Arrêt de la Cour
Case C-315/02

Anneliese Lenz

v

Finanzlandesdirektion für Tirol

(Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Free movement of capital – Tax on revenue from capital – Revenue from capital of Austrian origin: tax rate of 25% with discharging effect or tax at half the rate applicable to the whole of the revenue – Revenue from capital originating in another Member State: normal rate of tax)

Summary of the Judgment

Free movement of capital – Restrictions – Taxes on revenue from capital – Tax rate of 25% with discharging effect or ordinary tax rate reduced by half – Limitation to revenue from capital of national origin – Revenue from capital of foreign origin subject to ordinary tax without reduction – Not permissible – Justification – None

(EC Treaty, Arts 73b and 73d(1) and (3) (now Arts 56 EC and 58(1) and (3) EC))

Articles 73b and 73d(1) and (3) of the Treaty (now, respectively, Articles 56 EC and 58(1) and (3) EC) preclude legislation of a Member State which allows only the recipients of revenue from capital of national origin to choose between a tax with discharging effect at the rate of 25% and ordinary income tax with the application of a rate reduced by half, while providing that revenue from capital originating in another Member State must be subject to ordinary income tax without any reduction in the rate.

Such tax legislation constitutes a prohibited restriction on the free movement of capital in that it has the effect of deterring taxpayers living in the Member State concerned from investing their capital in companies established in another Member State; it also produces a restrictive effect in relation to companies established in other Member States in that it constitutes an obstacle to their raising capital in the Member State concerned.

That legislation cannot be justified by an objective difference in situation of such a kind as to justify a difference in tax treatment, in accordance with Article 73d(1)(a) of the Treaty. In relation to a tax rule designed to attenuate the effects of double taxation – corporation tax and then a tax on income – of the profits distributed by the company in which the investment is made, shareholders who are fully taxable in the Member State concerned and receive revenue from capital from a company established in another Member State are in a situation comparable with that of shareholders who are likewise fully taxable in that Member State but receive revenue from capital from a company established in that same Member State.

Moreover, in the absence of a direct link between the obtaining of the tax advantages at issue enjoyed by taxpayers resident in the Member State concerned on their domestic revenue from capital and the taxation of the companies' profits by way of corporation tax, tax on the income of physical persons and corporation tax being in any case two distinct taxes which affect different

taxpayers, and having regard to the fact that the aim pursued, namely the attenuation of an instance of double taxation, would not be affected in any way if one were also to give the benefit of that legislation to persons deriving revenue from capital originating in another Member State, it cannot be justified by the need to ensure the coherence of the tax system in question.

Furthermore, in the absence of such a link, refusal to grant those tax advantages to the recipients of revenue from capital originating in another Member State cannot be justified by the fact that revenue from companies established in another Member State is subject to low taxation in that State. Nor can unfavourable tax treatment contrary to a fundamental freedom be justified by the existence of other tax advantages, even supposing that such advantages exist.

A reduction in tax receipts cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom.

(see paras 20-22, 28, 31-32, 34-36, 38, 40, 42-43, 49, operative part 1-2)

JUDGMENT OF THE COURT (First Chamber)
15 July 2004(1)

(Free movement of capital – Tax on revenue from capital – Revenue from capital of Austrian origin: tax rate of 25 % in discharge or rate equal to half of the average tax rate on aggregate income – Income from capital originating in another Member State: normal tax rate)

In Case C-315/02,
REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between
Anneliese Lenz

and

Finanzlandesdirektion für Tirol,
on the interpretation of Articles 73b et 73d of the EC Treaty (now Articles 56 EC and 58 EC),

THE COURT (First Chamber),,

composed of: P. Jann, President of the Chamber, A. Rosas, S. von Bahr, R. Silva de Lapuerta and K. Lenaerts (Rapporteur), Judges,
Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,
after considering the observations submitted on behalf of:

– A. Lenz, by C. Huber and R. Leitner, accountants and tax advisers,
– the Austrian Government, by H. Dossi, acting as Agent,
– the Danish Government, by J. Molde, acting as Agent,
– the French Government, by G. de Bergues and P. Boussaroque, acting as Agents,
– the United Kingdom Government, by K. Manji, acting as Agent, and M. Hoskins, barrister,
– the Commission of the European Communities, by K. Gross and R. Lyal, acting as Agents,
after hearing the oral observations of A. Lenz, represented by R. Leitner and G. Toifl, tax advisers, of the Austrian Government, represented by J. Bauer, acting as Agent, of the United Kingdom

Government, represented by M. Hoskins, and of the Commission, represented by K. Gross and R. Lyal, at the hearing on 29 January 2004,

after hearing the Opinion of the Advocate General at the sitting on 25 March 2004,

gives the following

Judgment

1 By order of 27 August 2002, received at the Court on 6 September 2002, the Verwaltungsgerichtshof (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC).
2 Those questions were raised in proceedings brought before that court by Ms Lenz, questioning the compatibility of Austrian tax legislation on the taxation of revenue derived from capital with Community law.

Austrian legal background
3 Under the Austrian tax system, the earnings of companies established in Austria are taxed at two levels: at company level on the profits which it makes at the fixed rate of 34%, and at shareholder level on revenue received from companies, that is to say on dividends and other benefits distributed by the company.
4 As regards the taxation of shareholders, the system applicable varies according to whether the revenue is of Austrian or of foreign origin.
The taxation of revenue from capital of Austrian origin
5 According to Paragraph 93(2) of the Einkommensteuergesetz 1988 (the 1988 Law on Income Tax, BGBl. 1988/400; 'the EStG'): 'domestic revenue from capital assets exists where the person liable to pay revenue from capital assets has its residence, head office or seat in Austria or is the branch office in Austria of a credit institution …' (version published in BGBl. 1996/201).
6 Paragraph 93(1) of the EStG (version published in BGBl. 1996/201) provides that 'in the case of domestic revenue from capital assets ... income tax shall be levied by deduction from revenue from capital assets ('Kapitalertragsteuer') which, in accordance with Paragraph 95(1) of the EStG, amounts to 25%.
7 Paragraph 97(1) of the EStG (version published in BGBl. 1996/797) provides that liability to tax on revenue from capital 'is regarded as having been discharged by virtue of the deduction of the tax'. Revenue from capital is therefore not subject to any further income tax.
8 In cases where payment in discharge of tax liability ('definitive taxation') cannot be levied by means of deduction at source (i.e. with the companies), Paragraph 97(2) of the EStG provides that the tax is to be levied by 'voluntary payment, at the payment counter, of an amount corresponding to the tax on revenue from capital' (version published in BGBl. 1996/797).
9 If the taxpayer decides not to opt for the definitive taxation of 25% of his domestic revenue from capital, he benefits, in accordance with Paragraph 37(1) and (4) of the EStG (version published in BGBl. 1996/797), from the 'half rate' system ('Halbsatzverfahren').
10 In that case, the revenue from capital contributes towards determining aggregate taxable income, possibly leading to an increase in the rate to be applied. However, in compensation for that increase, such revenue from capital is subject to a tax rate reduced to half the average rate applicable to aggregate income.
Taxation of foreign revenue from capital

11 Foreign revenue from capital paid to a taxpayer living in Austria is subject to ordinary income tax. It therefore contributes to determining the total taxable income and is subject in the ordinary way to income tax, the maximum rate of which is 50%.
12 The Austrian legal position has been changed by a law which came into force on 1 April 2002. That law is subsequent to the dispute in the main proceedings, and the latter is therefore not affected by it.

The dispute in the main proceedings and the questions referred
13 Ms Lenz, a German national fully liable to tax in Austria, declared in her income tax return for 1996 revenue from capital in the form of dividends received from limited liability companies established in Germany. The Austrian tax authorities charged that revenue to ordinary income tax. The half-rate taxation provided for under Paragraph 37 of the EStG and the definitive taxation under Paragraph 97 in combination with Paragraph 93 of the EStG (‘the tax advantages at issue) apply only to revenue from capital of Austrian origin.
14 Taking the view that application of the ordinary progressive rate of income tax to her revenue from capital of German origin was contrary to the freedom of movement of capital laid down by Article 73b(1) of the Treaty, Ms Lenz lodged a complaint with the Finanzlandesdirektion für Tirol (Regional Tax Directorate, Tirol). That complaint was rejected by a decision of 16 April 1999, against which Ms Lenz brought an action before the Verwaltungsgerichtshof.
15 It was in those circumstances that the Verwaltungsgerichtshof decided to stay the proceedings and refer 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 that in Paragraph 97(1) and (4) of the Einkommenssteuergesetz 1988 (1988 Law on Income Tax) in conjunction with Paragraph 37(1) and (4) of the Einkommenssteuergesetz 1988, under which a taxpayer in receipt of dividends from domestic shares may choose whether they should be subject to tax (at a flat rate of 25%) in discharge of liability or whether they should be taxed at a rate equivalent to half of the average tax rate applicable to the aggregate income, whereas dividends from foreign shares are always taxed at the normal rate of income tax?
2. Is the level of taxation of the revenue of a limited company which has its seat and head office in another EU Member State or a non-Member State in which shares are held of relevance to the answer to the first question?
3. If the answer to the first question is in the affirmative, can the situation described in Article 73b(1) of the EC Treaty (now Article 56(1) EC) arise as a result of the corporation tax paid in the countries in which they are established by companies limited by shares with seats and head offices in other EU Member States or non-Member States being credited pro rata against the Austrian income tax payable by the recipient of the dividends?’

The first two questions
16 By its first two questions, which it will be convenient to examine together, the referring court asks in essence whether Articles 73b(1) and 73d(1) and (3) of the Treaty preclude legislation of a Member State which reserves the application of definitive taxation at a flat rate of 25 %, or of a tax rate reduced by half, for revenue from capital paid by a company established in that Member State, to the exclusion of such revenue paid by a company established in another Member State, and, if so, whether assessment of the compatibility of such legislation with those provisions of the Treaty depends on the level of corporation tax on the profits of companies in the State where they are established.
17 Since the dispute in the main proceedings concerns the refusal by the tax authorities of a Member State to grant the tax advantages at issue to a person fully taxable in that Member State and who received dividends from a company established in another Member State, the questions raised call for a reply only in so far as they concern the free movement of capital between Member States.

18 It first needs to be examined whether, as Ms Lenz and the Commission of the European Communities maintain, tax legislation such as that at issue in the main proceedings restricts the free movement of capital within the meaning of Article 73b(1) of the Treaty.
19 According to consistent case-law, although direct taxation falls within the competence of Member States, the latter must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; and Case C-334/02 *Commission* v *France* [2004] ECR I-0000, paragraph 21).
20 In this case, the tax legislation at issue has the effect of deterring taxpayers living in Austria from investing their capital in companies established in another Member State. The legislation allows such a taxpayer, in respect of the taxation of his domestic revenue from capital, to choose between definitive taxation at the fixed rate of 25% and ordinary income tax at a rate reduced by half, whereas his revenue from capital originating in another Member State is subject to the application of ordinary income tax, the rate of which may be as much as 50%.
21 That legislation also produces a restrictive effect in relation to companies established in other Member States, inasmuch as it constitutes an obstacle to their raising capital in Austria. To the extent that revenue from capital originating in another Member State receives less favourable tax treatment than revenue from capital of Austrian origin, the shares of companies established in other Member States are, for investors living in Austria, less attractive than the shares of companies established in that Member State (see, to that effect, *Verkooijen*, paragraph 35, and *Commission* v *France*, paragraph 24).
22 It follows from the above that legislation such as that at issue in the main proceedings constitutes a restriction on the free movement of capital which is, in principle, prohibited by Article 73b(1) of the Treaty.
23 It remains to be examined, however, whether that restriction on the free movement of capital is capable of being justified having regard to the provisions of the Treaty.
24 It should be noted in that respect that, in accordance with Article 73d(1) of the Treaty, '… 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' or their right 'to take all requisite measures to prevent infringements of national law and regulations'.
25 According to the Austrian, Danish, French and United Kingdom Governments, it is clear from that provision that Member States are entitled to reserve the tax advantages at issue for revenue from capital paid by companies established in their territory.
26 In that respect, it should be noted that Article 73d(1) of the Treaty, which, as a derogation from the fundamental principle of the free movement of capital, must be interpreted strictly, cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they invest their capital is automatically compatible with the Treaty. The derogation in Article 73d(1) of the Treaty is itself limited by Article 73d(3) of the Treaty, which provides that the national provisions referred to in Article 73d(1) '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'.
27 A distinction must therefore be made between unequal treatment which is permitted under Article 73d(1) of the Treaty and arbitrary discrimination which is prohibited by Article 73(d)(3). In that respect, the case-law shows that, for national tax legislation like that at issue, which makes a distinction between revenue from capital paid by companies established in the territory of the Member State concerned and that originating in another Member State, to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest, such as the need to safeguard the cohesion of the tax system, the fight against tax avoidance and the effectiveness of fiscal supervision (*Verkooijen*, paragraph 43; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraphs 49 and 72; *Commission* v *France*

, paragraph 27). In order to be justified, moreover, the difference in treatment between different categories of revenue from capital must not go beyond what is necessary in order to attain the objective of the legislation.
28 The governments which have submitted observations in this case argue, first, that the Austrian authorities collect the tax on the profits which companies established in Austria distribute to their shareholders partly from the companies and partly from the shareholders. In relation to companies established outside their territory, the Austrian authorities are not in a position to levy the tax on revenue from companies in the same way. The tax legislation at issue is therefore justified by an objective difference in situation of such a kind as to justify a difference in tax treatment, in accordance with Article 73d(1)(a) of the Treaty (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 30 to 34 and 37; *Verkooijen*, paragraph 43).
29 It therefore needs to be examined whether, in accordance with Article 73d(1)(a) of the Treaty, the difference in treatment of a person fully taxable in Austria, according to whether such person receives revenue from capital from companies established in that Member State or revenue from capital from companies established in other Member States, relates to situations which are not objectively comparable.
30 The documents before the Court show that the Austrian tax legislation is designed to attenuate the economic effects of double taxation of company profits arising from the taxation of company profits by way of corporation tax and the taxation of a shareholder who is a taxpayer, by way of income tax, on the same profits distributed in the form of dividends.
31 However, both revenue from capital of Austrian origin and such revenue originating in another Member State are capable of being the subject of double taxation. In both cases, the revenue is, in principle, subject first to corporation tax and then, to the extent to which it is distributed in the form of dividends, to income tax.
32 In relation to a tax rule designed to attenuate the effects of double taxation of the profits distributed by the company in which the investment is made, shareholders who are fully taxable in Austria and receive revenue from capital from a company established in another Member State are therefore in a situation comparable with that of shareholders who are likewise fully taxable in Austria but receive revenue from capital from a company established in Austria.
33 It follows that the Austrian tax legislation which makes application of the definitive tax rate of 25%, or of the tax rate reduced by half, to revenue from capital subject to the condition that such revenue must be of Austrian origin does not relate to a difference in situation within the meaning of Article 73d(1)(a) of the Treaty between revenue from capital of Austrian origin and revenue from capital originating in another Member State (see, to that effect, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 41 to 49, and Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraphs 47 to 54).
34 Secondly, the governments which have submitted observations to the Court argue that the Austrian tax legislation is objectively justified by the need to ensure the coherence of the national tax system (Case C-204/90 *Bachmann* [1992] ECR I?249; Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305). They argue in that respect that the tax advantages at issue are designed to attenuate the effects of double taxation of company profits. They argue that there is a direct economic link between the taxation of the profits of the company and those taxation advantages. Therefore, since only companies established in Austria are subject to corporation tax in that Member State, it is justified to reserve those tax advantages for the recipients of revenue from capital of Austrian origin.
35 In paragraph 28 of the judgment in *Bachmann* and paragraph 21 of the judgment in *Commission* v *Belgium*, in which the Court acknowledged that the need to preserve the coherence of a tax system might justify a restriction on the exercise of fundamental freedoms guaranteed by the Treaty, it is important to note that there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the cohesion of the tax system in question (see, in particular, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 24; *X and Y*

, paragraph 52).
36 In this case, apart from the fact that tax on the income of physical persons and corporation tax are two distinct taxes which affect different taxpayers (Case C?251/98 *Baars* [2000] ECR I-2787, paragraph 40; *Verkooijen*, paragraphs 57 and 58; Case C-168/01 *Bosal* [2003] ECR I-0000, paragraph 30), it should be noted that the Austrian tax legislation does not make the obtaining of the tax advantages at issue enjoyed by Austrian residents on their domestic revenue from capital dependent upon the taxation of the companies' profits by way of corporation tax.
37 It should also be recalled that the argument based on the need to preserve the coherence of a tax system must be verified having regard to the aim pursued by the tax legislation in question (Case C-9/02 *De Lasteyrie du Saillant* [2004] ECR I-0000, paragraph 67).
38 In this case, the aim pursued by the Austrian tax legislation, namely the attenuation of an instance of double taxation, would not be affected in any way if one were also to give the benefit of the Austrian tax legislation to persons deriving revenue from capital originating in another Member State. On the contrary, the fact of reserving the definitive tax rate of 25% and tax rate reduced by half solely for persons deriving revenue from capital of Austrian origin has the effect of increasing the disparity between the overall tax burden on the profits of Austrian companies and that on the profits of companies established in another Member State.
39 An argument based on the need to preserve the coherence of the Austrian tax system cannot therefore be accepted.
40 Admittedly, granting the tax advantage at issue also to persons receiving revenue from capital originating in another Member State would involve a reduction in tax receipts for the Member State concerned. However, it is settled case-law that a reduction in tax receipts cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (*Verkooijen*, paragraph 59; Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 56; *X and Y*, paragraph 50).
41 Moreover, contrary to what the Austrian and Danish Governments argue, the level of taxation on companies established in another Member State is not relevant in relation to Austrian tax legislation when assessing the compatibility of national legislation with Articles 73b and 73d(1) and (3) of the Treaty.
42 It should be noted in that regard that, in respect of capital from revenue of Austrian origin, the tax legislation at issue establishes no direct link between the taxation of company profits by means of corporation tax and the tax advantages enjoyed, in relation to income tax, by taxpayers living in Austria. In those circumstances, the level of the taxation of companies established outside Austrian territory cannot justify a refusal to grant those same financial advantages to persons receiving revenue from capital paid by those latter companies.
43 Whilst one cannot exclude the possibility that extension of the tax legislation in question to revenue from capital originating in another Member State might make it advantageous for investors living in Austria to buy shares of companies established in other Member States, where corporation tax is lower than in Austria, that possibility is in no way capable of justifying legislation such as that at issue in the main proceedings. As regards an argument based on a possible tax advantage for taxpayers receiving in their country of residence dividends from companies established in another Member State, 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 (*Verkooijen*, paragraph 61, and case-law there cited).
44 The French Government further argues that the Austrian tax legislation is justified by the need to ensure the effectiveness of fiscal supervision.
45 In that respect, the Court notes that Article 73d(1)(b) of the Treaty, amongst other provisions, shows that the effectiveness of financial supervision may be relied upon in order to justify restrictions on the exercise of fundamental freedoms guaranteed by the Treaty (Case C-254/97 *Baxterand Others* [1999] ECR I-4809, paragraph 18; Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 39).

46 Concerning, first, the tax advantage arising from the taxation of revenue from capital of Austrian origin at a reduced rate, it has not in any way been demonstrated that the application of different rates of tax by reference to the origin of the revenue from capital is capable of making financial supervision more effective.
47 Concerning, secondly, the definitive tax at the rate of 25%, it should be noted that this is deducted directly at source by companies established in Austria. However, as the Advocate General points out in paragraphs 33 and 34 of his Opinion, tax that is definitive in nature does not necessarily presuppose a tax at source. Thus, Article 97(2) of the EStG provides that, in cases where deduction at source is not possible, the definitive tax may be paid by 'voluntary payment, at the payment counter, of an amount corresponding to the tax on revenue from capital'. In respect of revenue from companies established in other Member States, therefore, a procedure similar to 'voluntary payment' to the tax administration could be instituted.
48 Admittedly, deduction at source, carried out directly by companies established in Austria, is an easier operation for the tax administration than a 'voluntary payment'. However, mere administrative inconvenience is not capable of justifying an obstacle to a fundamental freedom of the Treaty, such as the free movement of capital (*Commission* v *France*, paragraphs 29 and 30).
49 Having regard to all of the foregoing, the answer to the first two questions must be that Articles 73b and 73d(1) and (3) of the Treaty preclude legislation which allows only the recipients of revenue from capital of Austrian origin to choose between definitive taxation at the rate of 25% and ordinary income tax with the application of a rate reduced by half, while providing that revenue from capital originating in another Member State must be subject to ordinary income tax without any reduction in the rate. Refusal to grant the recipients of revenue from capital originating in another Member State the tax advantages granted to recipients of revenue from capital of Austrian origin cannot be justified by the fact that revenue from companies established in another Member State is subject to low taxation in that State.

The third question

50 By its third question, the national court asks whether Article 73b(1) of the Treaty precludes tax legislation which allows a taxpayer who lives in Austria, and receives revenue from capital originating in another Member State, to deduct pro rata from his income tax the corporation tax paid by the company in which he has a holding.
51 The applicant in the main proceedings and the Commission have doubts as to the admissibility of this question. They maintain that it is of no relevance in resolving the dispute in the main proceedings, since it concerns a tax system that is not in force in Austria.
52 In that respect, it has been consistently held that the Court of Justice may not rule on a question referred for a preliminary ruling by a national court where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, or where the problem is hypothetical (Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; Case C?36/99 *Idéal Tourisme* [2000] ECR I-6049, paragraph 20; Case C-380/01 *Schneider* [2004] ECR I-0000, paragraph 22).
53 In this case, the provisions referred to in the order for reference do not provide for the possibility of deducting in Austria corporation tax which has been paid in another Member State. When asked by the Court to give further detail on that point, the Austrian Government confirmed that the tax legislation in force at the date of the facts in the main proceedings did not allow the identification of a deduction such as that indicated by the referring court, even on a broad interpretation of the law.
54 In those circumstances, there is no need to reply to the third question.

Costs

55 The costs incurred by the Austrian, Danish, French and United Kingdom Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending

before the national court, the decision on costs is a matter for that court.
On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 27 August 2002, hereby rules:

1. Articles 73b and 73d(1) and (3) of the EC Treaty (now, respectively, Articles 56 EC and 58(1) and (3) EC) preclude legislation which allows only the recipients of revenue from capital of Austrian origin to choose between a tax with discharging effect and ordinary income tax with the application of a rate reduced by half, while providing that revenue from capital originating in another Member State must be subject to ordinary income tax without any reduction in the rate.

2. Refusal to grant the recipients of revenue from capital originating in another Member State the tax advantages granted to recipients of revenue from capital of Austrian origin cannot be justified by the fact that revenue from companies established in another Member State is subject to low taxation in that State.

Jann

Rosas

von Bahr

Silva de Lapuerta

Lenaerts

Delivered in open court in Luxembourg on 15 July 2004.

R. Grass

P. Jann

Registrar

President of the First Chamber

1 – Language of the case: German.