Case C-311/08

Société de Gestion Industrielle (SGI)

v

État belge

(Reference for a preliminary ruling from the tribunal de première instance de Mons)

(Freedom of establishment – Free movement of capital – Direct taxation – Income tax legislation ? Determination of the taxable income of companies ? Companies having a relationship of interdependence ? Unusual or gratuitous advantage granted by a resident company to a company established in another Member State ? Addition of the amount of the advantage in question to the profits of the resident company which granted it ? Balanced allocation of the power to tax between Member States ? Combating tax avoidance ? Prevention of abuse ? Proportionality)

Summary of the Judgment

1. *Freedom of movement for persons – Freedom of establishment – Provisions of the Treaty – Scope*

(Arts 43 EC, 48 EC and 56 EC)

2. *Community law – Principles – Equal treatment – Discrimination on grounds of nationality – Relationship between Article 12 EC and Articles 43 EC and 56 EC*

(Arts 12 EC, 43 EC and 56 EC)

3. *Freedom of movement for persons – Freedom of establishment – Tax legislation – Income tax*

(Arts 43 EC and 48 EC)

1. Legislation of a Member State under which a resident company is taxed in respect of an unusual or gratuitous advantage where the advantage has been granted to a company established in another Member State with which it has, directly or indirectly, a relationship of interdependence, and is not so taxed where the advantage has been granted to another resident company with which it has such a relationship, must be examined in the light of Articles 43 EC and 48 EC alone, where the dispute concerned relates solely to the effect of the legislation in question on the tax treatment of a company which has with the other companies concerned a relationship of interdependence characterised by definite influence. Although such legislation is also capable of affecting the exercise of other freedoms of movement, and in particular the free movement of capital within the meaning of Article 56 EC, Articles 43 EC and 48 EC are nevertheless applicable in such a situation.

(see paras 30, 36-37)

2. Article 12 EC applies independently only to situations governed by Community law for which the EC Treaty lays down no specific rules of non-discrimination. Articles 43 EC and 56 EC lay down such specific rules on non?discrimination in relation to freedom of establishment and the

free movement of capital.

(see paras 31-32)

3. Article 43 EC, read in conjunction with Article 48 EC, must be interpreted as not precluding, in principle, legislation of a Member State under which a resident company is taxed in respect of an unusual or gratuitous advantage where the advantage has been granted to a company established in another Member State with which it has, directly or indirectly, a relationship of interdependence, whereas a resident company cannot be taxed on such an advantage where the advantage has been granted to another resident company with which it has such a relationship.

Such a difference in the tax treatment of resident companies based on the place where the companies receiving unusual or gratuitous advantages have their registered office constitutes a restriction on freedom of establishment within the meaning of Article 43 EC, read in conjunction with Article 48 EC. A resident company could be deterred from acquiring, creating or maintaining a subsidiary in another Member State or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed, in a cross?border situation, on the grant of advantages at which such legislation is directed. Moreover, such legislation is liable to have a restrictive effect on companies established in other Member States, since such a company could be deterred from acquiring, creating or maintaining a subsidiary in the Member State concerned or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed there on the grant of the advantages at which that legislation is directed. There is, in any event, still a risk of double taxation in a cross?border situation because the unusual or gratuitous advantages granted by a resident company which are added back to that company’s own profits may give rise to the recipient company being taxed thereon in the Member State in which it is established.

However, in the light of the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance, taken together, such legislation pursues legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and is appropriate for ensuring the attainment of those objectives. To permit resident companies to transfer their profits in the form of unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States may well undermine the balanced allocation of the power to impose taxes between the Member States. It would be liable to undermine the very system of the allocation of the power to impose taxes between Member States because, according to the choice made by companies having relationships of interdependence, the Member State of the company granting unusual or gratuitous advantages would be forced to renounce its right, in its capacity as the State of residence of that company, to tax its income in favour, possibly, of the Member State in which the recipient company has its establishment. By providing that the resident company is to be taxed in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State, the legislation in question permits the Member State concerned to exercise its tax jurisdiction in relation to activities carried out in its territory.

Moreover, to permit resident companies to grant unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States, without making provision for any corrective tax measures, carries the risk that, by means of artificial arrangements, income transfers may be organised within companies having a relationship of interdependence towards those established in Member States applying the lowest rates of taxation or in Member States in which such income is not taxed.

However, it is for the national court to verify whether such legislation goes beyond what is necessary to attain the objectives pursued by the legislation, taken together. National legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance, taken together, where, first, on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction. Second, where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence. In those circumstances, subject to verification to be carried out by the national court as regards the last two points, which concern the interpretation and application of national law, such national legislation is proportionate to the set of objectives pursued by it.

(see paras 44-45, 53, 55, 63-64, 67, 69-72, 75-76, operative part)

JUDGMENT OF THE COURT (Third Chamber)

21 January 2010 (*)

(Freedom of establishment – Free movement of capital – Direct taxation – Income tax legislation ? Determination of the taxable income of companies ? Companies having a relationship of interdependence ? Unusual or gratuitous advantage granted by a resident company to a company established in another Member State ? Addition of the amount of the advantage in question to the profits of the resident company which granted it ? Balanced allocation of the power to tax between Member States ? Combating tax avoidance ? Prevention of abuse ? Proportionality)

In Case C?311/08,

REFERENCE for a preliminary ruling under Article 234 EC from the tribunal de première instance de Mons (Belgium), made by decision of 19 June 2007, received at the Court on 14 July 2008, in the proceedings

Société de Gestion Industrielle SA (SGI)

v

État belge,

THE COURT (Third Chamber),

composed of J.N. Cunha Rodrigues, President of the Second Chamber, acting for the President of the Third Chamber, P. Lindh, A. Rosas (Rapporteur), U. Lõhmus and A. Ó Caoimh, Judges, Advocate General: J. Kokott,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 4 June 2009,

after considering the observations submitted on behalf of:

– Société de Gestion Industrielle SA (SGI), by R. Forestini and J.F. Libert, avocats,

– the Belgian Government, by J.-C. Halleux, acting as Agent,

– the German Government, by M. Lumma and C. Blaschke, acting as Agents,

– the Swedish Government, by A. Falk and S. Johannesson, acting as Agents,

– the Commission of the European Communities, by R. Lyal and J.-P. Keppenne, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 September 2009,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 12 EC, 43 EC, 48 EC and 56 EC.

2 The reference was made in proceedings between Société de Gestion Industrielle SA (SGI) (‘SGI’), a company incorporated under Belgian law, and État belge (the Belgian State) which were brought on the ground that the national tax authorities had added back to that company’s own profits the amount of unusual or gratuitous advantages which the company had granted to companies with which it has a relationship of interdependence that are established in other Member States.

National legal background

3 Article 26 of the Code des impôts sur le revenu (Income Tax Code), consolidated by the Royal Decree of 10 April 1992 and confirmed by the Law of 12 June 1992 (Supplement to the *Moniteur belge*, 30 July 1992, p. 17120), in the version applicable to the dispute in the main proceedings (‘the CIR 1992’), is worded as follows:

‘Subject to the provisions of Article 54, where an undertaking established in Belgium grants unusual or gratuitous advantages, those advantages shall be added to its own profits, unless they are used in order to determine the taxable income of the recipients.

Notwithstanding the restriction laid down in the first paragraph, there shall be added to the undertaking’s own profits unusual or gratuitous advantages which it grants to:

1. a taxpayer referred to in Article 227 with which the undertaking established in Belgium is, directly or indirectly, in some form of relationship of interdependence;

2. a taxpayer referred to in Article 227 or a foreign establishment which, under the legislation of the country in which it is established, is not subject to income tax in that country or is subject to a

tax system there which is markedly more favourable than the tax system to which the undertaking established in Belgium is subject;

3. a taxpayer referred to in Article 227 which has common interests with the taxpayer or establishment referred to in subparagraph 1 or subparagraph 2.'

4 It is apparent from the order for reference that, according to national case?law, in order to be regarded as 'unusual' within the meaning of subparagraph 1 of the second paragraph of Article 26 of the CIR 1992, the advantage granted must be contrary to the normal course of events and established business rules and practice, in the light of the prevailing economic circumstances and the financial situation of the parties. A 'gratuitous' advantage is one which is granted in the absence of any obligation or consideration.

5 Article 49 of the CIR 1992 provides as follows:

'Expenses shall be regarded as deductible business expenses if they have been incurred or borne by the taxpayer during the tax period for the purposes of generating or retaining taxable income and the authenticity and amount of those expenses is demonstrated by documentary evidence or, where that is not possible, by any other form of evidence admitted under general law, other than by oath.

Expenses shall be treated as incurred or borne during the tax period if, during such period, they were actually paid or borne or they acquired the characteristics of proven and established debts or losses and are accounted for as such.'

6 Article 79 of the CIR 1992 is worded as follows:

'Business losses may not be deducted from any portion of earnings or profits which derives from unusual or gratuitous advantages obtained by the taxpayer, directly or indirectly, in whatsoever form and by whatsoever means, from an undertaking with which, directly or indirectly, it has a relationship of interdependence.'

7 Article 207 of the CIR 1992 provides that it is not possible for certain deductions to be made from the portion of income deriving from unusual or gratuitous advantages.

8 Article 227(2) of the CIR 1992 defines non?resident companies as follows:

'Foreign companies … which do not have their registered office, principal place of business or centre of management or administration in Belgium …'

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

9 SGI is a holding company incorporated under Belgian law. It has a 65% holding in the capital of Recydem SA ('Recydem'), a company incorporated under French law. It is also one of the directors of that company.

10 Cobelpin SA ('Cobelpin'), a company incorporated under Luxembourg law, is one of the shareholders of SGI. In its reply of 7 April 2009 to a written question put by the Court on 23 March 2009, SGI stated that Cobelpin has a 34% shareholding in SGI. Cobelpin is a director and managing director of SGI.

11 Mr Leone is a managing director of SGI and a director of Cobelpin and Recydem.

12 On 31 December 2000, SGI granted an interest-free loan of BEF 37 836 113 (EUR 937 933)

to Recydem. According to the Belgian tax authorities, for the tax year 2001 it was necessary, in accordance with subparagraph 1 of the second paragraph of Article 26 of the CIR 1992, to add to SGI's own profits a sum of BEF 1 891 806 (EUR 46 897) in respect of unusual or gratuitous advantages granted by SGI to that subsidiary. That sum corresponds to notional interest calculated at an annual rate of 5%.

13 From 1 July 2000, SGI paid director's remuneration of LUF 350 000 (EUR 8 676) per month to Cobelpin. Taking the view that the requirements in Article 49 of the CIR 1992 were not satisfied, the Belgian tax authorities refused to allow that remuneration as deductible business expenses for the tax years 2001 and 2002. The sums paid were considered to be clearly disproportionate and unrelated to the economic benefit of the services in question. Cobelpin's representative on the SGI board of directors was also on the board in his own name.

14 Thus, SGI was issued with revised assessments for the tax years 2001 and 2002. Since the objections which SGI lodged against those assessments on 28 January and 9 February 2004 were rejected by administrative decision of 22 July 2004, the company brought an action before the tribunal de première instance de Mons (Court of First Instance, Mons) on 4 August 2004.

15 The tribunal de première instance de Mons considers that the Belgian tax authorities correctly applied subparagraph 1 of the second paragraph of Article 26 of the CIR 1992 by adding back to SGI's own profits the notional interest on the loan which it had granted to Recydem. There was in the court's view, no economic justification for that loan. Whereas, during the period in question, the subsidiary was in a secure financial position and generated profits, SGI was subject to a severe financial burden as a result of granting loans.

16 The tribunal de première instance de Mons considers that the director's remuneration paid by SGI to Cobelpin is not deductible as business expenses under Article 49 of the CIR 1992 and that such benefits should be added to SGI's own profits under subparagraph 1 of the second paragraph of Article 26 of the CIR 1992.

17 However, the referring court has doubts as to whether the latter provision is compatible with the principle of freedom of establishment within the meaning of Article 43 EC et seq. and the principle of the free movement of capital enshrined in Article 56 EC et seq. It explains that the profits of a resident company are increased by the amount of the unusual or gratuitous advantages granted by it if the recipient company with which it has a relationship of interdependence is established in another Member State, whereas that is not the case where such advantages have been granted to another resident company in such a position and are used to determine that company's taxable income.

18 In those circumstances, the tribunal de première instance de Mons decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Does Article 43 [EC], in conjunction with Article 48 [EC] and, if appropriate, Article 12 [EC], preclude legislation of a Member State which, like that at issue, gives rise to the taxation of a company resident in Belgium in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State with which the Belgian company has, directly or indirectly, a relationship of interdependence, whereas, in identical circumstances, the company resident in Belgium cannot be taxed in respect of an unusual or gratuitous advantage where that advantage is granted to another company established in Belgium with which the Belgian company has, directly or indirectly, a relationship of interdependence?

2. Does Article 56 [EC], in conjunction with Article 48 [EC] and, if appropriate, Article 12 [EC], preclude legislation of a Member State which, like that at issue, gives rise to the taxation of a

company resident in Belgium in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State with which the Belgian company has, directly or indirectly, a relationship of interdependence, whereas, in identical circumstances, the company resident in Belgium cannot be taxed in respect of an unusual or gratuitous advantage where that advantage is granted to another company established in Belgium with which the Belgian company has, directly or indirectly, a relationship of interdependence?'

The questions referred

19 By its two questions, which are framed in virtually identical terms, the tribunal de première instance de Mons asks, essentially, whether Article 43 EC, read in conjunction with Article 48 EC, and/or Article 56 EC must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which a resident company is taxed in respect of an 'unusual' or 'gratuitous' advantage which it has granted to a company established in another Member State with which it has, directly or indirectly, a relationship of interdependence, whereas a resident company cannot be taxed on such an advantage where the advantage has been granted to another resident company with which it has such a relationship.

20 It is apparent from the order for reference that the first question, which essentially concerns the exercise of freedom of establishment within the meaning of Articles 43 EC and 48 EC, relates in substance to SGI's grant of an interest?free loan to its French subsidiary, Recydem, and, in particular, to the fact that the Belgian tax authorities, acting pursuant to subparagraph 1 of the second paragraph of Article 26 of the CIR 1992, added the amount of notional interest payable on that loan to SGI's own profits for the purpose of determining its taxable income.

21 It is also apparent from the order for reference that the second question, which concerns essentially the interpretation of Article 56 EC governing the free movement of capital, relates to payment by SGI to its Luxembourg shareholder, Cobelpin, of director's remuneration, which is regarded as unreasonably high, and to the tax treatment of that remuneration as regards SGI. It is clear from the order that the Belgian tax authorities, relying on Article 49 of the CIR 1992, refused to deduct those payments as business expenses. It is not possible to ascertain on the basis of the information on the case?file whether, in that context, those authorities applied subparagraph 1 of the second paragraph of Article 26 of the CIR 1992.

22 However, even if Article 49 of the CIR 1992 were relevant for the purpose of resolving the dispute in the main proceedings, the fact remains that the tribunal de première instance de Mons has referred questions to the Court concerning only the interpretation of the freedoms in question in connection with subparagraph 1 of the second paragraph of Article 26 of the CIR 1992. It is sufficient to point out that that court, which must assume responsibility for the forthcoming judicial decision, is best placed, in the light of the particular circumstances of the case before it, to define the relevant national legal framework and to delimit its reference for a preliminary ruling by reference to that framework (see, to that effect, Joined Cases C?378/07 to C?380/07 *Angelidaki and Others* [2009] ECR I?0000, paragraph 48 and the case?law cited).

The freedoms in question

23 It is necessary to determine at the outset whether and to what extent national legislation such as that at issue in the main proceedings is capable of affecting the exercise of freedom of establishment within the meaning of Articles 43 EC and 48 EC and/or that of the free movement of capital enshrined in Article 56 EC et seq.

24 All the interested parties which have submitted observations to the Court consider that the first question should be examined from the point of view of freedom of establishment. As regards

the facts underlying the second question, SGI and the Belgian and German Governments submit that the provisions governing the free movement of capital are applicable. On the other hand, the other interested parties are of the view that it is appropriate to answer that question in the same terms as the first. SGI refers to Article 12 EC in connection with both questions.

25 According to established case?law, in order to determine 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 (see, to that effect, Case C?196/04 *Cadbury Schweppes and Cadbury Schweppes Overseas* [2006] ECR I?7995, paragraphs 31 to 33; Case C?452/04 *Fidium Finanz* [2006] ECR I?9521, paragraphs 34 and 44 to 49; and Case C?182/08 *Glaxo Wellcome* [2009] ECR I?0000, paragraph 36).

26 According to the Belgian Government, the legislation at issue in the main proceedings concerns the manner in which the gross profit of resident companies is determined for the purpose of the taxation of their income. In order to prevent tax avoidance, income that has not been generated as a result of unusual or gratuitous advantages being granted to non?resident companies with which the resident company has a relationship of interdependence is added back to the latter's profits. In such circumstances, that system is said to enable the national tax authorities to tax a resident company on amounts which correspond, as the case may be, to the sum paid by it over and above the arm's length price or to the loss of profit sustained by the company.

27 In its reply of 24 April 2009 to a written question put by the Court on 23 March 2009, the Belgian Government stated that the legislation at issue in the main proceedings is aimed at situations in which different conditions influence the relationships of the companies in question from those applying to relationships between independent undertakings. According to the Belgian Government, there is a 'relationship of interdependence' within the meaning of that legislation, inter alia where one of the companies in question has a holding in the capital of the other which enables it to exercise definite influence over that company's decisions and to determine its activities within the meaning of the *Baars* line of case?law (Case C?251/98 [2000] ECR I?2787, paragraph 22).

28 The Court has repeatedly held that national legislation which applies in such circumstances comes within the substantive scope of the provisions of the EC Treaty on freedom of establishment (see, inter alia, *Baars*, paragraphs 21 and 22; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 31; and *Glaxo Wellcome*, paragraph 47).

29 However, according to the Belgian Government, the legislation at issue in the main proceedings is not applicable only to situations falling within the scope of the *Baars* case?law. Whether there is a relationship of interdependence between the companies concerned does not depend on the extent of the holding of one of those companies in the capital of the other. In its response referred to at paragraph 27 above, the Belgian Government stated that the legislation in question covers all links which, in the light of the facts and circumstances, give rise to some form of interdependence, be it direct or indirect, between the companies concerned. That could take the form of a holding in the capital of the other company in question which is not characterised by the exercise of 'definite influence' within the meaning of that case?law, but also, for example, the form of dependence in terms of raw materials or dependence as regards technical cooperation and guarantees.

30 In the light of that guidance, it must be held that the national legislation at issue in the main proceedings is, in principle, also capable of affecting the exercise of other freedoms of movement, and in particular the free movement of capital within the meaning of Article 56 EC.

31 As regards the applicability of Article 12 EC, which lays down a general prohibition of all discrimination on grounds of nationality, it should be noted that that provision applies independently only to situations governed by European Union law for which the Treaty lays down no specific rules of non-discrimination (see, inter alia, Joined Cases C?397/98 and C?410/98 *Metallgesellschaft and Others* [2001] ECR I?1727, paragraphs 38 and 39; Case C?443/06 *Hollmann* [2007] ECR I?8491, paragraphs 28 and 29; and Case C?105/07 *Lammers & Van Cleeff* [2008] ECR I?173, paragraph 14).

32 Articles 43 EC and 56 EC lay down such specific rules on non?discrimination in relation to freedom of establishment and the free movement of capital.

33 As regards the Treaty provisions which are applicable in circumstances such as those in the main proceedings, it should be noted that it is not disputed before the referring court that there is a 'relationship of interdependence', within the meaning of the legislation at issue, between SGI and Recydem and between SGI and Cobelpin.

34 With regard to the nature of those relationships, it is apparent from the order for reference that SGI has a 65% holding in the capital of Recydem. According to the reply referred to at paragraph 10 above, Cobelpin has a 34% holding in the capital of SGI. The Court does not have available to it information to enable it to establish whether there are other equity links between those companies.

35 Such holdings are, in principle, capable of giving SGI 'definite influence', within the meaning of the *Baars* case?law referred to at paragraphs 27 and 28 above, over the decisions and activities of Recydem and of giving Cobelpin such influence over the decisions and activities of SGI. Moreover, according to the order for reference, there are links between those companies at management level.

36 Consequently, since the dispute in the main proceedings relates solely to the effect of the legislation in question on the tax treatment of a company which has with the other companies concerned a relationship of interdependence that is characterised by 'definite influence' within the meaning of the *Baars* case?law, Articles 43 EC and 48 EC on freedom of establishment are applicable.

37 It is therefore necessary to answer the questions referred solely in the light of Articles 43 EC and 48 EC. It is appropriate to consider those questions together.

Whether there is a restriction on the freedom of establishment

38 The freedom of establishment which Article 43 EC grants to Community nationals includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the same conditions as those laid down for its own nationals by the law of the Member State of establishment. It entails, for companies or firms 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 pursue their activities in the Member State concerned through a subsidiary, branch or agency (see, inter alia, Case C?471/04 *Keller Holding* [2006] ECR I-2107, paragraph 29, and *Glaxo Wellcome*, paragraph 45).

39 Even though, according to their wording, the provisions of the Treaty concerning freedom of establishment are directed at ensuring 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 (see, inter alia, Case C?264/96 *ICI* [1998] ECR I?4695, paragraph 21; Case C?446/03 *Marks & Spencer* [2005] ECR I?10837, paragraph 31; Case C?298/05 *Columbus Container Services* [2007] ECR I?10451, paragraph 33; and Case C?418/07 *Papillon* [2008] ECR I?8947, paragraph 16).

40 In the case of companies, their 'registered office' for the purposes of Article 48 EC serves, in the same way as nationality in the case of individuals, as the connecting factor with the legal system of a Member State. Acceptance of the proposition that the Member State of establishment may freely apply different treatment merely by reason of the fact that the registered office of a company is situated in another Member State would deprive Article 43 EC of all meaning (see, to that effect, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; Case C?330/91 *Commerzbank* [1993] ECR I?4017, paragraph 13; and Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?0000, paragraph 38).

41 SGI, the Swedish Government and the Commission take the view that the legislation at issue in the main proceedings constitutes a restriction within the meaning of European Union law. The Belgian and German Governments take the opposite view. They argue that, in the light of the general context, the legislation is not such as to place at a disadvantage resident companies granting unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States by comparison with resident companies granting such advantages to other resident companies which are in such a position. The system in question does not therefore constitute a restriction.

42 In the present case, it is common ground that, under the legislation at issue in the main proceedings, unusual or gratuitous advantages granted by a resident company to a company with which it has a relationship of interdependence are added to the former company's own profits only if the recipient company is established in another Member State. By contrast, a resident company is not taxed on such an advantage if the advantage is granted to another resident company with which it has such a relationship, provided that the advantage is used in order to determine the taxable income of the recipient company.

43 It follows that the tax position of a company resident in Belgium which, like SGI, grants unusual or gratuitous advantages to companies with which it has a relationship of interdependence that are established in other Member States is less favourable than it would be if it granted such advantages to resident companies with which it has such a relationship.

44 Such a difference in the tax treatment of resident companies based on the place where the companies receiving the advantages in question have their registered office is liable to constitute a restriction on freedom of establishment within the meaning of Article 43 EC. A resident company could be deterred from acquiring, creating or maintaining a subsidiary in another Member State or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed, in a cross?border situation, on the grant of advantages at which the legislation at issue in the main proceedings is directed.

45 Moreover, that legislation is liable to have a restrictive effect on companies established in other Member States. Such a company could be deterred from acquiring, creating or maintaining a subsidiary in Belgium or from acquiring or maintaining a substantial holding in a company established in that State because of the tax burden imposed there on the grant of the advantages at which that legislation is directed.

46 That conclusion cannot be invalidated by the arguments put forward by the Belgian and German Governments.

47 The Belgian Government contends that the tax disadvantage resulting from the application of that legislation does not arise from the fact that the Belgian tax authorities add the unusual or gratuitous advantage granted by the resident company back to that company’s own profits but from the risk of double taxation if the Member State in which the recipient company is established does not make a corresponding tax adjustment. In its submission, that risk is greatly diminished by the fact that it is possible to apply Convention 90/436/EEC of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) (‘the Arbitration Convention’).

48 The Belgian Government also draws attention to the fact that, in domestic situations, Articles 79 and 207 of the CIR 1992 provide that certain tax deductions are not available to resident companies which have benefited from unusual or gratuitous advantages. Accordingly, the difference in tax treatment of resident companies based on the place where recipient companies have their registered office is less significant than it might appear.

49 According to the German Government, the Belgian tax authorities do not impose any form of additional taxation in cross?border situations. Since they have no power to tax the income of a recipient company established in another Member State, they tax the unusual or gratuitous advantage in the hands of the resident company which granted it. That Government points out that tax is payable on that kind of advantage in domestic situations, not by the resident company which granted the advantage but by the recipient resident company. It is therefore doubtful whether the legislation at issue in the main proceedings has a restrictive effect.

50 First, it should be noted that, for legislation to be regarded as a restriction on freedom of establishment, it is sufficient that it be capable of restricting the exercise of that freedom in a Member State by companies established in another Member State, without there being any need to establish that the legislation in question has actually had the effect of leading some of those companies to refrain from acquiring, creating or maintaining a subsidiary in the first Member State (see Case C?524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I?2107, paragraph 62, and Case C?231/05 *Oy AA* [2007] ECR I?6373, paragraph 42).

51 As regards the arguments relating to the tax treatment in a domestic situation of the income of the resident recipient company, it is apparent, as the Advocate General observed at point 45 of her Opinion, that the Governments in question base their observations on a global view of the group of companies and presume that it is irrelevant to which company within a group particular income is attributed.

52 In that connection, it should be noted that the resident company granting an unusual or gratuitous advantage and the recipient company are separate legal persons, both of which have their own individual tax liability. In any event, the tax burden borne by the recipient company in a domestic situation cannot be likened to the taxation, in a cross-border situation, of the company granting the advantage in question.

53 Even if, in a domestic situation in which the companies concerned are, directly or indirectly, 100% related to each other, the allocation of the tax burden between them may, in some circumstances, have no implications for the purpose of taxation, there is, in any event, still a risk of double taxation in a cross?border situation. As the Advocate General has rightly observed at points 46 and 47 of her Opinion, in such a situation, the unusual or gratuitous advantages granted by a resident company which are added back to that company’s own profits may give rise to the recipient company being taxed thereon in the Member State in which it is established.

54 As regards the possibility of applying the Arbitration Convention, it should be pointed out, as

observed by the Advocate General at point 48 of her Opinion, that where the tax authorities in question endeavour to resolve a matter by mutual agreement, as provided for by Article 6 in Section 3 of the Convention, an additional administrative and financial burden is imposed on the company which has submitted its case to such a procedure. Moreover, a procedure aimed at resolution by mutual agreement, followed, if necessary, by an arbitration procedure, may extend over several years. During that period, the company in question must bear the burden of double taxation. Furthermore, it is apparent, in particular in the light of the matters set out at paragraph 29 above, that the legislation at issue in the main proceedings is applicable in certain situations falling outside the scope of the Convention.

55 It follows that legislation of a Member State such as that at issue in the main proceedings constitutes a restriction on freedom of establishment within the meaning of Article 43 EC, read in conjunction with Article 48 EC.

Whether the legislation at issue in the main proceedings can be justified

56 According to established case?law, a measure which is liable to hinder the freedom of establishment enshrined in Article 43 EC is permissible only if it pursues a legitimate objective compatible with the Treaty and is justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate to ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain it (see, inter alia, Case C?250/95 *Futura Participations and Singer* [1997] ECR I?2471, paragraph 26; Case C?9/02 *de Lasteyrie du Saillant* [2004] ECR I?2409, paragraph 49; *Marks & Spencer*, paragraph 35; and *Lammers & Van Cleeff*, paragraph 25).

57 The Swedish Government and the Commission take the view that the legislation at issue in the main proceedings is justified by the need to ensure a balanced allocation of the power to tax between Member States, the fear of tax avoidance and the need to combat abusive practices, taken together. However, the Commission points out that it is necessary to comply with the principle of proportionality. The Belgian and German Governments rely, in the alternative, on the same grounds of justification.

58 The Belgian Government states that the legislation at issue in the main proceedings seeks to combat tax avoidance by making it possible to adjust, for taxation purposes, situations in which the companies concerned apply conditions to their relationships which go beyond what would have been agreed under fully competitive conditions. At the hearing, the Belgian Government stated that the system in question was based on Article 9 of the model tax convention on income and on capital drawn up by the Organisation for Economic Cooperation and Development (OECD) and Article 4 of the Arbitration Convention, which provide for similar adjustments to profits when transactions between associated companies are inconsistent with the arm’s length principle.

59 According to the Belgian Government, the concept of ‘advantage’ within the meaning of the legislation at issue in the main proceedings is based on the premiss that the recipient is enriched and the person granting the advantage receives no real consideration equivalent to that advantage. The requirement that the advantage must be ‘unusual’ is designed to cover situations which are contrary to the normal course of events, rules or established practice or contrary to what is customary, in similar cases. The requirement that the advantage must be ‘gratuitous’ presupposes that it is granted on the basis that it does not represent the fulfilment an obligation or that no consideration is provided in that connection.

60 First, as regards the balanced allocation between Member States of the power to tax, it should be recalled that such a justification may be accepted, in particular, where the system in question is designed to prevent conduct capable of jeopardising the right of a Member State to

exercise its tax jurisdiction in relation to activities carried out in its territory (see, inter alia, *Marks & Spencer*, paragraph 46; Case C?347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 42; *Oy AA*, paragraph 54; and *Aberdeen Property Fininvest Alpha*, paragraph 66).

61 The Court has recognised that the preservation of the allocation of the power to impose taxes between Member States may make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses (see inter alia, *Oy AA*, paragraph 54, and Case C?414/06 *Lidl Belgium* [2008] ECR I?3601, paragraph 31).

62 To give companies the right to elect to have their losses or profits taken into account in the Member State in which they are established or in another Member State could seriously undermine a balanced allocation of the power to impose taxes between the Member States, since the tax base would be increased in one of the States in question, and reduced in the other, by the amount of the losses or profits transferred (see, to that effect, *Marks & Spencer*, paragraph 46; *Oy AA*, paragraph 55; and *Lidl Belgium*, paragraph 32).

63 In the present case, it must be held that to permit resident companies to transfer their profits in the form of unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States may well undermine the balanced allocation of the power to impose taxes between the Member States. It would be liable to undermine the very system of the allocation of the power to impose taxes between Member States because, according to the choice made by companies having relationships of interdependence, the Member State of the company granting unusual or gratuitous advantages would be forced to renounce its right, in its capacity as the State of residence of that company, to tax its income in favour, possibly, of the Member State in which the recipient company has its establishment (see, to that effect, *Oy AA,* paragraph 56).

64 By providing that the resident company is to be taxed in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State, the legislation at issue in the main proceedings permits the Belgian State to exercise its tax jurisdiction in relation to activities carried out in its territory.

65 Second, as regards the prevention of tax avoidance, it should be recalled that a national measure restricting freedom of establishment may be justified where it specifically targets wholly artificial arrangements designed to circumvent the legislation of the Member State concerned (see, to that effect, *ICI*, paragraph 26; *Marks & Spencer*, paragraph 57; *Cadbury Schweppes and Cadbury Schweppes Overseas*, paragraph 51; and *Test Claimants in the Thin Cap Group Litigation*, paragraph 72).

66 In that context, national legislation which is not specifically designed to exclude from the tax advantage it confers such purely artificial arrangements – devoid of economic reality, created with the aim of escaping the tax normally due on the profits generated by activities carried out on national territory – may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States (see, to that effect, *Oy AA*, paragraph 63).

67 As regards the relevance of that ground of justification in the light of circumstances such as those of the main proceedings, to permit resident companies to grant unusual or gratuitous advantages to companies with which they have a relationship of interdependence that are established in other Member States, without making provision for any corrective tax measures, carries the risk that, by means of artificial arrangements, income transfers may be organised within companies having a relationship of interdependence towards those established in Member States

applying the lowest rates of taxation or in Member States in which such income is not taxed (see, to that effect, *Oy AA*, paragraph 58).

68 By providing that the resident company is to be taxed in respect of an unusual or gratuitous advantage which it has granted to a company established in another Member State, the legislation at issue in the main proceedings is able to prevent such practices, liable to be encouraged by the finding of significant disparities between the bases of assessment or rates of tax applied in the various Member States and designed only to avoid the tax normally due in the Member State in which the company granting the advantage has its seat (see, to that effect, *Oy AA*, paragraph 59).

69 In the light of those two considerations, concerning the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance, taken together, it must be held that legislation such as that at issue in the main proceedings pursues legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that it is appropriate for ensuring the attainment of those objectives.

70 That being so, it remains necessary to examine whether legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued, taken together.

71 National legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction represents an artificial arrangement, entered into for tax reasons, is to be regarded as not going beyond what is necessary to attain the objectives relating to the need to maintain the balanced allocation of the power to tax between the Member States and to prevent tax avoidance where, first, on each occasion on which there is a suspicion that a transaction goes beyond what the companies concerned would have agreed under fully competitive conditions, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction (see, to that effect, *Test Claimants in the Thin Cap Group Litigation*, paragraph 82, and order in Case C?201/05 *Test Claimants in the CFC and Dividend Group Litigation* [2008] ECR I?2875, paragraph 84).

72 Second, where the consideration of such elements leads to the conclusion that the transaction in question goes beyond what the companies concerned would have agreed under fully competitive conditions, the corrective tax measure must be confined to the part which exceeds what would have been agreed if the companies did not have a relationship of interdependence.

73 According to the Belgian Government, the burden of proof as to the existence of an ‘unusual’ or ‘gratuitous’ advantage within the meaning of the legislation at issue in the main proceeding rests with the national tax authorities. It states that when those authorities apply that legislation, the taxpayer is given an opportunity to provide evidence of any commercial justification that there may have been for the transaction in question. The taxpayer has a month, a period which may be extended, within which to establish that no unusual or gratuitous advantage is involved, having regard to the circumstances in which the transaction was effected. If, however, those authorities persist in their intention of issuing a revised assessment and do not accept the taxpayer’s arguments, the latter can challenge the assessment to tax before the national courts.

74 The Belgian Government adds that, where the legislation at issue in the main proceedings is applied, only the unusual or gratuitous part of the advantage in question is added back to the profits of the company which granted it.

75 In those circumstances, subject to verification to be carried out by the referring court as

regards the last two points, which concern the interpretation and application of Belgian law, it must be concluded that, in the light of the foregoing, national legislation such as that at issue in the main proceedings is proportionate to the set of objectives pursued by it.

76 Accordingly, the answer to the questions referred is that Article 43 EC, read in conjunction with Article 48 EC, must be interpreted as not precluding, in principle, legislation of a Member State, such as that at issue in the main proceedings, under which a resident company is taxed in respect of an unusual or gratuitous advantage where the advantage has been granted to a company established in another Member State with which it has, directly or indirectly, a relationship of interdependence, whereas a resident company cannot be taxed on such an advantage where the advantage has been granted to another resident company with which it has such a relationship. However, it is for the national court to verify whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation, taken together.

Costs

77 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 (Third Chamber) hereby rules:

Article 43 EC, read in conjunction with Article 48 EC, must be interpreted as not precluding, in principle, legislation of a Member State, such as that at issue in the main proceedings, under which a resident company is taxed in respect of an unusual or gratuitous advantage where the advantage has been granted to a company established in another Member State with which it has, directly or indirectly, a relationship of interdependence, whereas a resident company cannot be taxed on such an advantage where the advantage has been granted to another resident company with which it has such a relationship. However, it is for the referring court to verify whether the legislation at issue in the main proceedings goes beyond what is necessary to attain the objectives pursued by the legislation, taken together.

[Signatures]

* Language of the case: French.