The Subject-to-Tax Requirement in the EU Parent-Subsidiary Directive (2011/96)

In this article, the author analyses the requirement in the EU Parent-Subsidiary Directive (2011/96) for a company to be subject to one of the taxes listed in Annex I, Part B of the Directive, without the possibility of an option or of being exempt, or to any other tax that may be substituted for any of those taxes, particularly in light of the recent decision of the Court of Justice of the European Union (ECJ) in Wereldhave (Case C-448/15).

1. Introduction and Applicable EU Law

The Parent-Subsidiary Directive (2011/96) applies to distributions of profits by subsidiary companies of a Member State to parent companies of other Member States (and permanent establishments (PEs) thereof). The status of “parent” and “subsidiary” companies is defined in article 3(1) of the Directive and substantially boils down to the parent being a company of a Member State that holds at least 10% of the capital of a company of another Member State, i.e. the subsidiary.

The term “company of a Member State” is defined as any company that:

(1) takes one of the specific forms listed in Annex I, Part A;
(2) according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a tax treaty concluded with a third State, is not considered to be resident for tax purposes outside the European Union; and
(3) is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax that may be substituted for any of those taxes.

This article analyses requirement (3), particularly in light of the recent decision of the Court of Justice of the European Union (ECJ) in Wereldhave (Case C-448/15). This requirement has been construed in different fashions by various Member States, in the process of implementing the Directive under their respective domestic laws, which makes a good case for the present analysis.

Section 2. deals with the facts of the Wereldhave decision and summarizes the holding of the ECJ. Section 3. disentangles the main issues posed by the subject-to-tax requirement under article 2(a)(iii) of the Directive and analyses them in light of the ECJ’s decision. Section 4. provides for a brief comparison between the Directive and the free movement under the Treaty on the Functioning of the European Union (TFEU) (2007). Finally, section 5. provides some conclusions.

2. The Wereldhave Decision

2.1. Facts

The Wereldhave case concerned the distribution of dividends by a Belgian subsidiary to its two Netherlands parent companies, holding 35% and 45% of the capital of the former, respectively. The relevant dividends, distributed in 1999 and 2000, amounted to approximately EUR 11 million per year. The parent companies applied to be exempt from the Belgian dividend withholding tax, maintaining that they should have been regarded as companies of the Netherlands for the purposes of the application of the Parent-Subsidiary Directive (90/435).

In the absence of a decision from the Belgian authorities, the Netherlands companies brought an action before the Court of First Instance of Brussels, which held in favour of the applicants. The Belgian state brought an appeal before the Court of Appeal of Brussels, which stayed the proceedings and referred two questions to the ECJ for a preliminary ruling.
The first question concerns the possibility of applying Directive 90/435 to dividends received by parent companies, such as those in the main proceedings, which, although being liable to tax under Netherlands law, are in fact subject to a zero-rate tax in the Netherlands as "fiscal investment institutions", provided that all of their profits are paid to their shareholders. In this respect, the referring court doubted whether such companies could be regarded as "subject to one of the [listed] taxes, without the possibility of an option or of being exempt", as provided for in article 2(1)(c) of Directive 90/435 (now article 2(a)(iii) of the Directive).

The second question deals with the issue of whether or not the freedom of establishment and the free movement of capital should be construed as precluding the taxation of those dividends in Belgium. According to the ECJ, however, the absence of any details in the request submitted by the referring court regarding the national legal framework applicable to the payment of dividends to similar resident companies makes it impossible to determine whether the EU fundamental freedoms preclude taxation in Belgium.

2.2. Ruling on the first question

According to the ECJ, article 2(1)(c) of Directive 90/435 lays down both (1) a positive requirement, i.e. the relevant company must be liable to tax, and (2) a negative requirement, i.e. it must not be exempt from tax and not have the possibility of an option. This twofold requirement excludes from the scope of application of the Directive companies that are not actually liable to pay one of the listed taxes. In this respect, the ECJ, referring to the Opinion of Advocate General Sánchez-Bordona, held that the application of a zero-tax rate is equivalent, in practical terms, to an exemption from tax.

In the Court’s opinion, this conclusion, which is based on the wording of the Directive, is further supported by a teleological interpretation thereof. Indeed, according to the ECJ, the Directive is intended to cover situations in which, in its absence, the exercise by the Member States of their taxing powers might lead to the profits distributed


9. Wereldhave (C-448/15), para. 31.

10. Id. para. 32.


13. See the reference to the logic and the objective pursued by the Directive (Wereldhave (C-448/15), para. 35).

by subsidiaries to their parents being subject to double taxation. Where a parent company is entitled, under the legislation of its Member State, to a zero rate of taxation on all of its profits, however, “the risk of double taxation on the part of that parent company of profits which were distributed to it by its subsidiary is ruled out” and, therefore, there is no need for the Directive to apply. Similarly, Advocate General Sánchez-Bordona maintains that, as the:


3.1. Structure and functions of the subject-to-tax requirement

As noted in section 1., in order for the Directive to apply, both the parent and the subsidiary companies must be “subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes”. The purpose of the provision is to define, together with the other relevant requirements, the subjective scope of application of the Directive.

It has also been argued that the provision has the additional goal of defining the objective scope of application of the Directive, i.e. to identify the taxes covered by it. This conclusion, however, must be qualified. Indubitably, article 2(a)(iii) refers to a list of taxes to which the Directive applies, so that, for instance, in the state of the parent company none of the taxes listed in the Annex may be levied on the profits distributed, or, if levied, such taxes must be reduced by an amount equal to the corresponding fraction of the corporate tax paid by the subsidiary. This does not mean, however, that Member States are allowed to levy taxes on the profits distributed that are not listed in the Annex, or that are not in substitution for one of the listed taxes, as this would frustrate the object and purpose of the Directive.
As the ECJ clearly pointed out, article 2(a)(iii) of the Directive enumerates, for the purpose of identifying those companies in the Member States which are regarded as falling within the scope of the Directive, the national taxes to which those companies are normally subject [...]. However, it cannot be inferred from this that other taxes having the same effect are authorised.

In contrast, whenever the relevant tax qualifies as a “tax on the distributed profits”, it falls within the scope of articles 4, 5 and 6 of the Directive, regardless of its name and formal categorization within the domestic legal system. In order to establish whether a tax qualifies as a “tax on the distributed profits”, the case law of the ECJ on the definition of “withholding tax” under articles 5 and 6 of the Directive appears to be relevant. It substantially requires that three conditions be met: (1) the tax must be triggered by the distribution of profits, (2) the taxable amount must be based on the amount of the distribution and (3) the taxable person must be the recipient of the distribution. Moreover, condition (2) should not be construed as requiring the taxable amount to be equal to the profits distributed; it is sufficient for such profits to be included in the taxable amount, as is generally the case in respect of corporate tax levied on the parent company in its state of residence.

The following subsections deal with the most relevant issues relating to the subject-to-tax requirement.

3.2. Parents versus subsidiaries

3.2.1. Exempt companies

The first issue, which is mainly of a policy nature, is whether it makes sense, in light of the goal pursued by the Directive, to exclude from its scope of application profits distributed by fully taxable subsidiaries to exempt parents.

Recital 3 of the Directive reads:

The objective of this Directive is to exempt dividends and other profit distributions paid by subsidiary companies to their parent companies from withholding taxes and to eliminate double taxation of such income at the level of the parent company.

The elimination of double taxation, however, is not the ultimate goal of the Directive, but only an intermediate one that is instrumental in facilitating the grouping together of companies of different Member States. It is regarded as “necessary in order to create within the Union conditions analogous to those of an internal market and in order thus to ensure the effective functioning of such an internal market”. According to recital 4 of the Directive:

Such operations should not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States. It is therefore necessary, with respect to such grouping together of companies of different Member States, to provide for tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the internal market, to increase their productivity and to improve their competitive strength at the international level.

In this respect, recital 6 recognizes that, before Directive 90/435:

the tax provisions governing the relations between parent companies and subsidiaries of different Member States varied appreciably from one Member State to another and were generally less advantageous than those applicable to parent companies and subsidiaries of the same Member State. Cooperation between companies of different Member States was thereby disadvantaged in comparison with cooperation between companies of the same Member State.

It was, therefore, “necessary to eliminate that disadvantage though the introduction of a common system in order to facilitate the grouping together of companies at Union level.

From this perspective, it appears that the elimination of source taxation (article 5 of the Directive) and the application of the exemption/indirect credit methods in the state of the parent company (article 4) are two sides of the same coin, which are both necessary in order to eliminate the economic double taxation that characterizes cross-border profit distributions as compared to purely domestic profit distributions. Where the profits distributed by the subsidiary are actually exempted (through the application of a zero-rate tax, or any other means) in the state of the parent, double taxation remains as long as the state of the subsidiary, which has already taxed the latter on its profits when derived, continues to levy a withholding tax on their distribution to the parent. Thus, from a policy perspective, the situation of the parent company and that of the subsidiary company are not comparable. The Directive builds upon the cornerstone that corporate profits should be taxed exclusively or primarily where derived, i.e. in the hands of the subsidiary. Any subsequent distribution thereof should be exempted, or taxable only in the state of residence of the parent together with the granting of an indirect tax credit. In any event, no withholding tax should be allowed in the state of the subsidiary, as it would perpetuate the double taxation of cross-border profit distributions.

The consequence is that, from a policy perspective, it would be reasonable to distinguish the status of the parent company from that of the subsidiary company, by applying the requirement of being “subject to one of the [listed] taxes … without (the possibility of) … being exempt” only for subsidiary companies. Parent companies, in contrast, should be entitled to benefit from the Directive insofar as is necessary to achieve the objective of eliminating double taxation.
as they prove they are “liable to tax” in a Member State. In other words, while requiring effective taxation at the subsidiary level is necessary to avoid corporate profits from going untaxed within the European Union, the same requirement at the level of the parent company is not only unnecessary, but can also turn out to be contrary to the main goal of the Directive. Therefore, the solution currently adopted in the Directive, as interpreted by the ECJ in the Wereldhave decision, appears to be a streamlined one that sacrifices coherence and proportionality for the sake of simplicity, which, in any event, remains the balance struck by the Council.

3.2.2. Fiscally transparent companies

A different argument can be advanced with reference to the requirement of being “subject to [tax], without the possibility of an option”, which should be read as referring primarily to the possibility of an option to be treated as fiscally transparent entities. The Directive is not purported to eliminate every instance of double taxation in connection with corporate profit distributions. In particular, it clearly does not apply to profits distributed to individuals, as a result of the legitimate policy choice made by the Council. This choice has led to (and justifies) the exclusion from the scope of application of the Directive of companies opting to be treated as fiscally transparent. Indeed, where a company is treated as transparent, its profits are automatically attributed to its shareholders and taxed accordingly. Thus, from a tax perspective, there is no difference between (1) a company distributing dividends to individuals and (2) a company distributing dividends to its parent, where such dividends are regarded – for tax purposes – as paid to the individual shareholders of the latter.

In light of the telos of the Directive, it is submitted that the concept of “tax transparency” should be construed here on the basis of the actual effects of the relevant tax regime and not its formal characteristics. In this respect, where the tax regime applicable to the parent company in its Member State does not simply have the effect of exempting that company from tax, but also leads to the taxation of its profits in the hands of its shareholders, that regime must be regarded as a tax transparency regime for the purpose of the Directive. This is also the case for the

Return to text 25.

26. A different question is whether a company that could have opted to be regarded as a transparent entity, but did not exercise such an option, qualifies for the application of the Directive. Although the English, French, Italian, Spanish, Portuguese and German texts of the Directive may be viewed as supporting the conclusion that the mere possibility for a company to opt for tax transparency would exclude that company from the scope of the Directive, a teleological interpretation may be employed to uphold the thesis that the actual exercise of that option is decisive, since, in the absence thereof, cross-border corporate double taxation remains unresolved. In this respect, see also Mastro (2002), supra n. 8, at 289.

27. For a different perspective, see Wijnen, supra n. 6, at 374.

28. See, by analogy and with regard to the concept of “exemption”, Wereldhave (C-448/15), paras. 33-34.

29. As well as in (c) and (d). A similar reasoning should apply with regard to the interpretation of the expressions “holding [..] in the capital of a company”, included in art. 3(1)(a), and “by virtue of the association of the parent company with its subsidiary”, included in art. 4(1).

30. See, by analogy, para. 6 et seq. of OECD Model Tax Convention on Income and on Capital: Commentary on Article 1 (26 July 2014), Models IBFD.


34. Or any other relevant connecting factor.
fact that taxation in the state of the PE could be limited to a part of the subsidiary’s profits.

Based on the above, it appears that the requirement of being “subject to [tax], without the possibility of an option” should be regarded as relevant for the purpose of qualifying both the parent and the subsidiary as “companies of a Member State”.

3.3. Subjective exemption versus objective exemption – Full exemption versus partial exemption

A second relevant aspect concerns the possible distinction between subjective (i.e. concerning the taxable person) and objective (i.e. concerning only certain categories of income) exemptions for the purpose of article 2(a)(iii) of the Directive. This topic is somehow intertwined with that of the distinction between full and partial exemptions, as subjective exemptions generally (although not always) concern the full income of the exempt person, while objective exemptions relate to – from a legal, not factual, perspective – only a certain part of the income.

Starting with the dichotomy of full exemption versus partial exemption, the relevant legal question is whether any distinction should be drawn for the purpose of applying the Directive, between companies that are, from a legal perspective, exempt from tax on all of their profits and companies that benefit only from the exemption of a certain part of their profits. In this respect, partial exemption can relate to (1) specific categories of income, and thus be objective (for example, dividend exemption, royalty exemption, foreign income exemption) – i.e. objective partial exemptions –, or to (2) some subjective characteristics of the company (for example, certain types of partnerships) that are only partially liable to tax, or certain types of investment entities that are exempt only on certain categories of investment income, as they are intended to be used as collective vehicles for such investments – i.e. subjective partial exemptions.

While companies benefitting from full exemption schemes fall outside the scope of application of the Directive, partial exemption, as well as reduced taxation, should not disqualify a company for the purposes of the Directive. The wording of the Directive, in this respect, is clear and should not disqualify a company for the purposes of the Directive. The logical subsequent question is whether, with regard to companies partially liable to tax, the benefits of the Directive should be granted in respect of all the profits of such companies, or whether they should be limited to that part of the profits that is effectively subject to tax.

Fibbe (2006) maintains that, on the basis of the object and purpose of the Directive, and in order to avoid abuses thereof, the application of the Directive should be “limited to the part of the entity that is effectively liable to tax”. This conclusion should be firmly rejected with regard to objective partial exemptions, i.e. where the exemption applies, across the board, to certain categories of income. The wording of the proviso, which refers to the “company [being] subject to one of the taxes listed … without the possibility of an option or of being exempt”, appears in fact to refer exclusively to subjective exemptions, while sanctioning the irrelevance of objective exemptions.

This conclusion is further supported by a systematic interpretation of the Directive, which is that the subject-to-tax requirement is used solely in order to define the personal scope of application of the Directive and not, more generally, to single out cases where the existence of exemptions makes its benefits inapplicable. Moreover, it would not

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35. The situation of such companies must be distinguished from that of companies that are, from a legal perspective, exempt only on certain items of income, but which end up not paying any tax in a certain tax year due to the fact that in that year they derive only those items of income.


37. For instance, Italian real estate listed companies, which may elect to apply a special regime (the SIIQ regime) and thus be exempt on (1) real estate rental income; (2) dividends distributed by other SIIQs (and non-listed real estate companies) out of their exempt income; (3) income distributed by real estate investment funds and SICA’s having particular features; and (4) capital gains arising from the disposal of assets producing the above categories of income, if certain conditions are met. SIIQs are required to distribute at least 70% of their exempt income every year (a specific rule on distribution applies in respect of exempt capital gains). SIIQs remain ordinarily taxable with regard to other items of income.

38. It has been argued in the literature that full exemptions granted for a limited number of years could be regarded as not disqualifying the relevant company. See, in this respect, Maisto (1996), supra n. 8, at 30; A. Fedele, La direttiva “madre-foglia” e la disciplina attuativa come complesso normativo unitario e sistematico: i criteri interpretativi, Rassegna Tributaria 5, p. 1264 (2001). See also AG Opinion in Wereldhave (C-448/15), para. 44, which refers to a “legal provision, which establishes permanently and in advance that it is the case for a certain class of bodies” (emphasis added). See, however, the contrary position of the French tax authorities (Brokelind, supra n. 6, at 129).

39. Wereldhave (C-448/15), para. 32. See, in accordance, Maisto (1996), supra n. 8, at 28-29.

40. See, among others, Hosson, supra n. 8, at 429; N. Raby, National Implementation of the Parent-Subsidiary Directive: Some Problems and Opportunities identified, EC Tax Rev. 4, p. 222 (1992); Wijnen, supra n. 8, at 362 and 374; Maisto (1996), supra n. 8, at 30-31; Fedele, supra n. 38, at 1264; Maisto (2002), supra n. 8, at 288.

41. P.H. Schenewille, Some questions on the Parent-Subsidiary Directive and the Merger Directive, Intertax 1, p. 16 (1992), who maintains that companies whose taxable profits are significantly reduced because of the application of special tax schemes, or tax rulings, still qualify as companies of a Member State, under the clear wording of (current) art. 26(a)(iii) of the Directive. See, similarly, Maisto (2013), supra n. 8, at sec. 1.2.2.2.; Maisto (1996), supra n. 8, at 30-31; Bulgarelli, supra n. 6, at 129 Wijnen et al., in contrast, question whether companies subject to taxes imposed at a very low rate, or a very reduced base, qualify for the purposes of applying the Directive (Wijnen, supra n. 6, at 362).

42. This conclusion also appears to be supported by the arguments employed by the ECJ in the Wereldhave decision. As partial exemption schemes actually leave companies subject to tax with regard to a portion of their income (Wereldhave (C-448/15), paras. 32-34).

43. Provided that the other conditions are met.

44. See, in this respect, Fibbe, supra n. 36, at 100.

45. Id.

make sense, for the same reasons highlighted in section 3.2.1., to deny the benefits of the Directive in situations in which the Member State of the parent exempted, under its domestic law, the dividends received by that company, since such exemption would clearly be consistent with the general goal of the Directive. Finally, according to de Hosson (1990), the Council minutes prior to the adoption of Directive 90/435/EEC contain several statements supporting the view that the intention of the EU legislature was to exclude from the scope of application of the Directive any company that is, in principle, liable to tax, but which, in effect, does not pay any tax because of the existence of a regime that exempts all of its income. Although these statements, according to the ECJ’s case law, are not binding on the Court, they nonetheless appear to be of auxiliary relevance for the purpose of interpreting the Directive, as they confirm a construction based on its wording and the nature of the system.

With regard to subjective partial exemptions, however, the thesis put forward by Fibbe appears sounder. It is true that, with regard to its effects on the exempt company, a subjective partial exemption applying only to certain categories of income can be hardly distinguished from an objective partial exemption. Under this perspective, thus, subjective and objective partial exemptions should be treated equally (full access to the benefits of the Directive). A second argument, however, can also be upheld, which clearly distinguishes between objective and subjective partial exemption schemes. In contrast to the former, the latter are (in most cases) optional regimes available only to companies that (1) carry on exclusively or predominantly with regard to its effects on the exempt company, a subjective partial exemption applying only to certain categories of income can be hardly distinguished from an objective partial exemption. Under this perspective, thus, subjective and objective partial exemptions should be treated equally (full access to the benefits of the Directive). A second argument, however, can also be upheld, which clearly distinguishes between objective and subjective partial exemption schemes. In contrast to the former, the latter are (in most cases) optional regimes available only to companies that (1) carry on exclusively or predominantly certain activities and (2) satisfy certain additional requirements. Where this is the case, one may argue that, for the purposes of article 2(a)(iii) of the Directive, such regimes qualify not only as “exemptions”, but also as “options” that concern the company as a whole and that are inextricably linked to the company’s subjective characteristics, such as its predominant activity. This argument is even stronger where the option for the subjective partial exemption leads to results equivalent to partial tax transparency, i.e. to the actual taxation of a part of the corporate profits in the hands of its shareholders. In such an event, there are sensible reasons to distinguish these regimes from objective partial exemptions, since it appears that a robust link exists between the non-taxation of the company and the taxation of its shareholders. This interpretation, which is supported by the telos of the Directive, breaks down, however, when the wording and system of the same Directive is examined, which would seem to exclude the possibility of qualifying a company as a “company of a Member State” only with regard to a certain part of its profits.

With regard to the dichotomy between subjective exemption versus objective exemption, it may be concluded that companies benefitting from subjective exemption schemes fall outside the scope of the Directive, while companies granted specific objective exemptions generally do not. In the Wereldhave case, the ECJ took a position only in respect of subjective full exemptions, due to the specific facts of the main proceedings. Therefore, drawing an a contrario inference from the ruling and the underlying arguments is a somewhat unfair exercise. That being said, the impression is that both the ECJ and the Advocate General attribute relevance exclusively to cases of subjective (full) exemption. In particular, according to the Advocate General, “exemption” within the meaning of article 2(1)(c) of Directive 90/435 entails that “no payment of the relevant tax is required as the legislature has deemed fit to release a particular class of companies from the obligation to pay the tax”, which is true when, “by means of an express legal provision”, a Member State “establishes permanently and in advance [a complete absence of tax] for a certain class of bodies, irrespective of the profits received.” This conclusion is also in line with the results of the analysis carried out herein.

3.4. De jure exemption versus de facto absence of tax liability

Both the wording and the system of the Directive point to the conclusion that the absence of corporate tax liability in a certain tax year is irrelevant for the purposes of

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47. This interpretation is also confirmed by an a contrario reading of the anti-hybrid rule included in art. 4 of the Directive, which was drafted in order to also apply in the event of a domestic exemption of the dividends received by the parent; this amendment, in fact, would prove ineffective if the parent company were considered to fall outside the subjective scope of application of the Directive due to the fact that it benefitted from the above-mentioned domestic law dividend exemption.

48. F. de Hosson, The Direct Investment Tax Initiatives of the European Community, p. 35 (Kluwer 1990); de Hosson, supra n. 8, at 429. See also Wijnen, supra n. 6, at 362 and 373.

49. See, to the same extent, AG Opinion in Wereldhave (C-448/15), paras. 30 and 46. As correctly pointed out by the Advocate General, at para. 46 of his Opinion, the fact that such statements were not included in the final text of the Directive is not decisive due to “the certainty that the wording of Article 2(a)(ii)”, in so far as it related to exemption from tax, itself covered those exclusions.


51. This conclusion appears to also play a relevant role in respect of Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made Between Companies of Different Member States, OJ L157 (2003), EU Law IBFD, as it entails that, “rebours sine stantibus, the interest and royalties falling within the scope of application of that directive should benefit from the withholding tax exemption, even when they were not taxed in the hands of the recipient due to a specific objective exemption available in its Member State.” To ensure that interest and royalties were taxed at least once in a Member State, it would thus be necessary to amend the provisions of the Directive. On the work devoted within the Council to reach an agreement to include a minimum effective taxation clause in the Interest and Royalties Directive, see the Presidency Note 3988/17 – FISC 33 of 6 Feb. 2017, secs. 21 et seq.

52. This is also the approach taken by the Italian legislator and the Italian Revenue Agency with regard to the SIJCs mentioned in n. 37 (see Italian Revenue Agency’s Circular Letter no 8/Eof 2008, sec. 6.1). See also, with regard to the French regime applicable to Sociétés immobilières d’inves- tissement et de gestion, Brokelind, supra n. 6, at 128-129.

53. While not qualifying it as a “company of a Member State” with regard to the remainder of such profits.

54. For a concurrent opinion, see Wijnen, supra n. 6, at 374 and Maisto (1996), supra n. 8, at 27-29.

55. Wereldhave (C-448/15), paras. 32-33.

56. AG Opinion in Wereldhave (C-448/15), para. 44.

57. Id., para. 42.

58. Id., para. 44.
article 2(a)(iii) unless it is caused by a de jure subjective exemption.59 A company qualifying as a taxpayer under the relevant domestic corporate tax law is, indeed, subject to tax in the sense of article 2(a)(iii) of the Directive.60 In addition, the fact that such a company does not pay tax in a certain fiscal year because it only derives exempt items of income (for example, dividends), or because it is in a loss position, does not transform it into a company “exempt” in the sense of article 2(a)(iii), as it does not benefit from a (full) subjective exemption. As such, and provided that the other conditions are met, it qualifies as a company of a Member State under the Directive.61

This interpretation has also been supported by the ECJ62 and Advocate General Sánchez-Bordona,63 who both appear to limit the cases of exemption, relevant for the purpose of article 2(a)(iii) of the Directive, to exemptions specifically granted by the law (in advance and in abstracto), while excluding the relevance of instances where companies end up paying no tax in a specific tax year because of mere factual and accidental circumstances.

4. Subject-to-Tax: A Comparison between the Directive and the Free Movement of Capital

The fact that a parent company falls outside the scope of application of the Directive, due to a subjective exemption granted by its Member State of residence, does not preclude the possibility for it to have indirect access to similar benefits under the EU fundamental freedoms.64 In particular, the freedom of establishment and the free movement of capital oblige the Member State of the subsidiary to grant to the non-resident parents the same treatment that it would apply to dividends distributed to comparable resident parents. In this respect, where the law of the Member State of the subsidiary seeks to prevent the profits distributed by resident companies from being subject to a series of charges to tax, the situation of resident parents is generally comparable to that of non-resident parents.65

In particular, where a Member State makes the tax treatment of the dividends distributed by its resident subsidiaries (taxation versus exemption) exclusively dependent on the place of residence of the parent (non-resident versus resident),66 the tax treatment of dividends distributed to non-resident parents is discriminatory regardless of whether or not the parent is subject to tax in the state of residence67 and regardless of the tax situation of its shareholders.68 The levying of a withholding tax is, therefore, contrary to EU law, unless justifiable on the basis of imperative reasons in the public interest.

As the author pointed out in section 3.2.1., the argument that, since the parent company is not taxed in its state of residence, double taxation does not arise at the level of the parent company, has no merit. According to the ECJ, it is the state of the subsidiary that, by subjecting profits to withholding tax that have already been taxed when derived, creates an unlawful series of charges to tax that that very same Member State chose to prevent in respect of profits distributed to resident companies.69

Only where the domestic dividend exemption is conditional on the tax treatment of the parent company shareholders would that treatment become relevant with regard to non-resident parent companies, in order to assess their comparability with resident parents and, therefore, to establish where a discriminatory treatment prohibited by the TFEU is at stake.70

5. Conclusions

After almost 30 years since the approval of the Directive, the manner in which Member States construe and apply one of its basic requirements, i.e. the subject-to-tax clause, still varies significantly across the European Union. In parallel, such a clause is the source of several hermeneutical uncertainties. In the recent Wereldhave decision, the ECJ has satisfactorily clarified certain interpretative issues.

59. See, accordingly, Fedele, supra n. 38, at 1264.
60. Maisto (2013), supra n. 8, at sec. 1.2.2.2.
61. See, for a similar view, de Hosson, supra n. 8, at 429.
62. Wereldhave (C-448/15), para. 34.
63. AG Opinion in Wereldhave (C-448/15), paras. 43-44.
64. DE: ECJ, 29 Oct. 2011, Case C-284/09, Commission of the European Communities v. Federal Republic of Germany, para. 48, ECJ Case Law IBFD.
65. FI: ECJ, 18 June 2009, Case C-303/07, Aberdeen Property Fininvest Alpha Oy v. Uudenmaan verovirasto and Helsingin kaupunki, paras. 43-44; ECJ Case Law IBFD, Commission v. Germany (C-284/09), paras. 57-58; and FR: ECJ, 10 May 2012, Joined Cases C-338/11 to C-347/11, Santander Asset Management SGIC and Others, para. 39.
66. According to ECJ case law, “where national tax legislation establishes a distinguishing criterion for the taxation of distributed profits, account must be taken of that criterion in determining whether the situations are comparable” and, in this respect, “only the relevant distinguishing criteria established by the legislation in question must be taken into account in determining whether the difference in treatment resulting from that legislation reflects situations which are objectively different” (Santander Asset Management SGIC and Others (C-338/11 to C-347/11), paras. 27 and 28).
67. Aberdeen (C-303/07), para. 51. In the ECJ’s words “the non-taxation of [the profit distribution in the State of the parent company] is not such as to justify it being taxed by the [State of the subsidiary], since that State has chosen not to exercise its tax jurisdiction over such income where it is received by companies resident in [that State]” (id., para. 52).
68. Santander Asset Management SGIC and Others (C-338/11 to C-347/11), paras. 28 and 39. It is worth highlighting that the ECJ, similar to what has been argued by the author in sec. 3.2.2. of this article, has recognized the need to distinguish (1) regimes that simply exempt the parent company from (2) regimes that link such exemption to the taxation of the income in the hands of the parent company shareholders. In this respect, the ECJ found that, where the exemption applies even in cases where the resident parent company capitalizes the dividends received, such that there is no redistribution of such dividends that may give rise to its shareholders being subject to further taxation, the relevant domestic legislation must be regarded as establishing no link between the tax treatment of the dividends received by the parent company and the tax situation of its shareholders. In such a scenario, the exemption granted to the resident parent company must be extended to the dividends received by non-resident parent companies, notwithstanding the tax treatment of its shareholders in the (foreign) Member State of that parent (Santander Asset Management SGIC and Others (C-338/11 to C-347/11), para. 31; see also, by analogy, Aberdeen (C-303/07), para. 73. Aberdeen (C-303/07), 54.
69. NL: ECJ, 20 May 2008, Case C-194/06, Staatssecretaris van Financiën v. Orange European Smaller Cap Fund NV, paras. 33, 60 and 64, ECJ Case Law IBFD and Santander Asset Management SGIC and Others (C-338/11 to C-347/11), para. 40.
The path to full clarification is, however, still long. In addition, from a policy perspective, it appears that the application of a single subject-to-tax requirement to qualify both subsidiaries and parent companies is inappropriate.

It is the author’s opinion that the subject-to-tax requirement could be dropped from the Directive. It is a matter of policy for each Member State to decide whether and to what extent taxing corporate profits and the effective exercise of that policy choice requires a special shield in the Directive. On the one hand, the issue of intra-EU (double) non-taxation is resolved by the possibility under article 4 of applying the credit method. On the other hand, the risk of non-(adequate) taxation in the Member States where the corporate profits are produced can be eliminated by such states by taxing (exempt) subsidiaries when they distribute their profits and by taxing the profits of transparent entities in the hands of their investors, if significant economic activities are carried out in their territories. In addition, the fundamental freedoms guarantee that domestic taxation is applied in a non-discriminatory manner within the internal market and EU anti-avoidance rules ensure that unintended loopholes are not unlawfully abused.

Finally, in the long term, the CCTB project on an EU Common Corporate Tax Base (CCTB)\(^1\) could represent the appropriate tool, for the EU legislator, to abolish the subject-to-tax requirement and streamline the current rules for the elimination of corporate double taxation within the European Union.

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