# OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 4 September 2008 [1]

## I — Introduction

1. This reference for a preliminary ruling from the French Conseil d'État (Council of State) concerns provisions of the of the French Code Général des Impôts (General Tax Code, 'the CGI') on group taxation.

2. The basic idea behind the 'tax integration' (*intégration fiscale*) made possible by the CGI is to equate a group made up of parent and subsidiary companies to a single company which has a number of permanent establishments. Group taxation allows a parent company to offset the profits and losses of all the members of the group of companies, and to be solely responsible for corporation tax on the overall result of the group.

3. The applicant in the main proceedings, a French company, would like to undertake 'tax integration' with its French sub-subsidiary. The special feature of the case is that it holds the sub-subsidiary through a Dutch subsidiary. The French tax administration refused the 'tax integration' of the parent and sub-subsidiary on the grounds that a subsidiary not liable to corporation tax in France was involved.

4. In those circumstances, the referring court asks itself whether this constitutes an unjustified restriction on the freedom of establishment.

5. First of all, it should be noted, for clarity, that the subject-matter of this preliminary ruling is not the question whether the Netherlands subsidiary is to be included in the 'tax integration'. The French parent company had solely requested integration with the French sub-subsidiary. The facts at issue thus differ from those underlying the judgments in *Oy AA* [2] and *Marks & Spencer*. [3] These cases concern the treatment in a *cross-border*

1 — Original language: German.

2 — Case C-231/05 *Oy AA* [2007] ECR I-6373.

3 — Case C-446/03 *Marks & Spencer* [2005] ECR I-10837.

*context* of profits and losses of group companies established in various Member States. In the present case, the issue is whether a non-resident intermediate company can provide the necessary link between a resident parent company and a resident sub-subsidiary company.

## II — Legal framework

6. Article 223A of the CGI, in the version applicable to the dispute underlying the main proceedings, states:

'A company … can render itself the sole party liable for corporation tax due on the overall profits of the group formed by it and the companies of which it is the holder, continuously throughout the financial year, directly or indirectly through companies in the group, of at least 95% of the capital … The companies in the group remain obliged to declare their results, which may be audited under the conditions laid down by Articles L.13, L.47 and L.57 of the Manual on Tax Procedures. … Only those companies that have given their consent and whose results are subject to corporation tax may be members of the group …'.

7. The parent company may, in principle, freely define the extent of the membership of the consolidation, thereby determining which companies should participate in the 'tax integration'. However, according to the order for reference, it follows from the wording of Article 223A of the CGI that, when the parent company of the group defines the membership of the group, it may include a company in which it has an indirect holding only if the company though which it has that holding is itself a member of the integrated group, and therefore subject to corporation tax in France.

8. Article 223B of the CGI states:

'The overall profit is determined by the parent company through the algebraic sum of the results of each of the companies in the group, determined under the conditions of the general law or according to the methods provided for in Article 217bis ….'

9. It is apparent from the order for reference that Articles 223B, 223D and 223F of the CGI provide for the neutrality of intra-group transactions, such as provisions for doubtful claims or risks between the companies in the group, waiver of debt or intra-group payments, provisions for depreciation of the shares held in other companies in the group, and the transfer of fixed assets within the group.

## III — The facts and the main proceedings

10. The applicant in the main proceedings, Société Papillon ('Papillon'), is a company resident in France. Papillon held 100% of the capital of the Netherlands Company Artist Performance and Communication (APC) BV, which held 99.99% of the shares of SARL Kiron ('Kiron'), resident in France. Kiron also held further French companies.

11. From 1 January 1989 Papillion opted for the 'tax integration' scheme. Kiron and a number of its French subsidiaries were included in the membership of the integrated group of companies, which was headed by Papillon. The tax authorities however refused in retrospect to apply the 'tax integration' scheme. The justification given for refusal was that Papillon could not form an integrated group with companies indirectly held through a company resident in the Netherlands, because the latter was not subject to corporation tax in France and could not therefore be part of the 'tax integration' scheme. As a result, Papillon was taxed on the basis of its own profits, without being able to offset them by means of 'tax integration' against the results of other companies of the group.

12. Papillon challenged both the corporation tax levied on it retroactively for three years and the corresponding penalties. By judgment of 9 February 2004, the Tribunal administratif de Paris, [4] having ruled, in respect of part of the applicant's claim, that the case did not need to proceed to judgment to the extent of the tax relief granted by the tax authorities in the course of proceedings, dismissed the remainder of the company's claims. On appeal, the Cour administrative d'appel de Paris, [5] having again ruled that the case did not need to proceed to judgment to the extent of tax relief granted in the course of proceedings and ordered a partial repayment of the disputed taxes and penalties, also dismissed the remainder of Papillion's claim.

13. Papillon appealed to the Conseil d'État, the referring court, against the judgment of the Cour administrative d'appel de Paris.

## IV — Reference for a preliminary ruling

14. By judgment of 10 July 2007, lodged at the Court on 12 September 2007, the Conseil d'État stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

4 — Administrative Court, Paris.
5 — Administrative Court of Appeal, Paris.

'(1) Inasmuch as the tax benefit arising under the 'tax integration' scheme affects the liability to tax of the parent company of the group, which can offset the profits and losses of all the companies of the integrated group and benefit from the tax neutrality of the internal transactions of that group, does the impossibility — resulting from the scheme defined by Article 223A et seq. of the Code Général des Impôts — of including within the membership of a tax-integrated group a sub-subsidiary of the parent company, when it is held through a subsidiary which, being established in another Member State of the European Community and not carrying on business in France, is not subject to French corporation tax and thus cannot itself form part of the group, constitute a restriction on the freedom of establishment by reason of the tax consequences arising from the choice of the parent company as to whether to hold a sub-subsidiary through a French subsidiary or instead through a subsidiary established in another Member State?

(2) If the answer is in the affirmative, can such a restriction be justified either by the need to maintain the coherence of the 'tax integration' system — in particular the arrangements for the tax neutrality of transactions within the group, having regard to the consequences of a system in which a subsidiary established in another Member State is treated as belonging to the group solely for the purposes of the condition as to the indirect holding of the sub-subsidiary, while remaining automatically excluded from the application of the group scheme since it is not subject to French tax — or by any other overriding reason of public interest?'

15. In the proceedings before the Court of Justice, the French, Netherlands and German Governments and the Commission of the European Communities presented written and oral submissions. The Spanish Government made oral submissions.

## V — Legal assessment

16. By its two questions, the referring court essentially asks whether the French provisions at issue constitute a restriction of the freedom of establishment and if so whether this restriction is justified.

A — *Preliminary observations*

17. The subject-matter of the provisions at issue is the taxation of companies and therefore direct taxation. As such it should be recalled at the outset that, according to the settled case-law of the Court, although direct taxation does not as such fall within the purview of the European Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law. [6]

18. Moreover, it must be stated that the referring court is correct to assume that the factual situation falls within the scope of the freedom of establishment under Article 43 EC and not the free movement of capital under Article 56(1) EC.

19. As regards the question whether national legislation falls within the scope of one or other of the freedoms of movement, the purpose of the legislation concerned must be taken into consideration. [7]

20. National provisions which apply only to holdings in the capital of a company that give definite influence over the company's decisions and allow its activities to be determined, come within the substantive scope of the freedom of establishment. [8] In this respect, national rules solely concerning intra-group relationships primarily affect the freedom of establishment. [9] If those rules have at the same time restrictive effects on the free movement of capital, an independent examination of that legislation from the point of view of Article 56 EC et seq. is not justified, because those effects should be seen as the unavoidable consequence of any obstacle to freedom of establishment. [10]

21. Accordingly, in the present case only the freedom of establishment is relevant. According to the provisions at issue, participation in the tax integration scheme is only possible for those companies in which the parent company holds directly or indirectly at least 95% of the capital. Such a large share gives a definite and decisive influence over the companies held.

6 — See, inter alia, Case C-284/06 *Burda* [2008] ECR I-4571, paragraph 66; *Oy AA* (cited in footnote 2 above), paragraph 18; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 35, and Case C-196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I-7995, paragraph 40.

7 — See inter alia Case C-157/05 *Holböck* [2007] ECR I-4051, paragraphs 22 and 23; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraphs 26 to 34; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, paragraphs 34 and 44 to 49.

8 — *Cadbury Schweppes and Cadbury Schweppes Overseas* (cited in footnote 6 above), paragraphs 31 and 32, and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 7 above), paragraph 27; *Oy AA* (cited in footnote 2 above), paragraph 20; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37, and Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22.

9 — Case C-284/06 *Burda* (cited in footnote 6 above), paragraph 68; Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 118; *Test Claimants in Class IV of the ACT Group Litigation* (cited in footnote 7 above), paragraph 33; and *Oy AA* (cited in footnote 2 above), paragraph 23.

10 — *Oy AA* (cited in footnote 2 above), paragraph 24; *Cadbury Schweppes and Cadbury Schweppes Overseas* (cited in footnote 6 above), paragraph 33; and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 7 above), paragraph 34.

B — *Restriction of the freedom of establishment*

22. Freedom of establishment entails, for companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Community, the right to exercise their activity in other Member States through a subsidiary, branch or agency. [11]

23. Even though, according to their wording, the provisions of the EC Treaty concerning freedom of establishment aim to ensure that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation. [12]

24. For the purposes of clarity, it should once again be noted that the referring court does not ask whether a refusal to allow the Netherlands subsidiary to participate in the 'tax integration' constitutes a restriction of the freedom of establishment. The subject-matter of the preliminary reference is instead whether the refusal to allow a French parent company to form a 'tax integration' group with its sub-subsidiary, when a non-resident subsidiary is interposed, constitutes a restriction of the freedom of establishment.

25. As is clear from the order for reference, the 'tax integration' arrangement results, upon the taxation of the parent company, in a tax advantage due to the possibility of offsetting profits and losses. As a result of this offsetting, the group of companies can use the losses of individual companies immediately. Without the 'tax integration' scheme such a loss could only be carried forward and so only be used in the subsequent tax years.

26. Pursuant to the provisions of Article 223A et seq. of the CGI this tax advantage will not be granted, if the French parent company holds its French sub-subsidiary, in exercise of its right to freedom of establishment, through a subsidiary which is resident in another Member State, and not commercially active in France.

27. The application of the 'tax integration' scheme is dependent on two requirements.

11 — See, in particular, Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 18; Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29; Case C-141/99 *AMID* [2000] ECR I-11619, paragraph 20; Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 35.

12 — *Lidl Belgium* (cited in footnote 11 above), paragraph 19; Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 21.

First, companies in which the parent companies have an indirect interest can be included in the 'tax integration', only if the interest is held through a subsidiary which is also included in the 'tax integration' scheme. An '*unbroken chain*' of holdings in the capital of a company must therefore exist. Second, only companies which are liable to French corporation tax may participate in the tax integration.

28. A French parent company which holds its French sub-subsidiary through a non-resident subsidiary cannot fulfil the requirements for 'tax integration'. As the non-resident subsidiary is not subject to French corporation tax, it cannot itself participate in the 'tax integration'. As a result, the parent and subsidiary companies do not fulfil the first requirement. Through the involvement of the non-resident subsidiary, they do not form an 'unbroken chain'.

29. However, a French parent company may form an integrated group for tax purposes with a French sub-subsidiary, if the subsidiary is resident in France.

30. The legislation at issue in the main proceedings leads to an unequal treatment with regard to the possibility of opting for the 'tax integration' scheme, according to whether the parent company holds its indirect shares through a resident or non-resident subsidiary.

31. The Netherlands Government was certainly correct in pointing out that the prerequisite of an unbroken chain also applies to purely French constellations. However, a French parent company holding a sub-subsidiary through a French subsidiary has the free choice to incorporate the subsidiary into the tax integration and therefore to close the chain. On the other hand, if it holds the sub-subsidiary through a non-resident subsidiary, the parent company basically does not have the possibility to close the chain of participation though the inclusion of the subsidiary in the tax integration scheme. The subsidiary cannot be included in the integration, as it is not subject to corporation tax in France.

32. For this reason, the Netherlands Government is of the opinion that the restriction does not result from the 'unbroken chain' prerequisite but rather from the fact that a non-resident company may not be included in the tax integration scheme.

33. However, the 'unbroken chain' criteria also result in discrimination against French

companies holding shares through foreign subsidiaries. And this alone — as already mentioned above — is the subject-matter of the order for reference. Normally, only French parent companies with non-resident subsidiaries will find themselves in the position of requesting group taxation without the inclusion of their subsidiaries, because foreign subsidiaries cannot from the outset be included. Purely domestic groups of companies may, on the other hand, without difficulty form an 'unbroken chain'.

34. The French Government is of the view that the two situations, which are treated differently by the French provisions, are not comparable. In support of that assertion it claims that, in a case such as that in the main proceedings, the subsidiary is resident abroad and as a result not subject to French corporation tax.

35. The incomparability cannot be justified alone by the fact that the subsidiary, through which the shares are held, is not resident in France. Acceptance of the proposition that a Member State may freely apply different treatment solely by reason of the fact that the registered office of a company is situated in another Member State would deprive the provisions on freedom of establishment of all meaning. [13]

36. The mere fact that the subsidiary is not subject to French corporation tax due to its residence in the Netherlands cannot therefore preclude comparability. The decisive point must, rather, be whether both constellations are comparable from the point of view of the objective pursued by the French legislation on taxation of groups of companies. [14]

37. The purpose of the legislation at issue is to treat a group made up of parent and subsidiary companies as far as possible as a single undertaking with a number of permanent establishments. In order to achieve this, the individual results of the companies may be consolidated. A French parent company which would like to consolidate with its French sub-subsidiary has an interest in doing so, regardless of whether it holds the subsidiary through a resident or non-resident subsidiary. Consequently the two situations are comparable to each other.

38. In short, at this point it must be concluded that, according to the French legislation, the tax position of a parent company holding its sub-subsidiary through a non-resident subsidiary is less advantageous than the position of a parent company holding its sub-subsidiary through a resident subsidiary. The choice of a parent company to hold its sub-subsidiary through a French or a non-resident subsidiary therefore can have tax disadvantages.

13 — See, to that effect, inter alia Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 42, and Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18.

14 — See, to that effect, *Oy AA* (cited in footnote 2 above), paragraph 38 and *Metallgesellschaft* (cited in footnote 13 above), paragraph 60.

39. This difference in treatment, according to where the subsidiaries are resident, constitutes a restriction on freedom of establishment, since it makes it less attractive for companies to exercise freedom of establishment, and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in another Member State. [15]

C — *Justification of the restriction*

40. A restriction of the freedom of establishment is permissible only if it is justified by overriding reasons of public interest. It is necessary in such a case, moreover, that its application be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain it. [16]

1. Preservation of the allocation of the power to impose taxes between Member States

41. The German and Netherlands Governments are of the view that a restriction of the freedom of establishment resulting from the French provisions may be justified by the necessity to preserve the allocation of the power to impose taxes between Member States. In addition, they consider these provisions to be necessary to prevent losses being used twice and the risk of tax avoidance.

42. These justifications have been recognised by the Court in its judgment in *Marks & Spencer*. [17] However, in this judgment and in those which followed, the subject-matter was the possibility of taking losses and profits into consideration in a cross-border context.

43. The particular features of the present case may be distinguished from those cases. The subject-matter of the question referred by the national court is not whether a Netherlands company should be included in the system of tax integration, or in other words whether its profits and losses should be included in the consolidation. In such a case, the allocation of the Member States' power to impose taxes and the use of losses twice would certainly be the relevant justifications for consideration.

15 — See, to that effect, inter alia *Lidl Belgium* (cited in footnote 11), paragraph 25.

16 — See *Lidl Belgium* (cited in footnote 11 above), paragraph 27; *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 7 above), paragraph 64; *Cadbury Schweppes and Cadbury Schweppes Overseas* (cited in footnote 6 above), paragraph 47; and *Marks & Spencer* (cited in footnote 3 above), paragraph 35.

17 — *Marks & Spencer* (cited in footnote 3), paragraph 51; on the question as to whether it is necessary for all three justifications to be present in order for a restriction to be justified, see, in the negative, *Lidl Belgium* (cited in footnote 11 above), paragraph 40 and the Opinion of Advocate General Sharpston in that case, point 18.

44. The German and Netherlands Governments consider it appropriate in the present case to consider whether tax integration should be allowed in a cross-border context. They examine whether the freedom of establishment requires in principle that the Netherlands subsidiary be included in the tax integration. This examination however does not deliver any definitive answer to the actual question referred to the Court. The subject-matter of the order for reference is instead whether the French provisions which do not permit tax integration between two French companies when a non-resident company is interposed infringe the freedom of establishment. The non-resident company is not itself to be included in the tax integration but only to provide the link between the parent company and the sub-subsidiary.

45. As, in the case at issue, the non-resident company is not to be included in the tax integration, there is no direct problem with regard to the allocation of the power to impose taxes between Member States. In the present case, there is no basis for the presumption that the profits and losses of the Netherlands company are to be taken into account in a cross-border context.

46. In particular, the Netherlands company is not to be included in the tax integration in France. The risk that losses be used twice, as in the *Marks & Spencer* line of cases, is therefore not present. Where the subject-matter of the case-law of the Court of Justice has concerned the prevention of losses being used twice, it has been a question of the use of losses in two different Member States. This is logical, as justification based on the prevention of the danger that losses are used twice is closely connected to the allocation of the power to impose taxes. [18] It thus concerns the taking into consideration of the same loss by two different tax jurisdictions. In this case, the French Government refers only to the risk that the losses of French companies would be taken into consideration more than once in France.

47. Since the present case does not involve the tax integration of the Netherlands company, there is no basis for the presumption that the legislation at issue is necessary to prevent tax avoidance.

48. At this point, I therefore note that no arguments have been presented to the effect that the legislation at issue could be justified on the grounds of the allocation of the power to impose taxes between Member States, the use of losses twice and tax avoidance. The referring court and the French and Spanish Governments therefore correctly do not refer principally to these justifications, but rely on

18 — See my Opinion in *Oy AA* (cited in footnote 2 above), point 54.

the preservation of the coherence of the tax systems as a justification.

2. Coherence of the tax system

49. The French Government submits that the legislation under dispute is necessary in order to maintain the coherence of the system of 'tax integration'. It states that the system of 'tax integration' provides for a tax consolidation of companies. However, in compensation for this it provides for the neutralisation of certain transactions between group companies in accordance with Articles 223B, 223D and 223F of the CGI. The involvement of a non-resident company in the chain of integrated companies prevents the neutralisation of the transactions within the group and leads to the danger that, for example, losses could be taken into account more than once in the calculation of the results of the group.

50. The Court has recognised that the need to maintain the coherence of a tax system can generally justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty. [19] However, it applies this justification very restrictively, which is why it has now even been suggested that the Court has abandoned it. Nevertheless, the Court has examined it also in recent judgments. [20]

51. For such an argument to succeed, the Court demands that a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy. [21] The direct nature of the link must be established, in light of the objective pursued by the tax rules concerned, in relation to the relevant taxpayers by a strict correlation between the deductible element and the taxable element. [22]

52. The further condition that the tax advantage and levy must concern one and the same taxpayer [23] appears to have been abandoned by the Court in its judgment in *Manninen*. [24] Incidentally, this further criterion would seem to be fulfilled in the present case, because it would be artificial not to regard the companies of a group whose very aim is

19 — Case C-204/90 *Bachmann* [1992] ECR I-249, paragraph 28 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 21. Also see Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 42; and *Keller Holding* (cited in footnote 11 above), paragraph 40.

20 — Case C-293/06 *Deutsche Shell* [2008] ECR I-1129, paragraph 37; Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 46; Case C-443/06 *Hollmann* [2007] ECR I-8491, paragraph 56; and *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 7 above), paragraph 68.

21 — Case C-484/93 *Svensson* and *Gustavsson* [1995] ECR I-3955, paragraph 18 and *ICI* (cited in footnote 12 above), paragraph 29. See, also, *Manninen* (cited in footnote 19 above), paragraph 42; *Keller Holding* (cited in footnote 11 above), paragraph 40; and the cases cited in footnotes 19 and 20.

22 — *Deutsche Shell* (cited in footnote 20 above), paragraph 39, with reference to Case C-80/94 *Wielockx* [1995] ECR I-2493, point 24.

23 — I criticised the previous case-law on this point in my Opinion in *Manninen* (cited in footnote 19 above), point 53 et seq.

24 — This assessment is shared by Advocate General Geelhoed in his Opinion in *Test Claimants in the Thin Cap Group Litigation* (cited in footnote 7 above), point 88.

to seek treatment as a tax unit as not being the 'same' taxable person within the meaning of that case-law.

53. As Advocate General Poiares Maduro correctly stated in his Opinion in *Marks & Spencer*, compliance with the principle of coherence of national tax systems serves to protect the integrity of those systems, whose organisation is a matter for the Member States, provided they do not impede the internal market more than is necessary. [25] Coherence must first and foremost be adjudged in light of the aim and logic of the tax regime at issue. [26]

54. The purpose of the French legislation on 'tax integration' is to neutralise the effects of the formation of a group of companies for taxation purposes, in other words, to equate the group to a company with several permanent establishments. The advantage lies in the consolidation of the results of the members of the group: all profits and losses of the individual companies are added together at the level of the parent company and form, after this consolidation, the basis for assessment. However, the group should not have any further advantages, in that consolidation should not lead to some losses being used more than once. Under the French legalisation, the logical correlation of this consolidation is that the same losses may not be used more than once within a group of companies. The use of losses twice would run counter to the goal of neutrality pursued by the rule. In order to prevent this, the French legislation provides that certain transactions are neutralised.

55. The French Government has presented the following example as an illustration of neutralisation measures. A sub-subsidiary suffers losses. This leads to the subsidiary making provision for the depreciation of its shares in the sub-subsidiary. For this reason, the parent company makes, in turn, provision for the depreciation of its shares in its subsidiary. Thus, the sub-subsidiary suffers loss, which gives rise in each case to the making of provision by the subsidiary and the parent company. If the parent and the sub-subsidiary were to form a tax integration group, this loss would be taken into consideration in the course of the consolidation of results. For the first time, as the direct loss of the sub-subsidiary and once again for the same loss, but this time in the form of a provision made because of the loss of the subsidiary in relation to the parent company.

56. In order to prevent the uses of losses twice, the French legislation on 'tax

25 — Opinion of the Advocate General Poiares Maduro in *Marks & Spencer* (cited in footnote 3 above), point 66.

26 — Opinion in *Marks & Spencer* (cited in footnote 3 above), point 71.

integration' provides for certain neutralisation measures. The result of the measures, in the case of the example described above, is that a loss could only be used once. According to the French Government, if a non-resident subsidiary were involved, the losses would be used twice: once in the form of a provision made by the parent company for the loss of value in the shareholding of the parent company, because the non-resident subsidiary is not part of the group, with the result that the internal transaction cannot be neutralised.

57. At this point it must be noted that the purpose and the system of the French legislation on 'tax integration' requires that certain intra-group transactions be neutralised before the consolidation of results. However, is there a direct link between the tax advantage of group taxation and the offsetting of that tax advantage by a tax deduction within the meaning of the case-law of the Court?

58. In the *Bachmann* judgment, the Court found a direct link between the tax-deductibility of insurance premiums and the taxation of sums payable by the insurers under insurance contracts. Since Mr Bachmann had concluded an insurance contract in Germany pursuant to which payments made by the insurers would not be subject to taxation in Belgium, the refusal of the Belgian tax authorities to allow the deduction of his premiums paid pursuant to the insurance contracts was justified.

59. In the cases decided so far, in which the coherence of the tax system was the decisive justification, the disadvantage in question was a compensatory levy, in other words a tax. In the present case the disadvantage lies in the neutralisation of certain intra-group transactions. In the strict sense, this cannot be viewed as the imposition of tax, because neutralisation measures do not constitute the levying of a tax. Nevertheless, they are to be seen as a tax disadvantage, because certain measures, namely the provision for the loss of share value, in contrast to the individual assessment of a company, are not taken into consideration. There is also a direct link between the provisions on neutralisation and the tax integration, because a consolidation of the results of the various companies will only be accorded if it can at the same time be assured that the objective pursued is not distorted by the use of losses more than once.

60. Thus, a measure, which seeks to avoid the use of losses more than once, may be justified in order to maintain the coherence of the tax system.

61. The French measures must however also be consistent with the principle of proportionality.

62. In particular, there should be no more moderate means available to prevent the use of the losses more than once. It would have to be established that, in a context of the interposition of a non-resident subsidiary between a parent company and sub-subsidiary, it would not be possible to neutralise certain transactions in the same manner as in a purely French context in order to prevent the use of losses more than once. A more moderate means could be the neutralisation of the transactions in question in the same manner as in a purely French context.

63. France refers, however, to various practical problems which, it claims, would exist when determining whether losses have been used twice, when a non-resident company had been interposed. According to France, any use of losses twice is not easy to identify because the amount of the provision does not generally correspond to the amount of loss of the subsidiary. In addition, it is not always possible to identify the exact origin of a provision. In order to achieve this, changes to legislation would be necessary.

64. First, it must be pointed out in this context that practical difficulties cannot justify infringement of freedoms guaranteed by the Treaty. [27]

65. Second — as also pointed out by the Commission — Community law in the form of Directive 77/799/EEC [28] allows Member States to request the competent authority of the other Member State to forward any information which may be relevant in assessing the corporation tax payable.

66. Moreover, the tax authorities concerned are entitled to demand from the parent company itself such evidence as they consider necessary in order to determine whether the provisions made by the parent company for losses in share values are attributable indirectly to the loss of the sub-subsidiary through the provisions of the intermediary subsidiary. [29]

27 — See, to that effect, Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 48; Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 30; *Test Claimants in FII Group Litigation* (cited in footnote 9 above), paragraphs 155 to 157; also the Opinion of Advocate General Sharpston in *Lidl Belgium* (cited in footnote 11 above), point 31.

28 — Council Directive 77/799/EEC 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).

29 — See, to that effect, Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraph 57; *Centro di Musicologia Walter Stauffer* (cited in footnote 27 above), paragraph 49; Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 95; and also Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163, paragraph 54. The *Rewe* case notes especially at paragraph 58 that a parent company should be in a position to demand all the necessary documents directly from its subsidiaries.

67. On the basis of the information available to me, serious doubts exist as to whether the complete refusal to allow 'tax integration' between a parent company and a sub-subsidiary held through a non-resident subsidiary is the most moderate means to prevent the use of losses twice and therefore to maintain the coherence of the tax system. Ultimately, it will be for the national court to establish whether the goal pursued, that is, the prevention of losses being used twice in the framework of a tax integration, can be achieved by the more moderate means of neutralisation also in a cross-border situation.

## VI — Conclusion

68. For the foregoing reasons, I propose that the Court's answer to the questions referred by the Conseil d'État should be as follows:

'(1) National rules such as the French 'tax integration' scheme under Articles 223A et seq. of the Code Général des Impôts, according to which a French parent company may include a French sub-subsidiary in the tax integration only if the sub-subsidiary is held through a French subsidiary and not a non-resident subsidiary, constitute an obstacle to the freedom of establishment.

(2) This restriction can be justified on the basis of the coherence of the tax system if the exclusion is suitable to prevent losses being used twice when the results of the parent and the sub-subsidiary are being consolidated, and does not go beyond what is necessary to achieve this goal.'