Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 12 May 2016[1]

Case C-593/14

Masco Denmark ApS,
Damixa ApS
v
Skatteministeriet(Request for a preliminary ruling

from the Vestre Landsret (Western Regional Court, Denmark))

(Tax law — Freedom of establishment (Article 43 EC) — National corporation tax — Income from interest — Loan to a subsidiary — Tax exemption in the case where a thinly capitalised subsidiary is prohibited from deducting interest expenses — Parent companies with non-resident subsidiaries — Prohibition on deduction of interest expenses imposed by another Member State))

I – **Introduction**

1. The tax-avoidance strategies of international corporate groups have been a pressing concern of the international community over the past number of years. A classic method for shifting profits from one State to another is to provide financing to foreign subsidiaries in the form of loans instead of equity. This can result in a subsidiary's profits being shielded in part from taxation in the State of establishment and taxed instead, as interest income, in the country where the parent company is established, often under more favourable conditions.

2. This method of shifting profits forms the background to the present request for a preliminary ruling. The Danish tax authorities have attempted to counteract this by prohibiting so-called thinly capitalised subsidiaries from deducting interest expenses where there is a presumption that their parent company should in fact have provided them with greater equity. Because of this prohibition, the profits of Danish subsidiaries are not reduced by interest payments, such that they are taxed in full. However, in order to avoid a situation in which interest payments are subject to double taxation in Denmark, the interest income received by the Danish parent company is exempt from taxation in this case.

3. However, Danish parent companies are not allowed to benefit from this exemption if their subsidiary is established in another Member State and is there also prohibited from deducting interest expenses. The Court of Justice is now tasked with clarifying whether such a rule, which is designed to prevent the shifting of tax revenues, is compatible with the freedom of establishment. In this regard, the objective will primarily be to ensure the consistency of our case-law in the area of direct taxation.

1 — Original language: German.

II – **Legal context**

A –*EU law*

4. For the period relevant to the case in the main proceedings, Article 43 EC[2] (now Article 49 TFEU[3]) regulates the freedom of establishment as follows:

‘Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.’

5. Article 48 EC (now Article 54 TFEU) extends the scope of the freedom of establishment as follows:

‘Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

…’

B –*National law*

6. The Kingdom of Denmark levies corporation tax on the income of Danish companies, which also includes income derived from interest.

7. Pursuant to Paragraph 11(1) of the selskabsskattelov (Danish Law on corporation tax — ‘Danish Corporation Tax Law’), a Danish company that is a member of a group may in general not deduct interest expenses for intra-group liabilities as business expenses in so far as it is thinly capitalised. This presupposes that the company’s debt-to-equity ratio exceeds 4:1.

8. If the prohibition on the deduction of interest expenses in Paragraph 11(1) of the Danish Corporation Tax Law is applicable, then, pursuant to Paragraph 11(6), the recipient of the interest payments is exempt from taxation on the corresponding interest income.

III – **The dispute in the main proceedings**

9. The case in the main proceedings concerns the assessment of Danish corporation tax for the Danish company Damixa ApS (‘Damixa’) for the years 2005 and 2006, and in particular the tax treatment of certain interest income. At that time, Damixa was a subsidiary of Masco Denmark ApS, with which it was subject to joint group taxation and which is therefore also an applicant in the main proceedings.

2 — Treaty establishing the European Community, in the version of the Treaty of Amsterdam (OJ 1997 C 340, p. 173).

3 — Treaty on the Functioning of the European Union (OJ 2012 C 326, p. 47).

10. Damixa had granted a loan to its wholly-owned subsidiary Damixa Armaturen GmbH, which was established in Germany. In 2005 and 2006, Damixa received interest income from the loan totalling DKK 9 584 745. The interest payments made by its German subsidiary were disallowed as business expenses because, under German law, it was considered to be thinly capitalised (debt-to-equity ratio of more than 1.5:1).

11. In this case, the Danish tax authorities see no room for application of the tax exemption for interest income pursuant to Paragraph 11(6) of the Danish Corporation Tax Law. This is because the exemption requires that the interest expenses were subject to a prohibition on deduction by the company owing the interest pursuant to Paragraph 11(1) of the Danish Corporation Tax Law. However, this prohibition on deduction applies only to companies that are subject to Danish taxation, that is to say, only to companies that are established in Denmark.

12. By contrast, Damixa takes the view that the rule interferes with its freedom of establishment. This is because it is ultimately being denied a tax exemption solely because the subsidiary from which it receives interest income is established in another Member State.

IV – **Proceedings before the Court of Justice**

13. The Vestre Landsret (Western Regional Court, Denmark), before which the dispute is currently pending, submitted the following question to the Court of Justice on 19 December 2014 pursuant to Article 267 TFEU:

'Does Article 43 EC, read in conjunction with Article 48 EC (now, respectively, Article 49 TFEU and Article 54 TFEU), preclude a Member State from not allowing a resident company a tax exemption for interest income where an affiliated company within the same group established in another Member State is not entitled to a tax deduction for the corresponding interest expenditure as a result of rules (as in the present case) in the relevant Member State on interest deduction limitation in cases of thin capitalisation, where the Member State allows a resident company a tax exemption for interest income in cases where an affiliated company within the same group in that same Member State is not allowed a tax deduction for the corresponding interest expenditure as a result of national rules (as in the present case) on interest deduction limitation in cases of thin capitalisation?'

14. The applicants in the main proceedings, the Kingdom of Denmark and the European Commission submitted written observations to the Court of Justice on this question, and presented oral arguments at the hearing on 3 March 2016.

V – **Legal analysis**

15. By its question, the referring court essentially seeks to ascertain whether it is compatible with the freedom of establishment if a Member State exempts from taxation the interest income that a parent company receives from its subsidiary when the subsidiary's corresponding interest expenses are subject to a prohibition on deduction because of thin capitalisation, but not when the subsidiary is established in another Member State and is not allowed to deduct the interest payments for tax purposes there likewise for reasons of thin capitalisation.

A – *Restriction on the freedom of establishment*

16. Under Article 43 EC, in conjunction with Article 48 EC, restrictions on the freedom of establishment of companies of a Member State in the territory of another Member State are prohibited. This prohibition applies not only to the host State but also to a company's State of origin. [4] It therefore constitutes a generally prohibited restriction on the freedom of establishment when the State of origin treats a domestic company with a foreign subsidiary less favourably than it treats a domestic company with a domestic subsidiary. [5]

17. In the present case, it initially appears as though Damixa has been treated unfairly in this way. It was denied a tax exemption for the interest payments made by its foreign subsidiary even though that subsidiary was not allowed to claim the interest payments as business expenses in connection with the taxation of its income, whereas Damixa would have benefited from a tax exemption had the subsidiary been a domestic one that was likewise denied the deduction for interest payments.

18. However, a rule such as the Danish one ultimately does not restrict Damixa's freedom of establishment, because the disadvantage it suffered cannot be ascribed solely to the Kingdom of Denmark. This view follows from the principle of autonomy that has been established in the case-law (see 1), and it is not substantively called into question by the *Manninen* line of case-law (see 2).

1. The principle of autonomy

19. The Court of Justice has repeatedly held that fundamental freedoms do not require a Member State to take account, for the purposes of applying its tax law, of the possible adverse consequences arising from the particularities of the legislation of another Member State. [6] In particular, in accordance with settled case-law, freedom of establishment does not require a Member State to draw up its tax rules on the basis of those in another Member State in order to ensure, in all circumstances, taxation which removes all disparities arising from national tax rules. [7]

4 — See, inter alia, judgments of 27 September 1988, *Daily Mail and General Trust* (81/87, EU:C:1988:456, paragraph 16); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 35); of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 18); and of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 20).

5 — See, inter alia, judgments of 18 November 1999, *X and Y* (C-200/98, EU:C:1999:566, paragraphs 27 and 28); of 27 November 2008, *Papillon* C-418/07, EU:C:2008:659, paragraphs 31 and 32); of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraphs 23 to 27); of 17 July 2014, *Nordea Bank Danmark* (C-48/13, EU:C:2014:2087, paragraph 19); and of 2 September 2015, *Groupe Steria* (C-386/14, EU:C:2015:524, paragraph 15).

6 — See judgments of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 49), and of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraph 79).

7 — Judgments of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraph 43); of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraph 50); and of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 62). See also in this sense judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 51), and of 10 June 2015, *X* (C-686/13, EU:C:2015:375, paragraph 33) with respect to the choice between various Member States of establishment. Specifically on double taxation, see judgments of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 28); of 1 December 2011, *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 83); and of 21 November 2013, *X* (C-302/12, EU:C:2013:756, paragraph 29). With respect to tax notification duties, see also judgment of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraph 31). On the free movement of capital, see also judgments of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraph 31), and of 8 December 2011, *Banco Bilbao Vizcaya Argentaria* (C-157/10, EU:C:2011:813, paragraph 39).

20. This 'autonomy principle'[8] ultimately means that a Member State does not breach fundamental freedoms when adverse treatment in cross-border situations results solely from taking into account the tax rules of another Member State. This is because the tax regime of each Member State is to be viewed autonomously.[9]

21. The Court of Justice applied this principle, for instance, in ruling that a Member State is not obliged to make the manner in which it levies taxes dependent on whether another Member State does it the same way.[10]

22. Also, in connection with so-called exit taxation, the Court of Justice has held on the basis of the autonomy principle that a Member State is not obliged to take into account decreases in the value of a company's assets that are realised after the transfer of its place of management to another Member State based on whether the tax law of the host Member State allows such decreases in value be taken into account.[11]

23. Furthermore, under the autonomy principle, the cross-border treatment of losses also cannot be made dependent on whether the tax law of the other Member State does not allow losses sustained by a non-resident subsidiary to be carried forward[12] or generally does not provide for losses incurred on the sale of a property situated there to be taken into account.[13]

24. In all of these cases, the adverse treatment of the cross-border situation is at least equally attributable to the other Member State and is therefore the consequence of the allocation of tax powers between the Member States[14] or the parallel exercise of such powers.[15] However, if adverse treatment results solely from the interaction of the legal provisions of two Member States, it cannot be attributed to either Member State as a restriction on a fundamental freedom.[16]

8 — In connection with the principles cited, the Court of Justice has referred several times to a 'certain autonomy' that Member States have in the area of direct taxation. See judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 51); of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraph 31); and of 1 December 2011, *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraph 83).

9 — The reverse holds true as well: a Member State's legislation restricts fundamental freedoms even where adverse treatment caused by it alone is offset by the legislation of another Member State. See my Opinion in *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:104, point 50 and the case-law cited there). See also in this sense the judgment of 8 November 2007, *Amurta* (C-379/05, EU:C:2007:655, paragraph 78).

10 — See judgments of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraphs 28 to 31), and of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 28).

11 — See judgment of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraphs 61 and 62).

12 — See judgment of 3 February 2015, *Commission* v *United Kingdom* (C-172/13, EU:C:2015:50, paragraph 33 and the case-law cited there).

13 — See judgment of 7 November 2013, *K* (C-322/11, EU:C:2013:716, paragraphs 79 to 81).

14 — In this sense, see judgment of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 51 and 52).

15 — In this sense, see judgments of 14 November 2006, *Kerckhaert und Morres* (C-513/04, EU:C:2006:713, paragraph 20), and of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 25).

16 — The effects of the autonomy principle are classified as not constituting a restriction on fundamental freedoms in the judgments of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraphs 50 to 54); of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraphs 23 to 31), of 10 June 2015, *X* (C-686/13, EU:C:2015:375, paragraphs 33 to 35); and of 14 April 2016, *Sparkasse Allgäu* (C-522/14, EU:C:2016:253, paragraphs 24 to 32). In connection with the justification of a restriction, on the other hand, the autonomy principle is addressed in the judgments of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraphs 41 to 44); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraphs 50 to 64); of 1 December 2011, *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraphs 81 to 83); and of 21 November 2013, *K* (C-322/11, EU:C:2013:716, paragraphs 74 to 82).

25. A particularly illustrative example of this is the double taxation of cross-border situations by two Member States, which under the settled case-law of the Court of Justice does not constitute a restriction on fundamental freedoms,[17] even though the negative effects for the internal market are obvious. However, such obstacles to the internal market that result from the autonomous actions of two Member States can be prevented not by fundamental freedoms but rather only by legal acts at the EU level[18] or, as currently the second-best solution, by bilateral or multilateral agreements between the Member States.[19]

26. In the present case, a *conditio sine qua non* of the adverse treatment of Damixa's cross-border establishment is the fact that the foreign German tax law to which its subsidiary is subject prohibits the deduction of interest expenses. Absent this rule, which is attributable to another Member State, cross-border and domestic situations would be treated equally. In the absence of the foreign prohibition on deduction of interest expenses, Damixa would be treated like a parent company whose domestic subsidiary is not subject to such a prohibition. Both parent companies could not benefit from a tax exemption for their interest income.

27. On the other hand, if it were to be assumed in the present case that the Danish rule constitutes a restriction on the freedom of establishment, then, subject to justification of this restriction, the Kingdom of Denmark would make a tax exemption for cross-border situations depending on whether another Member State prohibits its taxpayers from deducting interest expenses. This would clearly be in conflict with the case-law on the autonomy principle.

2. The *Manninen* judgment

28. The *Manninen* judgment[20] is also consistent with the autonomy principle. The parties intensively discussed its importance for the purpose of answering the question referred, even though the judgment was delivered in 2004, which was *prior to* the development of the autonomy principle in our case-law.

29. In the *Manninen* judgment, the Court of Justice determined that there had been a restriction on the free of movement of capital in connection with the taxation of dividend income received by domestic shareholders. The national tax law essentially provided that shareholders were to receive a tax credit in the amount of the corporation tax on distributed profits already paid by the company in which they held shares. However, shareholders of foreign companies were excluded from this measure, which was designed to prevent the double taxation of company profits. It was not possible to set off the corporation tax that foreign companies had paid in another Member State. The Court of Justice held that this constituted a restriction on cross-border investments, for which it also could find no justification.

17 — See, inter alia, judgments of 16 July 2009, *Damseaux* (C-128/08, EU:C:2009:471, paragraph 34); of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 28); of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 170); and of 21 November 2013, *X* (C-302/12, EU:C:2013:756, paragraph 29).

18 — See, in particular, the judgments of 14 November 2006, *Kerckhaert and Morres* (C-513/04, EU:C:2006:713, paragraph 22); of 6 December 2007, *Columbus Container Services* (C-298/05, EU:C:2007:754, paragraph 45); of 12 February 2009, *Block* (C-67/08, EU:C:2009:92, paragraph 30); and of 15 April 2010, *CIBA* (C-96/08, EU:C:2010:185, paragraph 27).

19 — See, in particular, judgments of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraphs 41 and 42), and of 23 October 2008, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* (C-157/07, EU:C:2008:588, paragraphs 48 and 49).

20 — Judgment of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484).

30. Applying this to the present case, the argument could be made that the higher taxation of a subsidiary due to a prohibition on the deduction of interest expenses is also a tax, which is 'set off' by the domestic shareholder, that is to say, the parent company, because the interest income it receives is not taxed. Under this comparison, a restriction on the freedom of establishment would have to be presumed in the present case, just as in the *Manninen* judgment, since it is not possible to 'set off' foreign investments. This would call into question the validity of the autonomy principle.

31. However, it should be emphasised that in the grounds of its judgment, the Court of Justice expressly understood the contested national rule to mean that setting off the company's corporation tax against its shareholder's income tax would have the end result that the dividend income received by the shareholder was exempt from taxation.[21] The Member State concerned was thus solely responsible for the adverse treatment of foreign investments, for which there was ultimately no provision for a tax exemption for dividend income. When interpreted in this way, the *Manninen* judgment differs significantly from the present case. The Danish tax exemption for parent companies does not apply across the board but rather only where their subsidiaries are subject to a prohibition on the deduction of interest expenses. But in the case of non-resident subsidiaries, this depends on the tax law of another Member State.

32. However, this reading of the *Manninen* judgment might conflict with the fact that the Court of Justice does not consider the Member State concerned to be obligated to entirely exempt from taxation the dividends received by the shareholder of a non-resident company. Rather, in accordance with settled case-law, only the corporation tax actually paid in the Member State where the company is established is to be set off against the shareholder's tax.[22] This could thus be seen as being in conflict with the autonomy principle, since the amount of such set-off depends on the amount of the foreign tax and thus on the tax law of another Member State.

33. However, the supposed conflict resolves itself when one realises that the Court of Justice accommodated the Member State in this way only with regard to the choice of the method for eliminating the ascertained restriction. The Member State concerned need not provide an exemption for foreign investments in order to prevent a restriction on the free movement of capital. Rather, it suffices if it merely sets off the specific foreign corporation tax.[23] On the contrary, under the *Manninen* line of case-law, the setting off of foreign taxes as such — and thus the dependence on the tax regime or another Member State — is *not* prescribed by fundamental freedoms. This is particularly evident from the fact that, in a cross-border case, the shareholder must be exonerated at most from paying the tax on his dividend income but has no right to repayment of an amount of foreign corporation tax in excess thereof.[24]

3. Conclusion

34. A rule such as the Danish one, under which the tax exemption for interest income is dependent on a prohibition of the deduction of interest expenses, thus does not constitute a restriction on the freedom of establishment and accordingly does not breach Articles 43 EC and 48 EC.

21 — Judgment of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraphs 20 and 44).

22 — Judgment of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 54). See also, inter alia, judgments of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 70); of 6 March 2007, *Meilicke and Others* (C-292/04, EU:C:2007:132, paragraph 15); of 10 February 2011, *Haribo Lakritzen Hans Riegel and Österreichische Salinen* (C-436/08 and C-437/08, EU:C:2011:61, paragraph 61); and of 30 June 2011, *Meilicke and Others* (C-262/09, EU:C:2011:438).

23 — Judgment of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 46).

24 — Judgment of 12 December 2006, *Test Claimants in the FII Group Litigation* (C-446/04, EU:C:2006:774, paragraph 52).

B – *In the alternative: Justification for a potential restriction*

35. If, however, the Court of Justice should nevertheless find that Damixa's freedom of establishment has been restricted, it must then be examined whether the adverse treatment of Damixa is justified.

36. One justification for the adverse treatment of Damixa might be that, in its case, the prohibition on the deduction of interest expenses by its subsidiary has to do with *foreign* income taxation and is unrelated to the system of Danish corporation tax.

1. Allocation between the Member States of the power to impose taxes

37. To be considered here first is preservation of the allocation between the Member States of the power to impose taxes, which is a ground of justification recognised by the Court of Justice in settled case-law.[25] Member States accordingly have the right to exercise and protect the power assigned to them to impose taxes.[26] Measures adopted on this basis go beyond the mere interest of a Member State in preventing a reduction of its tax revenue — which as such is not a matter of overriding general interest[27] — because they are aimed at preventing an unwarranted shifting of the tax base from one Member State to another.

38. The present case features the particularity that the power to impose taxes was not defined by the Member States by an agreement or unilaterally,[28] as is customarily the case, but instead by a legal act of the European Union. This is because the interest that Damixa received from its German subsidiary ostensibly comes within the scope of Directive 2003/49/EC.[29] Article 1(1) and (2) of this directive assigns the right to tax such interest to the Member State of the party entitled to receive it by exempting the interest from taxation in the source State.

39. Although, pursuant to Article 4(1)(a) of Directive 2003/49, the source State is not prevented from taxing interest payments by way of exception as distributions of profits, as can be the case with the aid of a prohibition on the deduction of interest expenses, and although the taxation of the subsidiary directly affected by the prohibition on the deduction of interest is not covered by Article 1(1),[30] the directive clearly states that the power to tax cross-border interest payments is to rest with the Member State of the party entitled to receive them.[31]

40. However, the power of the Kingdom of Denmark to impose taxes in the present case would not be preserved if a source State, such as the Federal Republic of Germany, were to tax the interest payment by means of a prohibition on the deduction of interest expenses, forcing Denmark to relinquish its power to impose taxes by also having to provide for a tax exemption in such cases. The tax-related

25 — See, inter alia, judgments of 13 December 2005, *Marks & Spencer* (C-446/03, EU:C:2005:763, paragraph 45); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45); and of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 41).

26 — See, in particular, my Opinion in *Nordea Bank Danmark* (C-48/13, EU:C:2014:153, points 38 to 41 and the case-law cited there).

27 — See, inter alia, judgments of 16 July 1998, *ICI* (C-264/96, EU:C:1998:370, paragraph 28); of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 49); and of 16 June 2011, *Commission* v *Austria* (C-10/10, EU:C:2011:399, paragraph 40).

28 — See, inter alia, judgments of 18 June 2009, *Aberdeen Property Fininvest Alpha* (C-303/07, EU:C:2009:377, paragraph 25); of 29 November 2011, *National Grid Indus* (C-371/10, EU:C:2011:785, paragraph 45); and of 6 October 2015, *Finanzamt Linz* (C-66/14, EU:C:2015:661, paragraph 41).

29 — Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States (OJ 2003 L 157, p. 49).

30 — See judgment of 21 July 2011, *Scheuten Solar Technology* (C-397/09, EU:C:2011:499, paragraphs 30 and 31).

31 — See also the fourth recital of Directive 2003/49.

legal acts of the European Union, like Directive 2003/49, are of course subject to the constraints of fundamental freedoms,[32] but if the justification for an interference with fundamental freedoms in tax law has to be in line with the allocation of the power to impose taxes by the Member States,[33] then this must *a fortiori* be applicable to an allocation at the level of the European Union.

41. Since it appears that restricting the tax exemption in the present case to interest payments made by domestic subsidiaries is the most moderate means of preventing a shifting of the power to impose taxes to the source State contrary to the allocation specified by Directive 2003/49, this measure is justified in preserving the allocation between the Member States to impose taxes.

2. Fiscal coherence

42. In addition, the exclusion of non-resident subsidiaries from the tax exemption could also be justified on the ground of preserving fiscal coherence.[34]

43. For this purpose, a direct link is required between the tax advantage and the offsetting of that advantage by a particular tax levy.[35] The direct nature of the link between the advantage and the levy must be examined in the light of the objective pursued by the tax scheme in question.[36] If those requirements are met, a taxpayer may be denied the tax advantage in the event that he is not subject to the levy that the tax system of a Member State inextricably links with the tax advantage being sought.

44. In the present case, such a direct link exists between the Danish tax exemption for interest income received by the parent company and the Danish prohibition on deduction of interest expenses by the subsidiary. Damixa thus seeks the advantage of tax exemption for its interest income without its subsidiary being subject to the directly associated levy in the form of the Danish prohibition on deduction of interest expenses.

45. This conclusion is not invalidated by the fact that the Court of Justice has variously held that there is no direct link in the sense of fiscal coherence where, inter alia, different taxpayers are affected.[37] For, as I have already stated in greater detail elsewhere,[38] a direct link can exceptionally exist in such cases if, as in the present case, an identical economic transaction has inverse consequences for two taxpayers. In particular, in the *Papillon* judgment, the Court of Justice implicitly acknowledged this view and

32 — In this sense, regarding Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), see the judgment of 2 September 2015, *Groupe Steria* (EU:C:2015:524, paragraph 39 and the case-law cited there).

33 — See, in particular, my Opinion in the *Nordea Bank Danmark* (C-48/13, EU:C:2014:153, points 35 to 37 and the case-law cited there).

34 — See, inter alia, the judgments of 28 January 1992, *Bachmann* (C-204/90, EU:C:1992:35, paragraph 28); of 7 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 42); of 27 November 2008, *Papillon* (C-418/07, EU:C:2008:659, paragraph 43); of 12 June 2014, *SCA Group Holding and Others* (C-39/13 to C-41/13, EU:C:2014:1758, paragraph 33); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 39).

35 — See, in particular, judgments of 14 November 1995, *Svensson and Gustavsson* (C-484/93, EU:C:1995:379, paragraph 18); of 16 July 1998, *ICI* (C-264/96, EU:C:1998:370, paragraph 29); of 29 March 2007, *Rewe Zentralfinanz* (C-347/04, EU:C:2007:194, paragraph 62); of 13 November 2012, *Test Claimants in the FII Group Litigation* (C-35/11, EU:C:2012:707, paragraph 58); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 39).

36 — See, in particular, judgments of 28 February 2008, *Deutsche Shell* (C-293/06, EU:C:2008:129, paragraph 39); of 17 November 2009, *Presidente del Consiglio dei Ministri* (C-169/08, EU:C:2009:709, paragraph 47); and of 17 December 2015, *Timac Agro Deutschland* (C-388/14, EU:C:2015:829, paragraph 39). Similarly, see judgment of 17 September 2004, *Manninen* (C-319/02, EU:C:2004:484, paragraph 43).

37 — See, in particular, judgment of 17 September 2015, *F.E. Familienprivatstiftung Eisenstadt* (C-589/13, EU:C:2015:612, paragraph 83 and the case-law cited there).

38 — See my Opinion in *Manninen* (C-319/02, EU:C:2004:164, points 50 to 65).

found it to be relevant in that case. It held that a direct link existed between the advantage associated with consolidating the results of all group companies and the tax burden that came from neutralising certain transactions. [39] This concerned both advantages and disadvantages for each of the companies within a group.

46. In addition, in accordance with the most recent case-law, the exclusion of a tax exemption in the case of non-resident subsidiaries that are subject to a foreign prohibition on the deduction of interest expenses is also proportionate. In this regard, the Court of Justice has held that taking into account foreign circumstances that are not subject to a Member State's taxation would be contrary to the objective of a rule that, as is also the case here, seeks to avoid double taxation in the Member State's tax system. [40]

47. Thus, the aspect of preserving fiscal coherence would also justify restricting the tax exemption at issue to interest income received from domestic subsidiaries.

VI – **Conclusion**

48. In view of the foregoing, I therefore propose that the question referred by the Vestre Landsret (Western Regional Court, Denmark) be answered as follows:

Article 43 EC, read in conjunction with Article 48 EC, does not preclude a Member State from not allowing a resident company a tax exemption for interest income where an affiliated company established in another Member State is not entitled to a tax deduction for the corresponding interest expenditure according to the rules of that Member State restricting the deduction of interest expenses in cases of thin capitalisation, whereas it allows a resident company a tax exemption for interest income in cases where an affiliated company that is established in that Member State is not allowed a tax deduction for the corresponding interest expenditure as a result of national rules restricting the deduction of interest in cases of thin capitalisation.

39 — Judgment of 27 November 2008, *Papillon* (C-418/07, EU:C:2008:659, paragraphs 45 to 50).

40 — Judgment of 1 December 2011, *Commission* v *Hungary* (C-253/09, EU:C:2011:795, paragraphs 81 and 82).