Conclusions
OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 25 March 2004(1)

Case C-315/02

Anneliese Lenz
v
Finanzlandesdirektion für Tirol

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

(Articles 56 EC and 58 EC – Free movement of capital – National rules governing the taxation of revenue from capital assets)

1. By order of 27 August 2002, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling three questions on the interpretation of Articles 73b and 73d of the EC Treaty (now Articles 56 EC and 58 EC). By those questions, the Austrian court again asks whether national provisions which apply to the taxation of investment income rules which differ according to whether the company concerned is domestic or foreign are compatible with Community law.

2. The Court has already been asked to give a ruling on that question by the Berufungssenat V der Finanzlandesdirektion für Wien, Niederösterreich und Burgenland (Fifth Appeal Chamber of the Regional Tax Authority for Vienna, Lower Austria and Burgenland) in Case C-516/99 *Schmid*, in which the Court nevertheless held that it had no jurisdiction to answer the questions because the referring body was not a court or tribunal. (2)

I – Legal background

Community law

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

'1. The provisions of Article 73b shall be without prejudice to the right of Member States:

(a) to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested;

(b) to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

2. ...
3. The measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 73b.'

National law

4. Under the Austrian tax system, income from domestic limited companies is subject to taxation on two levels: at the company level, by means of a tax on revenue at a fixed rate of 34%, and on shareholders, by means of a tax on dividends and other profits distributed by companies (that is, investment income).

5. As regards the taxation of shareholders, which is of more direct concern here, the relevant provisions distinguish between domestic and foreign investment income, on the basis that investment income is deemed to be domestic 'where the person liable to pay investment income has its residence, head office or seat in Austria or is the branch office in Austria of a credit institution ...' (Paragraph 93(2) of the Einkommensteuergesetz 1988 (1988 Law on income tax, hereinafter 'the EStG')). (3)

(a) The taxation of domestic investment income

6. In respect of such income, Austrian law allows taxpayers to opt either for taxation at a special final fixed rate of 25% (hereinafter 'the final tax') or at the ordinary income tax rate reduced by 50% (hereinafter 'the reduced rate').

7. In the first case, the taxpayer will have to pay tax at the rate of 25% on his investment income which will thereby cease to be subject to ordinary income tax since, as explained, that payment is final. The investment income will not therefore be taken into account in determining that person's taxable income, with the result that a lower rate of income tax is likely to apply since the rate varies according to the level of income. The final tax is, in principle, collected by means of a deduction at source (that is, within the company). However, in certain cases where such tax cannot be withheld, it is to be collected by means of 'a voluntary payment of an amount equivalent to the tax on investment income to the person liable to pay the dividends …' (Paragraph 97 EStG). (4)

8. Should the taxpayer decide not to avail himself of the special final tax, he will be subject instead to ordinary income tax with a rate reduction of 50%. In that case, the investment income will be taken into account in his overall assessment to income tax, with the result that a higher rate of tax is likely to apply to his aggregate income. To make up for this, his investment income 'will be taxed at half of the average tax rate applicable to the aggregate income' (Paragraph 37 EStG). (5)

(b) The taxation of foreign investment income

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

10. Finally, it should be noted that the system described above was amended by a law which entered into force on 1 April 2002 after the facts of the present case and is not applicable in the circumstances of these proceedings.

II – Facts and procedure

11. Mrs Lenz is a German national residing in Austria where she has been a taxpayer since 1994.

12. In 1996, Mrs Lenz's income consisted entirely of dividends from companies that had their seat in Germany.

13. The Austrian tax authority therefore calculated her liability to tax for that year on the basis of the ordinary rate of income tax without applying the special final tax or the reduced rate provided for by Paragraphs 37 and 97 EStG.

14. Mrs Lenz made a complaint against that assessment to the Finanzlandesdirektion für Tirol,

claiming, in particular, that the failure to apply the final tax or the reduced rate to income from shareholdings in companies in other Member States was contrary to the free movement of capital guaranteed by Article 73b of the EC Treaty. That complaint was rejected and she therefore brought proceedings before the Verwaltungsgerichtshof. Having doubts as to the compatibility of the national tax provisions with Community law, that court referred the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 73b(1) in conjunction with Article 73d(1)(a) and (b) and (3) of the EC Treaty (now Article 56(1) EC 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 EStG 1988 in conjunction with Paragraph 37(1) and (4) of the EStG 1988, under which a taxpayer in receipt of dividends from domestic shares may choose whether they should be subject to a final flat-rate tax of 25% 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 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 where a percentage 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 Member States or non-Member States is set off against the Austrian income tax payable by the recipient of the dividends?'

15. In the proceedings thus instituted, the applicant in the main proceedings, the Austrian, Danish, French and United Kingdom Governments and the Commission submitted written observations. The applicant in the main proceedings, Austria, the United Kingdom and the Commission also presented oral argument at the hearing on 29 January 2004.

16. As a preparatory inquiry, the Court requested the Austrian Government to give details of the tax legislation in force in 1996.

III – Legal analysis

The first two questions

17. By its first two questions, which it is convenient to consider together, the Verwaltungsgerichtshof asks whether a rule which allows only recipients of domestic investment income to elect between a special final tax and the ordinary income tax with a reduction in the rate of 50%, whilst providing that ordinary income tax without any reductions in the rate must be applied to foreign investment income, is compatible with the Treaty provisions on the free movement of capital. It further wishes to know whether the answer to that question depends on the level of taxation of companies generating that revenue in other Member States or in third countries.

18. As I have already said, a similar question has already been referred to the Court in *Schmid*, in which no ruling was given on the merits because the referring body (the Berufungssenat) was not a court or tribunal within the meaning of Article 234 EC. I too concluded in my Opinion delivered on 29 January 2002 in that case that the reference for a preliminary ruling was inadmissible, (6) but I also examined in the alternative the merits of the question which has now, essentially, been re-referred by the Verwaltungsgerichtshof. I shall therefore rely considerably on that Opinion in what follows.

19. As in *Schmid,* in order to reply to the question summarised above it must first be established whether provisions of the kind under consideration may constitute a restriction on the movement of capital within the meaning of Article 73b of the EC Treaty and, if so, whether they may be justified under Article 73d.

(i) The restrictive nature of the provisions

20. On the first aspect, I must point out that 'measures taken by a Member State which are liable to dissuade its residents from ... making investments in other Member States constitute restrictions on movements of capital within the meaning [of Article 73b of the EC Treaty]'. (7) In

that connection, the Court has held, in particular, that ‘to make the grant of a tax advantage, such as the dividend exemption, relating to taxation of the income of natural persons who are shareholders subject to the condition that the dividends are paid by companies established within national territory constitutes a restriction on capital movements’. (8)

21. That is so inasmuch as such a provision:

– first, ‘has the effect of dissuading nationals … residing [in the Member State concerned] from investing their capital in companies which have their seat in another Member State’; and

– second, ‘has a restrictive effect as regards companies established in other Member States: it constitutes an obstacle to the raising of capital [in the Member State concerned] since the dividends which such companies pay to residents [in that State] receive less favourable tax treatment than dividends distributed by a company established [in that same State], so that their shares are less attractive to investors residing [in the State in question] than shares in companies which have their seat in that Member State’. (9)

22. As I have already said in *Schmid,* if that concept of ‘restrictions on the movement of capital’ within the meaning of Article 73b is upheld, provisions such as those under consideration, which offer a choice in respect of domestic investment income between taxation at a special final fixed rate of 25% or at the ordinary income tax rate with a reduction of 50%, while foreign investment income is subject to ordinary income tax at the full rate without any reduction, must be held to constitute such a restriction. Such provisions undoubtedly accord preferential treatment to domestic investment income, discouraging investors of one State from acquiring shares in companies established in other Member States and constituting for those companies an obstacle to the raising of capital in the Member State concerned.

23. As in *Schmid,* I consider therefore that, in reserving preferential tax treatment to domestic as opposed to foreign investment income, the provisions in question constitute a restriction on the movement of capital in principle contrary to Article 73b of the EC Treaty.

(ii) Possible justification of the rules in question on the basis of Article 73d

24. That conclusion does not however necessarily mean that such provisions are incompatible with the rules on the free movement of capital.

25. I would point out, once again, that Article 73d(1) of the EC Treaty provides that ‘[t]he provisions of Article 73b shall be without prejudice to the right of Member States ... to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to ... the place where their capital is invested’ and to their right ‘to take all requisite measures to prevent infringements of national law and regulations’. (10)

26. In order to reply to the first two questions from the Verwaltungsgerichtshof, it is still necessary therefore to assess whether the provisions in question may be justified on the basis of Article 73d(1) of the EC Treaty.

27. In this connection, I must first point out that, inasmuch as those provisions authorise a derogation from the fundamental principle of free movement of capital, (11) they must be interpreted strictly and cannot therefore justify national provisions or measures which constitute ‘a means of arbitrary discrimination’ or ‘a disguised restriction on the free movement of capital ... as defined in Article 73b’ (Article 73d(3) of the EC Treaty).

28. It follows that restrictions arising from provisions of the kind under consideration may be allowed under Article 73d(1) only if the different treatment accorded to domestic and foreign investment income is objectively justified by different situations or by overriding reasons in the general interest. (12)

29. I should add that the Court has had occasion to rule, with reference to measures designed to prevent infringement of national tax provisions, that ‘[f]or a measure to be covered by Article 73d of the Treaty, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it’. (13) In short, the measure must be ‘necessary in order to uphold the objectives pursued’ in that it is not possible to attain them ‘by measures less restrictive of the free movement of capital’. (14)

30. In order to establish whether the restrictions on the movement of capital arising from the tax provisions in question may be allowed under Article 73d(1) of the EC Treaty, it must therefore first be determined whether, as claimed by the governments that submitted observations, the different treatment accorded to domestic and foreign investment income is objectively justified and so does not constitute arbitrary discrimination or a disguised restriction on the free movement of capital.
31. The United Kingdom Government asserts in this connection that the tax advantages granted by the provisions in question are confined to the dividends of domestic companies in that the Austrian administration collects the tax on those dividends directly from the companies paying them. Since that method of collection is not possible in respect of investment income of companies established in other Member States, it is technically impossible to extend those advantages to such revenue.
32. I note, first, in this regard that only the final tax is collected from the company distributing its profits which, acting as an agent of the tax authority, withholds that tax at source. Therefore, it is only in respect of that form of taxation that the technical obstacle to the collection of tax exists which, according to the United Kingdom Government, places foreign investment income in an objectively different situation from that of domestic investment income, thereby justifying its different treatment.
33. Having said that, I indicated in *Schmid* that I did not find that argument convincing. While it is true that there must be an agent in Austria if the tax is to be withheld in that country, it is not equally true that the final tax necessarily involves withholding at source. In my view, various technical arrangements could be made to collect tax of the kind under consideration (that is, tax at a fixed final rate of 25%), which could also apply without difficulty to revenue received from foreign companies.
34. As the Commission pointed out in the present case as well, an example of such an arrangement is afforded by the Austrian provisions themselves, as described above, under which, in certain cases where tax cannot be withheld, the final tax may be recovered by 'voluntary payment of an amount equivalent to the tax on investment income to the person liable to pay the dividends'. (15) Provision could have been made for a similar kind of 'voluntary payment' to the tax authorities in respect of income from investments in foreign companies, enabling the final tax to apply to such income and thereby avoiding the restriction on the movement of capital observed in this connection.
35. All the governments that submitted observations argue that the 50% reduction in the ordinary income tax rate applicable to domestic investment income is necessary in order to guarantee the cohesion of the national tax system and, to that end, in accordance with the judgments in *Bachmann* and *Commission* v *Belgium*, (16) may 'justify rules liable to restrict fundamental freedoms'. (17) The provisions under consideration are justified, in particular, by the fact that the revenue of companies established in Austria is already subject to a fixed tax of 34% in that country and it would therefore be inappropriate to tax the same revenue again when it is distributed to shareholders by making it fully subject to income tax.
36. The applicant in the main proceedings and the Commission take a different view, claiming that there is no justification for according different treatment to dividends depending on whether they are paid by domestic or foreign companies. They submit, in particular, that the provisions under consideration cannot be justified by the need to guarantee the cohesion of the national tax system so as to avoid a form of double taxation (in the economic sense), since corporation tax and income tax apply to different bodies of taxpayers.
37. As I noted in *Schmid*, I too consider that the need cited in the judgments in *Bachmann* and *Commission* v *Belgium* (Case C-300/90) cannot be invoked in the present case. In those cases '*a direct link existed*, in the case of one and the same taxpayer, *between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy*, both of which related to the same tax. In those cases, there was a link between the deductibility of contributions and the taxation of sums payable by insurers under old-age insurance and life assurance policies, which it was necessary to preserve in order to guarantee the cohesion of the tax system at issue'. (18) In the

present case, on the contrary, there is no direct link between the corporation tax and that on revenue from capital since, as in *Verkooijen*, '[t]hey are two separate taxes levied on different taxpayers' (companies and shareholders). (19)

38. Consequently, in accordance with the principle established by the judgment in *Verkooijen*, I do not think that the restrictions on the movement of capital arising from the provisions under consideration can be justified by the need to guarantee the cohesion of the national tax system.

39. Moreover, in cases such as this one, I, unlike the Danish Government, consider in relation to the second question that the requirement of cohesion of the tax system cannot be relied upon where the revenue from companies which have their seat in another Member State is subject in that State to low taxation.

40. As the Commission rightly pointed out, there is no justification for excluding only foreign investment income from the final or reduced rate tax on the basis of the level of corporation tax. Such an exclusion would presuppose the existence of a direct link between corporation tax and tax on shareholders which, as noted, does not exist in the Austrian tax system; it would not therefore be cohesive to create a link of that type only in respect of the taxation of revenue generated by foreign companies.

41. To exclude those reliefs on the basis of the low rate of taxation of foreign companies would also be unjustified, however, because to do so would mean that the shareholders would bear the burden of any tax advantage to which those companies were entitled, from which they could benefit only indirectly and contingently, that is to say only where low taxation resulted in a greater distribution of profits.

42. But above all, to do so would discourage private persons from investing their capital in companies which enjoy better market conditions and are therefore able to guarantee a better return on investments in other Member States. That is so because the advantages arising from differences in the direct taxation of companies would be neutralised by a punitive tax regime which would ultimately deprive of any meaning the freedom of individuals to move their capital within the Community. (20)

43. Finally, to justify the Austrian provisions in question, the French Government argues that, if the final tax or the reduced rate tax were to be extended to dividends distributed by companies established in other Member States, the tax authorities of the shareholders' country of residence would not be able effectively to keep track of that company's profits. In its view, the provisions under consideration are therefore justified within the meaning of Article 73d(1)(b) of the EC Treaty, under which the provisions of Article 73b are to be without prejudice to the right of Member States 'to take all requisite measures to prevent infringements of national law and regulations'.

44. In my view, however, that argument cannot be upheld. As I pointed out in *Schmid*, it is clear that the provisions under consideration in no way guarantee the efficacy of fiscal controls, given that the less favourable treatment accorded to foreign investment income does not in fact enable the authorities to ascertain whether such income has been duly declared to the Austrian tax authorities for assessment to ordinary income tax.

45. It follows from the foregoing that the factors mentioned by the governments that submitted observations cannot justify, within the meaning of Article 73d(1) of the EC Treaty, the restrictions on the movement of capital arising from the tax provisions in question.

46. It must therefore be concluded that Article 73b(1) of the EC Treaty, in conjunction with Article 73d(1) of the EC Treaty, precludes provisions such as those under consideration, which allow only the recipients of domestic investment income to choose between taxation at a special final fixed rate and ordinary income tax with a rate reduction of 50%, while foreign investment income is subject in all cases to ordinary income tax at the full rate without any reduction.

47. The failure to grant recipients of foreign investment income the option to choose between the two forms of taxation cannot be justified on the ground that the revenue of companies which have their seat in another Member State is subject to a lower rate of taxation in that State.

The third question

48. By its third question, the referring court asks whether Article 73b(1) of the EC Treaty (now

Article 56(1) EC) precludes national fiscal provisions which allow a taxpayer who receives dividends from foreign companies to deduct a percentage of the tax on the revenue of legal persons paid abroad by the company of which the taxpayer is a shareholder from his national personal income tax.

49. The applicant in the main proceedings and the Commission challenged the admissibility of that question on the ground that it is a purely hypothetical question in so far as there is no provision for this type of deduction in the Austrian legal system.

50. In any event, the applicant in the main proceedings points out – even if it were provided for – that deduction would not remove the discrimination against the recipients of dividends from foreign companies in that, at least in certain circumstances, that income would continue to be taxed more heavily than domestic investment income.

51. According to the Commission, on the other hand, in that situation Community law would not preclude the deduction referred to by the national court provided that it was applied in the same way to domestic and foreign dividends.

52. According to the Austrian and Danish Governments, however, even if that deduction applied only to foreign investment income, it would be compatible with Articles 73b and 73d of the EC Treaty. Any unfavourable fiscal treatment to the prejudice of that revenue would in fact be justified by the requirement of guaranteeing the cohesion of the national tax system and of avoiding distortions of competition in favour of those States which tax more lightly those companies which have their seat within their territory.

53. For my part, I must point out first that, according to settled case-law, ‘the justification for a preliminary reference, and hence for the jurisdiction of the Court, is not that it enables advisory opinions on general or hypothetical questions to be delivered … but rather that it is necessary for the effective resolution of a dispute’. (21)

54. Furthermore, in order to preserve that role of the preliminary reference, the Court enjoys a degree of latitude as regards national courts’ assessment of the necessity and relevance of the questions referred to it, culminating, where necessary, in the exclusion of the reference on grounds of inadmissibility. (22)

55. That said, I note that the provisions in question in the order for reference do not provide for any deductibility in Austria of corporation tax paid in another Member State or in third countries. Additionally, it is not possible to ascertain from the order whether the availability of such a deduction might be inferred from an interpretation of other provisions.

56. Also, when requested by the Court to clarify the point, the Austrian Government itself confirmed that the tax legislation in force at the material time did not provide any basis for a deduction of the kind mentioned by the referring court, not even upon a wide interpretation of the law.

57. If – as the Austrian Government itself has stated – such a deduction cannot legitimately be inferred from the national legislation, then the applicant in the main proceedings and the Commission are right in saying that the third question is purely hypothetical.

58. If the Austrian Government’s view is correct, an answer from the Court on that question would be a consultative opinion on the measures which a Member State could, in the abstract, adopt to eliminate restrictions on the free movement of capital brought about by its own tax rules. But in so doing the Court would be resolving a purely hypothetical question which bears no relation to the purpose of the main action.

59. I therefore consider that the Court has no jurisdiction to give a ruling on the third question submitted by the Verwaltungsgerichtshof.

60. However, should the Court decide that, in light of the complexity of the fiscal provisions in question and the doubts expressed by the Austrian court, it is appropriate to reply to that question, the reply should, in my opinion, be in the negative.

61. I consider that national fiscal rules which allow a taxpayer who receives dividends from foreign companies to deduct a percentage of the corporation tax paid abroad by the company of which the natural person is a shareholder from the latter’s national personal income tax constitute

a restriction on the movement of capital which is, in principle, prohibited by Article 73b of the EC Treaty if those rules constitute preferential fiscal treatment for domestic investment income. It is, however, for the national court to assess whether, in the circumstances of the particular case, the application of that form of deduction penalises foreign investment income.

62. I would add that, contrary to the submissions of the Austrian and Danish Governments, any difference in treatment is not justified either by the requirement of cohesion of the tax system or by the need to avoid distortions of competition in favour of States which tax companies more lightly, for the reasons I have set out in points 39 to 42.

IV – Conclusion

63. In the light of the foregoing considerations, I therefore propose that the Court's answer to the questions referred to it for a preliminary ruling by the Verwaltungsgerichtshof should be in the following terms:

(1) Article 73b(1) of the EC Treaty (now Article 56(1) EC), in conjunction with Article 73d(1) of the Treaty (now Article 58(1) EC), precludes provisions such as Paragraphs 37 and 97 of the Einkommensteuergesetz 1988 (BGBl. 1988/400), in the version published in BGBl. 1996/797, which allow only recipients of domestic investment income to choose between taxation at a special final fixed rate and ordinary income tax with a rate reduction of 50%, while foreign investment income is subject to ordinary income tax at the full rate without any reduction.

(2) The failure to grant recipients of foreign investment income the option to choose between the two forms of taxation cannot be justified on the ground that the revenue of companies which have their seat in another Member State is subject to a lower rate of taxation in that State.

(3) The Court of Justice of the European Communities has no jurisdiction to reply to the third question referred to it by the Verwaltungsgerichtshof by order of 27 August 2002.

1 – Original language: Italian.

2 – Case C-516/99 *Schmid* [2002] ECR I-4573.

3 – BGBl. 1988/400 as amended by BGBl. 1996/201.

4 – As amended by BGBl. 1996/797.

5 – As amended by BGBl. 1996/797.

6 – Opinion of 29 January 2002 in Case C-516/99 *Schmid* [2002] ECR I-4573, in particular I-4575.

7 – Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, paragraph 10; Case C-222/97 *Trummer and Mayer* [1999] ECR I-1661, paragraph 26; and Case C-439/97 *Sandoz* [1999] ECR I-7041, paragraph 19.

8 – Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 36.

9 – .*Verkooijen*, paragraphs 34 and 35.

10 – Article 73d(1)(a) and (b).

11 – Case C-54/99 *Eglise de scientologie* [2000] ECR I-1335, paragraph 17.

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

13 – Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 41.

14 – Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 23.

15 – Paragraph 97(2) EStG.

16 – Cited in footnote 12.

17 – .*Verkooijen*, paragraph 56.

18 – .*Verkooijen*, paragraph 57. Emphasis added.

19 – .*Verkooijen*, paragraph 58.

20 – On the impossibility of justifying, on the basis of other tax advantages, an unfavourable fiscal regime in conflict with a fundamental freedom, see *Verkooijen*, paragraph 61. See also, as regards Article 43 EC, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 21; Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 53; and above all, in respect of Article 49 EC, Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraphs 43 to 45.

21 – See, inter alia, Joined Cases C-422/99, C-423/99 and C-424/99 *Zabala Erasun and Others* [1995] ECR I-1567, paragraph 29, and Case C-314/96 *Djabali* [1998] ECR I-1149, paragraphs 17 to 20.

22 – In particular, the Court has consistently held that ‘it cannot give a preliminary ruling on a question submitted by a national court where it is quite obvious that the ruling sought by that court on the interpretation or validity of Community law bears no relation to the actual facts of the main action or its purpose, [or] where the problem is hypothetical’ (Case C-36/99 *Idéaltourisme* [2000] ECR I-6049, paragraph 20. See also Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraphs 17 and 18; Case C-83/91 *Meilicke* [1992] ECR I-4871, paragraph 25; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 61; and Case C-437/97 *EKW and Wein & Co* [2000] ECR I-1157, paragraph 52).