JUDGMENT OF THE COURT (Fifth Chamber)

21 November 2002 *

In Case C-436/00,

REFERENCE to the Court under Article 234 EC by the Regeringsrätten (Sweden) for a preliminary ruling in the proceedings pending before that court between

X,

Y

and

Riksskatteverket,

on the interpretation of Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 EC,

* Language of the case: Swedish.

THE COURT (Fifth Chamber),

composed of: M. Wathelet, President of the Chamber, C.W.A. Timmermans (Rapporteur), D.A.O. Edward, P. Jann and A. Rosas, Judges,

Advocate General: J. Mischo,

Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— X and Y, by P. Nordquist, advokat,

— the Riksskatteverket, by T. Wallén, skattejurist,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Commission of the European Communities, by R. Lyal and J. Enegren, acting as Agents,

— the EFTA Surveillance Authority, by P.A. Bjørgan, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of X and Y, represented by P. Nordquist, of the Swedish Government, represented by A. Kruse, acting as Agent, of the Commission, represented by R. Lyal and J. Enegren, and of the EFTA Surveillance Authority, represented by P.A. Bjørgan, at the hearing on 20 March 2002,

after hearing the Opinion of the Advocate General at the sitting on 6 June 2002,

gives the following

Judgment

1 By order of 1 November 2000, received by the Court on 27 November 2000, the Regeringsrätten (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 EC.

2 That question was raised in proceedings brought by two Swedish nationals, X and Y, against a preliminary decision given by the Skatterättsnämnden (Revenue Law Commission) concerning the exclusion of X and Y, as transferors at undervalue of shares in companies, from the benefit of deferral of tax due on capital gains made on those shares through the application of a national rule

providing for such exclusion where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding or to a Swedish limited company in which such a foreign legal person either directly or indirectly has a holding.

National legal background

3 The first, second, third and eighth paragraphs of Section 3(1)(h), of Lagen (1947:576) om statlig inkomstskatt (the Law on State Income Tax, 'SIL'), as amended, provides:

'A transfer of an asset, to which the rules in Sections 25 to 31 apply, without consideration to a Swedish limited company in which the transferor or his kin directly or — unlike the case described in the third paragraph — indirectly holds shares shall be treated as though the asset were disposed of for a consideration equivalent to cost. The same shall apply to a transfer for a consideration which is less than both the market value of the asset and cost. If the market value is less than cost, the asset in that case shall be deemed to have been disposed of for a consideration equivalent to market value.

If no consideration is paid, the combined cost of the shares of the transferor and his kin in the limited company shall be increased by an amount equivalent to the cost of the asset or, in the case described in the third sentence of the first paragraph, the market value. If consideration is paid, the cost shall be increased by the difference between the cost or market value and the consideration.

A transfer of an asset to which the rules in Sections 25 to 31 apply, for no consideration or for a consideration which is less than the market value of the asset, to a foreign legal person in which the transferor or his kin directly or indirectly has a holding shall be treated as though the asset were disposed of for a consideration equivalent to the market value. The same shall apply in the case of a transfer to a Swedish limited company in which such a foreign legal person either directly or indirectly has a holding.

...

An asset which, under the first or third paragraph, is to be considered to have been disposed of for a certain consideration shall, in application of... this law, be deemed to have been acquired for the same consideration by the purchaser.'

4 According to the national court, those provisions were adopted in 1998 and in 1999 with a view to regulating more closely the tax treatment of contributions (i.e. transfers without consideration or at undervalue) of, *inter alia*, shares to companies.

5 According to the national court, those rules mean, in summary, that the difference between the actual value of the shares transferred at the time of the transfer ('market value') and the value of those shares on acquisition by the transferor ('acquisition cost') is chosen as the basis for taxation if the transfer at undervalue is to a foreign legal person in which such a person either directly or indirectly has a holding or to a Swedish company in which such a foreign legal

person either directly or indirectly has a holding. However, if the transfer at undervalue is to a Swedish company with no foreign ownership there is no immediate taxation. In such cases the capital gain represented by the difference between market value and acquisition cost of the shares transferred at undervalue is typically subject to tax when the transferor disposes of his holding in the transferee company. Thus, as a rule, the taxation of capital gains is deferred until the transfer of the holding held by the transferor in the transferee company.

6 The national court also points out that the difference for tax purposes between contributions made to companies which are taxable in Sweden and contributions to companies which are not, is explained in the *travaux préparatoires* for the SIL on the basis of the risk of the Swedish tax system being deprived of a source of revenue. That could happen, for instance, if a proprietor of a limited company, before leaving Sweden, transferred his shares in the company at undervalue to a foreign company which he also owned. Originally, the rules in the third paragraph of Section 3(1)(h) of the SIL only covered transfers to foreign legal persons. However, the Swedish legislature subsequently took the view that a form of tax avoidance could occur through the proprietor's transferring his shares in a company to a Swedish company which is a subsidiary of the foreign company he owns. The rules were therefore amended so as to cover both transfers to foreign legal persons in which the transferor or his kin directly or indirectly has a holding and transfers to Swedish legal persons in which such a foreign legal person directly or indirectly has a holding.

7 The national court points out that from the 2002 tax year (income earned in 2001) inkommstskattelagen (1999:1229) will apply in place of the SIL. That law contains provisions identical to those of the SIL that are relevant to the main proceedings.

The double taxation agreement between the Kingdom of Belgium and the Kingdom of Sweden

8 Under Article 13(4) of the Convention between the Kingdom of Belgium and the Kingdom of Sweden to avoid double taxation and prevent tax evasion in respect of income and capital tax (SFS 1991, No 606), signed on 5 February 1991, which entered into force on 24 February 1993 ('the Belgo-Swedish Convention'):

'Gains arising on the disposal of all assets other than... shall be taxable only in the Contracting State in which the transferor is resident.'

9 That provision of the Belgo-Swedish Convention is identical to Article 13(4) of the draft convention of the Organisation for Economic Cooperation and Development (OECD) (Model Double-Taxation Convention on Income and on Capital, Report of the Committee on Fiscal Affairs of the OECD, 1977, version of 29 April 2000).

10 In addition, Article 13(5) of the Belgo-Swedish Convention provides:

'Notwithstanding the provisions of paragraph 4, the gains which a natural person who is a resident of a Contracting State derives from the disposal of shares in a company which is a resident of the other Contracting State shall be taxable in that other State, if that natural person is a national of that other State and has been resident there at some time during the five years immediately preceding the disposal of the shares...'

11 Finally, Articles 26 and 27 of the Belgo-Swedish Convention lay down rules on exchange of information and assistance with recovery respectively.

The main proceedings

12 X and Y, natural persons of Swedish nationality resident in Sweden, have applied for a preliminary decision from the Skatterättsnämnden concerning the application of the share transfer provisions of Section 3(1)(h) of the SIL.

13 The purpose of the Swedish system of preliminary decisions on tax matters is to provide, on application by a taxpayer, a binding decision as to how a certain matter, which is of importance to that taxpayer, should be interpreted in the light of the tax legislation. Swedish law provides that, as a rule, matters in which such a preliminary decision is sought are to be confidential.

14 In the present case, the request for a preliminary decision concerns the tax implications of the proposed transfer by X and Y, at their acquisition cost, of their shares in X AB, a Swedish company, to Z AB, another Swedish company, which is in turn a subsidiary of Y SA, a Belgian company. Prior to the reorganisation of the group, X and Y had judged it expedient to transfer certain activities to Y SA.

15 X AB is the parent company in a group currently owned in equal shares by X and Y and a Maltese company. X and Y have no proprietary interest in this latter company. Y SA is also a parent company owned by the current owners of X AB.

16 In their application, X and Y asked the Skatterättsnämnden, *inter alia*, whether the difference in the tax implications depending on whether the shares were transferred at undervalue to a Swedish company without foreign owners (first paragraph of Section 3(1)(h) of the SIL) or to a Swedish company with such owners (second sentence of the third paragraph of Section 3(1)(h) of the SIL) could be sustained, both in the light of the provisions of the Belgo-Swedish Convention and of the provisions of the EC Treaty concerning freedom of establishment and free movement of capital.

17 In its preliminary decision, delivered on 27 September 1999, the Skatterättsnämnden held that if the transfer of shares in X AB were to take place it should be treated as a transfer for consideration equivalent to market value and that X and Y should thus be taxed on a gain equivalent to the difference between the value of those shares and their acquisition cost.

18 The Skatterättsnämnden also held that freedom of establishment was not at issue and, as regards free movement of capital, that the exception provided for by Article 58(1)(a) EC was applicable.

19 X and Y appealed against this decision to the Regeringsrätten claiming that the Regeringsrätten should declare that the transfer should be taxed on the basis of the proposed transfer price.

20 Before the Regeringsrätten, X and Y argued essentially that the much less advantageous tax treatment of share transfers at undervalue to Swedish companies in which the transferor has a holding through a foreign legal person constitutes a clear obstacle both to the free movement of capital under Article 56 EC and to freedom of establishment under Article 43 EC.

21 According to X and Y, that obstacle is not defensible on the basis of Article 58(1) EC, particularly in the light of the case-law of the Court of Justice and is, in any event, contrary to Article 58(3) EC. Nor is the obstacle defensible in order to maintain tax neutrality, to prevent tax evasion or for other such reasons.

22 Moreover, the obstacle is not defensible on the basis of Article 46 EC since, according to the case-law of the Court of Justice, considerations of an economic nature, such as the risk of tax avoidance or loss of tax revenue, cannot justify discriminatory restrictions.

23 Finally, X and Y submitted that the national provisions at issue are incompatible with Articles 43 and 56 EC because they are disproportionate to the objective they pursue, bearing in mind that the objective pursued — which is to prevent gains on shares transferred at undervalue from escaping taxation in Sweden to the benefit of other countries — could be achieved by far less interventionist means, for example by providing that liability to tax on such gains arises when the transferor moves abroad.

24 Before the Regeringsrätten, the Riksskatteverket (National Tax Board) argued essentially that Article 43 EC is not applicable in the present case and that, even if it were applicable and Section 3(1)(h) were considered discriminatory, such discrimination would be justified by overriding public interest requirements recognised by the Court of Justice such as the need to ensure effective fiscal supervision and the cohesion of a tax system. Moreover, by virtue of the second paragraph of Article 43, a national provision which can be justified on the basis of the Treaty provisions relating to free movement of capital cannot be declared unlawful under Article 43 EC.

25 The Riksskatteverket contended, however, that the only reason for the sale to the Swedish company set up for that purpose rather than to the Belgian company was the tax advantage to be gained thereby and that there were, moreover, in this case, strong tax avoidance reasons for the transaction. In that regard, the Riksskatteverket contended that, according to the case-law of the Court of Justice, a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

The question referred for a preliminary ruling

26 Taking the view that the solution of the dispute before it turned on an interpretation of Community law, the Regeringsrätten decided to refer the following question to the Court for preliminary ruling:

'In a situation such as that in the present case, do Articles 43 EC, 46 EC, 48 EC, 56 EC and 58 EC preclude the application of a Member State's legislation which — like the relevant Swedish legislation — has the effect that a capital contribution in the form of a transfer of shares at undervalue is taxed less advantageously if the contribution is to a legal person which is domiciled in another Member State and in which the transferor directly or indirectly has a holding or to a domestic limited company in which such a legal person has a holding, than would have been the case if there had been no such foreign proprietorial interests.'

The admissibility of the reference

27 Before replying to the question referred, it should be noted that the Court has held that the Regeringsrätten, when seised with an appeal against a ruling of the Skatterättsnämnden, is carrying out a judicial function. Second, although the dispute in the main proceedings concerns the possibility of carrying out in the future a transaction which has not yet been undertaken, it is a genuine dispute and the question of Community law raised by the referring court is in no way hypothetical (see Case C-200/98 *X and Y* [1999] ECR I-8261, paragraphs 16 to 22).

28 The question referred by the Regeringsrätten is therefore admissible.

Substance

29 The referring court is asking essentially whether Articles 43 EC, 46 EC and 48 EC concerning freedom of establishment, and Articles 56 EC and 58 EC on free movement of capital preclude a national provision such as that at issue in the main proceedings, which subjects transfers at undervalue of shares in companies to tax treatment which differs according to the nature of the transferee.

30 In the light of the national law at issue here, three types of share transfer at undervalue — that is to say, at less than market value — can be distinguished on the basis of the relationship between the transferor and the transferee, that is to say:

— transfers to a foreign legal person in which the transferor or his kin directly or indirectly has a holding (third paragraph, first sentence of Section 3(1)(h) of the SIL, hereinafter 'type A share transfers');

— transfers to a Swedish limited company in which such a foreign legal person either directly or indirectly has a holding (third paragraph, second sentence of Section 3(1)(h) of the SIL, hereinafter 'type B share transfers');

— transfers to a Swedish limited company other than those described in the previous indent and in which the transferor or his kin directly or indirectly had a holding (first paragraph of Section 3(1)(h) of the SIL, hereinafter 'type C share transfers').

31 The national provision at issue in the main proceedings provides that the transferor's liability to capital gains tax on shares which are the subject of a type C share transfer is as a rule deferred, generally until the time when the transferor disposes of his holding in the transferee company, whereas the benefit of such deferral is withheld from the transferor in respect of gains on shares which are the subject of type A or type B share transfers. In the case of such transfers, the transferor's liability to capital gains tax arises immediately.

32 It must be borne in mind from the outset that, although direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with Community law and avoid any discrimination on grounds of nationality (Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19; Case C-55/00 *Gottardo* [2000] ECR I-413, paragraph 32).

Freedom of establishment

33 Citing the judgment in Case C-112/91 *Werner* [1993] ECR I-429, the Riksskatteverket contends that the fundamental freedoms conferred by the Treaty have no bearing on the case in the main proceedings since it concerns a situation internal to a Member State. The case in the main proceedings concerns an amendment of the rules governing the pursuit of an economic activity in Sweden which, after that amendment, continues to be pursued in that Member State.

34 That argument cannot be upheld. The national provision at issue in the main proceedings requires that there be a foreign element, clearly relevant to the freedom of establishment conferred by the Treaty, namely, for type A share transfers, the fact that the transferee company is established in another Member State, and, for type B share transfers, the fact that a company established in another Member State has a holding in the transferee company and that this foreign element is the basis for a difference in tax treatment within one Member State.

35 Accordingly, it should be considered, first, whether the national provision at issue in the main proceedings is liable to constitute a restriction within the meaning of Article 43 EC on freedom of establishment.

36 First, as regards type A share transfers, the national provision at issue in the main proceedings entails a difference in treatment in refusing to the transferor the benefit of deferring capital gains tax made on shares transferred at undervalue, with a consequential cash flow disadvantage for him, where the transferee company in which the transferor has a holding is established in another Member State. Therefore, refusal of the tax advantage in question on the ground that the transferee company in which the taxpayer has a holding is established in another Member State, is likely to have a deterrent effect on the exercise by that taxpayer of the right conferred on him by Article 43 EC to pursue his activities in that other Member State through the intermediary of a company.

37 Such inequality of treatment thus constitutes a restriction on the freedom of establishment of nationals of the Member State concerned (and, moreover, on that of nationals of other Member States resident in that Member State), who have a holding in the capital of a company established in another Member State, provided that that holding gives them definite influence over the company's decisions and allows them to determine its activities (see *inter alia* Case C-251/98 *Baars* [2000] ECR I-2787, paragraphs 22 and 28 to 31, and Case C-208/00 *Überseering* [2002] ECR 9919, paragraph 77). It is for the referring court to ascertain whether that condition is fulfilled in the case in the main proceedings.

38 Second, as regards type B share transfers, the national provision at issue in the main proceedings constitutes a restriction within the meaning of Article 43 EC on the freedom of establishment of a company, established in another Member State (in the present case, a Belgian limited company), and treated, within the meaning of Article 48 EC, in the same way as a natural person who is a national of that Member State who wishes to pursue his activities through the intermediary of a branch in the Member State concerned (see *inter alia* Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 24, and Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 35). Acceptance, in the present case, of the proposition that the Member State concerned may refuse the benefit

of deferring capital gains tax, thus depriving the transferor of a cash flow advantage, by reason of the fact that the parent company of the transferee company is situated in another Member State would deprive Article 43 EC of all meaning (Joined cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 42).

39 Accordingly, application of the national provision at issue in the present case constitutes, both for type A share transfers, where the condition mentioned in paragraph 37 above is satisfied, and for type B share transfers, a restriction on the exercise of freedom of establishment conferred by the Treaty.

40 The Riksskatteverket contends that, in the present case, there is a risk of tax evasion which is doubly relevant to freedom of establishment. First, that risk calls into question the applicability of freedom of establishment since, in the present case, there is evidence of a possible abuse of that freedom. Second, even if freedom of establishment is applicable in the present case, that risk could be relied on as an overriding public interest requirement to justify a possible restriction on that freedom.

41 As regards a possible abuse of freedom of establishment, the Riksskatteverket points out that the only reason for the share transfer transaction proposed by the applicants in the main proceedings is the tax advantage to be gained thereby and that there were strong tax evasion reasons for the transaction, as is clear not least from the fact that X and Y referred a question to the competent tax tribunal in the first place as to whether the proposed transaction was to be regarded as tax evasion. In the circumstances, the Riksskatteverket, citing Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24, in support, takes the view that, according to the case-law of the Court, the Kingdom of Sweden is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

42 In that regard, the national courts may, case by case, take account — on the basis of objective evidence — of abuse or fraudulent conduct on the part of the persons concerned in order, where appropriate, to deny them the benefit of the provisions of Community law on which they seek to rely, but they must nevertheless assess such conduct in the light of the objectives pursued by those provisions (see, *inter alia*, *Centros*, cited above, paragraph 25).

43 The national provision at issue, insofar as it excludes categorically and generally any type A or type B share transfer from the benefit of deferral of tax, does not allow the national courts to make such a case-by-case analysis taking account of the particular features of each case.

44 Furthermore, the criterion on the basis of which the national provision excludes type A and type B share transfers from that tax advantage — namely the fact that the transfer is to a company established under the legislation of another Member State or a branch set up in Sweden by such a company — relates to the exercise of the freedom of establishment guaranteed by the Treaty and cannot, therefore, in itself, constitute an abuse of the right of establishment (see, to that effect, *inter alia*, *Centros*, cited above, paragraph 27).

45 Accordingly, refusal by a Member State of a tax advantage in respect of any transfer at undervalue of shares to a company established under the law of another Member State or to a branch of that company established on its territory (as provided for by the national provision at issue here) cannot be justified on the ground of abuse of freedom of establishment.

46 Second, it must be examined whether the restrictions on freedom of establishment resulting from the national provision at issue can be justified in the light, in particular, of the reasons cited by the Riksskatteverket set out at paragraph 24 above.

47 The *travaux préparatoires* for the national provision at issue here, mentioned by the referring court (see paragraph 6 above), and the observations of the Riksskatteverket show that refusal of the tax advantage in deferring capital gains tax in respect of all type A or type B share transfers is intended to prevent the Swedish tax system from being deprived of a source of revenue, especially where, prior to a definitive move abroad, the proprietor of shares in a Swedish limited company transfers them at undervalue to a foreign legal person in which the transferor or one of his kin has a direct or indirect holding or to a Swedish legal person in which such a foreign legal person has a direct or indirect holding.

48 The Riksskatteverket contends that the difference in tax treatment at issue is intended to achieve that objective so that it is justified by overriding public interest requirements relating to the need to ensure the coherence of a tax system, the risk of tax avoidance and the effectiveness of fiscal supervision and by the provisions of the Treaty concerning free movement of capital, that is to say, Article 58(1) and (2) EC. Article 58 could also justify restrictions on freedom of establishment within the meaning of Article 43 EC, second paragraph.

49 A restriction on freedom of establishment, such as the national provision at issue, can be justified only if that provision pursues a legitimate aim compatible with the Treaty and is justified by pressing reasons of public interest. Even if that were so, it would still have to be of such a nature as to ensure achievement of the aim

in question and not go beyond what was necessary for that purpose (see, *inter alia*, *Futura Participations and Singer*, cited above, paragraph 26, and the case-law cited therein).

50 It must be borne in mind that the reduction in tax revenue which would be likely to result from the granting of that advantage to type A and type B share transfers is not one of the grounds listed in Article 46 EC and cannot be regarded as a matter of overriding general interest which can be relied upon in order to justify unequal treatment that is, in principle, incompatible with Article 43 EC (see, *inter alia*, *ICI*, cited above, paragraph 28, *Metallgesellschaft and Others*, paragraph 59, and *Saint-Gobain ZN*, paragraph 51). Such an objective is purely economic and cannot, therefore, according to settled case-law, constitute an overriding reason in the general interest (see, *inter alia*, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 48).

51 On the other hand, it is clear from the case-law of the Court of Justice that the need to safeguard the cohesion of a tax system (see Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305), the prevention of tax evasion (see *ICI*, cited above, paragraph 26, and *Metallgesellschaft and Others*, paragraph 57) and the effectiveness of fiscal supervision (see, *inter alia*, *Futura Participations and Singer*, cited above, paragraph 31, and Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18) constitute overriding requirements of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see, in particular, as regards such justifications in the context of restrictions concerning a difference in income tax treatment, Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 23).

52 As regards the justification relied on by the Riksskatteverket based on the need to safeguard the cohesion of a tax system, in *Bachmann* and *Commission* v *Belgium*, cited above, in which the Court accepted that such a reason could justify a

restriction on the exercise of the fundamental freedoms guaranteed by the Treaty, there was a direct link between the deductibility of contributions and the taxation of sums payable by insurers under pension and life assurance contracts, and that link had to be maintained to preserve the coherence of the tax system in question (see, for example, *Vestergaard*, cited above, paragraph 24, and the case-law cited therein).

53 In the present case, insofar as the Kingdom of Sweden has concluded double-taxation conventions with other Member States, there is no fiscal coherence in relation to any one taxpayer in establishing a strict correlation between the deferral of capital gains tax and the final taxation of the gain. Coherence is at another level, namely, the reciprocity of the rules applicable in the Contracting States in terms of the convention on the basis of connecting factors for the purposes of apportioning competence in tax matters. This the Member States remain free to determine in the absence of Community measures, as here (see, *inter alia*, Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 24, and *Saint Gobain ZN*, cited above, paragraph 57).

54 The effect of double taxation conventions such as the Belgo-Swedish Convention, and, in particular, its Article 13(4), which is, in fact, identical to the same article of the OECD model convention, is that, as a general rule, a State taxes all gains on shares received by transferors resident on its territory, but, conversely, does not impose tax on gains made by transferors residing in the territory of the other Contracting State, regardless of whether the transferor has benefited from deferral of tax at the time of a previous transfer of the shares concerned.

55 The hypothetical risk of the transferor's moving definitively out of the country in the case of type A share transfers, which the national provision at issue seeks to deal with by refusing deferral of taxation, is thus covered by Article 13(4) of the

Belgo-Swedish Convention on a basis of reciprocity, insofar as, in that event, only the Contracting State to which the transferor has moved his residence has authority to tax the gains concerned.

56 Moreover, Article 13(5) of the Belgo-Swedish Convention provides for a reciprocal system which specifically apportions the rights to tax of the Kingdoms of Belgium and Sweden as regards taxation of gains on disposal of shares. That provision seeks to deal with the situation covered by the national provision at issue here, namely, in relation to a share transfer, the risk of a transferor's moving definitively to the other Contracting State. In that connection, Article 13(5) of the Belgo-Swedish Convention provides essentially that, in the event of a transfer of shares in a company resident in its territory by its own nationals, the Contracting State concerned loses only its right to tax share transfers which take place more than five years after the definitive departure for the other Contracting State of the transferor.

57 In any event, refusal of deferral of taxation on type A and type B share transfers, as provided for by the national provision at issue here, is not necessary and proportionate to the objective it pursues.

58 Any problem relating to the coherence of the tax system at issue here would have a fundamentally different origin from that at issue in *Bachmann* and *Commission* v *Belgium*, cited above. In those cases, payments were likely to evade taxation by the Member State which granted the tax advantage because they were made by third parties outside that Member State, that is to say in the country where those third parties were established. However, in a case such as the present, the risk relates to the fact that the tax base is liable to disappear at a subsequent stage following a definitive move abroad by the taxpayer.

59 In such a situation, in contrast to that giving rise to the judgments cited above in *Bachmann* and *Commission* v *Belgium* (see *Bachmann*, paragraph 28, and *Commission* v *Belgium*, paragraph 20), the coherence of the tax system can be safeguarded by measures which are less restrictive or less prejudicial to freedom of establishment, relating specifically to the risk of a definitive departure of the taxpayer, in respect of all types of share transfers entailing the same objective risk.

60 Next, as regards the justification cited by the Riksskatteverket based on the risk of tax evasion and that relating to effectiveness of fiscal supervision, it is to be noted, at the outset, that, in the light of the objective pursued by the national provision at issue here, those justifications overlap. In fact, the provision in question seeks to ensure both the effective taxation of the gains concerned and the effectiveness of the supervision of such taxation.

61 The provision at issue here is not specifically designed to exclude from a tax advantage purely artificial schemes designed to circumvent Swedish tax law, but concerns, generally, any situation in which, for whatever reason, the transfer at undervalue is to a company established under the legislation of another Member State or a branch set up in the Kingdom of Sweden by such a company.

62 However, tax evasion or tax fraud cannot be inferred generally from the fact that the transferee company or its parent company is established in another Member State and cannot justify a fiscal measure which compromises the exercise of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45).

63 In any event, the measure implemented by the Kingdom of Sweden is not capable of achieving the objective it is supposed to pursue, that is to say, ensuring that the transferor is actually taxed in Sweden on gains made on shares transferred, particularly if the transfer is made prior to his definitive move abroad. In the case of type C share transfers, the transferor benefits in any event from a deferral of tax on gains made on shares transferred. In answer to a question put by the Court, the Swedish Government was unable to establish that, for this type of transfer, there were objective differences in the situation which would imply that the potential risk, for the purposes of taxation of the transferor in Sweden, inherent in a definitive move abroad by that transferor, is of an essentially different nature from that for type A and type B transfers.

64 Finally, as regards the argument of the Riksskatteverket that, where a provision of national law appears justified on the basis of Article 58 EC, restrictions on freedom of establishment resulting from that national provision must also be held to be justified, suffice it to note that, as is clear from paragraph 72 of this judgment, Article 58 EC cannot on any view be relied on to justify application of a national measure such as that at issue here.

65 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling, insofar as it concerns the Treaty provisions relating to freedom of establishment, must be that Articles 43 EC and 48 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding — provided that that holding gives him definite influence over the company's decisions and allows him to determine its activities — or to a Swedish limited company which is a branch of such a foreign legal person.

Free movement of capital

66 In the light of the answer given to the question as regards the Treaty provisions on freedom of establishment, insofar as it concerns the Treaty provisions on free movement of capital, that question need be considered only to the extent that, in the light of the latter provisions, the national provision at issue is such as to involve a separate restriction, where the Treaty provisions concerning freedom of establishment do not apply.

67 In that regard, as is clear from paragraphs 38 and 65 above, as regards type B share transfers, the national provision at issue entails an unjustified restriction on freedom of establishment. On the other hand, as regards type A share transfer, it is clear from paragraphs 37 and 65 above that Article 43 EC precludes the national provision at issue only to the extent that the holding which the transferor has in the transferee company established in another Member State gives him definite influence over that company's decisions and allows him to determine its activities.

68 It is therefore appropriate to answer the question referred for a preliminary ruling, insofar as it concerns the provisions relating to free movement of capital, only in respect of the situation where, on a type A share transfer, Article 43 EC does not apply having regard to the insufficient level of participation of the transferor in the transferee company established in another Member State.

69 In that regard, the national provision at issue cannot be considered to be a purely internal measure because it applies in the event of movements of capital between Member States resulting from the transfer at undervalue of shares by a resident of a Member State to a company established in another Member State in which the transferor or his kin directly or indirectly has a holding.

70 It is common ground, moreover, that the national provision at issue is liable to dissuade those liable to Swedish tax on gains from transferring shares at undervalue to transferee companies established in other Member States in which they directly or indirectly have a holding and, therefore, constitutes, for those taxpayers, a restriction on free movement of capital within the meaning of Article 56 EC (see, to that effect, *inter alia*, Case C-478/98 *Commission* v *Belgium*, cited above, paragraph 18, and case-law cited therein).

71 It must therefore be determined whether such a restriction can be justified.

72 In that regard, the justifications relied on by the Riksskatteverket under Article 58 EC are essentially the same as those it put forward to justify the restrictions on freedom of establishment caused by the national provision at issue which relate to the coherence of the tax system, the prevention of tax avoidance and the effectiveness of fiscal supervision (see, as regards the relation between overriding public interest requirements recognised by the Court and Article 73d(1)(a) of the EC Treaty (now Article 58(1)(a) EC) *Verkooijen*, cited above, paragraphs 43 to 46). For the same reasons as those cited in connection with freedom of establishment at paragraphs 46 to 63 above, those justifications cannot be upheld in relation to the restriction on free movement of capital that has been held to exist at paragraph 70.

73 Accordingly, although, on a type A share transfer, Article 43 does not preclude the national provision at issue where there is an insufficient level of participation of the transferor in the transferee company established in another Member State, that national provision none the less constitutes a restriction on free movement of capital within the meaning of Article 56 EC, which cannot be justified under Article 58 EC.

74 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling, insofar as it concerns the Treaty provisions relating to free movement of capital, must be that Articles 56 EC and 58 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding — which is not such as to give him definite influence over the decisions of that foreign legal person or allow him to determine its activities.

75 Accordingly, the question referred should be answered as follows:

— Articles 43 EC and 48 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding — provided that that holding gives him definite influence over the decisions of that foreign legal person and allows him to determine its activities — or to a Swedish limited company which is a branch of such a foreign legal person;

— Articles 56 EC and 58 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding which is not such as to give him definite influence over the decisions of that foreign legal person or allow him to determine its activities.

Costs

76 The costs incurred by the Swedish and Dutch Governments and by the Commission and the EFTA Surveillance Authority, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Regeringsrätten by order of 1 November 2000, hereby rules:

1. **Articles 43 EC and 48 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which**

the transferor directly or indirectly has a holding — provided that that holding gives him definite influence over the decisions of that foreign legal person and allows him to determine its activities — or to a Swedish limited company which is a branch of such a foreign legal person.

2. Articles 56 EC and 58 EC preclude a national provision such as that at issue in the main proceedings, which excludes the transferor at undervalue of shares in companies from the benefit of deferral of tax due on capital gains made on those shares where the transfer is to a foreign legal person in which the transferor directly or indirectly has a holding which is not such as to give him definite influence over the decisions of that foreign legal person or allow him to determine its activities.

Wathelet Timmermans Edward

Jann Rosas

Delivered in open court in Luxembourg on 21 November 2002.

R. Grass M. Wathelet

Registrar President of the Fifth Chamber