A

OPINION OF ADVOCATE GENERAL
BOT
delivered on 11 September 2007 [1]

1. Free movement of capital, unlike the other freedoms of movement established by the EC Treaty, does not apply solely between Member States. It also prohibits restrictions on the movement of capital between Member States and third countries. In the current reference for a preliminary ruling, the Court is being called upon to rule on whether such freedom of movement has the same scope in relations between Member States and third countries as it has in intra-Community relations.

2. These proceedings are based on a dispute over the granting to a natural person living in Sweden of exemption from income tax in respect of dividends that were distributed to him by a company established in Switzerland in the form of shares it holds in a subsidiary.

3. Under the relevant Swedish legislation, that exemption is subject to a number of conditions. The Kingdom of Sweden, considering that it should be able to check compliance with those conditions where the distributing company is established abroad, has stipulated that such exemption may be granted only if the distributing company is established in a State within the European Economic Area (EEA) or in a State with which Sweden has concluded a taxation convention that contains a provision on exchange of information.

4. The point at issue is whether such legislation should be regarded as a restriction on the movement of capital within the meaning of Article 56(1) EC and, if so, whether that restriction may be justified.

5. In this Opinion, I shall contend that the concepts of 'movement of capital' and 'restriction' used in Article 56(1) EC should have the same scope in the case of transactions between Member States and third countries as in the case of relations between Member States. I shall conclude from this that the national legislation at issue does indeed constitute a restriction on the movement of capital within the meaning of that provision.

1 — Original language: French.

6. I shall then consider the extent to which that restriction may be justified.

7. It will be recalled that the need to guarantee the effectiveness of fiscal supervision may justify a restriction on the free movement of capital, provided the measure in question is appropriate for the purpose of achieving that objective and does not go beyond what is necessary for that purpose. I shall also state that, in relations between Member States and third countries, this ground for restriction may justify a tax advantage being conditional upon the existence of a convention providing for the exchange of information where that advantage is subject to conditions under national law and the tax authorities of the Member State concerned are not in a position to check compliance with those conditions using their own resources.

8. I shall conclude from this that the restriction at issue does comply with Articles 56 EC and 58 EC if the national court finds that the exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary is subject to conditions and, in order to check compliance with those conditions, the national tax authorities require information which can be obtained only by the competent tax authorities of the country in which the distributing parent company is established.

I — National legislation

9. Under Swedish Law No 1229 of 1999,[2] dividends paid to a natural person by a limited liability company are normally subject to income tax.

10. Under Paragraph 16 of Chapter 42 of the Swedish Law, dividends distributed by a Swedish limited liability company in the form of shares in a subsidiary are not included in taxable income provided:

(1) the distribution is made in proportion to the number of shares held in the parent company;

(2) the shares in the parent company are quoted on the Stock Exchange;

(3) all the parent company's shares in the subsidiary are distributed;

2 — Law on Income Tax (Inkomstskattelagen (1999:1229); the 'Swedish Law').

(4) the shares in the subsidiary after the distribution are not held by any undertaking that belongs to the same group as the parent company;

(5) the subsidiary is a Swedish limited liability company or a foreign company; and

(6) the subsidiary's business activity consists primarily in trading or, directly or indirectly, holding shares in undertakings that primarily conduct trading and in which the subsidiary, directly or indirectly, holds shares with a total number of votes corresponding to more than half the number of votes for all the shares in the undertaking.

11. Those provisions entered into force for the first time in 1992 and apply only to profits distributed by Swedish limited liability companies. Those provisions were repealed in 1994 and then reintroduced in 1995.

12. The Swedish Government explains that that legislation was adopted in order to facilitate the restructuring of undertakings and the dividing-up of companies. As a result of that legislation, a shareholder who receives profits from a distributing parent company in the form of shares which that company holds in a subsidiary may defer taxation of the profits thus distributed until the shares received have been sold.

13. According to the Swedish Government, such distribution of profits is not taxed because the shares held in the parent company are regarded as having lost the value represented by the shares in the subsidiary. In reality, the only effect of the distribution is that the indirect owners of the subsidiary become its direct owners, without any alteration in the value of the shares held. At the time of distribution, the purchase price of shares in the parent company is divided between those shares and the shares in the subsidiary. At the time of sale, the capital gain or loss is therefore determined on the basis of the corresponding fraction of the purchase price.

14. Under Paragraph 16a of Chapter 42 of the Swedish Law, added in 2001, the exemption provided for in Paragraph 16 of that chapter also applies if the distribution of shares is carried out by a foreign company which corresponds to a Swedish limited liability company and is established in a

State within the EEA or in a State with which the Kingdom of Sweden has concluded a taxation convention that contains a provision on exchange of information.

15. On 7 May 1965, the Swiss Confederation and the Kingdom of Sweden concluded a convention for the avoidance of double taxation in respect of taxes on income and capital.[3] The division of the power to tax dividends is governed by Article 10 of that Convention.[4]

16. The Convention does not contain a provision on exchange of information between the competent authorities of the two Contracting States. Article 27 of the Convention provides for an amicable procedure between the authorities with a view to the avoidance of taxation which is not in accordance with the provisions of the Convention and to resolve any difficulties or doubts arising as to the interpretation or application of those provisions.[5]

17. Moreover, it is clear from paragraph 5 of the record of negotiations and initialling in connection with the conclusion of the Convention that the Swiss delegation considered that the only information that could form the subject of an exchange was that needed in order to ensure proper application of the Convention and that which would prevent improper application of it. It is clear from the same paragraph that the Kingdom of Sweden took formal note of that explanation and did not seek to include in the Convention any express provision on exchange of information.

18. Furthermore, on 17 August 1993, an arrangement was concluded between the

3 — The 'Convention'.

4 — Article 10(1) of that Convention provides that dividends paid by a company which is resident in one Contracting State to a resident of the other Contracting State are liable to tax in that State. Article 10(2) of the Convention provides, however, that such dividends may be taxed in the State in which the distributing company is resident, but the tax so charged must not exceed 15% of the gross amount of the dividends. If this leads to taxation of dividends in both Contracting States, that double taxation is governed by Article 25 of the Convention. Thus, in the case of a natural person residing in Sweden who receives dividends from a company established in Switzerland, the income tax paid in Sweden must be deducted from the income tax paid in Switzerland.

5 — Article 27 reads as follows:

'1. Where a resident of one Contracting State considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident.

2. The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with this Convention.

3. The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of this Convention. They may also consult together for the elimination of double taxation in cases not provided for in this Convention.

4. The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. If it appears that oral exchanges of views would assist such agreement such exchanges of views may take place within a committee composed of representatives of the competent authorities of the Contracting States.'

Swiss Confederation and the Kingdom of Sweden (the 'Arrangement') concerning the implementation of Articles 10 and 11 of the Convention. [6] That Arrangement lays down, first, the procedure to be followed by an individual to obtain tax relief under Articles 10 and 11 and, second, the way in which such applications are to be dealt with by the tax authorities of the Contracting States.

II — The dispute in the main proceedings and the question referred for a preliminary ruling

19. A, a natural person residing in Sweden, owns shares in company X, with its registered office in Switzerland, which is considering distributing the shares it holds in one of its subsidiaries. A applied to the Skatterättsnämnden (Revenue Law Commission) for a preliminary decision on whether such a distribution was exempt from tax. A stated that X corresponded to a Swedish limited liability company and the conditions for tax exemption imposed by the Law, other than those relating to the location of the registered office of the company, were satisfied.

20. In a preliminary decision delivered on 19 February 2003, the Skatterättsnämnden responded that the distribution contemplated should be exempt from tax under the Treaty provisions on free movement of capital.

21. On the one hand, it considered that the condition laid down in Paragraph 16a of Chapter 42 of the Swedish Law, concerning the existence of a provision on exchange of information, was not satisfied. That condition refers to cooperation such as that provided for in Article 26 of the Model Tax Convention of the Organisation for Economic Cooperation and Development (OECD) and there is no such provision in the agreements entered into with the Swiss Confederation.

22. On the other hand, the Skatterättsnämnden found that the distribution in question was a movement of capital and that the absence of any exemption should be viewed as a restriction within the meaning of Article 56 EC. In its opinion, that restriction is not covered by Article 57(1) EC because the movement in question does not involve direct investment.

23. The Skatterättsnämnden therefore considered that, as the reason for the restriction

6 — Article 11 governs the allocation of the power to tax interest.

was that it was impossible for the Skatteverket (Tax Board) to check compliance with the conditions for granting the exemption, the restriction was disproportionate for the purposes of securing that objective, even though the provisions of Council Directive 77/799/EEC[7] are not applicable in the context of relations with the Swiss Confederation. The Arrangement appears to allow the Swedish tax authorities to obtain the information required for the application of their domestic law and it is possible to give taxpayer A the opportunity to demonstrate himself that all the requirements under the Swedish Law are satisfied.

24. The Skatteverket appealed against that decision to the Regeringsrätten (Supreme Administrative Court) (Sweden).

25. The Skatteverket argued that the Treaty provisions on free movement of capital are unclear with regard to the movement of capital between Member States and third countries, in particular in the case of countries that oppose exchanging information for purposes of fiscal supervision. Where the possibility of obtaining such information is very limited, a restriction such as that at issue in the main proceedings could be justified by the right of the Member States to guarantee the effectiveness of fiscal supervision. Indeed, this reason has been recognised in case-law as an overriding requirement of general interest capable of justifying a restriction on a freedom of movement guaranteed by the Treaty.

26. A maintained, however, that the restriction in question could not be justified, since the taxpayer concerned may undertake to show that all the requirements for the tax exemption are satisfied.

27. It was in those circumstances that the national court decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'In a situation such as that in the present case, is it contrary to the provisions on free movement of capital between Member States and third countries to tax A in respect of dividends distributed by X because X is not established in a State within the EEA or in a State with which [the Kingdom of] Sweden has concluded a taxation convention that contains a provision on exchange of information?'

7 — Directive of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

III — Analysis

28. As a preliminary point, it should be observed that, although nowadays direct taxation, which includes taxation of dividends, falls within their competence, the Member States must none the less exercise that competence consistently with Community law and, in particular, the freedoms of movement established by the Treaty. [8]

29. Also, according to the request from the national court, the compatibility of the contested legislation with Community law must be assessed against the yardstick of the EC Treaty provisions on the free movement of capital.

30. According to case-law, national legislation which makes the receipt of dividends liable to tax, where the rate depends on whether the source of those dividends is national or otherwise, irrespective of the extent of the shareholder's holding in the distributing company, may fall within the scope of both Article 43 EC on freedom of establishment and Article 56 EC on free movement of capital. [9]

31. It is also settled case-law that the chapter of the Treaty concerning the right of establishment does not include any provision extending its application to situations which involve the establishment in a third country of a Member State national or of a company incorporated under the legislation of a Member State. [10]

32. Since the situation at issue in the main proceedings concerns the distribution of dividends to a shareholder residing in a Member State by a company established in a third country, only the Treaty provisions on free movement of capital can apply.

33. By its question, the Regeringsrätten asks in essence whether Articles 56 EC and 58 EC must be interpreted as meaning that legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary, which is subject to a number of conditions, can be granted only where the distributing parent company is established in a State within the EEA or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of

8 — Case C-157/05 *Holböck* [2007] ECR I-4051, paragraph 21 and case-law cited.

9 — Ibid., paragraph 24 and case-law cited.

10 — Ibid., paragraph 28 and case-law cited.

information constitutes a restriction on the movement of capital and, if so, whether that restriction may be justified.

34. This question therefore contains two points. It requires us to decide, first of all, whether the legislation at issue must be regarded as a restriction on the movement of capital within the meaning of Article 56(1) EC. Then, in the case of an affirmative answer to the first point, it asks whether such a restriction may be justified.

35. Before considering those two points, it would be appropriate, first, to recall the content of the Treaty provisions on free movement of capital and the principal stages leading up to it and, second, to give a brief summary of the relevant provisions on the exchange of information on direct taxation, both at intra-Community level and in relations between Member States and third countries.

A — *The Treaty provisions on free movement of capital*

36. The Treaty provisions on free movement of capital comprise a principle, set out in Article 56 EC, and limitations on that principle, laid down in Articles 57 EC to 60 EC.

1. Recognition of the principle of free movement of capital

37. The movement of capital, between Member States on the one hand, and between Member States and third countries on the other hand, has been the subject of gradual liberalisation.

38. In the Treaty of Rome establishing the European Economic Community, movement of capital within and outside the Community was the subject of separate provisions that were scarcely binding. Thus, within the Community, under Article 67 of the EEC Treaty (subsequently Article 67 of the EC Treaty, which was itself repealed by the Treaty of Amsterdam), Member States were required in the course of the transitional period gradually to abolish restrictions on the movement of capital only 'to the extent necessary to guarantee the proper functioning of the common market'. So far as outside the Community was concerned, Article 70 of the EEC Treaty (subsequently Article 70 of the EC Treaty, which was itself repealed by the Treaty of Amsterdam) merely provided for gradual coordination of the exchange rate policies of Member States in respect of third countries.

39. In the light of the scarcely binding nature of Article 67 of the Treaty, the Court considered that that provision was not directly effective after the end of the transitional period, unlike the provisions of the Treaty introducing the other freedoms of movement, whilst acknowledging that free movement of capital itself constituted one of the 'fundamental freedoms' of the Treaty. [11]

40. A significant step was taken with Council Directive 88/361/EEC. [12] That directive provided for complete, unconditional liberalisation of the movement of capital between Member States, since Article 1 of the directive required the Member States to abolish restrictions on the movement of capital taking place between persons resident in their territory. The time-limit imposed on the Member States for complying with that obligation expired on 1 July 1990. In its judgment in *Bordessa and Others*, [13] the Court held that Article 1 of Directive 88/361 had direct effect.

41. On the other hand, as regards external relations, Directive 88/361 was less binding, since, under Article 7 of the directive, in their treatment of transfers in respect of movements of capital to or from third countries, the Member States were required only to endeavour to attain the same degree of liberalisation as that which applied to transactions within the Community.

42. The Treaty on European Union was the second important step in the process of liberalisation. At formal level, that treaty provided for the replacement of Articles 67 to 73 of the EEC Treaty (subsequently Article 73 of the EC Treaty, which was itself repealed by the Treaty of Amsterdam) by Articles 73b to 73g of the EC Treaty (now Articles 56 EC to 60 EC) from 1 January 1994.

43. As regards the substance, the EU Treaty made free movement of capital a fundamental freedom guaranteed by the Treaty, not only as regards movements between Member States but also between Member States and third countries. Thus, Article 73b(1) of the EC Treaty (now Article 56(1) EC) provides that '[w]ithin the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'.

11 — Case 203/80 *Casati* [1981] ECR 2595, paragraph 8.

12 — Directive of 24 June 1988 for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

13 — Joined Cases C-358/93 and C-416/93 [1995] ECR I-361, paragraph 34.

44. In the light of the precise and unconditional nature of that provision, the Court held in *Sanz de Lera and Others* [14] that the principle of free movement of capital has direct effect in that it prohibits restrictions both between Member States and between Member States and third countries. [15]

2. Limitations on the principle of free movement of capital

46. The limitations on the principle of free movement of capital include two sets of provisions, consisting, first, of safeguard clauses and, second, of derogations.

(a) The safeguard clauses

45. The Treaty of Amsterdam, which entered into force on 1 May 1999, renumbered the articles of the Treaty and reproduced the provisions of Article 73b(1) of the Treaty in Article 56(1) EC.

47. The safeguard clauses are contained in Articles 59 EC and 60 EC. They relate only to third countries. They are of a temporary nature and are intended to be applied in exceptional circumstances.

48. Article 59 EC permits a response to be made to economic difficulties. The article provides that, where, in exceptional circumstances, movements of capital to or from third countries cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the Council of the European Union, acting by a qualified majority on a proposal from the Commission of the European Communities and after consulting the European Central Bank, may take safeguard measures with regard to third countries for a period not exceeding six months if such measures are strictly necessary.

14 — Joined Cases C-163/94, C-165/94 and C-250/94 [1995] ECR I-4821.

15 — Since the cases in the main proceedings concerned the export of currency to third countries, the Court held that 'Article 73b(1) of the Treaty, which lays down the principle of free movement between the Member States and between Member States and non-member countries, [confers] rights on individuals which they may rely on before the courts and which the national courts must uphold' (paragraph 43). The German Government in its written observations in the present case argued that in paragraph 46 of *Sanz de Lera and Others* the Court limited the direct effect of Article 73b(1) of the Treaty to movements of capital other than those involving direct investment. I do not share that view. To my mind, the Court held in paragraph 46 that the prohibition laid down in Article 73b(1) of the Treaty applies to restrictions which do not fall within Article 73c(1) of the EC Treaty (now Article 57(1) EC), since the latter provision relates to restrictions on movements of capital involving direct investment *which existed on 31 December 1993* (emphasis added). The Court did not therefore exclude from the prohibition contained in Article 73b(1) of the Treaty all movements of capital involving direct investment, but only those existing on 31 December 1993. That is why the judgment in *Sanz de Lera and Others*, should, in my view, be interpreted as meaning that the principle of free movement of capital enshrined in Article 73b(1) of the Treaty has direct effect as regards relations with third countries and as regards all movements of capital within the meaning of that provision.

49. Article 60 EC, for its part, is of a political nature. It enables the Community legislature to take retaliatory measures with regard to movements of capital where the Community, in the context of common action adopted pursuant to the provisions of the Treaty relating to common foreign and security policy, has decided to cut back or break off economic relations with one or more third countries.

(b) The derogations

50. These are laid down in Articles 57 EC and 58 EC.

51. Article 57 EC also concerns only relations with third countries and covers movements of capital regarded as being particularly sensitive. These are movements of capital involving direct investment (including investment in real estate), establishment, the provision of financial services or the admission of securities to capital markets. Article 57(1) EC provides that national or Community restrictions which existed in respect of such movements of capital on 31 December 1993 are to be maintained.

52. Article 57(2) EC permits the Council to adopt new measures on those movements of capital. Under that provision, the Council is to act by a qualified majority when deciding to extend the freedom of such movements of capital and by unanimity when deciding to restrict them.

53. Article 58 EC, for its part, describes the powers retained by the Member States which enable them to restrict the movement of capital to or from other Member States or third countries. It provides:

'1. The provisions of Article 56 shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision

of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. The provisions of this Chapter shall be without prejudice to the applicability of restrictions on the right of establishment which are compatible with this Treaty.

3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56.'

54. It is clear from case-law that measures that may be regarded as essential in order to prevent infringements of the laws and regulations of a Member State include, in particular, those intended to guarantee the effectiveness of fiscal supervision. [16]

55. Furthermore, the list of justification measures in Article 58(1)(b) EC is not exhaustive. The Court has accepted that free movement of capital, like other freedoms of movement, may be restricted on other grounds, regarded as an overriding reason or requirement in the general interest. [17] The Court has held on a number of occasions that the need to guarantee the effectiveness of fiscal supervision also constitutes an overriding requirement of general interest capable of justifying a restriction on the free movement of capital. [18]

56. However, whatever the ground relied on, the measure in question must be suitable for the purposes of attaining the objective which it pursues and not go beyond what is necessary in order to attain it.

57. Lastly, in *Test Claimants in the FII Group Litigation*, [19] the Court stated that it may be that a Member State will be able to demonstrate that a restriction on capital movements to or from third countries is justified for a particular reason in circumstances where that reason would not con-

16 — Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 38 and case-law cited, and paragraph 39.

17 — See, inter alia, Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 40.

18 — See, inter alia, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 47 and case-law cited, and Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 51 and case-law cited.

19 — Case C-446/04 [2006] ECR I-11753, paragraph 171.

stitute a valid justification for a restriction on capital movements between Member States.

B — *Relevant provisions on the exchange of information for tax purposes*

1. The exchange of information between Member States for tax purposes

58. The exchange of information between Member States for tax purposes is governed mainly by Directive 77/799.

59. That directive was adopted in order to deal with the following two facts. First, practices of tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to affect the operation of the common market. Second, the international nature of the problem means that national measures, whose effect does not extend beyond the frontiers of the Member States, are insufficient, as is collaboration between administrations on the basis of bilateral agreements. [20]

60. Directive 77/799 provides that the competent authorities of the Member States are to exchange, in accordance with the provisions of that directive, any information that may enable them to effect a correct assessment of taxes on income and on capital. Under that directive and according to case-law, a Member State may therefore request the competent authorities of another Member State to send to it all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer under its domestic legislation. [21]

61. This is not, however, an unlimited obligation. That directive imposes no obligation on the requested Member State to have enquiries carried out or to provide information where the laws or administrative practices of that State do not permit the competent authorities either to carry out such enquiries or to collect or use such information for that State's own purposes.

62. To the same effect, Council Directive 2003/48/EC [22] introduced a system for the automatic exchange of information between Member States concerning interest payments.

20 — First and third recitals in the preamble to Directive 77/799.

21 — Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 49 and case-law cited.

22 — Directive of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38).

2. The exchange of information for tax purposes between third countries and Member States

63. As regards the exchange of information for tax purposes between third countries and Member States, measures equivalent to those provided for by Directive 2003/48 in the specific area covered by that directive have been the subject of agreements between the European Community, on the one hand, and the Swiss Confederation, the Principality of Andorra, the Principality of Liechtenstein, the Principality of Monaco, and the Republic of San Marino, on the other hand. [23]

64. In addition to those individual agreements, the exchange of information for tax purposes between third countries and Member States continues to be covered by bilateral or multilateral conventions. That is the case, in particular, as regards the exchange of information between the Member States and the countries within the EEA, that is, the Republic of Iceland, the Principality of Liechtenstein and the Kingdom of Norway. Those countries are not bound, under the Agreement on the European Economic Area of 2 May 1992, [24] to transpose into domestic law measures of secondary legislation relating to the exchange of information on tax matters, such as Directive 77/799.

23 — See, as regards the Swiss Confederation, the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Directive 2003/48 (OJ 2004 L 385, p. 30).

24 — OJ 1994 L 1, p. 3; 'the EEA Agreement'.

65. Article 26 of the OECD Model Tax Convention provides the standard format most widely used for this type of convention. [25] In the version in force on 29 April 2000, the model text is worded as follows:

'1. The competent authorities of the Contracting States shall exchange such information as is necessary for carrying out the provisions of this Convention or of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, in so far as the taxation thereunder is not contrary to the Convention. ...

2. In no case shall the provisions of paragraph 1 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

25 — According to the information available on the OECD website, over 2 000 bilateral conventions are based on the OECD model.

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information, the disclosure of which would be contrary to public policy (ordre public).'

66. It is against that background that I shall examine whether the Swedish Law must be regarded as a restriction on the movement of capital and, if so, whether that restriction may be justified.

C — Whether there is a restriction on the movement of capital

67. The first question which must be answered is whether legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary can be granted only where the distributing parent company is established in a State within the EEA or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of information constitutes a restriction on the movement of capital.

68. The Skatteverket and the Swedish, German, French and Netherlands Governments suggest that this question should be answered in the negative. In the view of those governments, Article 56(1) EC should not have the same scope in relations with third countries as it has in an intra-Community context. They put forward a number of arguments in support of that position, which may be summarised as follows.

69. First, the liberalisation of capital movements to and from third countries does not pursue the same objective as the liberalisation of such movements between Member States. In the case of relations with third countries, it is a case not of establishing the internal market but of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a worldwide dimension within the Member States.

70. Second, the liberalisation of capital movements to and from third countries is the result of a unilateral step taken by the Community, which is not necessarily reciprocated by such countries. To consider Article 56(1) EC as having the same scope

with regard to third countries as it has in an intra-Community context would thus weaken the Community's position in its negotiations with such countries. Such a broad interpretation would also conflict with association agreements, in which the provisions on free movement of capital have more limited scope.

71. Lastly, interpretation of Article 56(1) EC with regard to relations with third countries should take account of the fact that those countries are not bound by Community law, in particular by Directive 77/799. It is also necessary to take into account the fact that the scope of free movement of capital may overlap with the scope of freedom of establishment. It is necessary therefore to ensure, with regard to relations with third countries, that Article 56(1) EC is not interpreted as enabling economic operators who do not meet the requirements for exercising freedom of establishment in a Member State to circumvent those requirements.

72. The Swedish, German, French and Netherlands Governments deduce from those arguments that the concept of 'movement of capital' used in Article 56(1) EC does not cover a distribution of dividends by a company established in a third country and that the Swedish Law does not constitute a restriction within the meaning of that provision.

73. I do not agree with that view. Like A and the Commission, I am of the opinion that the terms 'movement of capital' and 'restrictions' in Article 56(1) EC must have the same scope in the case of relations between Member States and third countries as it does in the intra-Community context. I base my position on the following grounds.

74. First, I refer to the content of Article 56(1) EC. That provision lays down, in like terms, the principle of free movement of capital between Member States on the one hand, and between Member States and third countries on the other hand. In the light of the origin of that provision, its content is, in my view, decisive for the purpose of interpreting the scope of Article 56(1) EC with regard to the movement of capital at non-Community level.

75. As I pointed out above, until the EU Treaty, free movement of capital between Member States and between Member States and third countries was governed by separate provisions with differing content. Moreover, in Directive 88/361, the principle of free movement of capital between Member States was already stated clearly and unconditionally. Therefore, the fact that, in the EU Treaty, the Member States decided to enshrine that principle, in the same article and in the same terms, both within the

Community and in relations between Member States and third countries, to my mind demonstrates their intention to give that freedom of movement the same scope at intra-Community level and at non-Community level.

76. The argument put forward by the governments which have intervened in the present proceedings that the liberalisation of the movement of capital to and from third countries does not pursue the same objective as freedom of movement of capital within the Union does not, in my opinion, invalidate this view.

77. The Treaty does not state the reasons why the scope of that freedom was extended to third countries. It is commonly accepted that this extension should be seen in the context of the development of the Community's monetary policy. However, if the Member States had wanted that difference in objective to be reflected in the scope of that liberalisation as regards their relations with third countries, they should, logically, have set out the principle of free movement of capital within the Community and at non-Community level in different terms, as had been the case previously. The fact that, despite that difference in objective, they chose to provide for such freedom of movement in the same terms and in the same article of the Treaty can, in my view, be explained only by the intention to give it the same scope in both cases.

78. Second, confirmation of this view is to be found in the other articles of the chapter on free movement of capital.

79. In Articles 57 EC, 59 EC and 60 EC, the Community legislature expressly provided for economic and political safeguard clauses and derogations which apply specifically to such freedom of movement in relation to third countries. It is therefore those provisions, as well as those of Article 58 EC, which are designed to take into account the differences in objective and in legal context of the free movement of capital between Member States and third countries, and not Article 56(1) EC. In other words, it is because Article 56(1) EC has the same scope as regards relations between Member States and third countries as it has in the intra-Community context that it was necessary to provide for safeguard clauses and derogations in respect of non-Community relations.

80. As regards the first sentence of Article 57(2) EC, which states that the Council may, acting by a qualified majority, adopt measures on the movement of capital to or from third countries, '[w]hilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and

without prejudice to the other chapters of this Treaty',[26] unlike the German Government, I do not think that that shows that Article 56(1) EC has a less extensive scope as regards its non-Community dimension.

81. The first sentence of Article 57(2) EC should be read in the context of Article 57(1) EC, which provides that restrictions which existed on 31 December 1993 under the laws of Member States and under Community law in respect of the movement of capital to or from third countries involving direct investment (including investment in real estate), establishment, the provision of financial services or the admission of securities to capital markets are to be maintained.

82. Article 57(1) EC thus provides for such existing restrictions to be maintained indefinitely. The first sentence of Article 57(2) EC must therefore, in my view, be interpreted as allowing the Community and the Member States to conclude a convention with a third country that includes provisions on the free movement of capital which are uniformly applicable in all Member States without the possibility of the restrictions in Article 57(1) EC being relied on against them. The first sentence of Article 57(2) EC thus constitutes the legal basis which enables the Community legislature to refrain from applying such national or Community restrictions in the context of an agreement with a third country.[27]

83. Lastly, the second sentence of Article 57(2) EC allows the Council to adopt measures that restrict the free movement of capital in respect of one or more third countries, which gives the Community a means of exerting pressure in negotiations with the country or countries concerned.

84. Third, I am of the opinion that that interpretation is not at odds with the arguments put forward by the Skatteverket and by the Swedish, German, French and Netherlands Governments.

26 — The first sentence of Article 57(2) EC states:
'Whilst endeavouring to achieve the objective of free movement of capital between Member States and third countries to the greatest extent possible and without prejudice to the other chapters of this Treaty, the Council may, acting by a qualified majority on a proposal from the Commission, adopt measures on the movement of capital to or from third countries involving direct investment — including investment in real estate — establishment, the provision of financial services or the admission of securities to capital markets.'

27 — See, inter alia, Council Decision 2000/658/EC of 28 September 2000 concerning the conclusion of the Economic Partnership, Political Coordination and Cooperation Agreement between the European Community and its Member States, of the one part, and the United Mexican States, of the other part (OJ 2000 L 276, p. 44).

85. I do not therefore think that that interpretation is capable of weakening the Community's position in its negotiations with a third country or that it would conflict with the provisions of an association agreement on the movement of capital between the Community and the third country that is party to that agreement.

86. As mentioned above, the free movement of capital between Member States and third countries established by Article 56 EC is subject to several limitations under Articles 57 EC to 60 EC. These include, in particular, the maintenance of national or Community restrictions existing on 31 December 1993 on certain movements of capital. I can also point to the obstacles to this freedom of movement caused by measures taken by the Member States in order to prevent infringements of their laws, in particular in the field of taxation, referred to in Article 58(1)(b) EC. Lastly, these may also be national measures justified by an overriding requirement of general interest.

87. As will be shown more specifically in the second part of my analysis, and as is clear from the judgment in *Test Claimants in the FII Group Litigation*, the justification for a restriction based on the need to guarantee the effectiveness of fiscal supervision should be given a wider scope in the case of movements to or from third countries than in the intra-Community context, in particular since the obligations placed upon Member States under Community secondary legislation on the exchange of information do not apply to those countries.

88. The Community's negotiating power with third countries does not appear to me to be weakened in view of all these limitations on the scope of Article 56(1) EC, because those countries must still undertake the commitments necessary to ensure that such limitations are removed from conventions or association agreements concluded with the Community.

89. Nor do I think that my interpretation of Article 56(1) EC has the effect of allowing a natural or legal person who does not satisfy the requirements for relying on the Treaty provisions on freedom of establishment to circumvent those requirements.

90. It must be observed, first of all, that there is no such risk in the case in the main proceedings. The movement of capital in question is a distribution, by a parent company established in a third country, of dividends in the form of shares in a subsidiary, which is itself established in a third country, to a shareholder residing in a Member State. Such an operation might, therefore, in certain circumstances, give that shareholder a holding in the foreign sub-

sidiary of the distributing company of such an extent that it enables the holder to have a definite influence on that subsidiary's decisions. However, it cannot permit a shareholder residing in a third country to take control of a subsidiary established in a Member State.

91. Next, in its recent case-law, the Court has provided clarification as to the limits of the scope of freedom of establishment and free movement of capital respectively.

92. It is clear from that case-law that, where the legislation of a Member State, by reason of its purpose, concerns situations in which a shareholder's holding enables him to have a definite influence on a company's decisions and to determine its activities, as may be the case with a national law on controlled foreign companies [28] or legislation designed to combat undercapitalisation, [29] that legislation must be examined in the light of the articles of the Treaty relating to freedom of establishment and those articles alone. [30]

93. In such cases, the restrictive effects such legislation might have on the free movement of capital would appear to be the unavoidable consequence of any restriction on freedom of establishment and do not therefore justify an examination of that legislation in the light of Articles 56 EC to 60 EC. In other words, the Treaty provisions on free movement of capital do not apply in such a situation and cannot therefore be relied upon in order to circumvent the fact that it is impossible for a national of a third country established outside the Union to rely on the articles of that treaty relating to freedom of establishment.

94. It is true, however, that national legislation which makes the receipt of dividends liable to tax, where the rate depends on whether the source of those dividends is national or otherwise, irrespective of the extent of the holding which the shareholder has in the distributing company, may be covered by the free movement of capital. It is therefore conceivable that a shareholder who is a national of a third country and is established outside the Union and who has a significant holding in the capital of a company that is resident in a Member State, may rely on Article 56(1) EC in order to challenge that legislation.

95. The fact that the extent of his holding in the capital of a company that is resident in a Member State enables a shareholder to have a definite influence on that company's

28 — See, in that regard, Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraphs 31 to 33.

29 — See Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34, and the order in Case C-492/04 *Lasertec* [2007] ECR I-3775, paragraphs 18 to 26.

30 — See, concerning the application of the same principle as regards the limits of the scope of free movement of capital and freedom to provide services, Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34, 48 and 49.

decisions and to determine its activities does not in itself appear to constitute sufficient justification to exclude the application of Article 56(1) EC, in the light of Article 57(1) EC. The latter provision, as was seen above, provides that the Member States may maintain restrictions existing on 31 December 1993 on the movement of capital to or from third countries where such movement involves 'establishment'. It may therefore be deduced from that provision that the movement of capital to or from third countries may involve establishment.

96. However, even though a shareholder who is a national of a third country and is established outside the Union, and whose holding in the capital of a company resident in a Member State is of such an extent that he may rely on Article 56 EC, the risk that the rules of the Treaty on freedom of establishment will be circumvented in such a situation may also be avoided by virtue of Article 58(2) EC. In my view, that provision allows the Member States to adopt restrictive measures with regard to the distribution of dividends to such shareholders.

97. It is in the light of those considerations that I take the view that the concepts of 'movement of capital' and 'restrictions' used in Article 56(1) EC should be interpreted in the same manner, both as regards relations between Member States and third countries and as regards intra-Community relations.

98. On the basis of this premiss, there seems no serious reason to doubt, first, that a distribution of dividends in the form of shares in a subsidiary constitutes a movement of capital within the meaning of that provision.

99. In *Verkooijen*,[31] the Court held that the fact that a national of a Member State residing in that Member State receives dividends from shares in a non-resident company constitutes a movement of capital within the meaning of Article 1 of Directive 88/361. It based that finding on the ground that the receipt of such dividends necessarily presupposes participation in new or existing undertakings, as referred to in point 2 of Part I of the nomenclature annexed to that directive.

100. That finding may also be applied where the dividends distributed are in the form of shares in a subsidiary, since, as the Commission contends, such distribution presupposes that the recipient holds shares in the distributing company. Moreover, in so far as Article 56 EC substantially reproduces the content of Article 1 of Directive 88/361, the nomenclature of 'capital movements' annexed to that directive still has, according to established case-law, the same indicative

31 — Case C-35/98 [2000] ECR I-4071.

value for the purpose of defining the concept of 'movement of capital'. [32]

101. Secondly, there is no doubt that the Swedish Law constitutes a restriction on such movement of capital. That law, in so far as it precludes from exemption dividends distributed by companies established in States which are outside the EEA and which have not concluded with the Kingdom of Sweden a convention that contains a provision on exchange of information, discourages taxpayers in that Member State from investing their capital in companies established in such third countries.

102. Similarly, that law has a restrictive effect on the ability of such companies to raise capital in Sweden. It also constitutes a restriction in that regard, since such companies are entitled to rely on the Treaty provisions on free movement of capital, as is clear from case-law. [33]

103. Legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary can be granted only where the distributing parent company is established in a State within the EEA or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of information therefore constitutes a restriction on the movement of capital within the meaning of Article 56(1) EC.

104. It is appropriate at this point to consider whether such a restriction may be justified.

D — *Justification for the restriction*

105. The Skatteverket and the Swedish Government, together with a number of other governments, maintain that the restriction at issue is justified by the need to guarantee the effectiveness of fiscal supervision. The Italian Government, for its part, contends that that restriction is covered by Article 57(1) EC.

106. I shall begin by considering whether that restriction is an existing measure as referred to in Article 57(1) EC, because, if that is the case, there is no need to investigate whether it is justified on the basis of Article 58 EC.

32 — *Fidium Finanz*, paragraph 41 and case-law cited.

33 — *Fidium Finanz*, paragraph 25, and *Holböck*, paragraph 30.

1. Whether Article 57(1) EC is applicable

107. Article 57(1) EC provides that Member States may maintain restrictions which existed on 31 December 1993 in respect of the movement of capital involving direct investment. Unlike the Italian Government, I do not think that that provision can apply to the Swedish Law.

108. It is apparent from the information supplied by the Regeringsrätten that the national legislation providing for the exemption of dividends was in force on 31 December 1993 and that it applied solely to dividends paid by Swedish companies, with the effect that companies established in third countries were excluded from it. It could therefore be argued that, to that extent, the national legislation already excluded from the exemption dividends of companies established in third countries which had not concluded a taxation convention providing for the exchange of information with the Kingdom of Sweden.

109. However, the Regeringsrätten also states that that legislation was repealed in 1994 and then reintroduced in 1995. In view of the repeal, I do not think that the Swedish Law can be treated as 'restrictions which exist on 31 December 1993', as referred to in Article 57(1) EC, irrespective of whether the movement of capital at issue involves direct investment within the meaning of that provision.

110. Indeed, that provision must be interpreted in the light of the system of which it forms part. Article 57(1) EC constitutes a derogation from the principle laid down in Article 56(1) EC. It should therefore be subject to strict interpretation. Moreover, the provisions of the second sentence of Article 57(2) EC make it clear that any new restriction must be imposed by the Council acting unanimously.

111. In my view, therefore, the words 'restrictions which exist on 31 December 1993' presuppose that the legal provisions relating to the restriction in question have formed part of the national legal order continuously since 31 December 1993. Article 57(1) EC provides that Member States may maintain the restrictions referred to in that article permanently but does not provide that they may reintroduce restrictions that have been repealed.

112. In repealing that restriction, the Member State concerned considered that it was no longer required in its relations with third countries. To allow the Member State to

reintroduce such a restriction at any time would conflict with the principle laid down in Article 56 EC and with Articles 57(2) EC and 58 EC to 60 EC, under which the adoption of political or economic safeguard measures is subject to very strict conditions and any new measure which constitutes a step back as regards freedom of movement of capital to or from third countries requires unanimity within the Council.

113. This view appears to me to accord with case-law. In *Konle*, the Court interpreted the concept of 'existing legislation' used in Article 70 of the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded, [34] as allowing the Republic of Austria to maintain its existing legislation governing secondary residences for a limited period. It applied that interpretation in the context of legislation on the taxation of dividends in *Test Claimants in the FII Group Litigation* [35] and in *Holböck*. [36]

114. It is apparent from that case-law that any national measure adopted after 31 December 1993 is not, by that fact alone, automatically excluded from the derogation laid down in Article 57(1) EC. The Court accepted that that article also covers provisions which are, in substance, identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in that legislation.

115. However, it is not apparent from the grounds of those judgments nor from the context in which they were delivered that the concept of 'existing restrictions' can also apply where legislation that was in force at the relevant date has been repealed and then reintroduced into the national legal order some time later. In *Konle*, *Test Claimants in the FII Group Litigation* and *Holböck*, the contested legislation constituted an amendment to the legislation in force at the relevant date. In those cases, there was no time when, as in the case in the main proceedings, the original restriction had been removed from the national legal order and the contested legislation had not yet entered into force.

116. Nor have I found in the Court's judgments interpreting the concept of 'existing legislation' in a legal context other than direct taxation any example to contradict my view.

34 — OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1.

35 — Paragraphs 189 to 195.

36 — Paragraphs 40 to 43.

117. I am therefore of the opinion that the restriction at issue in the main proceedings cannot be justified by Article 57(1) EC.

2. Justification on the basis of Article 58 EC

118. The Skatteverket and the Swedish Government, supported in this respect by the Danish, Spanish, French, Netherlands and United Kingdom Governments, argue that the restriction concerned is justified by the fact that it is impossible for the Swedish tax authorities to check with a third country such as the Swiss Confederation that the conditions to which the exemption is subject are complied with.

119. According to the Swedish Government, this concerns the first, third, fourth and final conditions of the Swedish Law, which provide that the distribution must be made in proportion to the number of shares held in the parent company, that all the parent company's shares in the subsidiary must be distributed, that the shares in the subsidiary after the distribution are not to be held by any undertaking that belongs to the same group as the parent company, and that the subsidiary's business activity must consist primarily in trading or, directly or indirectly, holding shares in undertakings that engage in such activity. According to the Swedish Government, the information needed to check compliance with those conditions where the distributing parent company is established abroad can be obtained only by the authorities of the country of establishment.

120. Those interveners maintain that national tax authorities must be able to check the evidence supplied by the taxpayer. In the absence of a provision on exchange of information between the competent national authorities, there is a risk that tax law will be infringed. Exclusion from the exemption where the distributing company is established in a third country which did not wish to conclude a convention providing for the exchange of information is not therefore disproportionate.

121. A challenges this view and contends that the restriction at issue in the main proceedings is not proportionate for the purposes of attaining the objective of guaranteeing the effectiveness of fiscal supervision, since he is able to supply evidence himself that the requirements under the Swedish Law are met.

122. A refers in that regard to the position adopted by the Court in *Baxter and*

Others [37] and *Danner*, [38] that a Member State cannot withhold a tax advantage from a taxpayer on the ground that it must be possible for that State to check the information supplied by the taxpayer in respect of transactions entered into abroad.

123. The Commission also expresses doubts as to whether the restriction at issue in the main proceedings is inconsistent with the principle of proportionality. It considers that evidence of the various requirements under the Swedish Law could be supplied by the taxpayer and that it is for the national court to ascertain whether checks by the competent tax authority are necessary or not.

124. Like the Skatteverket and the intervening governments, I am of the opinion that the restriction may be justified by the need to guarantee the effectiveness of fiscal supervision. I base this opinion on the following grounds.

125. I am aware that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the movement of capital. This justification may also be linked to Article 58(1)(b) EC, which refers to measures taken by Member States to prevent infringements of national law and regulations. However, in order for the restriction to be justified, it is necessary, according to case-law, for the national measure in question to be suitable for the purposes of attaining the objective pursued but it must not go beyond what is necessary to attain it, in accordance with the principle of proportionality. [39]

126. That case-law on the scope of Article 58 EC in connection with intra-Community movements of capital may also be applied when assessing whether restrictions on the movement of capital to or from third countries are compatible with that article, since Article 58 EC, like Article 56 EC, makes no distinction between those two categories of movement of capital.

127. In the present case, it is indisputable that the exclusion from the exemption from income tax of dividends distributed by companies established in third countries that have not concluded a convention with the Kingdom of Sweden providing for the exchange of information for purposes of fiscal supervision is indeed suitable for the purpose of attaining the objective pursued,

37 — Case C-254/97 [1999] ECR I-4809.
38 — Case C-136/00 [2002] ECR I-8147.

39 — See, in particular, *Centro di Musicologia Walter Stauffer*, paragraph 32.

which is to ensure that that exemption is granted solely in respect of distributions which meet the conditions laid down in the Swedish Law.

128. The question at the centre of the present case is therefore whether the limitation at issue in the main proceedings is proportionate for the purpose of attaining that objective.

129. More specifically, that question arises because the exclusion from the exemption of profits distributed by a company established in a third country which has not concluded a convention with the Kingdom of Sweden that provides for exchange of information absolutely prevents the taxpayer receiving dividends from those companies from submitting evidence that the conditions laid down in the Swedish Law are met. The question is therefore whether such an exclusion, based on the premiss that evidence supplied by the taxpayer cannot be checked with the competent authorities of the country of establishment, can be regarded as proportionate.

130. I consider, for the following reasons, that this premiss is indeed made out in the present case. It is clear, in that regard, from the documents and explanations provided by the Swedish Government, that the only information which can be obtained from the Swiss authorities under agreements concluded with the Swiss Confederation is that needed to ensure proper application of the Convention. However, since the Skatterättsnämnden considered, on the contrary, that it is possible under the Arrangement to obtain the information needed to check compliance with the conditions laid down in the Swedish Law, it will be for the national court to verify this point.

131. On the assumption, therefore, that the premiss that the evidence supplied by the taxpayer cannot be checked with the competent Swiss authorities is well founded, I am of the view that the exclusion at issue in the main proceedings must be regarded as proportionate for the following two reasons.

132. First, the fact that it is impossible for a Member State to obtain from the competent authorities of the country of establishment the information needed to check the evidence supplied by the taxpayer where those authorities alone are in a position to gather that information reduces significantly that State's capacity to exercise genuine supervision. In such cases, it can take as its basis only the evidence supplied by the taxpayer and, where appropriate, by third parties.

133. Moreover, since that taxpayer knows that such evidence cannot be checked with the authorities of the country in which the distributing company is established, the Member State concerned faces an increased likelihood that its legislation will be infringed.

134. In those circumstances, it does not seem to me excessive for that Member State to exclude from the tax advantage in question situations where it is not in a position to conduct genuine and effective supervision of compliance with the conditions to which that advantage is subject under its national legislation.

135. I do not think that the case-law relied upon by A, in particular *Baxter and Others* and *Danner*, precludes this view.

136. Under that case-law, in the Community context, the fact that it is impossible, or difficult, for one Member State to obtain from another Member State the information needed in order to check that the conditions laid down in its national legislation are complied with does not justify absolutely preventing the taxpayer from demonstrating himself that those conditions are indeed met.

137. Such an impossibility or difficulty may arise in an intra-Community context. We have seen that although, under Directive 77/799, a Member State may request the competent authorities of another Member State to send to it all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer in accordance with its domestic legislation, that possibility is not unlimited. Article 8(1) of that directive provides that the requested Member State is under no obligation to have enquiries carried out or to provide information if the competent authorities are prevented by its laws or administrative practices from carrying out those enquiries and from collecting or using that information for that State's own purposes.

138. In such cases, according to established case-law, Member States are not permitted to exclude in principle the granting of a tax advantage such as that at issue in the main proceedings. The Court points out that national tax authorities may demand from the taxpayer such proof as they consider necessary and, where appropriate, refuse to grant that advantage where such proof is not forthcoming. [40]

139. Therefore, if, in the intra-Community context, exclusion in principle of such a tax

40 — See, for a recent application, *Commission* v *Denmark*, paragraph 54.

advantage where it is impossible to check compliance with national conditions with another Member State is regarded as disproportionate, it is, in my view, because that situation falls within the exception provided for in Article 8 of Directive 77/799. Where that exception applies, the restriction on the exercise of freedom of movement, which the exclusion in principle of that fiscal advantage would entail, is disproportionate, because failure to provide assistance on the part of the Member State in which the transactions are carried out falls within the accepted limitations on the requirement to provide mutual assistance laid down by Directive 77/799.

140. That case-law is therefore linked to the existence of the requirement of mutual assistance provided for by that directive and to the fact that that requirement is not unlimited. Therefore it cannot, in my view, be applied in the context of the movement of capital to or from a third country where that country, which is by definition outside the scope of Directive 77/799, is not bound by any requirement to provide mutual assistance.

141. Moreover, there is reason to believe that the case-law relied upon by A is also based on the fact that, as a result of other relevant provisions of Community law, the taxpayer is in a position to provide evidence which may constitute a reliable and relevant basis for supervision.

142. Thus, in *Baxter and Others*, to which A refers, the Court had to consider French legislation allowing only expenditure on research carried out in France to be deducted from the amount payable by way of a special levy imposed as pharmaceutical undertakings. That limitation on the deductibility of research costs thus prevented Community undertakings operating a secondary place of business in France from deducting research costs incurred in other Member States. It was viewed by the Court as a restriction on freedom of establishment. The French Government argued that that limitation was essential to enable its tax authorities to ascertain the nature and genuineness of the research expenditure incurred.

143. The Court held that that plea could not be accepted and that the possibility could not be excluded a priori that the taxpayer may be able to provide relevant documentary evidence enabling the French tax authorities to ascertain the nature and genuineness of the research expenditure incurred in other Member States. In the light of the case made by the Commission, there is every reason to believe that the Court took into consideration the fact that the taxpayer could submit information in the accounts of parent companies established in other Member States and that that information could

constitute a reliable basis for control because it had to be prepared in accordance with Fourth Council Directive 78/660/EEC [41] and Seventh Council Directive 83/349/EEC. [42]

144. To sum up, it is therefore where there is a requirement to provide mutual assistance and, to a certain extent, because the evidence provided by the taxpayer is covered by the Community legal order, that the fact that such evidence cannot be checked with another Member State cannot be regarded as sufficient reason to prevent, absolutely, that taxpayer from showing that he does in fact meet the conditions to which the grant of the tax advantage in question is subject under national law.

145. That case-law cannot be applied in the context of the movement of capital to or from third countries which are not bound by any mutual assistance requirement and which are not subject to Community law. [43]

146. The second ground on which my position rests relates to the need to encourage third countries to conclude conventions providing for the exchange of information with the Community or, at least, with the Member States.

147. I note that the Community legislature considered it necessary to adopt Directive 77/799 in order to combat practices of tax evasion and tax avoidance because such practices are liable to affect the operation of the common market. The freedoms of

41 — Directive of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11).

42 — Directive of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1).

43 — Moreover, I do not think that the Swedish Law should be regarded as disproportionate, in the situation of a taxpayer such as A, in view of the fact that the exemption at issue in the main proceedings is not excluded where the distributing company is established in a State within the EEA which is not a member of the Union and which is therefore not required to transpose Directive 77/799 into its domestic law. It does not appear that the Swiss Confederation, which has not ratified the EEA Agreement, is in a comparable position to that of the Republic of Iceland, the Principality of Liechtenstein or the Kingdom of Norway. So far as the Republic of Iceland and the Kingdom of Norway are concerned, they have concluded a multilateral convention on administrative assistance with the Kingdom of Sweden which includes provisions on the exchange of information and other rules on administrative assistance in fiscal matters. The Principality of Liechtenstein has not, to my knowledge, concluded a convention of this type with the Kingdom of Sweden. The latter was therefore, in my view, entitled also to exclude from the exemption at issue in the main proceedings dividends distributed by companies established in Liechtenstein. However, the fact that such dividends are not excluded from that exemption does not show that the Swedish Law is disproportionate with regard to dividends distributed by a company established in Switzerland. Moreover, the situation of a company established in Switzerland is not comparable to that of a company established in Liechtenstein, since that State, unlike the Swiss Confederation, is required under the EEA Agreement to transpose into its domestic law measures for the application of the freedoms of movement, in particular the directives harmonising company law, and, inter alia, the directives relating to company accounts (see Annex XXII to the EEA Agreement).

movement, at Community level, therefore go hand in hand with a system of mutual assistance between the competent authorities of the Member States, which is designed to ensure correct assessment of taxes on income and on capital.

148. That concern is also shared by the Contracting States of the OECD, which, in Article 26 of the Model Tax Convention on Income and on Capital, also laid down an obligation to exchange such information as is foreseeably relevant to the enforcement of domestic tax laws.

149. Lastly, it appears that, despite those provisions, tax evasion is on the increase and, in order to combat this practice, further action at Community [44] and at international [45] levels has been and is required.

150. If the Court were to consider that exclusion from a tax advantage in the context of the movement of capital to or from a third country which has not concluded a convention providing for the exchange of information with the Member State concerned is a disproportionate measure, the Community and the Member States would inevitably be deprived of a means of exerting pressure that might encourage third countries to make such commitments. That would make combating tax evasion more difficult and give rise to an unbalanced situation to the detriment of the Community.

151. For my part, I consider that this method of exerting pressure is necessary in order to combat tax evasion and tax avoidance and that, as regards the movement of capital to and from third countries, Article 56 EC must be interpreted as providing for liberalisation subject to conditions. A Member State is therefore entitled, in my opinion, to make such liberalisation subject to the condition that third countries should undertake to engage in administrative cooperation with its national authorities and afford mutual assistance at a level equivalent to that required at intra-Community level under Directive 77/799.

152. This requirement also appears to me to be acceptable in the light of the fact that that directive, by virtue of the restriction contained in Article 8 thereof, requires Member States to observe to some extent a 'principle of equivalence', in so far as, in order to ensure the correct assessment of the amount of income tax payable to the requesting

44 — See, in that regard, the communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee concerning the need to develop a coordinated strategy to improve the fight against fiscal fraud (COM(2006) 254 final).

45 — See amendments to Article 26 of the OECD Model Tax Convention, approved by the OECD Committee on Fiscal Affairs on 1 June 2004.

State, they are required to carry out for the benefit of that State the same enquiries as those which they would be entitled to make in order to apply their own legislation and not to conduct any investigations which their legislation or their administrative practices preclude them from conducting. [46]

153. It is in the light of those considerations that I take the view that legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary, which is subject to a number of conditions, can be granted only where the distributing parent company is established in a State within the EEA or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of information may be justified by the need to guarantee the effectiveness of fiscal supervision.

154. This conclusion must, however, be subject to one caveat. Such justification may only be accepted if the Member State itself is not able to check compliance with the conditions imposed by its domestic law on the granting of the tax advantage in question. It is clear that if the national tax authorities are in a position to carry out such checks using their own resources, the absence of a convention providing for the exchange of information with the third country concerned does not preclude the Member State from conducting genuine and effective supervision of compliance with its legislation.

155. In the present case, the Skatteverket and the Swedish Government claimed that the national tax authorities were not in a position to check compliance with the first, third, fourth and final conditions of the Swedish Law. I am of the view that this question is one of fact for the national court. The restriction in question cannot therefore be said to comply with Articles 56 EC and 58 EC unless the national court finds that compliance with those conditions cannot be checked by the Swedish tax authorities using their own resources and that information is required which the competent authorities of the country of establishment of the distributing company alone are in a position to obtain.

156. In the light of these considerations, I propose that the answer to the question referred for a preliminary ruling should be that Articles 56 EC and 58 EC must be interpreted as meaning that legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary can be granted only where the distributing parent company is established in a State within the EEA or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of information constitutes a

46 — This limitation was clearly confirmed by Council Directive 2004/56/EC of 21 April 2004 amending Directive 77/799 (OJ 2004 L 127, p. 70).

restriction on the movement of capital. Such a restriction is justified by the need to guarantee the effectiveness of fiscal supervision where the exemption is subject to conditions, compliance with which cannot be checked by the national tax authorities using their own resources, and information is required which the competent authorities of the country of establishment of the distributing company alone are in a position to obtain.

IV — Conclusion

157. In the light of the foregoing considerations, I propose that the Court reply as follows to the question submitted for a preliminary ruling by the Regeringsrätten:

Articles 56 EC and 58 EC must be interpreted as meaning that legislation under which exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary can be granted only where the distributing parent company is established in a State within the European Economic Area or in a State with which the Member State has concluded a taxation convention that contains a provision on exchange of information constitutes a restriction on the movement of capital.

Such a restriction is justified by the need to guarantee the effectiveness of fiscal supervision where the exemption is subject to conditions, compliance with which cannot be checked by the national tax authorities using their own resources, and information is required which the competent authorities of the country of establishment of the distributing company alone are in a position to obtain.