OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 July 2005 [1]

I — Introduction

1. The present case concerns the law in force in Sweden on the taxation of proceeds of sale which is applicable when a limited company resident in that State — for example in the course of a share capital reduction — repurchases shares from its own shareholders. At issue, essentially, is the question of whether the provisions on the free movement of capital (Articles 56 EC and 58 EC) preclude a difference in treatment between shareholders domiciled or permanently resident in Sweden and those shareholders who are not domiciled or permanently resident in Sweden, in so far as the first group are permitted to deduct their acquisition costs [2] from the taxable amount whereas that possibility is denied to the second group. [3]

2. Furthermore, it must be determined whether any difference in treatment may be compensated for by more favourable provisions resulting from a double taxation agreement which is in force between Sweden and the shareholder's State of residence.

II — Legal framework

A — *Community law*

3. The Community law framework for this case can be found in the provisions on free movement of capital.

1 — Original language: German.

2 — The 'acquisition costs' of a share are usually taken to mean its price (that is to say, its market price or its issue price) at the time at which it was acquired, plus transaction charges, if any.

3 — From the Community law point of view it makes no difference to the legal appraisal of the case whether the national provision refers to the *domicile* or to the *permanent residence* of a person. Accordingly, where for reasons of simplicity reference is made below only to *residence*, the observations apply in the same way to the criterion of *domicile*.

4. The general prohibition on restrictions on the movement of capital between Member States and between Member States and third countries is provided for by Article 56(1) EC:

'Within the framework of the provisions set out in this chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.'

5. As regards the scope for action retained by the Member States, reference must be made to Article 58 EC, which reads — in extract — as follows:

'1. The provisions of Article 56 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;

...

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 56.'

B — *National law*

6. As regards the relevant provisions of Swedish law, reference must be made both to Lag 1970:624 om kupongskatt [4] and to the double taxation agreement between Sweden and France. In so far as they are relevant, their provisions can be summarised as follows:

The Swedish Law on Dividend Tax

7. If a Swedish share company repurchases shares from a shareholder resident in Sweden, the payment made to the shareholder is taxed in Sweden as a capital gain. For a

4 — Lag 1970:624 om kupongskatt ('Law on Dividend Tax').

private individual that means that a tax rate of 30% is charged on the proceeds of sale less the acquisition costs.

8. If, however, the natural person from whom the shares are repurchased is not domiciled or permanently resident in Sweden, the payment made to that person is treated as a dividend distribution. Under Paragraphs 1, 2(2), 4 and 5 of the Swedish Law on Dividend Tax, a dividend tax of 30% is levied on that payment, and the acquisition costs *cannot* be deducted.[5] Paragraph 7 of the Law on Dividend Tax provides that on payment of the dividend the dividend tax is retained, as withholding tax, by a central securities administrator if the available information does not make it clear that the recipient of the dividend is not liable to tax.

9. If dividend tax has been charged in a higher amount than that which ought to be charged according to a double taxation agreement, there is a right to a refund under Paragraph 27 of the Law on Dividend Tax.

The Franco-Swedish double taxation agreement

10. Article 10(1) of the double taxation agreement in force between France and Sweden[6] provides that dividends distributed by a company resident in one contracting State to a person resident in the other contracting State are taxable in the latter State.

11. It follows from Article 10(2) of the double taxation agreement that such dividends may be taxed also in the contracting State in which the company making the distribution is resident. Where, however, the person actually entitled to those dividends is a natural person resident in the other contracting State, the tax so levied may not exceed 15% of the gross amount of the dividends.

12. Under Article 10(5) of the double taxation agreement, dividends within the

5 — This presupposes that the dividend payments are not attributable to income from commercial activity carried out from a permanent establishment in Sweden.

6 — Agreement between the Government of the French Republic and the Government of the Kingdom of Sweden for the avoidance of double taxation and the prevention of tax evasion in respect of taxes on income and wealth (in French: *Convention entre le Gouvernement de la République française et le Gouvernement du Royaume de Suède en vue d'éviter les doubles impositions et de prévenir l'évasion fiscale en matière d'impôts sur le revenu et sur la fortune*), signed in Stockholm on 27 November 1990, published in French in the JORF of 8 April 1992, as corrected in the JORF of 22 August 1992, and available in French at http://www.finances.gouv.fr/minefi/europe/index.htm (last visited on 26 May 2005).

meaning of the above provisions include income from shares and such income as at the entry into force of the double taxation agreement was treated for tax purposes as equivalent thereto under the law of the State of residence of the distributing company.

13. It follows from Article 13(6) of the double taxation agreement that a capital gain arising from the sale of shares is taxable only in the contracting State in which the seller is resident.

14. According to the information provided by the referring court, the double taxation agreement is based on a model convention [7] drawn up by the Organisation for Economic Cooperation and Development (OECD), for which the OECD has also compiled commentaries. [8]

15. It follows from the commentary [9] to Article 10 of the OECD Model Convention [10] that not only is the disbursement of profit decided at the annual shareholders' meeting to be regarded as a dividend, but also monetary advantages such as bonus shares, profits on liquidation and hidden dividends.

16. The commentary [11] to Article 13 of the OECD Model Convention [12] indicates that, in the event of a sale of shares in a company in connection with a reduction in its share capital or its liquidation, the difference between the sale price and the nominal value of the shares can also be treated in the State in which the company is resident as a distribution of accumulated profits rather than as a capital gain. According to the commentary, Article 13 of the Model Convention does not prevent the taxing of such a distribution according to the tax rates laid down in Article 10.

7 — *OECD Income and Capital Model Convention.* On the signing of the double taxation agreement between France and Sweden the Model Convention of 11 April 1977 applied (ISBN 92-64-11693-1). It is, however, identical in content — in so far as relevant in the present case — to the new OECD Model Convention of 28 January 2003, *OECD Model Convention with respect to taxes on income and on capital,* available on the OECD website, last visited on 30 May 2005, at: http://www.oecd.org/document/37/0,2340,en_2649_33747_1913957_1_1_1_1,00.html).

8 — *Model Tax Convention on Income and on Capital,* OECD loose-leaf publication, available at http://www.oecdbookshop.org/oecd/display.asp?lang=EN&sf1=identifiers&st1=232002081p1 (last visited on 30 May 2005), January 2003 version.

9 — Paragraph 27 of the commentary on the 1977 OECD Model Convention. In so far as relevant in the present case, that commentary is identical in content to Paragraph 28 of the commentary on the OECD Model Convention, January 2003 version, to which the national court refers in its order for reference.

10 — Article 10 of the double taxation agreement is based on this article.

11 — Paragraph 31 of the commentary on the OECD Model Convention of 1977, identical in terms of content to paragraph 31 of the commentary on the OECD Model Convention, January 2003 version.

12 — Article 13 of the double taxation agreement is based on this article.

III — Facts and main proceedings

17. Margaretha Bouanich is resident in France. She was a shareholder in the Swedish limited company Förvaltnings AB Ratos. On 2 December 1998 she sold her shareholding back to the company at a cash value of SEK 8 639 402. Pursuant to the Swedish Law on Dividend Tax and the double taxation agreement, dividend tax on the sum paid at the rate of 15% was retained at source, which corresponds to a sum of SEK 1 295 910.30.

18. Ms Bouanich thereupon lodged a complaint with the competent tax office [13] in Gävle, seeking a refund of the whole amount of dividend tax retained. Alternatively, she claimed a refund of that part of the dividend tax charged on the basis of the nominal value of the repurchased shares, which thus represents taxation of that nominal value too.

19. On 28 September 1999 the tax office accepted Ms Bouanich's alternative claim and refunded to her dividend tax in the amount of SEK 166 999.

20. She brought proceedings against the tax office's decision before the Länsrätten i Dalarnas län, [14] seeking a declaration that no dividend tax should be charged on the payment to her and that the outstanding amount of the dividend tax retained at source should also be refunded to her.

21. By judgment of 29 March 2001 the Länsrätten rejected Ms Bouanich's claim. She appealed against the judgment of the Länsrätten to the referring court, the Kammarrätten i Sundsvall [15].

IV — Questions referred and procedure before the Court

22. The Kammarrätten i Sundsvall has referred the following three questions to the Court for a preliminary ruling.

13 — Previously Skattemyndigheten (Local Tax Authority), now Skatteverket (Local Tax Board).

14 — County Administrative Court for Dalarna.

15 — Administrative Court of Appeal.

(1) Do Articles 56 EC and 58 EC permit a Member State to tax a payment in respect of a share repurchase, paid out by a limited company in the Member State, in the same way as a dividend, without there being a right to deduct the cost of acquisition of the repurchased share, if the payment is made to a shareholder who is not domiciled or permanently resident in the Member State, whereas a share repurchase payment made by such a company to a shareholder domiciled or permanently resident in the Member State is instead taxed as if it were a capital gain, with a right to deduct the cost of acquisition of the repurchased share?

(2) If the answer to Question 1 is no: When the double taxation agreement between the Member State in which the limited company is resident and the Member State in which the shareholder is resident provides that there is to be a lower rate of taxation than that applied to a share repurchase payment made to a shareholder in the first Member State, and a shareholder in the second Member State, with reference to the commentaries on the OECD Model Tax Convention, is also permitted a deduction corresponding to the nominal value of the repurchased shares, do the articles mentioned in the previous question permit, in those circumstances, a Member State to apply a rule such as that set out above?

(3) Do Articles 43 EC and 48 EC permit a Member State to apply a rule such as that set out above?

23. In the proceedings before the Court Ms Bouanich, the Swedish Government and the Commission have submitted written observations.

V — Compatibility of a national rule such as the Swedish one with the provisions on free movement of capital (first question)

24. By its first question the referring court essentially wishes to know whether the provisions on free movement of capital (Articles 56 EC and 58 EC) preclude a national rule such as the Swedish one according to which, in the event of a limited company resident in a Member State repurchasing its own shares from shareholders domiciled or permanently resident in that Member State, those shareholders are

permitted by the Member State to deduct their acquisition cost from the taxable proceeds of sale, whereas that possibility is denied to shareholders not domiciled or permanently resident in that Member State. The effects of any double taxation agreement which may apply are not the subject of this question, but only of the second question.

25. According to settled case-law, while direct taxes are within the competence of the Member States, they must however exercise their powers in compliance with Community law, [16] that is to say, in compliance also with the provisions on free movement of capital (Article 56 EC et seq).

A — *The notion of capital movements*

26. The EC Treaty contains no definition of the notion of capital movements. In general terms, any transfer of financial or real capital beyond the borders of a Member State which is not connected with the supply of goods or services and thus falling within the free movement of payments can be included as a capital movement. [17] Furthermore, the 'Nomenclature of Capital Movements' set out in Annex I to Directive 88/361, [18] notwithstanding the fact that it does not contain an exhaustive list of possible transactions, indisputably has an indicative value for the purposes of defining the notion of capital movements. [19]

27. On that basis the free movement of capital includes not only the unrestricted purchase of shares in domestic companies by foreign investors [20] but also in the same way the liquidation or assignment of those

16 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; Case C-242/03 *Weidert and Paulus* [2004] ECR I-7379, paragraph 12; Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 19; and Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 14.

17 — In contrast, the principle of the free movement of payments (Article 56(2) EC, formerly Article 73b(2) of the EC Treaty) is intended to enable a person liable to pay a sum of money for a supply of goods or services or in connection with a capital investment to discharge that contractual obligation voluntarily without undue restriction and to enable the creditor freely to receive such a payment (Case C-412/97 *ED* [1999] ECR I-3845, paragraph 17, and Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377, paragraphs 21 and 22).

18 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ 1988 L 178, p. 5.

19 — See Case C-222/97 *Trummer and Meyer* [1999] ECR I-1661, paragraph 21, the 'golden shares' judgments in Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, paragraph 37, Case C-483/99 *Commission* v *France* [2002] ECR I-4781, paragraph 36, and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809, paragraph 37, and also Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, paragraph 27, and Case C-376/03 *D.* [2005] ECR I-5821, paragraph 24.

20 — Headings I and III of the Nomenclature of Capital Movements (cited in point 26 of this Opinion) may serve as a point of reference.

shares, repatriation of the proceeds of such a liquidation, or immediate use of such proceeds within the limits of Community obligations.[21]

28. Thus, if a shareholder sells his shareholding — for example, in the course of a share capital reduction — back to the company which issued them, that transaction falls within the scope of the free movement of capital in the same way as does his original acquisition of those shares.

B — *Restrictions on capital movements*

29. Article 56(1) EC sets out the principle that all restrictions on the movement of capital between Member States are prohibited.

The concept of a restriction

30. Any measure that makes the cross-border transfer of capital more difficult or less attractive and is thus liable to deter the investor from making such a transfer constitutes a restriction on capital movements.[22] In that respect the concept of a restriction on capital movements corresponds to the concept of a restriction that the Court has developed in connection with the other fundamental freedoms.[23]

31. Moreover, the free movement of capital encompasses also, as do all the fundamental freedoms, a prohibition on discrimination, that is, a prohibition on differences in treatment as between operators on financial markets on the basis of their nationality, place of residence or the place where such capital is invested which is not objectively justified. It is true that such a prohibition on discrimination is — unlike previously in Article 67(1) of the EC Treaty — not currently to be found in the wording of Article 56(1) EC, and that at the most it still results indirectly from Article 58(3) EC. It cannot in any way be deduced from those circumstances, however, that nowadays following full liberalisation of capital movements the scope of that fundamental freedom is less extensive than it was previously. On the contrary, the prohibition on discri-

21 — To that effect, see the fourth indent of the introduction and the explanatory notes to the Nomenclature of Capital Movements (cited in point 26 of this Opinion), and in addition *Trummer and Meyer*, cited in footnote 19, paragraph 22.

22 — To that effect *Trummer and Meyer*, cited in footnote 19, paragraph 26; and see also my Opinion in Case C-319/02 *Manninen* [2004] ECR I-7498, point 28.

23 — See simply the leading cases: Case 8/74 *Dassonville* [1974] ECR 837, paragraph 5, Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12, and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37, and in addition my Opinion in *Manninen*, cited in footnote 22, point 28.

mination constitutes the core of each and every fundamental freedom, and continues therefore as a matter of course to be presupposed by Article 56(1) EC.[24]

Legal characterisation of a provision such as the Swedish one

32. A rule such as the Swedish one subjects taxpayers who have acquired shares in a company resident in Sweden to differing provisions, depending on whether or not they are resident in Sweden. In the event of a company repurchasing its own shares, taxpayers resident in Sweden are permitted to deduct their acquisition costs, that is to say the price of the share[25] at the time of its acquisition plus transaction charges, if any, from their taxable proceeds of sale, whereas taxpayers who are not so resident are precluded from doing so. That constitutes *a difference in treatment as between operators on financial markets* on account of their place of residence.[26]

33. At the same time a rule such as the Swedish one also contains, however, a *restriction on capital movements*. It is true that the rule directly concerns neither acquisition nor disposal of investments in a company, but only the tax treatment of income derived from capital investments or from their liquidation. However, as the objective of the investment is mostly to earn net income, the tax treatment of the income or proceeds usually also affects the attractiveness of the capital investment itself.[27] If investors not resident in Sweden who have acquired shares in a company resident in Sweden are, in the event of the issuing company repurchasing its shares, unable to deduct their acquisition costs from the proceeds of sale which are taxable in Sweden, that will generally reduce their net income and thus render it less attractive for them to make a cross-border capital investment in Sweden.

34. Moreover, the rule also has a restrictive effect for share companies resident in Sweden, since it hinders them in securing capital from outside of Sweden: after all, for the reasons set out, the acquisition of shares in a company resident in Sweden has tax disadvantages for persons not resident in Sweden.

24 — Also to that effect, the 'golden shares' judgments *Commission* v *Portugal*, paragraph 44, and *Commission* v *France*, paragraph 40, both cited in footnote 20, in which the Court held that Article 56(1) EC (previously Article 73b(1) of the EC Treaty) lays down a general prohibition on restrictions on the movement of capital between Member States and that that prohibition *goes beyond the mere elimination of unequal treatment, on grounds of nationality, as between operators on the financial markets*. From that it can be concluded that the free movement of capital in any event also encompasses a prohibition on such unequal treatment.

25 — Market price or issue price.

26 — Since most shareholders who are domiciled or permanently resident in Sweden also possess Swedish nationality whereas shareholders who are not so domiciled or permanently resident do not, the Swedish rule results in addition *indirectly* in *unequal treatment* of operators on the financial markets on account of their nationality.

27 — In the same vein also my Opinion in *Manninen*, cited in footnote 22, point 29.

C — *Justification*

35. The free movement of capital, as a fundamental principle of the Treaty, may be restricted by national rules only if they are justified on the grounds referred to in Article 58(1) EC or by overriding requirements of the general interest which are applicable to all persons and undertakings pursuing an activity in the territory of the host Member State. Furthermore, in order to be so justified, national legislation must be suitable for securing the objective which it pursues and must not go beyond what is necessary in order to attain it, so as to accord with the principle of proportionality. [28]

36. In the present case there are no indications whatsoever that a rule such as the Swedish one could be justified by overriding requirements of the general interest. However, justification on the basis of Article 58(1)(a) EC, [29] which permits Member States to apply 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, [30] falls to be considered.

37. Article 58(1)(a) EC, as a derogation from the fundamental principle of free movement of capital, must be interpreted strictly and cannot be interpreted as meaning that any tax legislation making a distinction between taxpayers by reference to the place where they reside or invest their capital is automatically compatible with the Treaty. The derogation in Article 58(1)(a) EC is itself limited by Article 58(3) EC, which provides that the national provisions referred to in Article 58(1) must not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56 EC. [31]

28 — See the 'golden shares' cases, *Commission* v *Portugal*, paragraph 49, *Commission* v *France*, paragraph 45, and *Commission* v *Belgium*, paragraph 45, and the recent judgment in *Commission* v *Italy*, paragraph 35, all cited in footnote 19; to the same effect, the earlier judgment in Case C-54/99 *Église de scientologie* [2000] ECR I-1335, paragraph 18.

29 — According to Declaration No 7 to the Treaty of Maastricht that provision is only to be applied to rules of national tax law which which were in existence at the end of 1993. In that respect the relevant date for Sweden should be its date of accession, that is to say 1 January 1995. Given the absence of contradictory information on the national legal framework, it will be assumed below that the Law on Dividend Tax in the version applicable in the main proceedings was already in force at that date.

30 — In the same vein also the consistent case-law on the other fundamental freedoms, see only *Schumacker*, paragraphs 31 to 34, and *Royal Bank of Scotland*, paragraph 27, cited in footnote 16.

31 — *Manninen*, cited in footnote 16, paragraph 28; in the same vein the earlier judgment *Église de scientologie*, cited in footnote 28, paragraph 18, with regard to Article 58(1)(b) EC.

38. A distinction must therefore be made between differential treatment which is permitted under Article 58(1)(a) EC and arbitrary discrimination which is prohibited by Article 58(3) EC. In that respect, case-law demonstrates that for a difference in treatment to be capable of being regarded as compatible with the Treaty provisions on the free movement of capital, it must concern situations which are not objectively comparable or be justified by overriding reasons in the general interest. [32] In order to be justified, moreover, the difference in treatment between different categories of taxpayers must not go beyond what is necessary in order to attain the objective of the legislation. [33]

39. According to the available information it can be assumed that shareholders resident in Sweden and shareholders not so resident are comparably situated. Irrespective of a shareholder's residence, in the event of a company repurchasing its own shares the costs of acquisition incurred are directly connected to the proceeds of sale later received. The very condition for receiving proceeds of sale in the event of a share repurchase is the investment of capital. To that extent, the present case does not differ therefore from, for example, *Gerritse* in which the Court assumed that residents and non-residents were comparably situated as regards their business expenses incurred in generating their income. [34] Just as in *Gerritse* there was no objective reason for denying non-residents the ability to deduct their business expenses, in the present case there is equally no apparent objective reason for precluding shareholders not resident in Sweden from deducting their acquisition costs. [35]

40. A rule such as the Swedish one does not result therefore in a permitted difference in treatment within the meaning of Article 58(1)(a) EC but in arbitrary discrimination which is prohibited by Article 58(3) EC.

41. In the light of these observations I have reached the conclusion that the provisions on the free movement of capital (Articles 56 EC and 58 EC) preclude a national provision under which, where a share company resident in a Member State repurchases its own shares, that Member State allows shareholders domiciled or permanently resident in that Member State to deduct their acquisition costs from their taxable proceeds

32 — *Manninen*, paragraph 29, and *Verkooijen*, paragraph 43 with further references, both cited in footnote 16.

33 — To the same effect, *Manninen*, cited in footnote 16, paragraph 29.

34 — Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 27, with regard to the freedom to provide services.

35 — Similarly, *Royal Bank of Scotland*, cited in footnote 16, paragraph 27 et seq, and Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraphs 48 and 49, in both of which cases the Court reached the conclusion that it is discriminatory to grant a tax allowance to residents, but not to non-residents.

of sale, whereas that possibility is denied to shareholders not domiciled or permanently resident in that Member State.

VI — The implications of a double taxation agreement (second question)

42. By its second question the referring court essentially wishes to know whether the conclusion reached on the first question is in any way modified when a double taxation agreement is taken into account which results in an upper limit being placed on the tax charge on a shareholder not domiciled or permanently resident in the Member State at issue and which, when interpreted in the light of the OECD commentary on its relevant Model Convention, opens up the possibility of deducting the nominal value of the shares from the taxable proceeds of sale.

43. A step-by-step approach is advisable when answering this question. Firstly the preliminary question must be examined whether double taxation agreements may be taken into consideration at all when determining the compatibility of national tax provisions with the fundamental freedoms (on this, see below, section A). It must then be examined whether the restriction on the free movement of capital which has been established can be entirely eliminated by the double taxation agreement applicable in the present case (on this, see below, section B).

A — *The relevance of double taxation agreements in general*

44. The Commission appears to consider double taxation agreements such as the Franco-Swedish one to be generally irrelevant when determining the compatibility of national tax provisions with the fundamental freedoms.[36] In so doing, it relies on the *'Avoir fiscal'*[37] and *Saint-Gobain*[38] judgments. Ms Bouanich makes a similar argument relying on *Eurowings Luftverkehr*.[39]

36 — In point 41 of its written observations the Commission argues that observance of Community law cannot depend on the content of the double taxation agreement concluded between two Member States; moreover a restriction [on a fundamental freedom] cannot be justified by the fact that the individual concerned possibly benefits from other tax advantages.

37 — Case 270/83 *Commission* v *France* (*'Avoir fiscal'*) [1986] ECR 273, paragraph 26.

38 — Cited in footnote 35, paragraph 54.

39 — Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447.

45. I do not share that view.

46. The abolition of double taxation within the Community constitutes one of the objectives of the Treaty; that can in fact also be seen from the EC Treaty itself, in the second indent of Article 293 EC. In the absence of unifying or harmonising measures at Community level, Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements. In that context, Member States are at liberty, in the framework of bilateral agreements concluded in order to prevent double taxation, to determine the connecting factors for the purposes of allocating powers of taxation as between themselves.[40]

47. In the exercise of the power of taxation so allocated, Member States may, nevertheless, not disregard Community rules.[41] This has in particular two consequences. First, a Member State may not subject its compliance with the duties imposed by Community law, above all its observance of the directly applicable fundamental freedoms, to a condition of reciprocity or render it in any other way dependent on the content of an agreement concluded with another State (*condition of reciprocity*).[42] And, second, a tax disadvantage which infringes a fundamental freedom cannot be justified by the possible existence of other advantages which have nothing to do with the individual case in question (*reference to other advantages*).[43]

48. In the present case neither a condition of reciprocity nor a reference to other advantages are at issue.

49. First, there are in this case no indications whatsoever which suggest the existence of any howsoever formulated *condition of reciprocity*. It has not been attempted here, unlike in '*Avoir fiscal*', to explain or even to justify discrimination against Community nationals by the absence of a double taxation agreement between the Member States concerned.[44] On the contrary, the opposite question has been raised, that is to say,

40 — Case C-336/96 *Gilly* [1998] ECR I-2793, paragraphs 16, 24 and 30, *Saint-Gobain*, cited in footnote 35, paragraph 57, and *D.*, cited in footnote 19, paragraph 52.

41 — *Saint-Gobain*, cited in footnote 35, paragraph 58; in the same vein *D.*, cited in footnote 19, paragraph 52.

42 — '*Avoir fiscal*', cited in footnote 37, paragraph 26. To the same effect, Case C-43/95 *Data Delecta* [1996] ECR I-4661, paragraph 21. As regards the prohibition of a condition of reciprocity, see already Case 159/78 *Commission* v *Italy* [1979] ECR 3247, paragraph 23, and the recent judgment in Case C-28/04 *Tod's* [2005] ECR I-5781, paragraph 34.

43 — '*Avoir fiscal*', cited in footnote 37, paragraph 21, *Saint-Gobain*, cited in footnote 35, paragraph 54, *Eurowings Luftverkehr*, cited in footnote 39, paragraph 44, and *Verkooijen*, cited in footnote 16, paragraph 61, and in addition Case C-107/94 *Asscher* [1996] ECR I-3089, paragraphs 51 to 54, Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 97, and Case C-315/02 *Lenz* [2004] ECR I-7063, paragraph 43.

44 — In '*Avoir fiscal*' the French Republic had argued that in order to eliminate the disadvantageous treatment at issue in that case an agreement would have to be concluded between the Member States concerned; see on this point 7 of the Opinion of Advocate General Mancini in that case.

whether on *the application of a double taxation agreement which already exists*, in other words on taking into account all the provisions applicable in Sweden to the individual case in question, there can be any question of disadvantage at all.

50. Second, it has also not been attempted here to argue that the disadvantage under the Law on Dividend Tax for shareholders not resident in Sweden can be compensated for in some or other manner by possible *other advantages*. The present case does not, in fact, unlike *Avoir fiscal* and comparable cases,[45] concern consideration of some supposed distant advantages which have nothing to do with the individual case in hand, rather at issue is an assessment of the effects of the legal provisions which actually apply in Sweden to the individual case in hand. According to the referring court, those provisions include the Franco-Swedish double taxation agreement. When answering a question referred for a preliminary ruling the Court must take as its basis the legal framework adopted by the referring court on drawing up its order for reference.[46]

51. As a result, the provisions of a double taxation agreement such as the Franco-Swedish one which are applicable to a particular individual case are most certainly to be taken into account when considering the compatibility of national tax provisions with the fundamental freedoms.

B — *The practical effects of the double taxation agreement*

52. It remains to be examined, however, whether a double taxation agreement such as the Franco-Swedish one ensures in practice the elimination of all disadvantages for shareholders not resident in Sweden.

Comparison of the tax treatment of shareholders resident in Sweden and that of shareholders not so resident

53. According to the information provided by the referring court, on taking the double taxation agreement into account, the tax treatment of a shareholder such as Ms

45 — In *'Avoir fiscal'*, cited in footnote 37, paragraph 21, and in *Asscher*, cited in footnote 43, paragraphs 51 to 54, *Saint-Gobain*, cited in footnote 35, paragraph 54, *Eurowings Luftverkehr*, cited in footnote 39, paragraph 44, *De Groot*, cited in footnote 43, paragraph 97, *Verkooijen*, cited in footnote 16, paragraph 61, and *Lenz*, cited in footnote 43, paragraph 43, reference was made to entirely unrelated *general advantages* which did not directly have anything to do with the actual application of the legal provisions at issue in the main proceedings in each particular case. That is particularly evident, for example, in *Eurowings Luftverkehr*, paragraph 44, where it was attempted to offset existing tax disadvantages in one Member State against tax advantages in another Member State; similarly *De Groot*, paragraph 97, read together with paragraph 38. See also *Asscher*, paragraphs 51 to 54, which concerned an attempt to offset particular tax disadvantages against supposed advantages as regards the duty to affiliate to a social security scheme.

46 — *Tod's*, cited in footnote 42, paragraph 14, with further references.

Bouanich who is *not resident in Sweden* is as follows: [47]

54. The payment which a shareholder not resident in Sweden has received from a company resident in that State as a result of that company repurchasing its own shares is treated in Sweden as a dividend. That possibility is opened up by Article 13(6) and Article 10(5) of the double taxation agreement as interpreted in the light of the commentary to Articles 10 and 13 of the OECD Model Convention.

55. If shareholders resident in France receive such payments from companies resident in Sweden, these will in principle be taxed in France (Article 10(1) of the double taxation agreement). Within certain limits they can, however, also be taxed in Sweden (Article 10 (2) of the double taxation agreement).

56. Pursuant to the Law on Dividend Tax, a shareholder such as Ms Bouanich would have to pay tax in Sweden at a rate of 30% on the entire value of the shares repurchased by the company which had issued them. As a result, in respect of proceeds of sale of 100, dividend tax in the amount of 30 would have to be retained at source.

57. The double taxation agreement improves the shareholder's position in two respects:

58. First, the *nominal value* of the shares must be deducted from the taxable amount (that follows from the double taxation agreement, as interpreted in the light of the commentary to Article 13 of the OECD Model Convention). Thus, if the amount of the proceeds of sale was 100 and the nominal value of the shares 50, then only an amount of 50 must at all be taxed in Sweden, which at a tax rate of 30% results in dividend tax of 15. If, however, the nominal value of the shares was 10, then in respect of the same proceeds of sale of 100, an amount of 90 must be taxed in Sweden, which at a tax rate of 30% results in dividend tax of 27.

59. Second, pursuant to Article 10(2) of the double taxation agreement an upper limit on the tax charge applies which is fixed at 15%

47 — See also points 7 to 16 of this Opinion. In answering a question referred for a preliminary ruling the Court relies exclusively on the information provided by the referring court in its order for reference. The referring court alone is responsible for the interpretation of the double taxation agreement and national law.

of the gross amount, that is to say in the present case, 15% of the proceeds of sale reduced by the nominal value of the shares. Thus, with proceeds of sale of 100 after deduction of the nominal value, the dividend tax amount which is in practice payable is reduced to a maximum of 15, even where the tax amount as actually calculated [48] is in fact higher.

60. In contrast, according to the information supplied by the referring court, the position of shareholders *resident in Sweden* is as follows: they are also subject to a tax rate of 30%, but they may deduct from the proceeds of sale their *acquisition costs*, that is to say, the price of the share [49] at the time of its acquisition plus transaction charges, if any. Thus if the proceeds of sale were 100 and the acquisition costs 60, then only an amount of 40 remains taxable at all, which at a tax rate of 30% results in tax of 12. If, however, the acquisition costs were 30, with the same proceeds of sale of 100 an amount of 70 is taxable in Sweden, which at a tax rate of 30% results in tax of 21.

61. As an interim conclusion it can be observed, therefore, that while the same tax rate of 30% applies as a starting point both to shareholders resident in Sweden and to those shareholders not so resident, in practice, however, the tax charge on shareholders *resident* in Sweden depends on their *acquisition costs*, whereas that of shareholders *not resident* in Sweden varies according to the *nominal value* of the repurchased shares and that in addition an upper limit of 15% of the proceeds of sale less the nominal value applies to them.

Appraisal

62. When considering this situation the fact must not be overlooked that as a rule a considerable difference exists between the *nominal value* of a share and the *acquisition costs* which a shareholder incurs in acquiring that share. Not infrequently, in fact, are the *acquisition costs* considerably higher than the *nominal value* of that share. Thus, even though the double taxation agreement permits shareholders not resident in Sweden to deduct the *nominal value* of the shares, this does not generally result in complete equality with shareholders who are resident in Sweden, as the latter are permitted to deduct their — generally higher — *acquisition costs* from the taxable proceeds of sale, such that in the main their taxable amount will as a result be lower.

63. Against that background, the possibility derived from the double taxation agreement for shareholders not resident in Sweden to deduct the nominal value of the shares

48 — 30% of the proceeds of sale reduced by the nominal value of the shares.

49 — Market price or issue price.

cannot be regarded from the outset as being equivalent in value to the possibility of deduction afforded to shareholders resident in Sweden as regards their acquisition costs.

64. It follows, however, from the prohibition of restrictions on capital movements (Article 56(1) EC) and in particular from the prohibition of arbitrary discrimination against investors according to their place of residence (Article 58(3) EC) that in a case such as the present, on the repurchase of shares by the company resident in Sweden which issued them, shareholders not resident in Sweden may not be treated less favourably in tax terms than shareholders who are resident in Sweden. [50]

65. It is for the referring court to determine whether in the present case deduction of the shares' nominal value and the upper limit of 15% [51] for shareholders not resident in Sweden leads to a result which is equivalent to the deduction of the acquisition costs for shareholders resident in Sweden. [52] If that is not the case, then the national court must ensure the full effect of Community law and protect those rights — in the present case the free movement of capital — which Community law grants the individual; for that purpose it is required, if necessary, of its own motion to refuse to apply any conflicting rules of domestic law, including provisions of a double taxation agreement, in so far as they preclude equal treatment between shareholders resident in Sweden and shareholders not so resident. [53]

66. It must merely in passing be observed that the limitation of the tax charge in Sweden to a maximum of 15% of the proceeds of sale provided for in the double taxation agreement (Article 10(2) of the agreement) does not at all result necessarily in the *privileging* of shareholders not resident in Sweden.

67. First, a shareholder not resident in Sweden is at best more favourably treated under that provision than a shareholder resident in Sweden only if his acquisition costs — in nominal terms — amounted to less than half of the proceeds of sale received; on the other hand, he remains less favourably treated if the acquisition costs amounted to more than half of the proceeds of sale received. [54]

50 — See on this my observations concerning the first question, points 24 to 41 of this Opinion.

51 — Article 10(2) of the double taxation agreement.

52 — In a similar fashion, *Gerritse*, cited in footnote 34, paragraphs 52 to 54.

53 — In this vein the Court's consistent case-law; see only Case 106/77 *Simmenthal* [1978] ECR 629, paragraphs 21 to 24, Case C-213/89 *Factortame* [1990] ECR I-2433, paragraphs 18 to 20, and Case C-184/89 *Nimz* [1991] ECR I-297, paragraph 19. On the inapplicability of an agreement between two Member States the provisions of which are incompatible with the EC Treaty, see Case C-3/91 *Exportur* [1992] ECR I-5529, paragraph 8, and Case C-469/00 *Ravil* [2003] ECR I-5053, paragraph 37.

54 — With nominal proceeds of sale of 100 and acquisition costs of 50, the tax charge for a shareholder *resident* in Sweden amounts to 15 (taxable amount: 50, tax rate: 30%, on this see above points 7 and 60 of this Opinion). Pursuant to Article 10(2) of the double taxation agreement, a taxpayer *not resident* in Sweden is also liable to pay at most tax of 15, regardless of whether or not he may deduct his acquisition costs or the nominal value of the shares. Therefore, the effect of the upper limit of 15% of the proceeds of sale is of benefit to the shareholder not resident in Sweden only if he can take advantage of acquisition costs or a nominal value of less than 50, since then the share of the proceeds which is subject to dividend tax in Sweden at a rate of 30% is more than 50.

68. Second, it must be recalled that, as regards their dividends or proceeds of sale, shareholders who are not resident in Sweden are in addition usually liable to tax in their State of residence; this is also permitted in the present case by the Franco-Swedish double taxation agreement (see Article 10(1)). By means of the upper limit of 15% provided for in the double taxation agreement (see Article 10(2)) the contracting States are ultimately only demarcating their respective tax jurisdictions, thereby governing the division of the tax revenues between themselves. [55]

69. Consequently, the conclusion must be that:

If, where a company resident in a Member State repurchases its own shares, the tax treatment of shareholders not domiciled or permanently resident in that Member State is determined by a double taxation agreement which that Member State has concluded with another Member State, it is for the national court to ensure in the particular case that the shareholders concerned are effectively treated no less favourably than shareholders domiciled or permanently resident in the first Member State. For that purpose, the national court must, if necessary, of its own motion refuse to apply any conflicting rules of national law, including provisions of a double taxation agreement, in so far as they preclude equal treatment of shareholders domiciled or permanently resident in the first Member State and shareholders not so domiciled or permanently resident.

VII — The relationship between the freedom of establishment and the free movement of capital (third question)

70. By its third question the referring court seeks in addition to obtain a ruling on the compatibility of a rule such as the Swedish one with the freedom of establishment (Articles 43 EC and 48 EC).

71. The scope of the freedom of establishment and that of the free movement of capital can overlap, in that the investment of capital may assist the process of establishment in another Member State, for example, through the establishment of branch offices or subsidiary companies. [56] The existence of Article 58(2) EC and the expression 'subject to the provisions of the chapter relating to

55 — See also point 46 of this Opinion.

56 — See to that effect, in particular, points 1 and 2 of Heading I in the Nomenclature of Capital Movements and further the explanatory notes thereto, especially the definition of the expression 'direct investment' (on the indicative value of that Nomenclature for the definition of the concept of capital movements, see point 26 of this Opinion). Further references can be found in the Opinion of Advocate General Alber in Case C-251/98 *Baars* [2000] ECR I-2787, points 12 to 30.

capital' contained in the second paragraph of Article 43 EC appear to indicate that in such cases neither the one nor the other fundamental freedom is ousted, but that both fundamental freedoms can be applied alongside each other. [57] In that respect, therefore, Article 58(2) EC ensures that both fundamental freedoms are subject to the same restrictions. [58]

72. It is not the case, however, that every cross-border holding in an undertaking falls within the scope of freedom of establishment. Rather, a holding in a company is only covered by that fundamental freedom if it gives the shareholder concerned 'definite influence over the company's decisions and allows him to determine its activities'. [59] Pursuant to the second paragraph of Article 43 EC it is in fact the case that freedom of establishment comprises 'the right to take up and pursue activities as self-employed persons and to set up and manage undertakings' in another Member State. In other words the shareholder — alone or together with other shareholders — must exercise control over the undertaking. If, however, merely the usual rights protecting minority shareholders are associated with his holding, then only the provisions on the free movement of capital can apply, and not freedom of establishment. [60]

73. In the present case the information supplied by the referring court contains no indication that Ms Bouanich had enjoyed by means of her shareholding a controlling influence on Förvaltnings AB Ratos. In those circumstances it must be assumed that freedom of establishment (Article 43 EC) is not applicable. Accordingly, it is unnecessary to answer the third question.

57 — To this effect, also my Opinion in Case C-174/04 *Commission* v *Italy* [2005] ECR I-4933, point 22.
Case-law on this point does not yet reveal a consistent picture. Thus, for example, in respect of the acquisition of land for the purposes of establishment, the Court expressly held in Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 22, both fundamental freedoms to be applicable. On the other hand, one could interpret Case C-208/00 *Überseering* [2002] ECR I-9919, paragraph 77, as indicating that there is a *lex specialis* relationship between the two fundamental freedoms. In yet other cases it appears rather to be a matter of procedural economy which explains why in each case only one of the two fundamental freedoms was examined: see, for example, Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727 and Case C-423/98 *Albore* [2000] ECR I-5965, and the 'golden shares' cases cited in footnote 19, *Commission* v *Portugal*, paragraph 56, *Commission* v *France*, paragraph 56, and *Commission* v *Belgium*, paragraph 59.
Moreover, the parallel application of both fundamental freedoms alongside one another is also favoured by Advocate General Alber in his Opinion in *Baars*, cited in footnote 56, point 12 et seq (albeit restricted to cases of 'direct intervention' affecting both fundamental freedoms, see in particular point 30), and by Advocate General La Pergola in his Opinion in *Verkooijen* [2000] ECR I-4071, in particular points 35, 38 and 45.

58 — Article 58(2) EC is also intended to ensure that in particular third country nationals who cannot rely on freedom of establishment cannot circumvent certain restrictions permitted by Community law on their establishment in a Member State by invoking the provisions on free movement of capital. Conversely, on the basis of the proviso 'subject to the provisions of the chapter relating to capital' in the second paragraph of Article 43 EC, lawful restrictions on capital movements also have implications for the freedom of establishment.

59 — Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 22; to the same effect, *Überseering*, cited in footnote 57, paragraph 77, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 37.

60 — If, on the other hand, the participation of a shareholder grants him *controlling influence* over an undertaking, then alongside freedom of establishment the provisions on free movement of capital are also applicable. See on this, for example, the explanatory notes to the Nomenclature of Capital Movements, cited in footnote 26 of this Opinion. It follows from those notes that, for example, *direct investments* in companies limited by shares, falling within the scope of the free movement of capital, enable 'the shareholder ... to participate effectively in the management of the company or in its control'. It is well known that a very similar criterion was applied in *Baars*, cited in footnote 59, paragraph 22, in order to describe an operation which fell within the scope of freedom of establishment.

VIII — Conclusion

74. In the light of the foregoing observations, I propose that the Court should answer the questions referred by the Kammarrätten i Sundsvall as follows:

(1) The provisions on free movement of capital (Articles 56 EC and 58 EC) preclude a national provision under which, where a share company resident in a Member State repurchases its own shares, that Member State allows shareholders domiciled or permanently resident in that Member State to deduct their acquisition costs from their taxable proceeds of sale, whereas that possibility is denied to shareholders not domiciled or permanently resident in that Member State.

(2) If, where a company resident in a Member State repurchases its own shares, the tax treatment of shareholders not domiciled or permanently resident in that Member State is determined by a double taxation agreement which that Member State has concluded with another Member State, it is for the national court to ensure in the particular case that the shareholders concerned are effectively treated no less favourably than shareholders domiciled or permanently resident in the first Member State. For that purpose, the national court must, if necessary, of its own motion refuse to apply any conflicting rules of national law, including provisions of a double taxation agreement, in so far as they preclude equal treatment of shareholders domiciled or permanently resident in the first Member State and shareholders not so domiciled or permanently resident.