OPINION OF ADVOCATE GENERAL TIZZANO

delivered on 29 January 2002 [1]

1. By order of 21 December 1999, Berufungssenat V (Appeal Chamber V) of the Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Regional Tax Authority for Vienna, Lower Austria and Burgenland) (hereinafter the 'Appeal Chamber') applied to the Court for a preliminary ruling on two questions concerning the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 and 58 EC). Essentially, the Appeal Chamber has asked the Court whether national provisions which apply different rules to the taxation of investment income from domestic and foreign companies respectively are compatible with Community law.

I — The legal framework

The relevant Community provisions

2. The relevant Community provisions for present purposes are Articles 73b and 73d of the Treaty. Article 73b(1) provides that 'all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited'. However, Article 73d provides as follows:

'1. The provisions of Article 73b 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

1 — Original language: Italian.

take measures which are justified on grounds of public policy or public security.

2. ...

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 73b.'

The relevant national provisions

3. Under the Austrian tax system, income from domestic limited companies is subject to two forms of taxation: on companies, in that their revenue is taxed at a fixed corporation rate of 34%, and on shareholders, in that tax is levied on dividends and other profits distributed by companies (i.e. investment income).

4. As regards the taxation of shareholders, which is of more direct concern here, the relevant provisions distinguish between domestic and foreign investment income, bearing in mind that 'investment income is deemed to be domestic where the person liable to pay investment income has its residence, head office or seat in Austria or is the branch office in Austria of a credit institution...'. [2]

(a) The taxation of domestic investment income

5. In respect of such income Austrian Law allows taxpayers to opt either for taxation at a special final fixed rate of 25% or at the ordinary income tax rate with a reduction of 50%.

6. In the first case, the taxpayer will have to pay tax at 25% on his investment income which will thereby cease to be subject to ordinary income tax since, as explained, that payment is final. The investment income will not be taken into account in his assessment to income tax, with the result that a lower rate of income tax will probably apply since the rate varies according to the level of income. The final tax is,

2 — Paragraph 93(2) of the Law on Income Tax (1988/400), in the version in force in 1997.

in principle, recovered by withholding tax at source (i.e. from the company);[3] however, in certain cases where tax cannot be withheld, the Law provides that tax shall be recovered 'by voluntary payment of an amount equivalent to the tax on investment income to the person liable to pay the dividends'.[4]

7. Should the taxpayer decide not to avail himself of the special final tax option, he will be subject to ordinary income tax with a reduction of 50%.[5] In that case, the investment income will be taken into account in his overall assessment to income tax, with the result that a higher rate of tax will probably apply to his aggregate income; to make up for this, his investment income will be taxed at 50% of the rate so determined.

8. To be more precise, it must also be pointed out that it is impossible to determine in advance which of the two systems of taxation described above will in fact be more advantageous for the taxpayer. While it is true that the tax on investment income under the second system will be less than, or at most equal to, the final tax (since the maximum rate of tax payable in Austria cannot exceed 50%), it is also the case that the rate applicable to the taxpayer's other income may be higher under that system. That is because, as I have said, under the second system, unlike the final tax system, investment income is taken into account in his overall assessment to tax, with the result that a higher rate of tax will probably apply to his aggregate income.

(b) The taxation of foreign investment income

9. The provisions I have just described apply, as I have said, only to domestic investment income, while income from shareholdings in foreign companies is subject to ordinary income tax. This means that it is taken into account in the overall assessment to tax, with the result that a higher rate of tax will probably apply, and that it is duly subject to income tax (which, as I have said, may be up to 50% in Austria) at the full rate, without any reduction. Thus, the special final fixed rate of 25% does not apply to income of this kind, nor does it benefit from the 50% reduction in the rate of tax applicable.

II — Facts and procedure

10. Mr Schmid resides in Austria. In 1997, his income consisted essentially of divi-

3 — Paragraph 93(1) of the Law cited above.
4 — Paragraph 97(2) of the Law cited above.
5 — Paragraph 37 of the Law cited above.

dends from companies that had their seat in Germany, in particular dividends from MAN AG.

11. The tax rate applicable to Mr Schmid's income for that year was calculated by the tax authority on the basis of his aggregate income from Austrian sources, investment income and income from foreign sources. The rate, after deductions, was set at 27.17% and the whole of his income from the German shares was also taxed at that rate.

12. On 3 December 1998, Mr Schmid lodged an appeal with the Appeal Chamber against the notice of assessment for 1997, claiming in particular that the dividends on ordinary shares in MAN AG ought to have been taxed at 50% of the ordinary rate.

13. In considering that appeal, the Appeal Chamber concluded that there were serious doubts about the compatibility of the national provisions with Community law, pointing out that the different treatment accorded to domestic and foreign investment income might constitute an obstacle to the free movement of capital guaranteed by the Treaty. By order of 21 December 1999, it therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Does Article 73b(1) in conjunction with Article 73d(1)(a) and (b) and (3) of the EC Treaty (now Article 56(1) in conjunction with Article 58(1)(a) and (b) and (3) EC) preclude a provision such as Paragraph 97 of the Einkommensteuer-gesetz ("EStG"; Law on Income Tax) of 1988 (BGBl. 1988/400; as amended, BGBl. 1996/797), which provides (pursuant to Paragraph 1(1)(1)(c) of the Endbesteuerungsgesetz (Law on Final Taxation), BGBl. 1993/11) that final taxation of dividends, interest and other earnings from foreign shares is excluded, and thus the rate of taxation in respect of domestic shares is 25%, whereas the rate of taxation in respect of foreign shares may be up to 50%?

2. Does Article 73b(1) in conjunction with Article 73d(1)(a) and (b) and (3) of the EC Treaty (now Article 56(1) in conjunction with Article 58(1)(a) and (b) and (3) EC) preclude a provision such as Paragraph 37(1) and (4) of the EStG of 1988 (BGBl. 1988/400), which provides that dividends of any kind from shareholdings in domestic limited companies in the form of shares are subject to a tax rate reduced to half of

the average tax rate applicable to the aggregate income, but that dividends of any kind from shareholdings in limited companies whose seat and place of management are in another EU Member State or a non-Member State are not subject to any reduction of that kind?'

III — Legal analysis

Admissibility

Arguments of the parties

14. In the subsequent procedure before the Court of Justice, the Republic of Austria, the French Republic and the Commission submitted observations. The first two took the view that the national provisions are compatible with the relevant Community provisions but the Commission took the opposite view, holding that the provisions in question are contrary to the provisions on free movement of capital contained in the Treaty.

15. To obtain clarification on certain points and details of the complex Austrian provisions on the taxation of investment income, the Court, by letter of 5 June 2001, put certain questions to the Appeal Chamber in accordance with Article 104(5) of its Rules of Procedure. By letter of 27 June 2001, the Appeal Chamber answered the questions put by the Court, providing full and detailed explanations which enabled a clearer idea to be gained of the legal framework described in brief above.

16. Before considering the substance of the questions referred for preliminary ruling, it must be determined whether the Appeal Chamber is a court or tribunal for the purposes of Article 234 EC and thus whether the Court has jurisdiction to give a preliminary ruling on the questions. Both the Commission and the Austrian Government expressed some doubts on the subject, although both ultimately concluded that the body in question is a court or tribunal. But the Appeal Chamber itself appeared to be aware of the problem, in that it took the precaution of setting out in the order for reference the reasons why, in its view, it ought to be recognised as a court or tribunal for the purposes of Article 234.

17. I should add that the doubts do not relate to all the factors that the Court usually takes into account in this connection. As we know, it is settled case-law that 'in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 177 of the Treaty, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the

body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent'. [6] The problems in the present case relate solely to whether the Appeal Chamber is acting as a third party (a requirement which in the case-law of the Court seems to be subsumed under independence) and whether the procedure in question is *inter partes*. There appears to be no doubt that it is established by law, that it is permanent, that its jurisdiction is compulsory and that it applies rules of law. I shall therefore confine myself to determining whether the Appeal Chamber also meets the first two requirements.

18. The doubts expressed in the present case as to whether appeal chambers act as a third party arise from the fact that, as the Commission and the Austrian Government point out, they are called upon to rule on decisions of tax authorities to which they themselves belong. It is clear from the order for reference that appeal chambers are organs of the regional tax authorities and that in principle the presidents of the authorities in question assume the presidency of the appeal chambers unless they decide to nominate a tax official to serve in their stead. To be precise, appeal commissions are established within the regional tax authorities, consisting partly of members elected by professional organisations and partly of members appointed by the Federal Finance Minister or the presidents of the regional tax authorities; the presidents of the regional tax authorities then establish various appeal chambers within those commissions, each consisting of five members, namely the president, a tax official and three members elected by professional organisations. The Commission considers that this structural link, combined with the fact that appeal chambers appear as defendants in appeals against their decisions before the Administrative Court, raises doubts as to whether those chambers act as a third party.

19. Despite those objections, the Commission nevertheless considers that the requirement that the body act as a third party is met in the present case, since:

— there is a constitutional provision (Paragraph 271(1) of the Bundesabgabenordnung ('BAO'; Federal Order on Taxes) to the effect that members of appeal chambers are not bound by any directions in the exercise of their functions;

— they are required to swear on their honour that their decisions will be impartial (Paragraph 271(2) BAO);

— the law specifies cases of incompatibility in which members of appeal

6 — Case C-17/00 *De Coster* [2001] ECR I-9445 paragraph 10.

chambers are required to abstain and the parties may challenge them (Paragraphs 76 and 283 BAO);

— most members of appeal chambers are members elected by professional organisations, not tax officials;

— presidents of regional tax authorities may appeal before the Administrative Court against decisions taken by appeal chambers, which shows that such decisions may also be unfavourable to the authorities.

20. The Austrian Government, for its part, concedes that some members of the Austrian legal establishment are inclined to doubt whether appeal chambers act as a third party, essentially for two reasons: first, because of the 'dual role' of the presidents of the regional authorities, who are heads of those authorities and also have a part in establishing the appeal chambers and in principle assume the presidency of those chambers; second, because of the 'mixed use' of the officials who are members of the appeal chambers and combine their activities in that context with their normal duties as tax officials. However, those objections are met by an appeal to normal practice whereby, on the one hand, presidents of regional tax authorities do not assume the presidency of appeal chambers in person and, on the other, officials who are members of those chambers have no say in matters or procedures they deal with in the normal course of their duties. In the light of that normal practice and the provisions on incompatibility, the Austrian Government argues that there are reasons to believe that appeal chambers are courts or tribunals for the purposes of Article 234 EC.

21. As I have said, the referring body expressly made the same point, citing Paragraph 271(1) BAO, under which members of appeal chambers are not bound by any outside directions.

22. As to the requirement that the procedure be *inter partes*, the Appeal Chamber contends that there can be no doubt that the procedure in the Chamber is indeed *inter partes*, since there is full provision for the parties (i.e. the taxpayers) to state their case in writing and attend hearings (Paragraphs 115(2), 161(3), 183(4), 279 and 284(1) BAO). Only the Commission expressed some doubts on the subject, since there is no provision for participation in the procedure at first instance, that is the tax authorities' procedure. However, in view of

the power conferred on the presidents of the regional authorities to challenge decisions of the appeal chambers, the Commission considers that the procedure in question may nevertheless be deemed to be *inter partes*, especially since, according to the case-law of the Court, 'the requirement that the procedure be *inter partes* is not an absolute criterion'. [7]

Assessment

23. Coming now to my assessment, I believe I can safely confine myself to examining the two points at issue in the present case without considering the other requirements laid down by the Court; nor, *a fortiori*, do I think there is any need to reopen here the debate as to whether those requirements may, together or separately, be suitably used as criteria for determining the nature of referring bodies.

24. To begin therefore with the requirement that the procedure must be *inter partes*, I note first that the doubts expressed by the Commission do not seem to me to be justified. I consider that the ample opportunity for taxpayers contesting the tax authorities' decisions to state their case before appeal chambers is sufficient guarantee that the procedure is *inter partes*. The fact that the tax authorities are not formally represented in procedures conducted by one of their own organs may at most raise doubts, as I shall shortly point out, as to whether the adjudicating body is in fact acting as a third party, but it does not seem to me to be sufficient to preclude the proposition that the procedure is *inter partes*.

25. A more complex and controversial question is whether appeal chambers act as a third party, that is to say whether they can in fact be regarded as a third party in relation to the taxpayers who bring appeals, on the one hand, and the tax authorities which adopted the contested decisions, on the other.

26. I note, in this connection, that in some of its earlier judgments the Court expressly and specifically held that the requirement that a referring body act as a third party is essential for the purpose of recognising it as a court or tribunal for the purposes of Article 234 EC, particularly in cases where such bodies belong to the very authorities that adopted the decisions challenged before the bodies in question. [8] Thus, in its judgment in *Corbiau*, the Court stated

7 — Judgment in Joined Cases C-110/98 to C-147/98 *Gabalfrisa* [2000] ECR I-1577, paragraph 37. The Commission also cites to the same effect the judgment in Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 31.

8 — The Court has not however dwelt specifically on the requirement in question in some cases where the reference order came from administrative bodies whose independence was likewise at issue but which were not an integral part of the authorities responsible for the contested decisions (see, for example, the judgments in *Dorsch Consult*, cited above, and Case C-103/97 *Köllensperger* [1999] ECR I-551).

clearly that 'the expression "court or tribunal" is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings'.[9] In that case the Directeur des Contributions did not act as a third party, since 'being at the head of the Direction des Contributions Directes et des Accises (Direct Taxes and Excise Duties Directorate), he [had] a *clear organisational link* with the departments which [had] made the disputed tax assessment, against which the complaint submitted to him [was] directed'. That was confirmed, moreover, by the fact that 'if the matter were to [have] come before the Conseil d'État on appeal, the Directeur des Contributions would [have been] *a party to the proceedings*'.[10]

27. Similarly, in its judgment in *Gabalfrisa*, the Court considered that it was necessary to determine whether the Spanish Tribunales Económico-Administrativos had 'the character of a third party in relation to the departments which [had] adopted the decision forming the subject-matter of the complaint and the independence necessary for them to be regarded as courts or tribunals for the purposes of Article 177 of the Treaty'.[11] In that case, as Advocate General Saggio pointed out, the question had arisen in particular because 'the Spanish Government itself [admitted] that, in organisational terms, the Tribunales Económico-Administrativos [did] not officially come under the auspices of the departments responsible for the administration of justice; rather they [were] incorporated in the Ministry of Economic Affairs and Finance (Ministerio de Economia y Hacienda)', that is to say 'the very authority whose acts taxpayers [contested] before them'.[12] However, the Court did not consider that that organisational link with the Ministry of Finance was sufficient to preclude the referring body from acting as a third party, since the Spanish legislation guaranteed 'a *separation of functions* between... the departments of the tax authority responsible for management, clearance and recovery and... the Tribunales Económico-Administrativos which rule on complaints lodged against the decisions of those departments without receiving any instruction from the tax authority'. In its judgment in that case, therefore, the Court did not attach significance so much to the fact that the referring body and the departments that had adopted the contested decision were both part of the same administrative authority but instead to the fact that a clear separation of functions was guaranteed in that instance.[13]

28. That having been said, and while there is no need to rule in this circumstance on the consistency of earlier decisions and the

9 — Judgment in Case C-24/92 *Corbiau* [1993] ECR I-1277, paragraph 15.

10 — Paragraph 16, my emphasis.

11 — Judgment cited above, paragraph 40.

12 — Point 16 of the Opinion.

13 — It is worth pointing out that in that case the *separation of functions* within the Spanish tax authorities meant that members of the Tribunales Económico-Administrativos may not serve at the same time in 'departments of the tax authority responsible for management, clearance and recovery'. With reference to that aspect, I think it is also helpful to point out that in its judgment in *De Coster*, cited above, the Court recognised the independence and impartiality of the Collège juridictionnel de la Région de Bruxelles-Capitale on the ground *inter alia* that members of that Collège juridictionnel may not be members of a municipal council or of the staff of a municipal authority responsible for decisions that may be challenged before it (paragraph 19 of the judgment).

expediency of reviewing, as has been suggested, [14] the less stringent approach adopted in *Gabalfrisa*, it seems to me that, on the criteria followed in the two judgments cited above, appeal chambers clearly do not act as a third party.

29. In that connection, I note, first, that appeal chambers are organs of the regional tax authorities, that is to say the authorities responsible for adopting the decisions on which those chambers are required to rule. Moreover, as the Austrian Government has pointed out, that structural link with the tax authorities is further strengthened:

(i) by the particular role assigned to the presidents of the regional authorities, who are heads of those authorities and also (at least in principle) assume the presidency of the appeal chambers and have a part in establishing them, with discretion to select the members of the appeal commissions who are to serve in the various chambers; [15]

(ii) by the fact that the other tax official appointed to serve in appeal chambers also continues to perform his normal duties for the tax authority.

30. Thus, not only is there in the present case the '*clear organisational link*' with the Tax Authority that led to the conclusion in *Corbiau* that the Directeur des Contributions was not a court or tribunal, but also the members of appeal chambers appointed by the tax authorities (including the president) are not subject to the kind of 'separation of functions' that would nevertheless ensure that the adjudicating body was acting as a third party, as laid down in the judgment in *Gabalfrisa*. Moreover, these fundamental objections cannot be met, as the Austrian Government suggests, by an appeal to normal practice, whereby, on the one hand, presidents of regional tax authorities do not assume the presidency of appeal chambers in person and, on the other, officials who are members of those chambers have no say in matters or procedures with which they deal in the normal course of their duties. The issue of whether the referring body is a court or tribunal must clearly be assessed on the basis of the legislation in force in the Member States, not of purely domestic practices which may be changed at will by those concerned in a way which is difficult for the Court to verify.

31. Two other factors seem to me to confirm the view that appeal chambers do

14 — On this question, I would simply point out here that the criteria employed in the judgment in *Gabalfrisa* were openly and strongly criticised by Advocate General Ruiz-Jarabo Colomer in points 26-28 of the Opinion in Case C-17/00 *De Coster*, delivered on 28 June 2001.

15 — The presidents of the regional authorities may at their discretion establish appeal chambers and select members of such chambers from the numerous members of the appeal commissions, the only condition being that the prescribed ratio between tax officials and members appointed by professional organisations must be maintained. The discretionary powers of the presidents of the regional authorities appear to be further enhanced by the fact that the appeal chambers are apparently not established for a definite period but are formed *ad hoc* to deal with the various cases.

not act as a third party in relation to the tax authorities that are the source of the contested decisions. In the first place, those departments are not parties to proceedings before the appeal chambers, which are attended only by the taxpayers challenging the tax authorities' decisions. The fact that the departments responsible for the contested decision do not take part in the proceedings contradicts the proposition that the appeal chambers act as a third party in relation to two opposing parties and appears, on the contrary, to imply that the chambers themselves defend the authorities' interests on such occasions. In the second place, the point I have just made seems to me to be confirmed by the fact that, as the Commission has pointed out, the appeal chambers appear as defendants in appeals against their decisions before the Administrative Court. In my view, it is difficult to reconcile the right to defend one's own decisions before an administrative court and to appear as a party in proceedings in this connection with the capacity to act as a third party which must be a distinctive feature of the judicial function. This is clear, moreover, from the judgment in *Corbiau*, where the Court held that the Directeur des Contributions did not act as a third party and that this was 'confirmed... by the fact that, if the matter were to come before the Conseil d'État, the Directeur des Contributions would be a party to the proceedings'. [16]

32. The two factors considered above suggest, in my view, that the procedures before appeal chambers are in fact simply administrative appeals, allowing taxpayers an opportunity to have the tax authorities' decisions reviewed by bodies established for the purpose by the authorities themselves (albeit with some outside members) and granted special independent status. I should add that, in the absence of a clear functional separation from the departments responsible for the contested decisions, the mere fact that the members of those administrative bodies are not subject to supervision and orders from their line managers does not of itself guarantee that the bodies in question act as a third party. [17]

33. In the light of the foregoing considerations, I therefore take the view that appeal chambers do not act as a third party in relation to the taxpayers that bring appeals, on the one hand, and the tax authorities that adopted the contested decisions, on the other. It follows that they cannot be recognised as courts or tribunals for the purposes of Article 234 EC and thus the Court does not have jurisdiction to give preliminary rulings on questions referred by them. It is scarcely necessary to point out that there is no danger of this conclusion affecting the uniform application of Community law, since the appeal cham-

16 — Paragraph 16.

17 — It is interesting to note in this connection that Advocate General Darmon held, in his Opinion in *Corbiau*, that the Directeur des Contributions did not act as a third party, since 'his task is to resolve a dispute between the administration of which he is a director and a taxpayer who is challenging a decision taken by one of his departments', yet the Court was told that he was 'totally independent both of his minister and the administration of which he is director' (point 29 of the Opinion).

bers' decisions may be challenged before the Administrative Court, which is undoubtedly a court or tribunal for the purposes of Article 234 EC.

Substance

34. In view of the conclusions I have reached as to the admissibility of the present reference for a preliminary ruling, I shall consider the questions referred to the Court only in the alternative.

35. I note in this connection that, by its first question, the Appeal Chamber essentially seeks to ascertain whether a national provision, under which the special final tax described above applies only to domestic investment income, is compatible with Community law and in particular with the provisions on free movement of capital contained in the Treaty. By its second question, on the contrary, it seeks to ascertain whether a national provision, under which the reduction of 50% in ordinary income tax applies only to domestic investment income is compatible with Community law.

36. Since, as we have seen, the choice between the systems of taxation mentioned in the two questions is open (only) to those in receipt of domestic investment income, I consider that it is essential to examine both systems together in order to determine whether the provisions as a whole are compatible with Community law. Therefore, I consider it essential to determine whether it is consistent with the provisions on free movement of capital contained in the Treaty to give those in receipt of domestic investment income an opportunity to choose between the two systems of taxation described above, while foreign investment income is subject to ordinary income tax at the full rate, without any reduction.

37. To that end, it must first be established whether provisions of the kind under consideration may constitute a restriction on the movement of capital within the meaning of Article 73b of the Treaty and, if so, whether they may be justified under Article 73d.

The nature of the restrictive provisions

38. On the first aspect, I must point out that 'measures taken by a Member State which are liable to dissuade its residents from... making investments in other Member States constitute restrictions on movements of capital within the meaning

of Article 73b of the Treaty'.[18] More specifically, the Court has held that 'to make the grant of a tax advantage, such as the dividend exemption, relating to taxation of the income of natural persons who are shareholders subject to the condition that the dividends are paid by companies established within national territory constitutes a restriction on capital movements',[19] inasmuch as such a provision:

— 'has the effect of dissuading nationals of a Member State residing [in the Member State concerned] from investing their capital in companies which have their seat in another Member State'; and

— 'also has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital [in the Member State concerned] since the dividends which such companies pay to residents [in that State] receive less favourable tax treatment than dividends distributed by a company established [in that State], so that their shares are less attractive to investors residing [in the State in question] than shares in companies which have their seat in that Member State'.[20]

39. In the light of that definition of the concept of 'restrictions on the movement of capital' within the meaning of Article 73b, it seems to me clear that provisions such as those under consideration, which offer a choice in respect of domestic investment income between taxation at a special final fixed rate of 25% or at the ordinary income tax rate with a reduction of 50%, while foreign investment income is subject to ordinary income tax at the full rate without any reduction, must be held to constitute such a restriction. Such provisions undoubtedly accord preferential treatment to domestic investment income, discouraging investors of one State from acquiring shares in companies established in other Member States and constituting for those companies an obstacle to the raising of capital in the Member State concerned.

40. It is moreover quite clear from the circumstances that gave rise to the action in the main proceedings that the Austrian provisions accord preferential treatment to domestic as opposed to foreign investment income.

41. The investment income received by Mr Schmid from the German company was taken into account in his assessment to

18 — Judgment in Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18; see also, to the same effect, judgments in Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10, Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 26, and Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19.

19 — Judgment in Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 36.

20 — Judgment in *Verkooijen*, paragraphs 34 and 35.

income tax and taxed at the rate of 27.17% without any reduction. If, however, that income had been paid by an Austrian company, Mr Schmid would have had a choice between the following options: (i) to pay final tax on the income in question, with the result that it would not have been taken into account in his assessment to income tax, a lower rate would have applied to the rest of his income and the investment income itself would have been taxed at the fixed rate of 25%; (ii) to pay ordinary income tax on the income in question, with a reduction of 50%. There is consequently no doubt that Mr Schmid's investment income from German companies was accorded less favourable tax treatment in Austria than it would have been accorded had it been income from Austrian companies.

42. It must therefore be concluded that, by according preferential treatment to domestic as opposed to foreign investment income, the provisions under consideration constitute a restriction on the movement of capital prohibited in principle by Article 73b of the Treaty.

Justification of the provisions under Article 73d

43. As already explained, however, the fact that national provisions of the kind under consideration constitute a restriction on the movement of capital within the meaning of Article 73b of the Treaty does not necessarily mean that they are incompatible with the provisions on free movement of capital. I note, once again, that Article 73d(1) of the Treaty provides that '[t]he provisions of Article 73b shall be without prejudice to the right of Member States... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to... the place where their capital is invested' and to their right 'to take all requisite measures to prevent infringements of national law and regulations'.[21] In order to reply to the questions referred by the Appeal Chamber for a preliminary ruling, it must therefore also be determined whether the provisions under consideration may be justified under Article 73d(1) of the Treaty.

44. In this connection, I must first point out that, inasmuch as those provisions authorise a derogation from the fundamental principle of free movement of capital,[22] they must be interpreted strictly and cannot therefore justify national provisions or measures which constitute 'a means of arbitrary discrimination' or 'a disguised restriction on the free movement of capital... as defined in Article 73b' (Article 73d(3) of the Treaty). It follows that restrictions arising from provisions of the kind under consideration may be allowed under Article 73d(1) only if the different treatment accorded to domestic and foreign investment income is objectively justified

21 — Article 73d(1)(a) and (b).

22 — Judgment in Case C-54/99 *Association Eglise de scientologie de Paris and Scientology International Reserves Trust* [2000] ECR I-1335, paragraph 17.

by different situations or by overriding reasons in the general interest. [23] I should add that the Court has had occasion to rule, with reference to measures to prevent infringement of national tax provisions, that '[f]or a measure to be covered by Article 73d of the Treaty, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it'; [24] to that end, the measure must also be 'necessary in order to uphold the objectives pursued' and it must not be possible to attain them 'by measures less restrictive of the free movement of capital'. [25]

45. In order to establish whether the restrictions on the movement of capital arising from the tax provisions in question may be allowed under Article 73d(1) of the Treaty, it must therefore be determined whether, as the Austrian and French Governments claim, the different treatment accorded to domestic and foreign investment income is objectively justified and so does not constitute arbitrary discrimination or a disguised restriction on the free movement of capital.

46. In that connection, the Republic of Austria points out, first, that the final tax applies only to income from investments in domestic companies because that tax necessarily presupposes the presence of an agent that can be required under Austrian law to withhold the tax at source. Such a condition could not be imposed with respect to income from investments in companies established in other Member States, so it would be impossible on technical grounds to apply the final tax in that case.

47. That argument does not, it seems to me, carry conviction. While it is true that there must be an agent in Austria if the tax is to be withheld in that country, it is not equally true that the final tax necessarily involves withholding at source. In my view, various technical arrangements could have been made to collect tax of the kind under consideration (that is, tax at a fixed final rate of 25%), arrangements that could also apply without problems to income from investments in foreign companies.

23 — It seems to me that this is the correct interpretation of the judgment in *Verkooijen* in which, with reference to Article 73d(1)(a), the Court cited case-law according to which 'before the entry into force of [that article], national tax provisions of the kind to which that article refers, in so far as they establish certain distinctions based, in particular, on the residence of taxpayers, could be compatible with Community law provided that they applied to situations which were not objectively comparable (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225) or could be justified by overriding reasons in the general interest, in particular in relation to the cohesion of the tax system (Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305)' (paragraph 43).

24 — Judgment in Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 41.

25 — Judgment in Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and others* [1995] ECR I-4821, paragraph 23.

48. Moreover, as the Commission has pointed out, an example of such an arrangement is afforded by the Austrian provisions themselves, as described above, under which, in certain cases where tax cannot be withheld, the final tax may be recovered 'by voluntary payment of an amount equivalent to the tax on investment income to the person liable to pay the dividends'. [26] Provision could have been made for a similar kind of 'voluntary payment' to the tax authorities in respect of income from investments in foreign companies, enabling the final tax to apply to such income and avoiding the restriction on the movement of capital observed in this connection.

49. Second, the Austrian and French Governments argue that the 50% reduction in the rate applicable to domestic investment income subject to ordinary income tax is necessary in order to safeguard the cohesiveness of the Austrian tax system and, to that end, in accordance with the judgments in *Bachmann* and *Commission* v *Belgium*, [27] it may 'justify rules liable to restrict fundamental freedoms'. [28] They argue that the provisions under consideration are justified, in particular, by the fact that the revenue of companies established in Austria is already subject in that country to a fixed tax of 34% and that it would therefore be incongruous to tax the same revenue again when it is distributed to shareholders by making all dividends subject to income tax.

50. The Commission takes a different view, holding that there is no justification for according different treatment to dividends from domestic and foreign companies. It points out, in particular, that the provisions under consideration cannot be justified by the need to safeguard the cohesiveness of the Austrian tax system so as to avoid a form of double taxation (in the economic sense), since corporation tax and income tax apply to different bodies of taxpayers.

51. I too consider that the need cited in the judgments in *Bachmann* and *Commission* v *Belgium* cannot legitimately be invoked in the present case. I note that in those cases '*a direct link existed*, in the case of one and the same taxpayer, *between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy*, both of which related to the same tax. In those cases, there was a link between the deductibility of contributions and the taxation of sums payable by insurers under old-age insurance and life assurance policies, which it was necessary to preserve in order to safeguard the cohesion of the tax system at issue'. [29] In the present case, on the contrary, there is no direct link between the corporation tax and the application of income tax with a reduction of 50% since, as in *Verkooijen*, '[t]hey are two separate taxes levied on different taxpayers' (companies and shareholders). [30] Consequently, in accordance with the principle established

26 — Paragraph 97(2) of the Law cited above.

27 — Judgments in Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

28 — Judgment in *Verkooijen*, paragraph 56.

29 — Judgment in *Verkooijen*, paragraph 57; my emphasis.

30 — Judgment in *Verkooijen*, paragraph 58.

by the judgment in *Verkooijen*, I do not think that the restrictions on the movement of capital arising from the provisions under consideration can be justified by the need to safeguard the cohesiveness of the Austrian tax system.

52. Third, the Republic of Austria considers that the provisions under consideration may be justified on the ground that, in the case of foreign investment income only, 'professional expenses' are deductible and are consequently not taken into account in the overall assessment to tax.

53. However, that argument too is easily rebutted in the light of the judgment in *Verkooijen*. To meet a similar argument advanced in that case by the Netherlands, 'based on a possible tax advantage for taxpayers receiving [in that country] dividends from companies with their seat in another Member State', the Court deemed it sufficient to say that 'it is clear from settled case-law that unfavourable tax treatment contrary to a fundamental freedom cannot be justified by the existence of other tax advantages, even supposing that such advantages exist'. [31]

54. Lastly, the French Government argues that if the final tax or the reduced rate were to be extended to dividends distributed by companies established in other Member States, the tax authorities of the shareholders' country of residence would not be able to exercise effective control over that company's distributions. In its view, the provisions under consideration may therefore be justified within the meaning of Article 73d(1)(b) of the Treaty, under which the provisions of Article 73b are to be without prejudice to the right of Member States 'to take all requisite measures to prevent infringements of national law and regulations'.

55. In my view, that argument is without foundation. It is clear that the provisions under consideration in no way guarantee the efficacy of the fiscal controls, since the less favourable treatment accorded to foreign investment income does not in fact enable the authorities to ascertain whether such income has been duly declared to the Austrian tax authorities for assessment to ordinary income tax.

56. It follows that the factors mentioned by the Austrian and French Governments cannot justify, within the meaning of Article 73d(1) of the Treaty, the restric-

31 — Judgment in *Verkooijen*, paragraph 61.

tions on the movement of capital arising from the tax provisions under examination. It must therefore be concluded that Article 73b(1) of the Treaty precludes provisions such as those under consideration, which offer a choice in respect of domestic investment income between taxation at a special final fixed rate or at the ordinary income tax rate with a reduction of 50%, while foreign investment income is subject to ordinary income tax at the full rate without any reduction.

Conclusion

57. In light of the foregoing considerations, I therefore propose that the Court should declare that it does not have jurisdiction to rule on the questions referred by the Appeal Chamber. However, should the Court hold that it has jurisdiction, I propose that it should give the following answer to the questions:

Article 73b(1) of the EC Treaty (now Article 56(1) EC) precludes provisions such as those contained in Paragraphs 37 and 97 of Law 1988/400 (in the version published in BGBl 1996/797), which offer a choice in respect of domestic investment income between taxation at a special final fixed rate or at the ordinary income tax rate with a reduction of 50%, while foreign investment income is subject to ordinary income tax at the full rate without any reduction. Such provisions cannot be justified by Article 73d(1) of the EC Treaty (now Article 58(1) EC).