JUDGMENT OF THE COURT (Grand Chamber)

18 December 2007 *

In Case C-101/05,

REFERENCE for a preliminary ruling under Article 234 EC from the Regeringsrätten (Sweden), made by decision of 15 October 2004, received at the Court on 28 February 2005, in the proceedings

Skatteverket

v

A,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts (Rapporteur) and A. Tizzano, Presidents of Chambers, R. Schintgen, J.N. Cunha Rodrigues, R. Silva de Lapuerta, J. Malenovský, T. von Danwitz, A. Arabadjiev and C. Toader, Judges,

* Language of the case: Swedish.

Advocate General: Y. Bot,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2007,

after considering the observations submitted on behalf of:

— the Skatteverket, by K. Rask, acting as Agent,

— A, by S. Andersson and P. Nortoft, advokater,

— the Swedish Government, by K. Wistrand and A. Falk, acting as Agents,

— the Danish Government, by B. Weis Fogh, acting as Agent,

— the German Government, by M. Lumma, U. Forsthoff and C. Blaschke, acting as Agents,

— the Spanish Government, by N. Díaz Abad and M. Muñoz Pérez, acting as Agents,

— the French Government, by G. de Bergues and J.C. Gracia and by C. Jurgensen, acting as Agents,

— the Italian Government, by I.M. Braguglia, acting as Agent, and by P. Gentili, avvocato dello Stato,

— the Netherlands Government, by H.G. Sevenster and C. ten Dam and by M. de Grave, acting as Agents,

— the United Kingdom Government, by C. Jackson and T. Harris, acting as Agents, and by T. Ward, Barrister,

— the Commission of the European Communities, by R. Lyal and K. Simonsson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2007,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Articles 56 EC to 58 EC.

2 This reference was made in proceedings between the Skatteverket (Swedish Local Tax Board) and A, a natural person living in Sweden, based on the refusal to grant A an exemption from tax on dividends distributed in the form of shares in a subsidiary by a company established in a third country.

National legislation

3 Under the 1999 Swedish Law on Income Tax (Inkomstskattelagen, SFS No 1229, 'the Law'), dividends paid to a natural person resident in Sweden by a limited liability company are normally subject to income tax in that Member State.

4 Paragraph 16 of Chapter 42 of the Law provides that:

'Dividends distributed by a Swedish limited liability company (parent company) in the form of shares in a subsidiary are not included in taxable income provided that:

(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 company are distributed;

(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.'

5 When that exemption was introduced in Swedish law in 1992, the relevant provisions applied only to profits distributed by Swedish limited liability companies. After being repealed in 1994, those provisions were reintroduced in national law in 1995.

6 Under Paragraph 16 of Chapter 42 of the Law, introduced in Swedish law in 2001, the exemption provided for in Paragraph 16 of that chapter also applies where 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 European Economic Area ('EEA') or in a State with which the Kingdom of Sweden has concluded a tax convention that contains a provision on exchange of information.

7 On 7 May 1965, a convention was concluded between the Swiss Confederation and the Kingdom of Sweden for the avoidance of double taxation in respect of taxes on income and capital ('the Convention'). Articles 10 and 11 of the Convention deal with rules on the taxation of dividends and interest respectively.

8 Article 27 of the Convention provides for an amicable procedure between the competent authorities of the contracting States 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 the Convention.

9 It is apparent from paragraph 5 of the record of negotiations and initialling in connection with the conclusion of the Convention ('the Protocol') 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 also apparent from paragraph 5 that the Kingdom of Sweden took formal note of that declaration and did not seek to include in the Convention any express provision on the exchange of information

10 On 17 August 1993, an arrangement was concluded between the Swiss Confederation and the Kingdom of Sweden concerning the implementation of Paragraphs 10 and 11 of the Convention ('the Arrangement'). That Arrangement sets out the procedure to be followed by an individual in order to obtain tax relief under the taxation conditions laid down in those articles and the manner in which such applications are to be treated by the tax authorities of the contracting States.

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

11 A owns shares in company X, which has its registered office in Switzerland and is considering distributing the shares which 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 income tax. A stated that X corresponded to a Swedish limited liability company and that 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.

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

13 According to the Skatterättsnämnden, such a right to exemption cannot be inferred from the Law since the Convention does not impose any obligation on the Swiss Confederation to provide the information needed by Swedish tax authorities. However, Paragraph 16a of Chapter 42 of the Law should be regarded as a restriction on the movement of capital within the meaning of Article 56 EC. Admittedly, the objective of such a restriction is to facilitate fiscal controls in a situation in which Council Directive 77/799 of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1) ('Directive 77/799'), does not apply. However, that restriction was disproportionate for the purposes of securing that objective. The Arrangement appears to make it possible to a certain degree for the Swedish tax authorities to obtain the information required for the application of domestic tax legislation. Moreover, the taxpayer may be given the opportunity to demonstrate himself that all the requirements under the Law are satisfied.

14 The Skatteverket appealed against the preliminary decision of the Skatterättsnämnden to the Regeringsrätten.

15 In its appeal, the Skatteverket stated that the 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 those third countries which oppose exchanging information for purposes of fiscal supervision. Where the possibility of obtaining information is limited, a restriction such as that imposed by Paragraph 16a could be justified in order to guarantee the effectiveness of fiscal supervision.

16 A maintained, on the other hand, that the provisions in the Protocol and in the Arrangement may be treated in the same way as if they were a provision on the exchange of information in the Convention itself. Paragraph 16a of Chapter 42 of the Law is, in any event, a restriction on the free movement of capital which cannot be justified. There is no need to seek information from the Swiss authorities, since the taxpayer may undertake to show that he satisfies all the requirements for qualifying for the exemption provided for in the Law.

17 In those circumstances, the Regeringsrätten decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'In a situation such as that in the main proceedings, 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?'

The question referred for a preliminary ruling

18 By its question, the Regeringsrätten asks, in essence, whether the provisions of the Treaty on free movement of capital are to be interpreted as precluding the legislation of a Member State which provides that exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary may be granted only if the distributing company is established in a State within the EEA or in a State with which a taxation convention providing for the exchange of information has been concluded by the Member State imposing the tax.

19 As a preliminary point, it is to be noted that, according to settled case-law, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law (Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19; and Case C-292/04 *Meilicke and Others* [2007] ECR I-1835, paragraph 19).

20 In that regard, Article 56(1) EC, which entered into force on 1 January 1994, gave effect to the liberalisation of capital between the Member States and between Member and non-member States. To that end, it provides, in the chapter of the Treaty entitled 'Capital and payments', that all restrictions on the movement of capital between Member States and between Member and non-member States are prohibited (Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lere and Others* [1995] ECR I-4821, paragraph 19, and Case C-513/03 *van Hilten-van der Heijden* [2006] ECR I-1957, paragraph 37).

The direct effect of Article 56(1) EC in relations between Member and non-member States

21 At the outset, it should be noted that Article 56(1) EC lays down a clear and unconditional prohibition for which no implementing measure is needed and which confers rights on individuals which they can rely on before the courts (see, to that effect, *Sanz de Lera and Others*, paragraphs 41 and 47).

22 However, the German Government submits that, in relations between Member and non-member States, that provision has direct effect only with regard to restrictions relating to categories of capital movement not covered by Article 57(1) EC. As regards the categories of capital movement referred to in Article 57(1), Article 57(2) confers power on the Council of the European Union to adopt liberalisation measures if and to the extent that such measures make it possible to promote the operation of economic and monetary union. While the Court, at paragraph 46 of the judgment in *Sanz de Lera and Others*, admittedly acknowledged that the adoption of measures by the Council is not a prerequisite for implementing the prohibition laid down in Article 56(1) EC, it limited that interpretation to restrictions which are not covered by Article 57(1) EC.

23 In that regard, under Article 57(1) EC, the provisions of Article 56 EC are without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or Community law adopted 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.

24 The first sentence of Article 57(2) EC provides that, 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 the Treaty, the Council may, acting by a qualified majority on a proposal from the Commission of the European Communities, 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. The second sentence of Article 57(2) provides that unanimity is required for measures which constitute a step back in Community law as regards the liberalisation of the movement of capital to or from third countries.

25 At paragraph 48 of the judgment in *Sanz de Lera and Others*, the Court held that Article 73b(1) of the EC Treaty (now Article 56(1) EC), in conjunction with Articles 73c and 73d(1)(b) of the EC Treaty (now Articles 57 EC and 58(1)(b) EC respectively), may be relied on before national courts and may render national rules that are inconsistent with them inapplicable.

26 Thus, the Court recognised the direct effect of Article 56(1) EC, without drawing a distinction between the categories of capital movement which are covered by Article 57(1) EC and those which are not so covered. The Court held that the exception provided for in Article 57(1) EC cannot preclude Article 56(1) EC from conferring rights on individuals which they can rely on before the courts (*Sanz de Lera and Others*, paragraph 47).

27 It follows that, as regards the movement of capital between Member and non-member States, Article 56(1) EC, in conjunction with Articles 57 EC and 58 EC, may be relied on before national courts and may render national rules that are inconsistent with it inapplicable, irrespective of the category of capital movement in question.

A

The concept of restrictions on the movement of capital between Member and non-member States

28 A response should be given, in the first place, to the arguments of the Skatteverket and of the Swedish, German, French and Netherlands Governments that the concept of restrictions on the movement of capital cannot be interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States.

29 The German, French and Netherlands Governments argue that, unlike the liberalisation of the movement of capital between the Member States, which is intended to complete the internal market, the extension of the principle of free movement of capital to relations between Member States and third countries is linked to the completion of economic and monetary union. All those governments state that, in relations with third countries, compliance with the prohibition laid down in Article 56(1) EC would lead to unilateral liberalisation on the part of the European Community without the Community securing a guarantee of equivalent liberalisation on the part of the third countries concerned and, in the relations with those countries, without measures for the harmonisation of national provisions, in particular on direct taxation.

30 The German and Netherlands Governments also submit that if the principle of free movement of capital were interpreted in an identical manner as regards relations with third countries and relations within the Community, the latter would be deprived of the means of negotiating liberalisation with those countries, since such liberalisation would have already automatically and unilaterally opened up the Community market to those countries. They state, in that regard, that the provisions on free movement of capital in the association agreements concluded with third countries often have a more limited scope than that of Article 56 EC, which would

be meaningless if that provision were as rigorously applicable in relations with third countries as in Community relations.

31 As the Advocate General observed at points 74 to 77 of his Opinion, even if the liberalisation of the movement of capital with third countries may pursue objectives other than that of establishing the internal market, such as, in particular, that of ensuring the credibility of the single Community currency on world financial markets and maintaining financial centres with a world-wide dimension within the Member States, it is clear that, when the principle of free movement of capital was extended, pursuant to Article 56(1) EC, to movement of capital between third countries and the Member States, the latter chose to enshrine that principle in that article and in the same terms for movements of capital taking place within the Community and those relating to relations with third countries.

32 Moreover, as the Advocate General also stated, at points 78 to 83 of his Opinion, all the provisions introduced in the Treaty in the chapter concerning capital and payments show that, in order to take account of the fact that the objective and the legal context of the liberalisation of the movement of capital differ according to whether relations between the Member States and third countries or the free movement of capital between the Member States is in issue, the latter considered it necessary to provide safeguard clauses and derogations which apply specifically to the movement of capital to or from third countries.

33 In addition to the exception provided for in Article 57(1) EC for certain restrictions on the movement of capital to or from third countries which existed on 31 December 1993 under national or Community law, Article 59 EC confers upon the Council, in exceptional circumstances where such movements of capital cause, or threaten to cause, serious difficulties for the operation of economic and monetary union, the power to take safeguard measures. Article 60(1)EC authorises the Council to take the necessary urgent measures as regards third countries if, in the case envisaged in Article 301 EC, action by the Community is deemed necessary. Lastly,

Article 60(2) EC provides for the possibility for a Member State, for serious political reasons and on grounds of urgency, as long as the Council has not exercised the power conferred upon it by Article 60(1) EC, to take unilateral measures against a third country with regard, inter alia, to capital movements.

34 In that regard, it should be noted that, contrary to the contentions of the German Government, it cannot be inferred from the conditions to which the power conferred on the Council by Article 57(2) EC to adopt measures on the categories of capital movements to or from third countries set out in that provision is subject that those categories fall outside the scope of the prohibition laid down in Article 56(1) EC. Article 57(2) EC must be read in conjunction with Article 57(1) and simply permits the Council to adopt measures on those categories of capital movements and the national or Community restrictions for which paragraph 1 expressly provides cannot be relied on against the Council.

35 As the Advocate General observed at point 86 of his Opinion, the restrictions which the Member States and the Community can impose under Article 57(1) EC on the movement of capital to or from third countries are in addition not only to those provided for in Articles 59 EC and 60 EC but also to those restrictions resulting from measures adopted by the Member States in accordance with Article 58(1)(a) and (b) EC or which are otherwise justified by an overriding requirement of general interest.

36 In addition, it is clear from the case-law of the Court that the extent to which the Member States are thus authorised to apply certain restrictive measures on the movement of capital cannot be determined without taking account of the fact, pointed out by several governments which submitted observations to the Court, that

movement of capital to or from third countries takes place in a different legal context from that which occurs within the Community.

37 Accordingly, because of the degree of legal integration that exists between Member States of the European Union, in particular by reason of the presence of Community legislation which seeks to ensure cooperation between national tax authorities, such as Directive 77/799, the taxation by a Member State of economic activities having cross-border aspects which take place within the Community is not always comparable to that of economic activities involving relations between Member States and third countries (Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 170). According to the Court, it may also be that a Member State will be able to demonstrate that a restriction on the movement of capital to or from third countries is justified for a particular reason in circumstances where that reason would not constitute a valid justification for a restriction on capital movements between Member States (*Test Claimants in the FII Group Litigation*, paragraph 171).

38 On those grounds, the argument put forward by the German and Netherlands Governments — that if the concept of restrictions on movement of capital were interpreted in the same manner with regard to relations between Member States and third countries as it is with regard to relations between Member States, the Community would unilaterally open up the Community market to third countries without retaining the means of negotiation necessary to achieve such liberalisation on the part of those countries — cannot be regarded as decisive.

39 Since the concept of restrictions on the movement of capital between Member States and third countries has thus been clarified, it is necessary to examine, in second place, whether legislation such as that at issue in the main proceedings must be regarded as such a restriction and, if so, whether it may be objectively justified on the basis of the provisions in the Treaty or overriding requirements of general interest.

Whether there is a restriction on the movement of capital

40 The measures prohibited by Article 56(1) EC, as restrictions on the movement of capital, include those which are likely to discourage non-residents from making investments in a Member State or to discourage that Member State's residents from doing so in other States (see *van Hilten-van der Heijden*, paragraph 44, and Case C-370/05 *Festersen* [2007] ECR I-1129, paragraph 24).

41 In the present case, Paragraph 16 of Chapter 42 of the Law grants taxpayers living in Sweden an exemption from tax in respect of dividends distributed in the form of shares in a subsidiary by a limited liability company established in Sweden or in another State within the EEA but refuses to grant them that exemption where such a distribution is made by a company established in third country outside the EEA, unless that country has concluded a convention providing for the exchange of information with the Kingdom of Sweden.

42 The effect of such legislation is to discourage taxpayers residing in Sweden from investing their capital in companies established outside the EEA. Since the dividends which such companies pay to Swedish residents receive less favourable tax treatment than dividends distributed by a company established in an EEA Member State, the shares of such companies are less attractive to investors residing in Sweden than shares in companies established in such a State (see, to that effect, *Verkooijen*, paragraphs 34 and 35, and *Manninen*, paragraphs 22 and 23, and, with regard to movement of capital between Member States and third countries, *Test Claimants in the FII Group Litigation*, paragraph 166).

43 Legislation such as that at issue in the main proceedings therefore entails a restriction of the movement of capital between Member States and third countries which, in principle, is prohibited by Article 56(1) EC.

44 Before examining whether, as the Skatteverket and the governments which submitted observations to the Court maintain, that restriction may be justified by an overriding requirement of general interest, it is necessary to address the argument put forward by the Italian Government that that restriction is covered by the exception provided for in Article 57(1) EC.

Whether the exception provided for in Article 57(1) EC applies

45 As was stated at paragraph 23 above, pursuant to Article 57(1) EC, the provisions of Article 56 EC are without prejudice to the application to third countries of any restrictions which existed on 31 December 1993 under national or Community law adopted 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.

46 A restriction on capital movements consisting of a less favourable tax treatment of foreign-sourced dividends is covered by the concept of 'direct investment' under Article 57(1) EC in so far as it relates to investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraphs 179 to 181; Case C-157/05 *Holböck* [2007] ECR I-4051, paragraphs 33 and 34; and Case C-112/05 *Commission* v *Germany* [2007] ECR I-8995, paragraph 18).

47 Since the order for reference does not preclude the possibility that the dividends which company X is contemplating distributing to A relate to such investments, it is necessary to examine whether legislation such as that at issue in the main proceedings may fall within the exception provided for in Article 57(1) EC as a restriction which existed on 31 December 1993.

48 As the Advocate General pointed out at points 110 to 112 of his Opinion, the words 'restrictions which exist on 31 December 1993' presuppose that the legal provision relating to the restriction in question have formed part of the legal order of the Member State concerned continuously since that date. If that were not the case, a Member State could, at any time, reintroduce restrictions on the movement of capital to or from third countries which existed as part of the national legal order on 31 December 1993 but had not been maintained.

49 The Court expressed a similar view when called upon to rule on whether the exception provided for in Article 57(1) EC was applicable to restrictions on the movement of capital which existed in the legal order of a Member State on 31 December 1993. While the Court accepted that any national measure adopted after that date is not, by that fact alone, automatically excluded from the derogation laid down in Article 57(1), it understood that possibility to encompass provisions which, in substance, are identical to previous legislation or which are limited to reducing or eliminating an obstacle to the exercise of Community rights and freedoms in the earlier legislation, whilst excluding provisions based on an approach which differs from that of the previous law and establishes new procedures (see, to that effect, *Test Claimants in the FII Group Litigation*, paragraph 192, and *Holböck*, paragraph 41). In so doing, the Court did not have in contemplation provisions which, whilst in substance identical to legislation which existed on 31 December

1993, reintroduced an obstacle to the free movement of capital which, following the repeal of the earlier legislation, no longer existed.

50 In the present case, on the date of its entry into force in 1992, Paragraph 16 of Chapter 42 of the Law already provided that dividends paid by companies established in a third country which had not concluded a convention providing for the exchange of information with the Kingdom of Sweden were precluded from the exemption provided for dividends distributed in the form of shares in a subsidiary. It is apparent from the order for reference that, at that date, that exemption applied only to dividends paid by companies established in Sweden.

51 Admittedly, the provisions on exemption were repealed in 1994, then reintroduced in 1995 and extended in 2001 to dividends paid by companies established in an EEA Member State or in another State with which the Kingdom of Sweden has concluded a convention providing for the exchange of information. However, the fact remains that, as the Italian Government contends, that exemption was removed continuously, at the very least with effect from 1992, for dividends paid by companies established in a third country outside the EEA which has not concluded such a convention with the Kingdom of Sweden.

52 In those circumstances, the preclusion, since 1992, from the exemption provided for by the Law of dividends paid by a company established in a third country outside the EEA which has not concluded a convention with the Kingdom of Sweden providing for the exchange of information must be regarded as a restriction which existed on 31 December 1993 within the meaning of Article 57(1) EC, at the very least where such dividends relate to direct investment in the distributing company, which is a matter for the Regeringsrätten to verify.

53 Since it is not clear from the order for reference whether the dividends in question in the main proceedings relate to direct investments, it is necessary to examine whether national legislation such as that in issue in the main proceedings may be justified by an overriding requirement of general interest.

The justification alleging the need to guarantee the effectiveness of fiscal supervision

54 According to the Skatteverket and the Swedish, Danish, German, Spanish, French Italian, Netherlands and United Kingdom Governments, the refusal to grant the exemption provided for in Paragraph 16 of Chapter 42 of the Law where dividends are paid by a company established a third country with which the Kingdom of Sweden has not concluded a taxation convention providing for the exchange of information is justified by the need to guarantee the effectiveness of fiscal supervision. With regard to a third country, the Swedish tax authorities cannot have recourse to the mutual assistance between competent authorities provided for by Directive 77/799. Moreover, neither the Convention nor the Protocol contains a measure providing for an exchange of information comparable to that in Article 26 of the Organisation for Economic Cooperation and Development (OECD) Model Convention. Even if the taxpayer has the information necessary to demonstrate that the requirements of Article 16 are satisfied, the onus still remains on the tax authorities to assess the value of the evidence provided, which would be impossible if those authorities did not have the power to seek cooperation from the competent authorities of the State of establishment of the distributing company.

55 Under Article 58(1)(b) EC, Article 56 EC is without prejudice to the right of a Member State to take all requisite measures to prevent infringements of national law

and regulations, in particular in the field of taxation. The Court thus recognised that the need to guarantee the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of freedom of movement guaranteed by the Treaty (Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31; Case C-315/02 *Lenz* [2004] ECR I-7063, paragraphs 27 and 45; and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 47).

56 For a restrictive measure to be justified, 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 (see, in particular, Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 28).

57 According to A and the Commission, the legislation at issue in the main proceedings is disproportionate for the purposes of securing the objective pursued, since the Swedish tax authorities can require the taxpayer to furnish proof that the requirements for entitlement to the exemption provided for by that legislation are satisfied. In so far as such an exemption relates to dividends paid by a company that is quoted on the Stock Exchange, certain information can also be obtained by inspecting the data which such a company is legally required to publish.

58 As A and the Commission pointed out, with regard to national legislation restricting the exercise of one of the freedoms of movement guaranteed by the Treaty, the Court has held that a Member State cannot rely on the fact that it may be impossible to seek cooperation from another Member State in conducting inquiries or collecting information in order to justify a refusal to grant a tax advantage. Indeed, even if it proves difficult to verify the information provided by the taxpayer, in particular due to the limited nature of the exchange of information provided for by Article 8 of Directive 77/799, there is no reason why the tax authorities concerned

should not request from the taxpayer the evidence that they consider they need to effect a correct assessment of the taxes and duties concerned and, where appropriate, refuse the exemption applied for if that evidence is not supplied (see, to that effect, Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 20; Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 54; and Case C-451/05 *ELISA* [2007] ECR I-8251, paragraphs 94 and 95).

59 In that context, the Court has held that the taxpayer should not be precluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the tax to ascertain, clearly and precisely, that he is not attempting to avoid or evade the payment of taxes (see, to that effect, Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraphs 19 and 20; Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 25; and *ELISA*, paragraph 96).

60 However, that case-law, which relates to restrictions on the exercise of freedom of movement within the Community, cannot be transposed in its entirety to movements of capital between Member States and third countries, since such movements take place in a different legal context from that of the cases which gave rise to the judgments referred to in the two preceding paragraphs.

61 In the first place, relations between the Member States take place against a common legal background, characterised by the existence of Community legislation, such as Directive 77/799, which laid down reciprocal obligations of mutual assistance. Even if, in the fields governed by that directive, the obligation to provide assistance is not unlimited, the fact remains that that directive established a framework for cooperation between the competent authorities of the Member States which does not exist between those authorities and the competent authorities of a third country where the latter has given no undertaking of mutual assistance.

62 In second place, as the Advocate General pointed out at points 141 to 143 of his Opinion, with regard to the documentary evidence which the taxpayer may provide to enable the tax authorities to ascertain whether the requirements under national legislation are satisfied, the Community harmonisation measures on company accounts which apply in the Member States allow the taxpayer to produce reliable and verifiable evidence on the structure or activities of a company established in another Member State, whereas the taxpayer is not ensured of such an opportunity in the case of a company established in a third country which is not required to apply those Community measures.

63 It follows that, where the legislation of a Member State makes the grant of a tax advantage dependent on satisfying requirements, compliance with which can be verified only by obtaining information from the competent authorities of a third country, it is, in principle, legitimate for that Member State to refuse to grant that advantage if, in particular, because that third country is not under any contractual obligation to provide information, it proves impossible to obtain such information from that country.

64 In the action in the main proceedings, the Skatteverket and the Swedish Government submit that the Swedish tax authorities cannot verify compliance with the first, third, fourth and sixth conditions laid down in Paragraph 16 of Chapter 42 of the Law, namely, the requirements that the distribution is made in proportion to the number of shares held in the parent company, that all the latter's shares in the subsidiary company are distributed, that shares in the subsidiary after the distribution are not held by any undertaking that belongs to the same group as the parent company and that the business activity of the subsidiary or companies controlled by that subsidiary consists primarily in trading.

65 That question falls to be determined by the Regeringsrätten.

66 The same applies with regard to the question whether the Protocol or the Arrangement permit the Swedish tax authorities to obtain information needed by it to implement Paragraph 16 of Chapter 42. While the Skatterättsnämnden considered that it may be possible under the Arrangement to obtain the necessary information, it is apparent from the documents and explanations provided by the Swedish Government at the request of the Court that the only information which can be obtained from the Swiss authorities is that needed to ensure proper application of the Convention.

67 In the light of the foregoing, the answer to the question referred must be that Articles 56 EC and 58 EC are to be interpreted as not precluding the legislation of a Member State which provides that exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary may be granted only if the distributing company is established in a State within the EEA or a State with which a taxation convention providing for the exchange of information has been concluded by the Member State imposing the tax, where that exemption is subject to conditions compliance with which can be verified by the competent authorities of that Member State only by obtaining information from the State of establishment of the distributing company.

Costs

68 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

Articles 56 EC and 58 EC are to be interpreted as not precluding the legislation of a Member State which provides that exemption from income tax in respect of dividends distributed in the form of shares in a subsidiary may be granted only if the company making the distribution is established in a State within the EEA or a State with which a taxation convention providing for the exchange of information has been concluded by the Member State imposing the tax, where that exemption is subject to conditions compliance with which can be verified by the competent authorities of that Member State only by obtaining information from the State of establishment of the distributing company.

[Signatures]