JUDGMENT OF THE COURT (Fifth Chamber)

8 March 2001

(Freedom of establishment - Free movement of capital - Advance payment of corporation tax on profits distributed by a subsidiary to its parent company - Parent company having its seat in another Member State - Breach of Community law - Action for restitution or action for damages - Interest)

In Joined Cases C-397/98 and C-410/98,

REFERENCES to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the High Court of Justice of England and Wales, Chancery Division, for a preliminary ruling in the proceedings pending before that court between

Metallgesellschaft Ltd and Others (C-397/98),

Hoechst AG,

Hoechst UK Ltd (C-410/98)

and

Commissioners of Inland Revenue,

H.M. Attorney General,

on the interpretation of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC), Article 58 of the EC Treaty (now Article 48 EC) and/or Article 73b of the EC Treaty (now Article 56 EC),

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

- Metallgesellschaft Ltd and Others, by J. Gardiner QC and F. Fitzpatrick, Barrister, instructed by Slaughter and May, Solicitors,

- Hoechst AG and Hoechst UK Ltd, by M. Barnes QC, instructed by Slaughter and May, Solicitors,

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- the United Kingdom Government, by J.E. Collins, acting as Agent, D. Wyatt QC and R. Singh, Barrister,

- the Netherlands Government, by M.A. Fierstra, acting as Agent,

- the Finnish Government, by H. Rotkirch and T. Pynnä, acting as Agents,

- the Commission of the European Communities, by R. Lyal, H. Michard and M. Patakia, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Metallgesellschaft Ltd and Others, represented by J. Gardiner and F. Fitzpatrick; of Hoechst AG and Hoechst UK Ltd, represented by M. Barnes; of the United Kingdom Government, represented by G. Amodeo, acting as Agent, and D. Wyatt; of the German Government, represented by B. Muttelsee-Schön, acting as Agent; of the French Government, represented by S. Seam, acting as Agent; of the Netherlands Government, represented by M. Fierstra; and of the Commission, represented by R. Lyal and H. Michard, at the hearing on 25 May 2000,

after hearing the Opinion of the Advocate General at the sitting on 12 September 2000,

gives the following

Judgment

1.

By two orders of 2 October 1998, received at the Court Registry on 6 November 1998 (C-397/98) and 17 November 1998 (C-410/98) respectively, the High Court of Justice of England and Wales, Chancery Division, referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) five questions on the interpretation of Articles 6 and 52 of the EC Treaty (now, after amendment, Article 12 EC and Article 43 EC), Article 58 of the EC Treaty (now Article 48 EC) and/or Article 73b of the EC Treaty (now Article 56 EC).

2.

Those questions have been raised in proceedings between, on the one hand, in Case C-397/98, Metallgesellschaft Ltd, Metallgesellschaft AG, Metallgesellschaft Handel & Beteiligungen AG and The Metal and Commodity Company Ltd ('Metallgesellschaft and Others) and, on the other, in Case C-410/98, Hoechst AG and Hoechst UK Ltd ('Hoechst), and the Commissioners of Inland Revenue, concerning the obligation imposed on companies resident in the United Kingdom to pay advance corporation tax in respect of dividends paid to their parent companies.

The relevant national provisions

3.

Under the provisions of Part I of the Income and Corporation Taxes Act 1988 ('ICTA), profits made during an accounting period by a company resident in the United Kingdom or by a company not so resident which is trading in the United Kingdom through a branch or agency are chargeable to corporation tax.

4.

In accordance with section 12 ICTA, an accounting period is generally 12 months. For accounting periods ending before 1 October 1993, corporation tax was payable either nine months after the end of the accounting period or one month after the issue of the notice of assessment relating to that accounting period, at the taxpayer's choice. For accounting periods ending after 1 October 1993, corporation tax is due and payable nine months and a day after the end of the accounting period.

Advance corporation tax

5.

Section 14 ICTA provides that a company resident in the United Kingdom which makes certain distributions, such as the payment of dividends to its shareholders, is liable to pay advance corporation tax ('ACT) calculated on an amount equal to the amount or value of the distribution made.

6.

It is important to bear in mind that ACT is not a sum withheld on a dividend, which is paid in full, but is rather corporation tax borne by the company distributing dividends, paid in advance and set off against the mainstream corporation tax ('MCT) payable in respect of each accounting period.

7.

A company is obliged to make a return, in principle every quarter, showing the amount of any distribution made during that period and the amount of ACT payable. ACT due in respect of a distribution must be paid within 14 days of the end of the quarter in which the distribution was made.

8.

Under sections 239 and 240 ICTA, the ACT paid by a company in respect of a distribution made during a given accounting period must, in principle, subject to that company's right of surrender, either be set off against the amount which that company must pay by way of MCT for that accounting period or be transferred to that company's subsidiaries, which can set it off against the amount of MCT for which they themselves are liable. If the company is not liable for any corporation tax for the accounting period in question (because, for example, its profits are insufficient), it may either set off the ACT against the corporation tax payable for subsequent accounting periods or claim to carry the set-off back to preceding accounting periods.

9.

Whereas MCT becomes payable nine months or nine months and a day after the end of the accounting period, depending on whether that period ended before or after 1 October 1993, ACT must be paid within 14 days of the end of the quarter during which the distribution was made. Consequently, ACT is always paid before the time at which MCT - against which it can generally be set off - becomes payable. The national court points out that the effect for a company distributing dividends is therefore to advance, by a period of from eight and a half months (in the case of a distribution made on the last day of an accounting period) to one year, five and a half months (where the distribution was made on the first day of the accounting period), the date for payment of corporation tax due in respect of dividends paid.

10.

Since, where no MCT is payable for the period in question, it is even possible to set off ACT against profits of subsequent accounting periods, the national court observes

that in that case the advance will have been made for a longer period and even, in certain circumstances, for an indefinite period.

Tax credit

11.

A company resident in the United Kingdom is not liable to pay corporation tax in respect of dividends which it receives from another company resident in the UnitedKingdom (section 208 ICTA). Accordingly, any distribution of dividends subject to ACT made by one resident company to another gives rise to a tax credit for the company receiving the dividends (section 231(1) ICTA).

12.

That tax credit is equal to the amount of ACT paid by the distributing company on that distribution of dividends (section 231(1) ICTA).

13.

Where a company resident in the United Kingdom receives from its resident subsidiary a distribution entitling it to a tax credit, the parent company may deduct the amount of ACT paid by its subsidiary from the amount of ACT which it must itself pay when making distributions to its own shareholders, with the result that it pays ACT only on the excess.

14.

Where a company resident in the United Kingdom, but wholly exempt from MCT, receives a dividend from its resident subsidiary on which ACT has been paid, it is entitled to payment of an amount equal to the tax credit (section 231(2) ICTA).

15.

Companies that are not resident in the United Kingdom and do not trade there through a branch or agency are not subject to corporation tax in the United Kingdom. They are, however, in principle subject to United Kingdom income tax in respect of income having its source in that Member State, including dividends paid to them by their resident subsidiaries.

16.

However, under section 233(1) ICTA, where a non-resident parent company is not in principle entitled to a tax credit in the absence of a double taxation convention to that effect concluded between the United Kingdom and its State of residence, it is not subject to United Kingdom income tax on dividends paid by its resident subsidiary.

17.

Conversely, where a non-resident parent company is entitled to a tax credit under a double taxation convention concluded between the United Kingdom and its State of residence, it is subject to United Kingdom income tax on dividends received from its resident subsidiary.

18.

The double taxation convention concluded between the United Kingdom and the Federal Republic of Germany on 26 November 1964, as amended on 23 March 1970, does not grant a right to a tax credit to companies resident in Germany which hold shares in and receive dividends from companies resident in the United Kingdom.

19.

Consequently, a parent company with its seat in Germany and receiving a distribution subject to ACT from a subsidiary resident in the United Kingdom is not entitled in the United Kingdom to a tax credit corresponding to the ACT paid and,

under United Kingdom tax law, is not taxable in the United Kingdom in respect of the dividends received from its resident subsidiary.

20.

Where a non-resident parent company is entitled to a tax credit pursuant to a double taxation convention concluded between the United Kingdom and its State of residence, that company may claim to set off that credit against the income tax for which it is then liable in the United Kingdom in respect of dividends received from its resident subsidiary and, where the amount of the tax credit exceeds the amount of the tax, to be repaid the difference. If the claim is rejected, the company which made it may appeal to the Special or General Commissioners and, if necessary, from them to the High Court.

Group Income Election

21.

Under section 247 ICTA, two companies resident in the United Kingdom, one of which holds at least 51% of the other, may make a group income election.

22.

The result of such election is that the subsidiary does not pay ACT on the dividends which it pays to its parent company, unless it gives notice that it does not wish the election to apply to a particular distribution of dividends.

23.

A request for group income election must be made to an Inspector of Taxes. If the request is rejected, the requesting company may appeal against that decision to the Special or General Commissioners and, as the case may be, may appeal from them on a point of law to the High Court.

24.

Where a dividend is paid under a group income election by a subsidiary resident in the United Kingdom to its parent company which is also resident in the United Kingdom, no ACT is payable by the subsidiary and the parent company is not entitled to a tax credit. A group of companies may not simultaneously benefit from a group income election and from a tax credit in respect of the same dividend.

25.

ACT was abolished by section 31 of the Finance Act 1998 with effect from 6 April 1999. The legal provisions described above in paragraphs 5 to 24 are those which were in force prior to that date.

The facts of the main proceedings

26.

In Case C-397/98, Metallgesellschaft Ltd and The Metal and Commodity Company Ltd, companies resident in the United Kingdom, paid dividends to their respective parent companies, Metallgesellschaft AG and Metallgesellschaft Handel & Beteiligungen AG, companies having their seat in Germany, and were therefore required to pay ACT. The two subsidiaries were subsequently able to set off that ACT against the MCT for which they were liable.

27.

Metallgesellschaft and Others instituted proceedings before the High Court of Justice of England and Wales, Chancery Division, against the Commissioners of InlandRevenue in which they sought a ruling that they had suffered loss by virtue of

the fact that the distribution of dividends by the subsidiaries to their parent companies had been subject to ACT. The dispute in the main proceedings concerns the amounts of ACT paid between 16 April 1974 and 1 November 1995 by Metallgesellschaft Ltd and between 11 April 1991 and 13 October 1995 by The Metal and Commodity Company Ltd.

28.

In Case C-410/98, Hoechst UK Ltd, a company resident in the United Kingdom, distributed dividends to its parent company, Hoechst AG, which has its seat in Germany, and paid the ACT due on those dividends in the United Kingdom. It was subsequently able to set off that ACT against the MCT for which it was liable.

29.

Hoechst also brought proceedings before the High Court against the Commissioners of Inland Revenue in which they sought a ruling that they had suffered loss by virtue of the fact that the dividends distributed by Hoechst UK Ltd to Hoechst AG between 16 January 1989 and 26 April 1994 had been subject to ACT. The dispute in the main proceedings concerns the amounts of ACT paid between 14 April 1989 and 13 July 1994.

30.

In each of the cases in the main proceedings, the parent companies maintain that, because it was impossible for them and their subsidiaries to make a group income election, which would have enabled the subsidiaries to avoid payment of ACT, those subsidiaries suffered a cashflow disadvantage which subsidiaries of parent companies resident in the United Kingdom did not incur. By making a group income election, the latter were able to retain, until the date when the MCT to which they were liable fell due, the sums which they would otherwise have had to pay as ACT on the distribution of dividends to their parent companies. In their view, that disadvantage amounts to indirect discrimination on grounds of nationality contrary to the EC Treaty.

31.

In the alternative, Metallgesellschaft AG and Metallgesellschaft Handel & Beteiligungen AG maintain, in Case C-397/98, that they ought to receive a tax credit corresponding, at least in part, to the ACT paid by their resident subsidiaries, similar to that afforded to a parent company resident in the United Kingdom or to a parent company not resident in the United Kingdom but entitled to a tax credit under a double taxation convention.

32.

In Case C-410/98, if the Court were to find that Hoechst UK Ltd is not entitled to repayment of interest due in respect of the ACT paid, Hoechst AG claims, in the alternative, payment of tax credits corresponding to that ACT or a sum equivalent to the credits which a parent company resident in the Netherlands would have received. According to Hoechst AG, the fact that United Kingdom tax legislation authorises the grant of tax credits to parent companies which are not resident in the United Kingdom in respect of the ACT paid by their resident subsidiaries only where a double taxation convention so provides, which is the case with the convention concluded between the United Kingdom and the Kingdom of the Netherlands but not the case with theconvention concluded between the United Kingdom and the Federal Republic of Germany, amounts to unjustified discrimination between parent companies resident in different Member States, contrary to the Treaty.

The questions submitted for preliminary ruling

33.

As it took the view that the outcome of the cases pending before it depended on an interpretation of Community law, the High Court of Justice of England and Wales, Chancery Division, decided to stay proceedings and to refer the following questions, identically worded in each case, to the Court for a preliminary ruling:

'(1) In the circumstances set out in the orders for reference, is it consistent with Community law and, in particular, with Articles 6, 52, 58 and/or 73b of the EC Treaty for the legislation of a Member State to permit a group income election (allowing distributions to be paid by a subsidiary to its parent without accounting for advance corporation tax (ACT)) only where both the subsidiary and parent are resident in that Member State?

(2) If the answer to Question 1 is no , do the abovementioned provisions of the EC Treaty give rise to a restitutionary right for a resident subsidiary of a parent company resident in another Member State and/or the said parent to claim a sum of money by way of interest on the ACT which the subsidiary paid on the basis that the national laws did not allow it to make a group income election, or can such a sum only be claimed, if at all, by way of an action for damages pursuant to the principles laid down by the Court of Justice in Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* v *Federal Republic of Germany* and *R* v *Secretary of State for Transport*, ex parte *Factortame and Others* [1996] ECR I-1029 and Case C-66/95 *R* v *Secretary of State for Social Security*, ex parte *Eunice Sutton* [1997] ECR I-2163, and in either case is the national court obliged to grant a remedy even if under national law interest cannot be awarded (whether directly or by way of restitution or damages) on principal sums which are no longer owing to the plaintiffs?

(3) In the circumstances set out in the orders for reference, is it consistent with the abovementioned provisions of the EC Treaty for the authorities of one Member State to deny any tax credit to a company resident in another Member State when it grants such credit to resident companies and to companies resident in certain other Member States by virtue of the terms of its double taxation conventions with those other Member States?

(4) If the answer to Question 3 above is no , is and was the first Member State at all material times obliged to make a tax credit available to such company on the same terms as to resident companies or as to companies resident in Member States with provision for such credits in their double- taxation conventions?

(5) Is a Member State entitled to plead in answer to such a claim for restitution, tax credit or damages, that the plaintiffs are not entitled to recover, or that the plaintiffs' claim should be reduced, on the grounds that, despite the terms of the national statute which prevented them from doing so, as a matter of national law they ought to have made a group income election, or claimed a tax credit and have appealed to the Commissioners and, if necessary, the courts, against the decision of the Inspector of Taxes refusing the election or claim, relying upon the primacy and direct effect of the provisions of Community law?

34.

By order of the President of the Court of 14 December 1998, Cases C-397/98 and C-410/98 were joined for the purposes of the written procedure, the oral procedure and the judgment.

The first question

35.

By its first question, the national court is in substance asking whether it is contrary to Articles 6, 52, 58 and/or 73b of the Treaty for the tax legislation of a Member State, such as that in issue in the main proceedings, to afford companies resident in that Member State the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that Member State but to deny them that possibility where their parent company has its seat in another Member State.

36.

According to Metallgesellschaft and Others and Hoechst, the national legislation in question tends to discourage companies resident in another Member State from establishing subsidiaries in the United Kingdom and therefore constitutes an unjustified restriction on freedom of establishment. Their subsidiary submission is that that legislation is likewise incompatible with the Treaty provisions on the free movement of capital.

37.

It should be remembered that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law and avoid any discrimination on grounds of nationality (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19, and Case C-251/98 *Baars* [2000] ECR I-2787, paragraph 17).

38.

It follows from the Court's case-law that the general prohibition of all discrimination on grounds of nationality laid down by Article 6 of the Treaty applies independently only to situations governed by Community law for which the Treaty lays down no specific non-discrimination rules (Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraphs 12 and 13, Case C-1/93 *Halliburton Services* [1994] ECR I-1137,paragraph 12, *Royal Bank of Scotland*, cited above, paragraph 20, and *Baars,* cited above, paragraph 23).

39.

It is common ground that, in relation to the right of establishment, the principle of non-discrimination was implemented and specifically laid down by Article 52 of the Treaty (*Halliburton Services*, cited above, paragraph 12, Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 21, and *Baars*, paragraph 24).

40.

Consequently, Article 6 of the Treaty is not applicable to the cases in the main proceedings. The question whether legislation such as that in question imposes an unwarranted restriction on freedom of establishment must therefore first of all be determined in the light of Article 52 of the Treaty.

41.

Article 52 of the Treaty constitutes one of the fundamental provisions of Community law and has been directly applicable in the Member States since the end

of the transitional period. Under that provision, freedom of establishment for nationals of one Member State within the territory of another Member State includes the right to take up and pursue activities as self-employed persons and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of another Member State (Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 13, and *Royal Bank of Scotland*, paragraph 22).

42.

Freedom of establishment thus defined includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, to pursue their activities in the Member State concerned through a branch or agency (Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 20, and the case-law cited therein, and Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 34). With regard to companies, it should be noted in this context that it is their corporate seat in the above sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons (*ICI*, cited above, paragraph 20, and the case-law cited therein, and *Saint-Gobain ZN*, cited above, paragraph 35). Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would thus deprive Article 52 of all meaning (*Commission* v *France*, cited above, paragraph 18).

43.

With regard to the right to make a group income election, the legislation in question creates a difference in treatment between subsidiaries resident in the United Kingdom depending on whether or not their parent company has its seat in the United Kingdom. Resident subsidiaries of companies having their seat in the United Kingdom may, subject to certain conditions, avail themselves of the group income election regime andthus be relieved of the obligation to pay ACT when distributing dividends to their parent companies. By contrast, that advantage is denied to the resident subsidiaries of companies not having their seat in the United Kingdom and which are therefore obliged to pay ACT whenever they distribute dividends to their parent companies.

44.

It is not disputed that this gives the subsidiary of a parent company resident in the United Kingdom a cashflow advantage inasmuch as it retains the sums which it would otherwise have had to pay by way of ACT until such time as MCT becomes payable, that is to say, for a period of between eight and a half months, at the least, and 17 and a half months, at the most, depending on the date of distribution. Where MCT is not payable at all for the accounting period in question, this entails an even longer period, since ACT can be set off against corporation tax due in respect of subsequent accounting periods.

45.

According to the United Kingdom, Finnish and Netherlands Governments, the difference in treatment for tax purposes between subsidiaries resident in the United Kingdom depending on whether or not their parent company is resident in that Member State is objectively justified.

46.

The first submission of the United Kingdom Government is that the situation of resident subsidiaries of resident parent companies is not comparable to that of resident subsidiaries of non-resident parent companies.

47.

So far as resident subsidiaries of resident parent companies are concerned, the United Kingdom Government claims that, even though making a group income election relieves the subsidiary of the obligation to pay ACT when paying dividends to its parent company, that payment is merely deferred, in that the parent company, being resident, is itself required to pay ACT when it makes distributions subject to that tax. The obligation to pay ACT when paying dividends is therefore transferred from the subsidiary to the parent company and the subsidiary's exemption from ACT is offset by the parent company's liability to ACT.

48.

By contrast, according to the United Kingdom Government, if resident subsidiaries and their non-resident parent companies were able to benefit from the group election regime, no ACT at all would be paid in the United Kingdom. The subsidiary would be exempt from payment of ACT when paying dividends to its parent company, but that exemption would not be offset by any subsequent payment of ACT by the non-resident parent company when it made distributions, in that it is not subject to United Kingdom corporation tax or, therefore, to ACT.

49.

The Netherlands Government maintains that the principle of territoriality allows a Member State to reserve to resident parent companies the possibility of opting for a regime such as group income election since even though, under such a regime, the State waives levying the tax on the subsidiary, it does not renounce its right to that tax, since the effect of that regime is simply to put back the charging of ACT to anotherlevel within the same group of companies. By contrast, if the exemption from ACT under a group income election were granted to subsidiaries of parent companies not resident in the United Kingdom, no ACT would be charged in the United Kingdom on transactions within the group since the other group companies are in another Member State and are not subject to corporation tax in the United Kingdom. That would be tantamount to tax avoidance.

50.

The Finnish Government also submits that affording subsidiaries of parent companies not resident in the United Kingdom the possibility of making a group income election would allow those subsidiaries to avoid taxation in the United Kingdom since their parent companies are not subject to tax in that Member State.

51.

Those arguments cannot be upheld.

52.

First, in so far as ACT is in no sense a tax on dividends but rather an advance payment of corporation tax, it is incorrect to suppose that affording resident subsidiaries of non-resident parent companies the possibility of making a group income election would allow the subsidiary to avoid paying any tax in the United Kingdom on profits distributed by way of dividends.

53.

The proportion of corporation tax which a resident subsidiary need not pay in advance when distributing dividends to its parent company under the group income election regime is in principle paid when the subsidiary's MCT liability falls due. It should be remembered that a resident subsidiary of a company resident in another

Member State is liable to MCT in the United Kingdom in respect of its profits in the same way as a resident subsidiary of a resident parent company.

54.

Consequently, to afford resident subsidiaries of non-resident companies the possibility of making a group income election would do no more than allow them to retain the sums which would otherwise be payable by way of ACT until such time as MCT falls due. They would thus enjoy the same cashflow advantage as resident subsidiaries of resident parent companies, there being no other difference - assuming equal bases of assessment - between the amounts of MCT for which the two types of subsidiary are liable in respect of the same accounting period.

55.

Second, the fact that a non-resident parent company will, unlike a resident parent company, not be subject to ACT when it in turn pays out dividends cannot justify denying the resident subsidiary of the non-resident parent the possibility of exemption from payment of ACT when paying dividends to the parent.

56.

The fact that a non-resident parent company is not liable to ACT is attributable to its not being liable to corporation tax in the United Kingdom, since it is subject to that tax in its State of establishment. Logic therefore requires that a company should not have to make advance payment of a tax to which it will never be liable.

57.

Third, as regards the risk of tax avoidance, the Court has already held that the establishment of a company outside the United Kingdom does not, of itself, necessarily entail tax avoidance, since that company will in any event be subject to the tax legislation of the State of establishment (*ICI*, paragraph 26).

58.

Moreover, it would seem that it is acceptable to the tax law of the United Kingdom, so far as resident parent companies are concerned, for no ACT to be paid ultimately by companies which have made a group income election. In certain cases, the parent company to which dividends have been distributed under such a taxation regime will not itself pay any ACT. In particular, it may make no distribution liable to ACT or it may make distributions under the group income election which would otherwise have been liable to ACT. The liability of a resident parent of a resident subsidiary to pay ACT does not, therefore, even necessarily offset the release, arising from the group income election, of its subsidiary from the obligation to pay ACT.

59.

Fourth and finally, as regards the loss of revenue for the United Kingdom tax authorities which would result from affording resident subsidiaries of non-resident parent companies the possibility of making a group income election and thus to be exempted from paying ACT, suffice it to point out that it is settled case-law that diminution of tax revenue cannot be regarded as a matter of overriding general interest which may be relied upon in order to justify a measure which is, in principle, contrary to a fundamental freedom (see, in relation to Article 52 of the Treaty, *ICI*, paragraph 28).

60.

Consequently, as the Advocate General has pointed out in paragraph 25 of his Opinion, the difference in the tax treatment of parent companies depending on whether or not they are resident cannot justify denial of a tax advantage to subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State where that advantage is available to subsidiaries, resident in the United

Kingdom, of parent companies also resident in the United Kingdom, since all those subsidiaries are liable to MCT on their profits irrespective of the place of residence of their parent companies.

61.

The second submission of the United Kingdom Government is that the refusal to grant resident subsidiaries of non-resident parent companies the right to make a group income election is justified by the need to preserve the cohesion of the United Kingdom's tax system.

62.

The Government contends that the principle on which the United Kingdom's tax system is based is that companies should be liable to tax in respect of their profits and that their members should at the same time be liable to tax in respect of their share of those profits which the companies, in certain cases, pay out in the form of dividends. In order to mitigate that double taxation in economic terms, corporate shareholders resident in the United Kingdom are exempt from corporation tax on the dividendswhich they receive from their resident subsidiaries, as that exemption is offset by the ACT charge on the payment of dividends by subsidiaries to their parent companies.

63.

The United Kingdom Government submits that there is therefore a direct link between the exemption from corporation tax accorded to a parent company in respect of dividends received from its resident subsidiary and the liability of that subsidiary to ACT when it pays those dividends. The requirement that ACT be paid by the company distributing dividends is essential in order to ensure that, before the company receiving dividends is granted any exemption, the distributing company is taxed on those dividends, whether or not it is subject to corporation tax in respect of profits made during the accounting period in the course of which the dividends are paid.

64.

Where a resident subsidiary is not required to pay ACT when it distributes dividends, on the ground that it has, with its resident parent company, made a group income election, it is the ACT to be paid by the parent company when it in turn distributes dividends that will offset the exemption of the parent company from corporation tax in respect of the dividends which it has received.

65.

According to the United Kingdom Government, to authorise exemption from ACT where a resident subsidiary pays dividends to its non-resident parent company would mean that the tax exemption afforded to the parent company in respect of the dividends received would not be offset by any tax charged on the payment of those dividends, which would be incompatible with the cohesion of the United Kingdom tax system.

66.

That line of argument cannot be upheld.

67.

The Court of Justice has, it is true, held that the need to safeguard the cohesion of a tax system may justify rules that are liable to restrict fundamental freedoms (Case C-204/90 *Bachmann* [1992] ECR I-249 and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305).

68.

That is not, however, the case here.

69.

Whereas in the cases of *Bachmann* and *Commission* v *Belgium*, cited above, there was a direct link between the deductibility of contributions paid for old-age and life assurance contracts and the taxation of the sums paid out under those contracts, a link which had to be maintained in order to safeguard the cohesion of the tax system in question, there is no such direct link in the present cases between, on the one hand, the refusal to exempt subsidiaries in the United Kingdom of non-resident parent companies from payment of ACT under a group income election and, on the other, the fact that parent companies having their seat in another Member State and receiving dividends from their subsidiaries in the United Kingdom are not liable to corporation tax in the United Kingdom.

70.

Parent companies, whether resident or not, are exempt from corporation tax in the United Kingdom in respect of dividends received from their resident subsidiaries. Itis irrelevant for the purposes of granting a tax advantage such as exemption from ACT under the group income election regime that, for resident parent companies, such exemption is intended to prevent double taxation of the profits of subsidiaries in the United Kingdom and that, for non-resident parent companies, that exemption simply results from the fact that they are not in any event subject to corporation tax in that Member State, being subject to a comparable tax in the Member State in which they are established.

71.

Furthermore, the only tax to which a non-resident parent company is liable in the United Kingdom in respect of dividends received from its resident subsidiary is income tax, but that liability is linked to the grant, if any, of tax credits provided for by a double taxation convention concluded between the United Kingdom and the State of residence of the parent company.

72.

With regard to the plaintiffs in the main proceedings, parent companies resident in Germany are not liable to income tax in the United Kingdom on dividends received from their subsidiaries resident in the United Kingdom since the double taxation convention concluded between the United Kingdom and the Federal Republic of Germany does not provide for the grant of tax credits corresponding to the ACT paid by subsidiaries.

73.

Consequently, the refusal to allow subsidiaries, resident in the United Kingdom, of parent companies resident in another Member State to make a group income election cannot be justified on grounds relating to the need to preserve the cohesion of the United Kingdom's tax system.

74.

Moreover, the fact that ACT has in the meantime been abolished suggests that its payment was not essential to the proper functioning of the corporation tax system in the United Kingdom.

75.

Since legislation such as that in question runs counter to the Treaty provisions on freedom of establishment, it is unnecessary to consider whether it also runs counter to the Treaty provisions on the free movement of capital.

76.

The answer to the first question must therefore be that it is contrary to Article 52 of the Treaty for the tax legislation of a Member State, such as that in issue in the main proceedings, to afford companies resident in that Member State the possibility of

benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that Member State but to deny them that possibility where their parent company has its seat in another Member State.

The second question

77.

Having regard to the answer given to the first question, the second question seeks in substance to ascertain whether, on a proper construction of Article 52 of the Treaty, where a subsidiary resident in the Member State concerned and its parent company having its seat in another Member State have been wrongfully deprived of the benefit of a taxation regime which would have enabled the subsidiary to pay dividends to its parent company without having to pay advance corporation tax, that subsidiary and/or its parent company are/is entitled to obtain a sum equal to the interest accrued on the advance payments made by the subsidiary from the date of those payments until the date on which the tax became chargeable, even when national law prohibits the payment of interest on a principal sum which is not due. The national court frames that question in two hypotheses: in the first alternative, where the claim by the subsidiary and/or parent company is made in an action for restitution of taxes levied in breach of Community law and, in the second, where the claim is made in an action for compensation for damage resulting from the breach of Community law.

78.

The United Kingdom Government maintains, first, that if it should be held that it was contrary to Community law to deny resident subsidiaries of parent companies not resident in the United Kingdom the benefit of the group income election regime, Community law would require that breach to be remedied, not through an action for restitution but through an action brought against the State for damages for loss occasioned by its breach of Community law. In its view, ACT is not a tax levied contrary to Community law, since subsidiaries are in any event bound to pay by way of MCT the sums paid by way of ACT. It is the fact that the United Kingdom legislature failed to provide for the possibility of a resident subsidiary and its non-resident parent making a group income election that is at the origin of the disputes in the main proceedings and that might cause the United Kingdom to incur non-contractual liability. In *Sutton*, cited above, the Court held, in particular, that in the case of damage arising out of breach of a directive, Community law does not require a Member State to pay a sum equivalent to the interest on a sum paid late, in that case arrears of social security benefits. From this the United Kingdom Government concludes that Community law does not require interest to be paid in respect of the loss of use of a sum of money for a certain period on account of the advance levying of a tax contrary to Community law.

79.

Second, the United Kingdom Government argues that, even if the plaintiffs' claims were to be treated as claims for recovery of sums paid in breach of Community law, such claims cannot be upheld inasmuch as settled case-law states that it is for national law to determine whether interest is payable in connection with reimbursement of charges improperly levied in the light of Community law. Under English law, entitlement to interest depends on whether or not proceedings were commenced before payment of the sum on which interest is claimed.

80.

In consequence, the United Kingdom Government submits that the plaintiffs in the main proceedings cannot claim interest under a claim for restitution or for damages inasmuch as the principal sums claimed were repaid by set-off of ACT against theamounts due by way of MCT payable by the subsidiaries before the proceedings were brought.

81.

It must be stressed that it is not for the Court to assign a legal classification to the actions brought by the plaintiffs before the national court. In the circumstances, it is for Metallgesellschaft and Others and Hoechst to specify the nature and basis of their actions (whether they are actions for restitution or actions for compensation for damage), subject to the supervision of the national court.

82.

First, on the assumption that the actions brought by the plaintiffs in the main proceedings are to be treated as claims for restitution of a charge levied in breach of Community law, the question is whether, in circumstances such as those in the main proceedings, a breach of Article 52 of the Treaty by a Member State entitles taxpayers to reimbursement of interest accrued on the tax they have paid from the date of its premature payment until the date on which it properly fell due.

83.

It is important to bear in mind in this regard that what is contrary to Community law, in the disputes in the main proceedings, is not the levying of a tax in the United Kingdom on the payment of dividends by a subsidiary to its parent company but the fact that subsidiaries, resident in the United Kingdom, of parent companies having their seat in another Member State were required to pay that tax in advance whereas resident subsidiaries of resident parent companies were able to avoid that requirement.

84.

According to well-established case-law, the right to a refund of charges levied in a Member State in breach of rules of Community law is the consequence and complement of the rights conferred on individuals by Community provisions as interpreted by the Court (judgments in Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case 309/85 *Barra* [1988] ECR 355, paragraph 17; Case C-62/93 *BP Supergas* [1995] ECR I-1883, paragraph 40; Case C-343/96 *Dilexport* [1999] ECR I-579, paragraph 23; and judgment of 21 September 2000 in Joined Cases C-441/98 and C-442/98 *Michailidis* [2000] ECR I-0000, paragraph 30). The Member State is therefore required in principle to repay charges levied in breach of Community law (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 20, *Dilexport*, cited above, paragraph 23, and *Michailidis*, cited above, paragraph 30).

85.

In the absence of Community rules on the restitution of national charges that have been improperly levied, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, first, that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and, second, that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness) (see, in particular, Case C-231/96 *Edis* [1998] ECR I-4951, paragraphs 19 and 34, Case C-260/96 *Spac* [1998]ECR I-4997, paragraph 18, Case C-228/96 *Aprile* [1998] ECR I-7141, paragraph 18, and *Dilexport*, paragraph 25).

86.

It is likewise for national law to settle all ancillary questions relating to the reimbursement of charges improperly levied, such as the payment of interest, including the rate of interest and the date from which it must be calculated (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 11 and 12, and Case 130/79 *Express Dairy Foods* [1980] ECR 1887, paragraphs 16 and 17).

87.

In the main proceedings, however, the claim for payment of interest covering the cost of loss of the use of the sums paid by way of ACT is not ancillary, but is the very objective sought by the plaintiffs' actions in the main proceedings. In such circumstances, where the breach of Community law arises, not from the payment of the tax itself but from its being levied prematurely, the award of interest represents the 'reimbursement of that which was improperly paid and would appear to be essential in restoring the equal treatment guaranteed by Article 52 of the Treaty.

88.

The national court has said that it is in dispute whether English law provides for restitution in respect of damage arising from loss of the use of sums of money where no principal sum is due. It must be stressed that in an action for restitution the principal sum due is none other than the amount of interest which would have been generated by the sum, use of which was lost as a result of the premature levy of the tax.

89.

Consequently, Article 52 of the Treaty entitles a subsidiary resident in the United Kingdom and/or its parent company having its seat in another Member State to obtain interest accrued on the ACT paid by the subsidiary during the period between the payment of ACT and the date on which MCT became payable, and that sum may be claimed by way of restitution.

90.

Second, assuming that the plaintiffs' claims are to be treated as claims for compensation for damage caused by breach of Community law, the question is whether, in circumstances such as those in the main proceedings, breach of Article 52 of the Treaty by a Member State entitles the taxpayer to payment of damages in a sum equal to the interest accrued on the tax which they have paid from the date of premature payment until the date on which it properly fell due.

91.

In that regard, as the Court has already held in paragraph 87 of its judgment in *Brasserie du Pêcheur* and *Factortame*, cited above, total exclusion of loss of profit as a head of damage for which reparation may be awarded cannot be accepted in the case of a breach of Community law since, especially in the context of economic or commercial litigation, such a total exclusion of loss of profit would be such as to make reparation of damage practically impossible.

92.

In this regard, the United Kingdom Government's argument that the plaintiffs could not be awarded interest if they sought compensation in a claim for damages cannot be accepted.

93.

Admittedly, the Court ruled in *Sutton* that the Community directive at issue in that case conferred only the right to obtain the benefits to which the person concerned would have been entitled in the absence of discrimination and that the payment of interest on arrears of benefits could not be regarded as an essential component of the

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right as so defined. However, in the present cases, it is precisely the interest itself which represents what would have been available to the plaintiffs, had it not been for the inequality of treatment, and which constitutes the essential component of the right conferred on them.

94.

Moreover, in paragraphs 23 to 25 of *Sutton*, the Court distinguished the circumstances of that case from those of Case C-271/91 *Marshall* [1993] ECR I-4367 ('*Marshall II*). In the latter case, which concerned the award of interest on amounts payable by way of reparation for loss and damage sustained as a result of discriminatory dismissal, the Court ruled that full compensation for the loss and damage sustained cannot leave out of account factors, such as the effluxion of time, which may in fact reduce its value, and that the award of interest is an essential component of compensation for the purposes of restoring real equality of treatment (*Marshall II*, cited above, paragraphs 24 to 32). The award of interest was held in that case to be an essential component of the compensation which Community law required to be paid in the event of discriminatory dismissal.

95.

In circumstances such as those in the cases in the main proceedings, the award of interest would therefore seem to be essential if the damage caused by the breach of Article 52 of the Treaty is to be repaired.

96.

The answer to the second question referred must therefore be as follows:

- Where a subsidiary resident in one Member State has been obliged to pay advance corporation tax in respect of dividends paid to its parent company having its seat in another Member State even though, in similar circumstances, the subsidiaries of parent companies resident in the first Member State were entitled to opt for a taxation regime that allowed them to avoid that obligation, Article 52 of the Treaty requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the Member State concerned have benefited as a result of the advance payment of tax by the subsidiaries.

- The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of thesums paid prematurely does not constitute a ground for dismissing such an action.

- While, in the absence of Community rules, it is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

The third and fourth questions

97.

In light of the answer given to the first question, it is unnecessary to reply to the third and fourth questions.

The fifth question

98.

By its fifth question, the national court is seeking in substance to ascertain whether it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and did not therefore make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.

99.

According to the United Kingdom Government, were refusal to allow resident subsidiaries of non-resident parent companies the benefit of a group income election to be held to be contrary to Community law, the appropriate legal recourse would be an action to establish State liability in accordance with the conditions laid down by the Court in *Brasserie du Pêcheur* and *Factortame*. It claims that it can plead, by way of defence to such actions for damages, that the claimants failed to act diligently, in that they did not at the outset apply to make a group income election, which would have enabled them to challenge the refusal of the tax authorities and to invoke the primacy and direct effect of Community law in order to obtain, in particular, a reference for a preliminary ruling at the earliest opportunity.

100.

That argument is not based on the existence in national law of any rule of limitation or time bar.

101.

The United Kingdom Government considers its position to be well founded, having regard in particular to paragraphs 84 and 85 of *Brasserie du Pêcheur* and *Factortame*,in which the Court ruled that, in accordance with a general principle common to the legal systems of the Member States, the injured party must show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the damage himself, and, therefore, that in order to determine the loss or damage for which reparation may be granted, the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage or limit its extent and whether, in particular, he availed himself in time of all the legal remedies available to him.

102.

First of all, it must be borne in mind that actions such as those in the main proceedings are subject to national rules of procedure, which may in particular require plaintiffs to act with reasonable diligence in order to avoid loss or damage or to limit its extent.

103.

Next, it is not disputed that in the cases in the main proceedings the tax legislation of the United Kingdom clearly denied resident subsidiaries of non-resident parent companies the benefit of the group income election, with the result that the plaintiffs cannot be faulted for failure to indicate their intention to apply to make a group income election. According to the orders for reference, it is not disputed that, had the plaintiffs applied for that taxation regime, their application would have been refused

by the Inspector of Taxes because the parent companies were not resident in the United Kingdom.

104.

Finally, the orders for reference make it clear that an appeal against such a refusal by the tax authorities could have been brought before the Special or General Commissioners and then, if necessary, before the High Court. According to the national court, before judgment could be given in such an appeal, the subsidiaries would still have had to pay ACT in respect of all the dividends which they had paid out and, furthermore, if the appeal had succeeded, they would not have obtained reimbursement of the ACT, since no such right to reimbursement exists under English law. If the subsidiaries had chosen not to pay ACT in respect of dividends paid before the determination of their appeals, they would nevertheless have been assessed to ACT, would have had to pay interest on those sums and would have laid themselves open to statutory penalties if they had been judged to have acted negligently and without reasonable cause.

105.

It therefore appears that, in the cases in the main proceedings, the United Kingdom Government is blaming the plaintiffs for lack of diligence and for not availing themselves earlier of legal remedies other than those which they took to challenge the compatibility with Community law of the national provisions denying a tax advantage to subsidiaries of non-resident parent companies. It is thus criticising the plaintiffs for complying with national legislation and for paying ACT without applying for the group income election regime or using the available legal remedies to challenge the refusal with which the tax authorities would inevitably have met their application.

106.

The exercise of rights conferred on private persons by directly applicable provisions of Community law would, however, be rendered impossible or excessively difficult if their claims for restitution or compensation based on Community law were rejected or reduced solely because the persons concerned had not applied for a tax advantage which national law denied them, with a view to challenging the refusal of the tax authorities by means of the legal remedies provided for that purpose, invoking the primacy and direct effect of Community law.

107.

The answer to the fifth question must therefore be that it is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.

Costs

108.

The costs incurred by the United Kingdom, German, French, Netherlands and Finnish Governments and by the Commission, 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 Court of Justice of England and Wales, Chancery Division, by orders of 2 October 1998, hereby rules:

1. It is contrary to Article 52 of the EC Treaty (now, after amendment, Article 43 EC) for the tax legislation of a Member State, such as that in issue in the main proceedings, to afford companies resident in that Member State the possibility of benefiting from a taxation regime allowing them to pay dividends to their parent company without having to pay advance corporation tax where their parent company is also resident in that Member State but to deny them that possibility where their parent company has its seat in another Member State.

2. Where a subsidiary resident in one Member State has been obliged to pay advance corporation tax in respect of dividends paid to its parent companyhaving its seat in another Member State even though, in similar circumstances, the subsidiaries of parent companies resident in the first Member State were entitled to opt for a taxation regime that allowed them to avoid that obligation, Article 52 of the Treaty requires that resident subsidiaries and their non-resident parent companies should have an effective legal remedy in order to obtain reimbursement or reparation of the financial loss which they have sustained and from which the authorities of the Member State concerned have benefited as a result of the advance payment of tax by the subsidiaries.

The mere fact that the sole object of such an action is the payment of interest equivalent to the financial loss suffered as a result of the loss of use of the sums paid prematurely does not constitute a ground for dismissing such an action.

While, in the absence of Community rules, it is for the domestic legal system of the Member State concerned to lay down the detailed procedural rules governing such actions, including ancillary questions such as the payment of interest, those rules must not render practically impossible or excessively difficult the exercise of rights conferred by Community law.

3. It is contrary to Community law for a national court to refuse or reduce a claim brought before it by a resident subsidiary and its non-resident parent company for reimbursement or reparation of the financial loss which they have suffered as a consequence of the advance payment of corporation tax by the subsidiary, on the sole ground that they did not apply to the tax authorities in order to benefit from the taxation regime which would have exempted the subsidiary from making payments in advance and that they therefore did not make use of the legal remedies available to them to challenge the refusals of the tax authorities, by invoking the primacy and direct effect of the provisions of

Community law, where upon any view national law denied resident subsidiaries and their non-resident parent companies the benefit of that taxation regime.

La Pergola

Wathelet

Edward

Jann

Sevón

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

A. La Pergola

Registrar

President of the Fifth Chamber