 224, p. 13), annexed to which was a list of laboratories per Member State that were approved as being able to officially ascertain foot-and-mouth disease; see ECJ, 15 June 2006, Case C-28/05, *G.J. Dokter, Maatschap Van den Top, W. Boekhout v. Minister van Landbouw, Natuur en Voedselkwaliteit*, Para. 9.

46. ECJ, 28 January 1986, Case 270/83, *Commission of the European Communities v. French Republic (“Avoir fiscal”)*.

47. ECJ, 21 September 1999, Case C-307/97, *Compagnie de Saint-Gobain, Zweigniederlassung Deutschland v. Finanzamt Aachen-Innenstadt*.

48. Directive 2003/123/EC, Art. 1(1). See, inter alia, Para. 19 of the Explanatory Memorandum to the Proposal for a Council Directive amending the Parent-Subsidiary Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM (2003) 462 final, 2003/0179 (CNS) of 29 July 2003.

49. ECJ, 13 December 1983, Case 218/82, *Commission of the European Communities v. Council of the European Communities*, Para. 15 and ECJ, 29 June 1995, Case C-135/93, *Kingdom of Spain v. Commission of the European Communities*, Para. 37.

scope of the Directive and thereby contribute to the aim of the Directive. The ECJ held, however, that “the Parent-Subsidiary Directive does not seek to introduce a common system for all companies of the Member States nor for all holdings”.<sup>50</sup>

The authors believe that the ECJ, by completing its teleological interpretation with the statement that the Directive “does not seek to introduce a common system for all companies of the Member States nor for all holdings”, did not put sufficient effort into its analysis in this area.

Based on the objective of the Directive, which is the avoidance of economic double taxation that occurs if both the distributing company and the receiving company are faced with corporate income tax and withholding tax on the same profit, the ECJ should, in the authors’ view, have reached a different outcome. As double taxation only occurs if the parent company is taxed on the profits received, the ECJ should have concluded that only entities that are not subject to corporate income tax on the profits received were to be excluded from the scope of the Directive.<sup>51</sup>

#### 4.1.6. Historical interpretation

In addition to the literal, systematic and teleological interpretation methods, the ECJ may also apply the historical interpretation method.<sup>52</sup> Historical interpretation entails a review of documents that are part of the legislative process that led to the adoption of the Directive (“travaux préparatoires” or “preparatory works”). In this respect, the ECJ has held that the historical method of interpretation “is not sufficient in itself and cannot be decisive, because it plays only a subsidiary role in the interpretation of Community law.”<sup>53</sup> In general, the ECJ had always been reluctant to rely on preparatory works, as preparatory works were not published.<sup>54</sup> Following the adoption of Regulation 1049/2001 regarding public access to documents,<sup>55</sup> however, and the launch of PreLex,<sup>56</sup> both increasing the availability of preparatory works to the public, the ECJ has acknowledged, to a greater extent, the importance it attaches to the preparatory works.

The ECJ held that, on the basis of legal certainty, the fact that certain Member States have expressed their wish to only exclude partnerships from the sphere of the Directive, a point argued by *Gaz de France*, is not legally relevant if these wishes are not expressed in legislation. The authors can understand the ECJ’s reluctance to rely on expressions of intent that have not been expressed in legislation. As the ECJ held in *Epson Europe BV*:

according to settled case-law, declarations recorded in Council minutes in the course of preparatory work [...] cannot be used for the purpose of interpreting that directive where no reference is made to the content of the declaration in the wording of the provision in question, and, moreover, such declarations have no legal significance.<sup>57</sup>

Furthermore, in *Gaz de France*, the ECJ had recourse to “legislative developments and, in particular [...] Directive 2003/123”, in “legitimizing” its view.<sup>58</sup> The ECJ thus

could deduce the legislator’s intent in 1990 from an analysis of the intention of the 2003 amendment.

On 20 August 1993, the Commission adopted a Proposal to enable the Directive to be applied to all companies subject to corporate income tax;<sup>59</sup> however, according to the Commission proposal from which Directive 2003/123/EC originated: “the asymmetries found in commercial law governing the legal types of entities and the diversity of tax arrangements applicable to them in the Member States” would create “considerable problems” if the Directive were to be extended to all enterprises resident and subject to corporation tax.<sup>60</sup> Instead, it was proposed that the list be extended to cover new named legal types.

When interpreting the Directive, one should be cautious in referring to documents relating to proposals for the amendment of the Directive, as the wording used in such proposals will often be “tainted”. It appears that the reason why the scope of the Directive was not extended to all companies subject to tax was not of a fundamental nature, but rather of a political nature. As indicated in the Report by the European Parliament on the 2003 Pro-

50. *Gaz de France*, see note 1, Para. 36.

51. Such a broad interpretation, based on the objective of a directive, was applied, for instance, in the *Dokter* case concerning Council Directive 85/511/EEC of 18 November 1985 introducing Community measures for the control of foot-and-mouth disease (OJ 1985 L 315, p. 11). Annexed to this directive was a list of laboratories per Member State that were approved as being able to officially diagnose foot-and-mouth disease, after which the sick animals were to be slaughtered on the spot. In the *Dokter* case, the question arose as to whether or not the slaughtering of animals as a result of confirmation of the disease by a laboratory with a different legal entity than the one listed for the Netherlands in the Annex was legal. According to the ECJ the objective of that directive is effective control of foot-and-mouth disease. This requires a broad interpretation of the term ‘laboratory’, which does not mean that the slaughtering measures may be taken *only* after diagnosis by a laboratory included in the list in the annex to that directive. See *Dokter*, note 45, Paras. 51 and 52.

52. Court of First Instance, 7 November 2007, Case T-374/04, *Federal Republic of Germany v. Commission of the European Communities*, Para. 92.

53. ECJ, Advocate General’s Opinion, 15 November 2007, Case C-404/06, *Quelle AG v. Bundesverband der Verbraucherzentralen und Verbraucherverbände*, Para. 59.

54. See N. Dhondt and W. Geursen, “Over gedeelde bevoegdheden en hiërarchie in interpretatiemethoden”, *Nederlands Tijdschrift voor Europees Recht* 10 (2008), p. 276.

55. Regulation (EC) No. 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents.

56. <http://ec.europa.eu/prelex/apcnet.cfm>.

57. ECJ, 8 June 2008, Case C-375/98, *Ministério Público and Fazenda Pública v. Epson Europe BV*, Para. 26, citing ECJ, 26 February 1991, Case C-292/89, *The Queen v. Immigration Appeal Tribunal, ex parte Gustaff Desiderius Antonissen*, Para. 18 and ECJ, 13 February 1996, Joined Cases C-197/94 and C-252/94, *Société Bautiaa v. Directeur des Services Fiscaux des Landes and Société Française Maritime v. Directeur des Services Fiscaux du Finistère*, Para. 51.

58. *Gaz de France*, see note 1, Para. 41.

59. Proposal for a Council Directive amending the Parent-Subsidiary Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM (93) 293 final, OJ C 225 of 20 August 1993. The recommendation to extend the scope of the Directive to companies subject to tax was prompted by the final report from the Committee of Independent Experts on Company Taxation, chaired by Onno Ruding (1992).

60. Proposal for a Council Directive amending the Parent-Subsidiary Directive of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, COM (2003) 462 final, 2003/0179 (CNS) of 29 July 2003.

posals,<sup>61</sup> the proposal to extend the scope of the Directive to all companies subject to tax received the full support of the European Parliament, but was eventually abandoned by the Council in 1997 due to disagreement stemming from certain differences as a result of which some entities would be regarded as transparent in one Member State and non-transparent in another Member State (hybrid entities).

Although the Report by the European Parliament referred to the “abandonment” of the proposal to extend the Directive to all companies subject to tax, the updated list of companies in the Annex to Directive 2003/123/EC indicates otherwise. Of the (then) 15 Member States listed, the paragraphs of nine Member States contained a catch-all clause, which ensured that, in addition to companies having the listed legal forms, a company having a non-listed legal form constituted under the law of that Member State, which was subject to corporate income tax in that Member State, could also be regarded as a “company of that Member State”.<sup>62</sup> For four Member States the requirements were even less strict: it was sufficient if a company was incorporated under the laws of that Member State, or was a “commercial” company.<sup>63</sup> The “old technique” of exclusively listing the qualifying legal forms only applied with respect to Sweden and Finland (two out of the (then) 15 Member States).<sup>64</sup>

Finally, it is interesting to note that the Commission held in 2004 that an SAS did not fall within the scope of the Directive as it was not listed.<sup>65</sup> Surprisingly, the Commission completely reversed its position in *Gaz de France* by adhering to *Gaz de France*’s view that a dividend distribution to an SAS should be exempt from withholding tax.<sup>66</sup>

#### 4.2. Unequal treatment and (in)validity of the Directive

In the *Ouzo* case, the ECJ held that “measures of the Community institutions are in principle presumed to be lawful”, but if those measures are “tainted by an irregularity whose gravity is so obvious that it cannot be tolerated by the Community legal order they must be treated as having no legal effect”. The finding that a measure is without legal effect “might be reserved for quite extreme situations”.<sup>67</sup>

As *Gaz de France* submitted, the exclusion, from the outset, of an SAS from the scope of the Directive constitutes a disadvantageous treatment of an SAS in comparison to an SA. According to the ECJ, the disadvantageous treatment *in itself* is not unlawful as:

the Community legislature has a wide discretion in relation to the harmonisation and approximation of legislation, [therefore] restricting the scope of the harmonisation and approximation of legislation to certain fields [...] cannot, in itself, be unlawful.<sup>68</sup>

As the obligation to avoid economic double taxation of profits is placed on the Member States only as regards companies within the meaning of the Directive, the Member States may determine themselves whether or not, and to what extent, economic double taxation of

profits is avoided as regards companies outside the scope of the Directive. These measures, however, may not conflict with the freedoms of movement guaranteed by the EC Treaty (now TFEU).<sup>69</sup> According to the ECJ, the exclusion from the outset of other companies created under national law does not restrict the freedom of establishment.

The ECJ seems to consider the exclusion (or non-inclusion) of the SAS in the Directive as inherent to the process of gradual harmonization.<sup>70</sup> The Advocate General only mentions that the free movement provisions prohibit a distinction on the basis of the seat of the company, which leads to (indirect) discrimination on the basis of nationality and that no such discrimination exists in respect of a distinction between two different corporate entities of the same Member State. Although the views of the ECJ and the Advocate General are correct, the authors believe that they have erroneously neglected reviewing a breach of the principle of equality. As some scholars have argued, the incomplete coverage of entities may constitute discrimination.<sup>71</sup> In their view, the unequal treatment of one entity compared to another infringes the principle of equality and non-discrimination; a general principle of Community law<sup>72</sup> and a gen-

61. Report on the proposal for a Council Directive amending the Parent-Subsidiary Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (COM(2003) 462 – C5 – 0427/2003 – 2003/0179(CNS)) of 5 December 2003.

62. Belgium, Denmark, Germany, Greece, Spain, France, Luxembourg, the Netherlands and Austria.

63. Ireland, Italy, Portugal, the United Kingdom and currently also Lithuania.

64. Currently also the Czech Republic, Estonia, Latvia, Hungary, Malta, Poland, Romania, Slovenia and the Slovak Republic; for Cyprus and Bulgaria the authors were not able to establish with certainty which technique was used, but the Annex seems to use the technique of listing the companies by their names only.

65. Answer of Commissioner Bolkestein, on behalf of the Commission, in reply to the Written Questions P-2823/03 by Françoise Grossète (PPE-DE) to the Commission (OJ 2004, C78 E/175).

66. The Commission’s point of view is found, for instance, in *Gaz de France*, note 1, Paras. 34, 35, 39 and 43.

67. ECJ, 5 October 2004, Case C-475/01, *Commission of the European Communities v. Hellenic Republic (“Ouzo”)*, Paras. 18-20, and the case law cited therein.

68. *Gaz de France*, see note 1, Para. 47.

69. *Gaz de France*, see note 1, Para. 60, citing, inter alia, ECJ, 18 June 2009, Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, Para. 28; see also Y. Robert, S. Lauratet, P. Tredaniel, A. Reillac, “Dividend Withholding Tax Levied on Investment Funds: *Aberdeen* and its Implications in France”, *European Taxation* 12 (2009), pp. 606-610.

70. The ECJ has previously held that gradual harmonization does not result in illegal discrimination: see, for instance, ECJ, 18 April 1991, Case C-63/89, *Les Assurances du Crédit SA and Compagnie Belge d’Assurance Crédit SA v. Council of the European Communities and Commission of the European Communities*, Para. 23 concerning Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (OJ 1973, L228/3), as amended by Council Directive 87/343/EEC of 22 June 1987 (OJ 1987, L185/72).

71. See Kofler, note 7, p. 493, citing B.H. ter Kuile, “Taxation, Discrimination and the Internal Market”, 32 *European Taxation* 12 (1992), p. 402 and C.M. Harris, “The European Community’s Parent-Subsidiary Directive”, 9 *Florida Journal of International Law* (1994), p. 111; see, for a general overview of harmonizing measures that infringe the principle of equal treatment, T. Tridimas, *The General Principles of EC Law* (Oxford etc.: Oxford University Press, 1999), p. 62 et seq.

72. ECJ, 12 September 2006, Case C-300/04, *M.G. Eman and O.B. Sevinger v. College van burgemeester en wethouders van Den Haag*, Para. 57.

eral principle of law.<sup>73</sup> This principle has been applied by the ECJ where there has been, “an arbitrary or unjustifiably unequal treatment of two persons within an area of Community competence.”<sup>74</sup>

Such unequal treatment exists in regards to the difference in treatment between an SA and an SAS. Both entities hold the same “nationality” as they are both incorporated under the laws of France.<sup>75</sup> Contrary to the principle of equality, they are, nevertheless, treated differently.

The existence of a breach of this principle seems to be confirmed by the preamble to Directive 2005/19/EC,<sup>76</sup> amending Directive 90/434/EEC,<sup>77</sup> the Merger Directive. It provides that:

certain forms of company are not listed in that Annex, even though they are resident for tax purposes in a Member State and are subject to corporation tax there. In the light of the experience, this appears to be an unjustifiable lacuna.

The Annex to the Merger Directive was almost identical to the Annex to the Directive.<sup>78</sup> The same analysis should, therefore, apply to the Directive.

In the *Gaz de France* case, the ECJ did not elaborate explicitly on possible justification grounds. In the authors’ view it did, however, implicitly do so by referring to the discretion of the EU legislator to harmonize gradually.<sup>79</sup> In the *Arcelor* case the ECJ elaborated extensively on the (strict) conditions under which such unequal treatment in secondary EU law is objectively justified.<sup>80</sup> The gradual harmonization – in *Arcelor* the ECJ named this the “step-by-step approach” – is one of those justification grounds. The ECJ held that:

[a] difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment.<sup>81</sup>

The burden of proof of objective justification is on the EU legislator.<sup>82</sup> In the *Arcelor* case, the ECJ accepted a step-by-step approach by the EU legislator provided that it reviews the measures adopted at reasonable intervals.<sup>83</sup> One might argue that the EU legislator fulfilled this proviso in the case of the Parent-Subsidiary Directive with the 2003 amendment, although too late for the SAS.

Another acceptable objective justification ground might be found in difficulties of harmonization, as was the case in the *Francovich II* case.<sup>84</sup> In *Gaz de France* the ECJ seems – again implicitly – to refer to such difficulties as well in the field of direct taxation as this concerns the harmonization of diverse and complex national provisions.<sup>85</sup>

When it comes to justifying the different treatment in the *Gaz de France* case, the ECJ should, in the authors’ view, have given a more explicit reasoning as it did, for example, in the *Arcelor* and *Francovich II* cases; unsatisfyingly, it now only did so implicitly.

### 4.3. Reconciling *Gaz de France* with the ECJ’s earlier case law

#### 4.3.1. Gradual harmonization

In recent years, the ECJ has issued several judgments in which it ruled on the scope of the Directive. Such cases include *Denkavit*<sup>86</sup> (temporal scope), *Les Vergers du Vieux Tauves*,<sup>87</sup> *Amurta*<sup>88</sup> (material scope) and *Aberdeen* (personal scope).<sup>89</sup> The judgments in these cases follow a clear pattern: first, the ECJ will uphold the validity (in light of the fundamental freedoms) of the Directive. According to the ECJ, the mere fact that certain transactions are covered by that Directive, whereas others are not, is not in itself, according to the ECJ, a restriction of

73. With respect to the third EU pillar: ECJ, 3 May 2007, Case C-303/05, *Advocaten voor de Wereld VZW v. Leden van de Ministerraad*, Paras. 45-46.

74. See P. Craig and G. De Búrca, *EU Law, Texts, Cases, and Materials* (Oxford: Oxford University Press, 2007), pp. 559-560, citing, inter alia, ECJ, 19 October 1977, Joined Cases 117/76 and 16/77, *Albert Ruckdeschel & Co. et Hansa-Lagerhaus Ströh & Co. v. Hauptzollamt Hamburg-St. Annen; Diamalt AG v. Hauptzollamt Itzehoe*, Para. 7. See also *Eman and Sevinger*, note 72, Para. 61, in which the ECJ held that although no discrimination regarding nationality exists when Dutch citizens resident in the Netherlands Antilles and Aruba are excluded from the general suffrage for the European Parliament, whilst Dutch citizens resident in third countries are not excluded, this difference in treatment is contrary to the (general) principle of equality.

75. ECJ, 16 December 2008, C-210/06, *CARTESIO Oktató és Szolgáltató bt*, Para. 123.

76. 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, L58/19).

77. 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 (OJ 1990, L225/1).

78. Consideration 10 of the Preamble to Directive 2005/19/EC; this consideration contains almost the same wording as consideration 4 of the Preamble to Directive 2003/123/EC, except that in that case no reference was made to the unjustifiable lacuna.

79. *Gaz de France*, see note 1, Para. 52.

80. ECJ, 16 December 2008, Case C-127/07, *Société Arcelor Atlantique et Lorraine and Others v. Premier ministre, Ministre de l’Écologie et du Développement durable and Ministre de l’Économie, des Finances et de l’Industrie*, Para. 57 et seq.; in this case the question arose as to whether the inclusion of the steel sector and the exclusion of the plastics and aluminium industries – which produce to a certain extent competing products (substitutes) – from the greenhouse gas emission allowance trading scheme under Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC (OJ 2003, L 275/32) was a breach of equal treatment; according to the ECJ there was a breach which was objectively justified; See F. Donnat, “Principe d’égalité et mise en oeuvre expérimentale d’un système d’échanges de quotas d’émission de gaz à effet de serre: quel degré de contrôle pour la Cour de justice?”, *Revue juridique de l’Economie publique* (2009) No. 664, pp. 22-24.

81. *Arcelor*, see note 80, Para. 47 and the case law cited therein.

82. *Arcelor*, see note 80, Para. 48 and the case law cited therein.

83. *Arcelor*, see note 80, Paras. 61 and 62.

84. ECJ, 9 November 1995, Case C-479/93, *Andrea Francovich v. Italian Republic*, Para. 28; this is the second *Francovich* case; the first was Case C-6/90. In this case the difficulty was caused by finding a concept of insolvency capable of unambiguous application in the different Member States; a distinction caused by the harmonized definition of insolvency, which caused unequal treatment, was justified due to the difficulty mentioned.

85. *Gaz de France*, see note 1, Para. 52.

86. ECJ, 14 December 2006, Case C-170/05, *Denkavit Internationaal BV and Denkavit France SARL v. Ministre de l’Économie, des Finances et de l’Industrie*.

87. ECJ, 22 December 2008, Case C-48/0, *État belge – Service public fédéral Finances v. Les Vergers du Vieux Tauves SA*.

88. ECJ, 8 November 2007, Case C-379/05, *Amurta SGPS v. Inspecteur van de Belastingdienst/Amsterdam*.

89. The ECJ judges in the *Aberdeen* case were the same judges as in the *Gaz de France* case.



the fundamental freedoms, as it is inherent to the process of gradual harmonization in the field of direct taxation (see 4.2.). After establishing that a certain transaction is outside of the scope of the Directive, the ECJ will reiterate its mantra that if a situation is not covered by the Directive, it is up to the Member States, either unilaterally or through conventions, to provide for relief for double taxation. When Member States provide such relief, they may not restrict the freedom of establishment/free movement of capital by treating a cross-border dividend distribution less favourably than a domestic dividend distribution.

#### 4.3.2. *Gaz de France and Aberdeen*

In both *Gaz de France* and *Aberdeen* the ECJ had to determine whether or not a company having a non-listed legal form (in *Gaz de France* an SAS and in *Aberdeen* a SICAV) could qualify as a “company of a Member State”. In both cases, the ECJ’s conclusion was negative.

Subsequently, the ECJ had to determine whether or not a restriction on the freedom of establishment existed. In *Gaz de France*, the ECJ held that an unfavourable treatment of an SAS compared to an SA does not constitute a restriction on the freedom of establishment that would potentially invalidate the Directive; whereas an unfavourable treatment under national law of an SAS compared to a comparable German entity would.<sup>90</sup> In this respect, the ECJ referred to settled case law<sup>91</sup> regarding the freedom of establishment, which provides that the Member State of establishment (“host state”) may not impose any restrictions on nationals of another Member State (“state of origin”) that set up agencies, branches or subsidiaries in that host state.<sup>92</sup>

In *Gaz de France*, the ECJ did not actually examine whether or not an SAS was treated less favourably than a comparable German entity. Instead, the ECJ left that analysis to the referring German Court. In *Aberdeen*, however, the ECJ did address the comparability of a Luxembourg SICAV to a Finnish parent company. In this respect, the ECJ held that, in order to assess the comparability of two legal forms, these forms need not necessarily be identical, “as the company law of the Member States has not been fully harmonized at Community level”.<sup>93</sup> Requiring that these forms be identical would thus “deprive the freedom of establishment of all effectiveness”.<sup>94</sup>

Interestingly, this consideration was interpreted by the Dutch legislator as meaning that the legal form requirement in the Directive is irrelevant. From 1 January 2010, the legal form requirement is, therefore, removed from Art. 4 of the Dutch Dividend Withholding Tax Act.<sup>95</sup> In the authors’ view, this change seems premature after the ECJ’s judgment in *Gaz de France*, but rational in light of *Aberdeen*.

Furthermore, it is settled case law of the ECJ that if a Member State, either unilaterally or by way of a tax treaty, imposes withholding tax not only on resident shareholders, but also on non-resident shareholders, the

position of non-resident shareholders is comparable to that of the resident shareholders.<sup>96</sup>

The question that remains, is whether or not the SAS can *only* claim the same treatment as comparable German parent companies (the *Aberdeen* “solution” providing for “national treatment”), or whether it could *also* claim the same treatment as an SA under German national law. The favourable treatment of an SA follows from the national German legislation transposing the Directive. In other words: can it be concluded that the national legislation transposing the Directive is contrary to the freedom of establishment (Art. 49 TFEU) or to the general principle of equality, even in the event the Directive is not invalidated (although the correctness of that conclusion is doubtful in the authors’ view (see 4.2.))?<sup>97</sup> In order to answer that question, it is relevant in the authors’ view to consider whether the breach of EU law by national legislation transposing a directive is imputable to the Member State. In the *Deutsche Bahn* case the Court of First Instance (CFI) had to rule – in the field of State aid – whether the exemption of kerosene from excise duties constituted State aid to airline companies.<sup>98</sup> The exemption was imposed on the Member States by a directive.<sup>99</sup> Therefore, the CFI concluded that the national measure at issue:

[wa]s not imputable to [a Member] State, but in actual fact stem[med] from an act of the Community legislature.<sup>100</sup>

In the authors’ view there is no valid argument why this analysis should not apply *mutatis mutandis* in the field of the free movement provisions.<sup>101</sup>

Consequently, if the national measure (correctly) transposes a directive, the national measure itself cannot be held contrary to EU law as the measure is not imputable

90. *Gaz de France*, see note 1, Para. 59.

91. Most recently: *Aberdeen Property Fininvest Alpha Oy*, see note 69.

92. *Gaz de France*, note 1, Para. 54, citing, inter alia, ECJ, 23 February 2006, Case C-253/03, *CLT-UFA SA v. Finanzamt Köln-West*, Para. 13.

93. *Aberdeen Property Fininvest Alpha Oy*, see note 69.

94. *Aberdeen Property Fininvest Alpha Oy*, see note 69, Para. 50. See also Y. Robert et al., note 69.

95. Artikelsgewijze toelichting OFM, Belastingplan 2010, Art. V, part A (Art. 4 of the 1965 Law on the Taxation of Dividends – *Wet op de dividendbelasting 1965*), pp. 40-42.

96. See, inter alia, *Amurta*, note 88, Para. 38 and the case law cited therein.

97. It should be noted that if the national legislation transposing a directive were to be tested against EU law, the directive is (indirectly) tested (as well), although through the backdoor.

98. CFI, 5 April 2006, Case T-351/02, *Deutsche Bahn AG v. Commission of the European Communities*.

99. Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992, L316/12); this exemption is in line with international practice following from, for example, for the Chicago Convention of 7 December 1944 on International Civil Aviation (United Nations Treaty Series, Vol. 15, p. 295).

100. *Deutsche Bahn*, see note 98, Para. 102.

101. Although the ECJ did not accept it in a case in the field of the free movement (of capital), in which Belgium used the argument that the restrictive measure was not imputable to it, because “the contested measure was taken by the Belgian State not in its capacity as a public authority but in its capacity as a private operator”.

The ECJ did not accept this argument, because the restrictive measure constituted “a regulatory measure which only the State in its capacity as public authority is authorised to take”. In the authors’ view, that case is not relevant here, as the national measure did not transpose a directive. ECJ, 26 September 2000, Case C-478/98, *Commission of the European Communities v. Kingdom of Belgium*, Para. 20 et seq.

to the Member State.<sup>102</sup> In that event, only the measure, i.e. the directive, enacted by the Union legislator can be tested against EU law and, if contrary, invalidated. This is confirmed by settled case law of the ECJ in the field of harmonization in which the ECJ holds that national legislation that is in conformity with directives cannot be regarded as infringing primary EU law.<sup>103</sup>

In view of the foregoing, the conclusion would be that an SAS cannot claim the same treatment under German law as an SA based on the argument that the German national law, transposing the Directive, is contrary to the freedom of establishment or to general principle of equality.

## 5. Implications of *Gaz de France*

### 5.1. Limited scope of the Directive

In *Gaz de France* and *Aberdeen*, the ECJ clearly sets forth a (limited) *personal* scope of the Directive. Companies that fall outside that scope may, however, be protected by the freedom of establishment, which guarantees them a similar treatment to a comparable national entity. As discussed above, the ECJ held in *Aberdeen* that differences between the legal forms of foreign parent companies and domestic parent companies are, to a large extent, irrelevant.

### 5.2. The catch-all clause as the main legislative technique

In *Gaz de France*, the ECJ attached importance to the fact that the main legislative technique used in the initial Annex was the explicit listing of qualifying legal forms. From its schematic interpretation, the ECJ concluded that the list in the Annex was exhaustive rather than merely exemplary.

With the 2003 amendment, the catch-all clause has become the main legislative technique used in the Annex. When applying a schematic interpretation to the amended Annex, it may be argued that since the main technique is the catch-all clause, the list in the Annex has become exemplary rather than exhaustive.

### 5.3. Dual-resident companies and the catch-all clause

The majority of the catch-all clauses require, in order for an entity to be characterized as a “company of a Member State”, that (1) the company be incorporated under the law of a Member State and (2) the company be subject to corporate income tax in the *same* Member State. The catch-all clauses prevent the undesired exclusion of new legal forms from the scope of the Directive, such as the SAS in *Gaz de France*.<sup>104</sup>

As far as the authors are aware, the ECJ has not yet interpreted the term ‘subject to tax’ contained in the Annex to the Directive, nor has it interpreted the same term used in Art. 2(c) of that Directive.<sup>105</sup> Two different interpretations of the term “subject to tax” have been put forward by scholars:<sup>106</sup>

(1) the (form of the) company must be subject to tax, regardless of whether or not the company actually pays tax;<sup>107</sup> and

(2) the profit realized by the company must be subject to tax (which makes the company “fully liable to tax”).<sup>108</sup>

The authors are of the opinion that these two interpretations of the term ‘subject to tax’ in Art. 2(c) of the Directive can also be used for the catch-all clause in the Annex.

Using the fully-liable-to-tax interpretation may have an adverse impact on dual-resident companies. For example, consider a company that is incorporated by way of a new (i.e. a non-listed) Dutch legal form. Further, assume that the Dutch Corporate Income Tax Act has also been extended to include that legal form. Pursuant to the catch-all clause in the “Dutch” paragraph in the Annex, that company will have a qualifying legal form if it is “constituted under Dutch law subject to Dutch corporate [income] tax”.<sup>109</sup> If the real seat of that company is transferred to, for instance, Germany (see the *Überseering* case),<sup>110</sup> the company will become a dual-resident company. Pursuant to Dutch tax law, the company will technically remain subject to Dutch corporate income tax, as it is incorporated under the law of the Netherlands, but it will no longer be “fully liable to tax” in the Netherlands. Pursuant to German tax law, the company will become subject to German corporate income tax, as its real seat/place of its effective management is in Germany.<sup>111</sup>

102. Of course this situation should be distinguished from cases where there is, for example, minimum harmonization, in which case national legislation going beyond the minimum harmonized norms can still be tested against primary EU law; see for example: ECJ, 14 July 1998, Case C-389/96, *Aher-Waggon GmbH v. Bundesrepublik Deutschland*, Paras. 15 and 16. See also: Y. Hofhuis, *Minimumharmonisatie in het Europees recht: vormen, begrip en gevolgen*, *Europese monografieën* Vol. 83 (Deventer: Kluwer, 2006), p. 126 and Kofler, note 7, p. 480.

103. See Kofler, note 7, p. 479 and ECJ, 11 June 1987, Case 241/86, *Openbaar Ministerie v. Jacques Bodin and Établissements Minguet & Thomas*, Para. 13.

104. J.N. Bouwman and M.G. de Weerd-de Jong, “Richtlijn 2003/123/EG; de aanpassing van de moeder-dochterrichtlijn”, *Weekblad Fiscaal Recht* 1597 (2004).

105. Neither has the ECJ interpreted the similar terms used in Art. 3(c) and the Annex to the Merger Directive.

106. The Dutch Supreme Court draws this distinction when interpreting the term “liable to tax” contained in the residence article of tax treaties, corresponding to Art. 4(1) of the OECD Model Convention (OECD Model). According to the Dutch Supreme Court, a dual resident company is not fully liable to tax and, therefore, not resident, in the state of its statutory seat/incorporation, but rather in the state of its real seat/place of its effective management; see *Hoge Raad*, 28 February 2001, No. 35.557, BNB 2001/295. For comments on (1) the full tax liability, see Paras. 3 and 8.3 OECD Commentary on Art. 4 of the OECD Model (2008); (2) dual resident companies subject to tax in more than one state, see Para. 21 OECD Commentary on Art. 4 of the OECD Model (2008); and (3) the subject-to-tax clause, see Para. 15 OECD Commentary on Art. 1 of the OECD Model (2008).

107. M.V. Lambooi, “De moeder-dochterrichtlijn en de Nederlandse wetgeving”, *FED's Fiscaal Weekblad* 153 (1991); C.W. van Noordenne, “De Europese Moeder-Dochterrichtlijn”, *Weekblad Fiscaal Recht* 443 (1991).

108. J.A.G. van der Geld, “Het wetsvoorstel tot implementatie van de Moeder-Dochterrichtlijn”, *Weekblad Fiscaal Recht* 1991/1635; H.T.P.M. van den Hurk, “Enige kanttekeningen bij de Moeder-Dochterrichtlijn”, *Weekblad Fiscaal Recht* 1265 (1991); H.T.P.M. van den Hurk, “Onderworpenheid en compartimentering; europees geïnterpreteerd”, *Weekblad Fiscaal Recht* 1434 (1994).

109. Point (s) of the Annex to the Directive.

110. ECJ, 5 November 2002, Case 208/00, *Überseering BV*; see D.M. Weber, “Exit Taxes on the Transfer of Seat and the Applicability of the Freedom of Establishment after *Überseering*”, *European Taxation* 10 (2003), p. 350.

111. Pursuant to Art. 3(5) of the Netherlands–Germany tax treaty, the company will be considered a resident of Germany as its place of management is in Germany.

If the catch-all clause must be interpreted as meaning that the company should be “fully liable to tax” in the Member State of incorporation (the Netherlands), the dual-resident company will not qualify as a “company of a Member State”. Although it is incorporated under Dutch law, it is (no longer) fully liable for Dutch corporate income tax. On the other hand, the company is subject to German corporate income tax, but it is not incorporated under German law and, therefore, it also does not qualify as a “company of a Member State” under the “German” paragraph in the Annex.<sup>112</sup>

Applying the ECJ’s literal interpretation in *Gaz de France* to this case may, therefore, lead to the conclusion that this dual-resident company does not qualify under the Annex to the Directive. This outcome would be contrary to the aim of the Directive, which is the avoidance of double taxation, as the profits received by the dual-resident company will be taxed under German tax law. A more satisfying outcome would, therefore, be reached by interpreting the term “subject to corporate tax” as meaning that the form of the company must be subject to corporate tax pursuant to the Dutch Corporate Income Tax Act, rather than that the company should be “fully liable to tax” in the Netherlands.

## 5.4. Listed hybrid entities

### 5.4.1. Considered transparent by the source state

From *Gaz de France* it must be concluded that a company having a listed legal form that fulfils the other criteria of the Directive is entitled to an exemption from dividend withholding tax. This applies also if the source state considers the entity transparent, whereas the resident state considers the entity non-transparent (hybrid entities).

The Annex to the Directive lists several hybrid entities, such as Belgian and Hungarian general partnerships (*‘société en nom collectif’/‘vennootschap onder firma’* (SNC)<sup>113</sup> and *‘betéti társaság’* (BT));<sup>114</sup> and the Slovak and Dutch limited partnerships (*‘komanditná spoločnosť’*,<sup>115</sup> and *‘open commanditaire vennootschap’* (OCV)).<sup>116</sup>

Although Art. 4(1a) of the Directive allows the Member State of the parent company to consider its subsidiary transparent, such a provision does not exist in the reverse situation, where the Member State of the subsidiary considers the parent company transparent.<sup>117</sup> The source state is, therefore, held to apply Art. 5 of the Directive and should provide an exemption from withholding tax. This is confirmed by the sixth recital of the preamble to Directive 2003/123/EC:

[t]he new entities to be included in the list are corporate taxpayers in their Member State of residence but some are considered on the basis of their legal characteristics to be transparent for tax purposes by other Member States. Member States treating non-resident corporate taxpayers as fiscally transparent on this basis should grant the appropriate tax relief in respect of revenue which forms part of the tax base of the parent company.

The source state should also provide an exemption from withholding tax on a distribution to a company it considers transparent if that company has a legal form that is

not explicitly listed, but nevertheless qualifies as a “company of a Member State” by virtue of a catch-all clause.

### 5.4.2. Full or partial exemption?

The remaining question is whether or not the source state should provide a full exemption from withholding tax or whether it is only required to provide a partial exemption (exempting only the amount of withholding tax corresponding to the share in the distribution of the limited partners, since only that part is taxed at the level of the partnership).<sup>118</sup>

The Directive does not explicitly refer to the object of taxation. In order to qualify as a “company of a Member State”, it is required that a company be listed and that it be “subject to one of the [corporate income taxes enumerated in the Parent-Subsidiary Directive], without the possibility of an option or of being exempt”.<sup>119</sup> On the basis of the ECJ’s “literal” interpretation in *Gaz de France*, it should be argued that if a partnership is listed and subject to corporate income tax, although only on the share of the limited partners, the source state should (still) provide a full exemption. Based on the objective of the Directive (the avoidance of double taxation), however, the authors are of the view that an exemption should only be provided as regards the share of the limited partners that is taxed at the level of the partnership. The share of the dividend that is attributable to the general partner (the transparent part of the partnership) will not be subject to corporate income tax at the level of the partnership and will, therefore, not result in double taxation at that level. Those dividends are taxed at the level of the general partner.

In the authors’ view, the source state should also only provide an exemption from withholding tax on the dividend attributable to the general partner if the general partner is a company subject to corporate income tax that would also qualify as a “company of a Member State”. In a triangular case, where the general partner is established in a different (i.e. third) Member State than the distributing company and the partnership, the partnership should be considered to constitute a PE of the General Partner.

112. Point (f) of the Annex to the Directive.

113. Point (b) of the Annex to the Directive.

114. Point (q) of the Annex to the Directive; *Cartesio* had the form of a BT; *CARTESIO*, note 75.

115. Point (y) of the Annex to the Directive.

116. Point (s) of the Annex to the Directive.

117. See R. Russo, “Partnerships and Other Hybrid Entities and the EC Corporate Direct Tax Directives”, *European Taxation* 10 (2006), p. 478, Para. 2; see, for the treatment of hybrid entities under the Merger Directive, R. Russo and R. Offermanns, “The 2005 Amendments to the EC Merger Directive”, *European Taxation* 6 (2006), p. 250, Paras. 3 and 8; and regarding Dutch legislation in respect of hybrid entities implementing the 2003 amendment to the Directive: R.W.J.K. Rademakers and M.J. Swets, “New Decrees on the Classification and Tax Treatment of Foreign (Hybrid) Entities in the Netherlands”, *European Taxation* 5 (2005), p. 171.

118. Since only that part of the profits is subject to corporate income tax at the level of the partnership. See, for a description of the treatment of these partnerships for tax purposes in the state of incorporation, OECD “The Application of the OECD Model Tax Convention to Partnerships”, Edition 6 of *Issues in International Taxation* (Paris: OECD Publishing, 1999), Annex III to the Partnership Report, p. 67 et seq.

119. Council Directive 2003/123/EC, Art. 3, Para. b.

Fibbe<sup>120</sup> finds support for this reasoning in the preamble to Directive 2003/123/EC, which states that:

[t]he payment of profit distributions to, and their receipt by a permanent establishment of a parent company should give rise to the same treatment as that applying between a subsidiary and its parent.<sup>121</sup>

If the general partner does not qualify as a “company of a Member State”, the source state should not be required to exempt withholding tax on the dividends attributable to the general partner. If the full amount of dividend withholding tax is exempt, the status of the general partner (“company of a Member State” or not) becomes irrelevant.

### 5.5. Non-listed hybrid entities

Applying the ECJ’s restrictive approach in *Gaz de France* to a distribution to a non-listed hybrid entity leads to the conclusion that the source state is not compelled, under the Directive, to provide an exemption from withholding tax.

An example of such a non-listed hybrid entity is a Czech limited partnership, the ‘*komanditní společnost*’, which is not explicitly mentioned in the Annex to the Directive. Furthermore, the ‘*komanditní společnost*’ cannot qualify under a catch-all clause, as such a clause is non-existent in respect of the Czech Republic.<sup>122</sup> The profit share of the limited partners is subject to Czech corporate income tax. The Czech limited partnership seems to be comparable to the explicitly listed Slovak and Dutch limited partnerships.<sup>123</sup> In the authors’ view that is not very consistent.

Other examples of non-listed hybrid entities are the French partnerships (‘*société en nom collectif* (SNC) and ‘*société en commandite simple*’ (SCS)). These entities are not explicitly listed in the Annex and may opt for the corporate income tax regime. Although the SNC and SCS fall within the scope of the catch-all clause, they do not fulfil the criterion of Art. 2(c) of the Directive, as they can opt to be subject/exempt from French corporate income tax. Neither the SNC nor the SCS, therefore, qualify as a ‘company of a Member State’.

For those companies, the *Aberdeen* ‘approach’ would apply. A dividend distribution to a Czech ‘*komanditní společnost*’, or a French SNC or SCS should thus be exempt if that company is considered non-transparent by the source state, and dividends to a national non-transparent company are exempt by the source state.

## 6. Conclusion

In *Gaz de France*, the ECJ limits the personal scope of the Directive to those companies having a legal form (explicitly) listed in the Annex. The analysis of the ECJ that led to the conclusion that an SAS cannot be regarded as a “company of a Member State” can

certainly be criticized. Based on the objective of the Directive, and also on the basis of Art. 48 of the EC Treaty (now Art. 54 TFEU), several arguments can be put forward for an extension of the scope of the Directive to non-listed companies. The schematic and historical interpretation applied by the ECJ lacks cohesion.

The ECJ (correctly) holds that only an unfavourable treatment of an SAS compared to a similar German company may constitute an infringement of the freedom of establishment. The ECJ neglects, however, to analyse whether an unfavourable treatment of an SAS compared to an SA may constitute a breach of the principle of equality. In view of the apparent lack of an explicit objective justification for the distinction, the ECJ’s analysis is unsatisfying. The judgment in *Gaz de France* is in line with the ECJ’s earlier case law on the scope of the Directive, including *Aberdeen*. The ECJ accepts that the arbitrary distinction created by a restrictive interpretation of the scope of the Directive does not affect the Directive’s validity under primary EC (now EU) law. In *Gaz de France* the ECJ did not apply the lenient criteria set forth in *Aberdeen* to determine whether or not an SAS was treated unfavourably as opposed to a comparable German entity. The ECJ leaves it up to the Member States to ensure that if a dividend distribution to a national parent company is exempt from withholding tax, a similar treatment should be guaranteed in regards to a comparable foreign parent company.

The ECJ’s literal and restrictive interpretation of the Directive allows the conclusion that dual-resident companies cannot qualify as companies of a Member State. Furthermore, the ECJ’s approach may also have undesirable effects if dividends are distributed to hybrid entities. The authors, therefore, suggest a more teleological approach, based on the Directive’s objective of avoidance of double taxation.

120. This example is derived from G. Fibbe, “*EC Law Aspects of Hybrid Entities*”, IBFD Doctoral Series (Amsterdam: IBFD, 2009), pp. 302-306.

121. Para. 8 of the Preamble to Council Directive 2003/123/EC of 22 December 2003 amending the Parent-Subsidiary Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States.

122. Point (d) of the Annex to the Directive. Oddly, the ‘*komanditní společnost*’ is listed under point (p) of the Annex to Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payment made between associated companies of different Member States (OJ 2003, L157/49).

123. Especially the Czech and Slovak limited partnerships are alike; both from a corporate law point of view, and from a tax law point of view. When Czechoslovakia fell apart into two states, the new states took over the 1991 Corporate law legislation of Czechoslovakia (see M. Pauknerová, “*Entwicklungen im tschechischen internationalen Gesellschaftsrecht*”, *IPRax* 2 (2007), p. 162). The treatment under tax law is equal as well; see for the treatment of these partnerships for tax purposes, OECD (1999), note 118. The Slovak limited partnership even has (practically) the same name as the Czech limited partnership: a ‘*komanditná spoločnosť*’.