OPINION OF ADVOCATE GENERAL ALBER

delivered on 8 June 2000 *

I — Introduction

1. The present reference for a preliminary ruling asks whether Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes a Belgian tax provision which prevents a Belgian company with a permanent establishment in Luxembourg from deducting losses incurred in Belgium from profits subsequently made in Belgium on the ground that those losses should have been deducted from profits accrued in Luxembourg, with the result that the company cannot offset its losses incurred in Belgium either in Belgium or in Luxembourg.

2. The NV Algemene Maatschappij van Verzekeringen en Grondkrediet, now known as NV Algemene Maatschappij voor Investering en Dienstverlening (abbreviated as 'AMID'), the plaintiff in the main proceedings, has its fiscal domicile in Belgium and has a permanent establishment in the Grand Duchy of Luxembourg within the meaning of Article 5 of the Belgo-Luxembourg double taxation treaty. Whereas the plaintiff incurred losses in the 1981 financial year through its Belgian operations, it made a profit from its Luxembourg establishment for the same period which, pursuant to Article 23(2)(1) of the double taxation treaty, was not subject to taxation in Belgium. In its corporation tax return for 1982, the plaintiff wishes, pursuant to Article 114 of the Belgian income Tax Code, [1] to carry forward its losses in Belgium in 1981 against the profits it made in Belgium in 1982.

3. The tax authorities refused to allow that deduction, however, on the ground that, in the absence of profits made in Belgium, any losses incurred in Belgium were to be set off against profits exempted by treaty. The authorities maintained that the loss incurred by the company in Belgium for the 1981 financial year should be set off against the profit made for the same year by its Luxembourg operation. It could not be set off against profits made in Belgium in 1982.

4. According to information provided by the referring court, the Hof van Boeroep te Gent, it was in this way that losses incurred in Belgium during 1981 were completely covered by the tax-exempt profits made in Luxembourg, thereby leading to a situation in which the plaintiff was unable to deduct

* Original language: German.

1 — Royal Decree on the coordination of the Income Tax Code of 26 February 1964, published in *Moniteur belge* of 10 April 1964, p. 3809.

its 1981 Belgian losses from its 1982 taxable income, which would have reduced its tax burden. Nor could the 1981 losses incurred in Belgium be deducted, for the purposes of assessing the amount of corporation tax due in Luxembourg, from the profits made in Luxembourg. It was thus that the plaintiff's profits made in Belgium, as well as those made by the establishment in Luxembourg, were subject to corporation tax, without the plaintiff being given the chance to deduct its Belgian losses from its taxable profits.

5. Had the plaintiff opened an establishment not in Luxembourg but in Belgium, it would have been perfectly able, according to the information provided by the referring court, to deduct these losses from its taxable income when assessing the corporation tax due. Thus, by having a permanent establishment in Luxembourg, the plaintiff has suffered tax disadvantages which it would not have suffered if that permanent establishment had been located in Belgium.

6. The referring court has therefore raised the question whether the application of Articles 66 and 69 of the Royal Decree implementating the Income Tax Code [2] (hereinafter: the 'Royal Decree'), which require that losses be set off against the tax-exempted profits of the Luxembourg operations, do not restrict the freedom of establishment as laid down in Article 52 of the EC Treaty. It has therefore referred the following question to the Court of Justice for a preliminary ruling:

'Does Article 52 of the Treaty of 25 March 1957 establishing the European Community preclude the application of national legislation of a Member State under which, for the purposes of assessment to corporation tax, a business loss incurred in that Member State during an earlier taxable period by a company established in that State can be offset against the profits made by that company during a later taxable period only to the extent to which that loss cannot be attributed to the profit made by a permanent establishment of that company in another Member State during that earlier taxable period, with the result that the loss thus attributed cannot be offset, in either of the Member States concerned, against the taxable income of that company for the purposes of assessment to corporation tax, whereas if the permanent establishment were located in the same Member State as the company, the business losses in question could certainly be set off against the taxable income of that company?'

II — Relevant provisions under Belgian tax law

7. The setting off of losses against profits made in the following financial year, as intended by the plaintiff, is possible under Article 114 of the Income Tax Code, which provides that business losses incurred dur-

2 — Royal Decree of 4 March 1965, published in *Moniteur belge* of 30 April 1965, p. 4722.

ing a taxable period may be set off against the profits made during the previous five taxable periods.

8. Article 66(2)(c) of the Royal Decree sets out the order in which losses are to be offset. Firstly losses incurred in Belgium are to be offset against Belgian profits, then, if those profits are insufficient, against profits taxable at a lower rate, and finally against profits exempted by treaty.

9. Pursuant to Article 69 of the Royal Decree, the previous losses referred to in Article 114 of the Income Tax Code are only to be offset in so far as those losses were not hitherto capable of being offset, or were not previously covered by profits exempted by treaty.

III — Pleadings of the parties

10. The plaintiff contends that, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law. The plaintiff maintains that Belgium has failed to do so in the present case, because the disputed rule violates Article 52 of the EC Treaty. It holds that Article 52 of the EC Treaty precludes discrimination on the ground of nationality in the area of freedom of establishment, as well as laying down obligations not just for the host Member State, but also for the Member State of origin. The plaintiff argues that even indirect obstacles to the freedom of establishment, e.g. fiscal disadvantages, are illegal.

11. The plaintiff contends that such disadvantages are present in the matter at issue here. The plaintiff demonstrates, with numerous examples, how a company with an establishment in another Member State could be required, on the basis of the rules contested here, to pay more in taxes than it had even earned during the period concerned. According to the table submitted by the plaintiff, that results from the fact that, in the present case, the losses incurred in Belgium can only be offset against the Luxembourg profits exempt from tax, and not against the profits made and subject to tax in Belgium. That meant in practice that losses could not be offset against taxable income, which thus became higher than the company's actual earnings. The plaintiff maintains that this situation would be different if it had an establishment in Belgium. It thus feels it has suffered a disadvantage or penalty for having a permanent establishment in another Member State. Even where such discrimination is minimal, it still infringes the freedom of establishment.

12. Since Belgium has not suggested any grounds in justification, the plaintiff argues that no examination need take place as to whether any such grounds exist. In any event, the plaintiff argues that such grounds must fail because the contested rule is disproportionate.

13. The Belgian Government does not see any restriction of the freedom of establishment in the present case. It maintains that the tax rule in question must be considered in an overall context, in which Belgian companies are taxed according to their world-wide income, i.e. the totality of profits and losses of all their operations (both at home and abroad), pursuant to Article 66 of the Royal Decree. The application of this Article, in conjunction with the double taxation treaties which Belgium has entered into with all Member States, leads, in most cases, to an advantageous outcome for companies, because losses incurred abroad can be offset against profits made in Belgium.

14. The Belgian Government maintains that within the calculations necessary to asses the amount of tax due, very complex questions arise, and thus it is unavoidable that, in certain rare cases, an undertaking may suffer disadvantages. Nevertheless the Belgian Government holds the view that Article 66 of the Royal Decree has no influence on the decision of an undertaking as to whether or not to open an establishment abroad. It holds that when a company decides to open an establishment in another Member State it is not capable of knowing in advance whether it will make losses and, if so, where. The difficulties experienced in the present case may be attributed, in the opinion of the Belgian Government, to differences between national taxation systems.

15. It is settled case-law[3] that such national taxation systems must avoid any overt or covert discrimination by reason of nationality. The Belgian Government denies the existence of any such discrimination in this case, referring to the judgment in *Schumacker*,[4] on the ground that a Belgian company with operations abroad cannot be said to be in the same situation as an undertaking operating solely in Belgium. In the latter case, profits and losses from all operations would be grouped together on one balance sheet, so that the problem of offsetting the losses of one of the operations against the company would not arise. An establishment operating abroad on the other hand is treated, from the point of view of taxation law, as a unit which is to be taxed in accordance with the law of the host State or, where applicable, the relevant double taxation treaty. An objectively comparable situation between both companies cannot — by definition — exist, because the permanent establishment system does not exist in Belgium.

16. The Belgian Government further points out that there is no discrimination between Belgian and foreign companies and that all Belgian companies with operations abroad are subject to the same treatment. The Belgian Government contends that, should it be necessary to amend the provisions in dispute here, the entire system of Belgian company taxation would have to be overhauled. In such an eventuality, there could be no certainty that the treatment accorded the offsetting of losses would remain as favourable as is the case at present.

3 — Judgment of 11 August 1995 in Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493, paragraph 16.

4 — Judgment of 14 February 1995 in Case C-279/93 *Finanzamt Köln-Altstadt* v *Roland Schumacker* [1995] ECR I-225.

17. Finally the Belgian Government reiterates its view that the present case does not involve a restriction of the freedom of establishment and asks why, if the Commission considers that there has been a clear infringement of Article 52 of the EC Treaty, it has not previously brought an action against Belgium, for failure to fulfil its obligations.

18. The Commission considers that in this case there is an obstacle to establishment in another Member State. The obstacle consists in the fact that a Belgian company wishing to open an establishment must first consider whether to do so in another Member State or in Belgium, because, in the event of it opening an establishment abroad and incurring losses in Belgium, it may in certain circumstances not be able to offset such losses. That would be so if its operations in the other Member State were to make profits, which, the Commission argues, is the purpose of opening an establishment.

19. On the question of carrying forward losses itself, the Commission argues that, although Community law in its present state does not require that such an opportunity be given, where a Member State has provided in its tax system for the deduction of losses, this must be permitted without discrimination and in accordance with the judgment in *Daily Mail.* [5] The Commission considers that the reference should be viewed less from the angle of non-deductibility of losses than from that of inequality of treatment of Belgian companies wishing to carry on business in another Member State by opening an establishment there. The Commission maintains that, pursuant to Articles 66 and 69 of the Royal Decree, companies with their tax domicile in Belgium and which operate establishments in another Member State are no longer able to deduct, or at any rate fully to deduct, losses incurred in Belgium from profits made in Belgium. That is not the case for Belgian companies which do business only in Belgium, or which do business abroad but not through a permanent establishment. Belgian companies with an establishment in another Member State are thereby disadvantaged.

20. With the help of a worked example, the Commission also comes to the conclusion that these companies are overtaxed and could thereby be dissuaded from opening an establishment in another Member State. In its view, that represents a restriction on the freedom of establishment. Such unequal treatment results not from the double taxation treaty but from the Belgian system. The Commission disputes the Belgian Government's assertion that this is an isolated case. At issue here is the system, which applies to all Belgian undertakings in the same situation. Referring to the *Dassonville* [6] case-law, the Commission argues that it is immaterial whether the restriction in question is potential or actual.

5 — Judgment of 27 September 1988 in Case 81/87 *The Queen v H.M. Treasury and Commissioners of Inland Revenue, ex parte Daily Mail and General Trust PLC* [1988] ECR 5483.

6 — Judgment of 11 July 1974 in Case 8/74 *Procureur du Roi v Dassonville* [1974] ECR 837.

21. The Commission considers that this is not a problem of disparity between national systems, because only Belgian taxpayers are concerned. As for the Belgian Government's claim that the position of a Belgian establishment is not comparable with that of a foreign branch, the Commission argues that the present case does not concern the taxation of the profits of the foreign establishment. That is a matter for the double taxation treaty. At issue here is the question why it was not possible to offset losses. The reason given here is the fact the profits were made in a branch in another Member State. In the Commission's opinion that represents discrimination.

22. The Commission finally considers the question of justification, but points out that the Belgian Government has itself failed to make any pleadings in that regard. In particular, the Commission rejects any justification on the basis of fighting tax evasion or tax fraud. The pursuit of an activity in another Member State by means of a permanent establishment there cannot in itself be regarded as an indication of evasion or fraud. Moreover, the offsetting of losses, limited in time, only takes place under Belgian sovereignty and can therefore easily be checked.

23. The Commission can see that the inability to offset losses might be thought to counterbalance the fact that profits made in Luxembourg are exempt from tax, but does not view that as representing any sort of justification.

24. The Belgian Government — according to the Commission — has argued that it was by means of the provisions at issue that it wished to preclude the double offsetting of losses. However, whilst making this point, the Belgian Government has based its argument upon precisely the opposite set of circumstances, namely that losses were incurred in Luxembourg but profits made in Belgium. The Commission maintains that in the present case the double offsetting of losses is completely out of the question, because Luxembourg, in application of the principle of territoriality, does not permit the deduction of losses incurred in Belgium. The present case, therefore, does not concern excluding double offsetting of losses, but rather the double exclusion of the offsetting of losses. The Commission argues that, in addition to the measures taken, other means are available for excluding double offsetting. In this context the Commission refers to Article 23(1)(5) of the double taxation treaty which applies to the opposite case scenario and demonstrates that the possibility of offsetting losses may be provided without undermining the taxation system.

IV — Legal analysis

25. Belgium is correct in pointing out that direct taxes fall under the competence of Member States. That competence must, however, in accordance with the established case-law, [7] be exercised consistently with Community law, in this case the freedom of establishment.

7 — Judgment of 16 July 1988 in Case C-264/96 *Imperial Chemical Industries (ICI)* v *Kenneth Hall Colmer (HM Inspector of Taxes)* [1998] ECR I-4695, paragraph 19, with further references to the judgment in Case C-279/93 *Schumacker*, cited in footnote 4, paragraph 21; to the judgment in Case 80/94 *Wielockx*, cited in footnote 3, paragraph 16; to the judgment of 27 June 1996 in Case C-107/94 *P.H. Asscher* v *Staatssecretaris van Financiën* [1996] ECR I-3089, paragraph 36; and to the judgment of 15 May 1997 in Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions* [1997] ECR I-2471, paragraph 19.

26. The Commission maintains that the contested provisions could infringe the freedom of establishment, which Article 52 of the EC Treaty guarantees to nationals of the Member States, and which also applies to companies pursuant to Article 58 of the EC Treaty (now Article 48 EC).

27. The Court has consistently held that:

'As far as the provisions concerning freedom of establishment are concerned, it must be pointed out that, even though, according to their wording, those provisions are mainly aimed 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 which comes within the definition contained in Article 58 of the Treaty'. [8]

28. That is the case here. At issue is whether Belgium is hindering the establishment of a Belgian company in another Member State by refusing it the possibility, under certain circumstances, of offsetting its losses. A Belgian company that is contemplating opening a permanent establishment in another Member State must take into account the fact that under certain circumstances — e.g. profits in Luxembourg, losses in Belgium — it may not be able to offset its losses. It would not be subject to this disadvantage if, instead, it were to open a further establishment in Belgium. The eventuality of such a disadvantage is certainly capable of preventing a company from opening an establishment in another Member State. Its freedom of establishment is thereby restricted.

29. In this context, it is immaterial that the company — as has been argued by the Belgian Government — is not capable of knowing in advance whether, and if so where, it will incur losses. When contemplating opening an establishment in another Member State the company must consider and weigh up all possible contingencies. In doing so it is certainly plausible that the possibility of not being able to offset losses, which would not apply to an establishment in Belgium, would cause the company to distance itself from the idea of opening an establishment in another Member State. Even if Belgium argues that the circumstances at the heart of the present dispute arise only very rarely, because establishments located abroad often, unlike the present case, incur losses, that is also immaterial here. First it must be assumed— as the Commission has pointed out — that a company opens an establishment in another Member State in order to make a profit. Thus, when planning on doing so, it will invariably envisage this eventuality as possible or desirable. Moreover, the extent to which the freedom of establishment has been infringed is of no consequence. As the Court has stated, 'Article 52 prohibits all discrimination, even if only of a limited nature'. [9] Even if this case did concern a special and very rare set of circumstances,

8 — Judgment of 18 November 1999 in Case C-200/98 *X AB, Y AB v Riksskatteverket* [1999] ECR I-8261, paragraph 26, with further reference to the judgment in Case 81/87 *Daily Mail and General Trust*, cited in footnote 5, and to the judgment in C-264/96 *ICI*, cited in footnote 7, paragraph 21.

9 — Judgment of 28 January 1986 in Case 270/83 *Commission v France* [1986] ECR 273, paragraph 21.

that would not alter the fact that an infringement of the freedom of establishment is at issue.

30. In any event, the case is not purely hypothetical, because the plaintiff actually finds itself in this — albeit very particular — situation. Any analysis must be made on the basis of the concrete circumstances of any given situation, even if these do not correspond to the 'regular case scenario'. It is sufficient that any national measure may potentially result in fundamental freedoms being restricted. As the Court of Justice has stated: [10] 'Article 52 preclude(s) any national measure, (which)... even though it is applicable without discrimination on grounds of nationality, is liable to hamper or to render less attractive the exercise, by Community nationals... of fundamental freedoms guaranteed by the Treaty'.

31. In the Belgian Government's view, the disadvantage of the tax provisions at issue is a result of the differences between the individual national taxation systems which are still in existence at the current, still uncompleted, state of harmonisation. However, the causes of the disadvantage experienced here are not differing rates of taxation in the individual Member States, or diverging assessments of the personal situation of the party required to pay tax, such as was the case in *Gilly*. [11] The disadvantage experienced by the plaintiff is due much more to the fact that, in the present case, Belgium offsets the losses with the tax-exempted profits made by the Luxembourg establishment instead of deducting them from profits made in Belgium. Even the provisions of the double taxation treaty are of no relevance in this context.

32. Basing its reasoning upon the Court's judgment in *Schumacker*, [12] the Belgian Government additionally contends that Belgian companies operating exclusively in Belgium and those operating an establishment in another Member State do not find themselves in a similar situation. Even if, under Belgian tax law, business operations in Belgium are taxed as a whole in Belgium, and it is thereby impossible, by definition, for a Belgian company to have an establishment within the meaning of a foreign establishment, that does not change the fact that a Belgian company, with business operations at various places within Belgium, may make unlimited use of the possibility of offsetting losses. If the Belgian Government now maintains that individual establishments, although they are not considered as such in Belgium, are subject to a common assessment and no distinction is made between them, that nevertheless means that losses incurred by the individual Belgian 'establishments' are taken into account when taxing the company as a whole. Belgian companies which operate at least one establishment in another Member State are not able fully to offset any losses they incur. To conclude therefrom that the plaintiff is in an objectively different situation from other Belgian companies is incorrect.

33. The Court has instituted such a distinction between residents and non-residents of

10 — Judgment of 31 March 1993 in Case C-19/92 *Kraus* v *Land Baden-Württemberg* [1993] ECR I-1663, paragraph 32; judgment of 30 November 1995 in Case C-55/94 *Gebhard* v *Consiglio dell' Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, paragraph 37.

11 — Judgment of 12 May 1998 in Case C-336/96 *Gilly* v *Directeur des Services Fiscaux du Bas-Rhin* [1998] ECR I-2793, paragraphs 47 and 50.

12 — Judgment in Case C-279/93 *Schumacker*, cited in footnote 4.

a Member State. In the *Gschwind* [13] case, which concerned the taxation of non-residents, the Court concluded that 'the situations of residents and of non-residents in a given State are not generally comparable, since income received in the territory of a State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode...'.

34. The present case, however, concerns residents who are taxed at their 'place of residence', whereby the taxation differs according to the seat of the individual branches. Beyond that, no objective difference is evident between those companies exclusively active in Belgium and those operating an establishment in another Member State. Nor is such a difference grounded in the fact that part of the revenues of a Belgian undertaking operating an establishment abroad are taxed abroad and the losses incurred there may sometimes also be offset there. Precisely because, in the present case, the losses incurred in Belgium may not be offset against the profits made in Luxembourg, the situation of both companies is comparable. Both wish to offset the losses incurred in Belgium against the profits made there. The fact that one company may not do so, because it has an establishment in Luxembourg which, during the period of time in question, made a profit, represents an obstacle to the freedom of establishment.

35. In this context the fact that in Belgium Belgian and foreign companies are treated equally — as the Belgium Government contends — is irrelevant. The present case does not concern discrimination against a foreign company, but rather the hindrance of a Belgian company, which has an establishment in another Member State. Of equally little importance is the fact that all Belgian companies with a foreign establishment are treated equally, so long as all such Belgian companies are treated differently from Belgian undertakings which do business only in Belgium.

36. In its judgment in *Gebhard*, the Court of Justice stated that, in order to be justified, restrictive national measures likely to transfer the exercise of fundamental freedoms guaranteed by the Treaty or make such exercise less attractive had to fulfil four conditions: 'They must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and

13 — Judgment of 14 September 1999 in Case C-391/97 *Frans Gschwind v Finanzamt Aachen-Außenstadt* [1999] ECR I-5451, paragraph 22 with further reference to the judgment in *Schumacker*, cited in footnote 4, paragraph 31 et seq.

they must not go beyond what is necessary in order to attain it...'.[14]

37. The Belgian Government has submitted no pleadings in favour of the contested measure's justification. It has merely affirmed that one must view the taxation system as a whole, and that to amend the measure in question would entail the complete overhaul of the system, perhaps leading to the worsening of any existing tax disadvantages. However, the Belgian Government has not substantiated these assumptions or made any arguments in their favour.

38. The Court of Justice has in the past recognised the need to maintain the cohesion of tax systems, as it did, for example, in *ICI*,[15] in which the Court stated: 'Nevertheless, in the cases cited, there was a direct link between the deductibility of contributions from taxable income and the taxation of sums payable by insurers under old-age and life assurance policies, and that link had to be maintained in order to preserve the cohesion of the tax system in question ...'.

39. The Belgian Government has not explicitly mentioned the coherence of the Belgian tax system as grounds for justification in the present case. Nor has it claimed that a link exists under the Belgian tax system between the possibility of offsetting losses or tax preferences and the manner in which its subjects are taxed. In the present case, one might be led to believe that the advantage of having tax-exempt profits in Luxembourg was meant to be counterbalanced by not being able to offset losses. However Belgium has not made any assertions to that effect, nor would that lead to any justification in the present case, because there is no direct link between the losses incurred in Belgium and the profits made in Luxembourg.

40. The conclusion must therefore be that the Belgian measure at issue here restricts the freedom of establishment of Belgian companies in other Member States.

V — Costs

41. The costs incurred by the Commission, which has 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.

14 — Judgment in Case C-55/94 *Gebhard*, cited in footnote 10, paragraph 37.

15 — Judgment in Case C-264/96 ICI, cited in footnote 7, paragraph 29, with further reference to the judgment of 28 January 1992 in Case C-204/90 *Bachmann* v *Belgian State* [1992] ECR I-249, and to the judgment in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

VI — Conclusion

42. In light of the foregoing considerations, I recommend that the Court answer the question referred to it in the following terms:

Article 52 of the EC Treaty (now, after amendment, Article 43 EC) precludes national legislation of a Member State under which, for the purposes of assessment to corporation tax, a business loss incurred in that Member State by a company of that Member State during an earlier taxable period can be deducted from the profits made by that company during a later taxable period only to the extent to which that loss cannot be set off against the profit for that earlier taxable period made by a permanent establishment of that company in another Member State, with the result that the loss thus offset cannot be deducted, in either of the Member States concerned, from the taxable income of that company for the purposes of assessment to corporation tax, whereas, if the permanent establishment were located in the same Member State as the company, the business losses in question could certainly be deducted from the taxable income of that company.