The freedom of establishment and German corporation tax - an analysis of the Saint-Gobain judgement

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Master thesis in European Union Tax Law 20 credits

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Summary

Non-harmonized direct taxes fall within the Member States’ competence. This means that the Member States are free to develop their own tax systems, as long as there is no Community harmonisation. But since the freedom of establishment (and other rights under the EC Treaty) could be disturbed by national tax law, this competence must be exercised in consistency with Community law to avoid any discrimination or restrictions of the free movement.

The freedom of establishment gives natural and legal persons a right to primary and secondary establishment within the Community. The principle is laid down in Article 43 EC for natural persons and is considered to include a prohibition of discrimination as well as a prohibition of restrictions. The freedom of establishment in Article 43 EC has direct effect. However, discriminating or restricting measures can be justified by a Member State, either by Article 46 EC or by matters of common interest, the so called rule of reason. Arguments that could be considered as justifications are cohesion of the tax system and fiscal supervision. Article 43 is extended to legal persons formed in accordance with the laws of a Member State through Article 48 EC.

The Saint-Gobain case1 concerned three German tax benefits that were not granted to Saint-Gobain ZN, since it was subject to limited tax liability, being a permanent establishment. According to Germanys DTAs and the national tax legislation, the benefits in question were granted only to companies with unlimited tax liability. Permanent establishments and subsidiaries were hence treated differently. The ECJ concluded that this was in conflict with the freedom of establishment, since permanent establishments were subject to discrimination. The most important statements of the judgement were:

- If a tax concession that is granted, by law or by a double-taxation agreement, to companies with unlimited tax liability but is refused to a company with limited tax liability, and if the refusal is based on the location of the company’s seat, there is an infringement of Article 43 EC, unless the different treatment can be justified.

- National companies and permanent establishments of companies in other Member States are objectively in the same situation when it comes to taxation of dividends from foreign subsidiaries. This is especially true since the permanent establishment with limited tax liability that is refused the tax concession in practice is liable to tax not only for domestic, but also for foreign income.

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The consequence of this judgement is that Germany, and other Member States, have to extend the tax legislation and the application of their DTAs so that permanent establishments are granted the same benefits as companies subject to unlimited tax liability. The equal treatment is necessary because of the right to choose the appropriate legal form of a secondary establishment.

The analysis in this thesis focuses on the German Körperschaftsteuergesetz. Some changes in this law were made in 1993 in order to comply with the freedom of establishment. However, there are still provisions that might be in conflict with Community law. The possibility to forward dividends received from a foreign company to another German company without fiscal consequences has for instance not been fully extended to permanent establishments. The exemption in the calculation of income is granted to permanent establishments only where the dividends are received directly from the foreign company. Neither are the provisions on tax exemptions for Organschaften fully extended to constellations where the Organträger is a permanent establishment. There might also be a problem with the tax rates that give companies with unlimited tax liability the possibility to be taxed by a lower rate if it pays dividends of at least 30%. Consequently, the changes of the KStG were not sufficient; there are still some provisions that probably are inconsistent with the freedom of establishment.

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2 Das Körperschaftsteuergesetz BGBI I 1999 p817ff
Preface

It has been very interesting to be able to participate in the research project “Internationell skattekonkurrens ur ett EG-rättsligt perspektiv”. My thesis treats a very small part of this complicated field of law, but I still hope that it could be a useful contribution to the project, and perhaps even to other readers.

I would like to thank professor Sture Bergström and Anette Bruzelius, Univerity of Lund for their valuable comments and opinions on my writings. I would also like to thank professor Paul Kirschhof, University of Heidelberg, for receiving me in Heidelberg, letting me use his private library and pointing me in the right direction.

Lund, November 2000

Nina Svensson
## Abbreviations

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<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>BewG</td>
<td>Bewertungsgesetz</td>
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<td>the Court</td>
<td>the European Court of Justice</td>
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<td>DB</td>
<td>Der Betrieb</td>
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<td>DStR</td>
<td>Deutsches Steuerrecht</td>
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<td>DTA</td>
<td>Double Taxation Agreement</td>
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<td>EC</td>
<td>European Community</td>
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<td>ECR</td>
<td>European Court Reports</td>
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<td>EStG</td>
<td>Einkommensteuergesetz</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>EU</td>
<td>European Union</td>
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<td>EuZW</td>
<td>Europäische Zeitschrift für Wirtschaftsrecht</td>
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<td>GewStG</td>
<td>Gewerbesteuergesetz</td>
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<td>KStG</td>
<td>Körperschaftsteuergesetz</td>
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<td>StandOG</td>
<td>Standortsicherungsgesetz</td>
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<td>the Treaty</td>
<td>the Treaty establishing the European Community</td>
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<td>UStG</td>
<td>Umsatzsteuergesetz</td>
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<td>ZN</td>
<td>Zweigniederlassung (=branch)</td>
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1 Introduction

One of the main objectives of the EC Treaty is to create a common market that should be free from restrictions and discrimination. The inner market is in Article 14 EC described as an area without borders between the Member States and where the obstacles to the free movement of goods, persons, services and capital have been abolished. These four freedoms are consequently of great importance to the establishment of a common market. This thesis is focused on one of them; the freedom of establishment, that is regulated in Article 43 EC.

The Member States accordingly have to make sure that their legislation is not in conflict with the freedom of establishment or any of the other freedoms. However, it is possible for the Member States to keep some obstacles to the freedom of movement as long as these can be justified, either by the Treaty or by the exceptions laid down in the case law of the European Court of Justice. The possibility to justify national measures will be closer analysed in the following.

The purpose of this thesis is to show the consequences of the freedom of establishment, as it is laid down in the Saint-Gobain judgement on the German corporation tax. I will analyse how German double taxation agreements and legislation in general is affected by this judgement. I will also look deeper into the German corporation tax law, the KStG, and draw attention to some problematic areas where the provisions might be in conflict with Article 43 EC. The perspective of the analysis is the same as in the judgement; the fiscal situation of permanent establishments of other Member States will be analysed to see whether they are entitled to the same benefits as subsidiaries of foreign companies.

To do this, I first had to clarify the purport of the freedom of establishment. This was done mainly through the study of Community cases, since European law is a discipline developed by cases from the ECJ. Subsequently, I have analysed the Saint-Gobain judgement in detail. Comments in literature and articles have been used as help in determining the consequences of this case on the German corporation tax law. Finally, I have studied some paragraphs of the KStG and tried to draw conclusions on their compatibility with the freedom of establishment. To do this, I have used the latest version of the legislation together with a handbook on taxes. The selection of paragraphs that might be in conflict with the freedom of establishment is:

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4 Das Körperschaftsteuergesetz BGBl I 1999 p817ff
establishment has been made from fields that have been described as problematic in different articles, most published in German periodicals.
2 The Right of Establishment

The freedom of establishment is considered to be one of the most fundamental principles of Community law. Its main purpose is to integrate the market, by making it easier for nationals and companies to set up business in another Member State. The right of establishment is closely linked to the free movement of workers, but concerns the activity of self-employed persons instead of employees. It might also be problematic to distinguish it from the freedom to provide services. The decisive criteria are then the duration, regularity, periodicity and continuity of the activity in the host Member State.6

2.1 Legislation

The principle of freedom of establishment is laid down in Article 43 EC:

Within the framework of the provisions set out below, restrictions of the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 43 EC is extended to companies and firms in Article 48 EC. It gives the nationals or companies of the Community a right to primary or secondary establishment. Primary establishment means that a new company is founded. Secondary establishment is when an existing company founds an agency, a branch or a subsidiary. According to Article 43 EC, restrictions of the freedom of establishment is prohibited. This means that a foreign company must be treated in the same way as national companies, but also that different kinds of establishments, i.e. agencies, branches and subsidiaries must be treated in the same way, to give a company or a person the free choice of the appropriate legal form of the establishment. As we will

see below, it also means that a Member State must not hinder its own nationals and companies from establishing themselves in another Member State.

Secondary Community legislation has been adopted concerning the right of establishment for nationals, for instance Council Directive 73/148/EEC on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to establishment and the provision of services. In Directive 64/221/EEC on free movement of workers, the scope of the public policy, public security and public health-justifications has been defined, but only regarding natural persons. Very little secondary legislation has been adopted concerning the right of establishment for companies and firms. The Court has also clarified that the above mentioned Directive 73/148 refers only to natural persons and its provisions can not be applied by analogy to legal persons.

2.2 The Right of Establishment and Taxation

Non-harmonized direct taxes fall within the Member States’ competence. This means that the Member States are free to develop their own tax systems, as long as there is no Community harmonisation. But since the freedom of establishment (and other rights under the EC Treaty) could be disturbed by national tax law, the Member States have to consider EC prohibitions when adopting tax regulations. If foreign companies were refused certain tax advantages or were taxed by a higher rate, this would constitute an obstacle to their right of establishment (or other rights under the EC Treaty). It is therefore settled case-law, that although direct taxation falls within the competence of the Member States, this competence must be exercised in consistency with Community law to avoid any discrimination or restrictions of the free movement. If there would be a conflict between national tax law and the freedoms guaranteed by the EC Treaty, Community law would prevail. Article 43 EC also has direct effect, as the European Court of Justice has stated in several cases, and thus can be relied on before a national court.

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7 C-81/87 Daily Mail and General Trust PLC [1988] ECR 5483 p 28
11 C-81/87 Daily Mail and General Trust PLC [1988] ECR 5483 p 15
2.3 Restrictions or discrimination

Community rules on free movement of goods, services and people are normally seen as either prohibitions of restrictions or prohibitions of discrimination, or both.\(^{12}\) A prohibition of discrimination has as its purpose to oblige Member States to ensure equal treatment for nationals and companies from other Member States. The definition of discrimination is that different rules are applied to comparable situations or the same rules are applied to different situations.\(^{13}\) However, it has been recognized that residents and non-residents are not necessarily in the same situation. A Member State can not automatically apply different rules to non-residents, but in certain situations, if there is an objective and relevant difference in situation between residents and non-residents, different rules may not constitute discrimination.\(^{14}\)

To violate a prohibition of discrimination, there has to be some kind of discriminatory treatment on national grounds. There are however different kinds of discriminatory treatment; direct and indirect discrimination. Both are forbidden in Article 43 EC. When a regulation overtly differentiates between people or companies on grounds of nationality, there is no doubt that the regulation is directly discriminatory. But, as the Court has stated, a rule that appears to be based on non-national criteria, but still acts mainly to the detriment of nationals of other Member States, may constitute indirect discrimination on grounds of nationality.\(^{15}\)

Traditionally, the rules protecting the free movement on goods, services and people have been seen as prohibitions of discrimination. Most Community cases have concerned some kind of discrimination, direct or indirect, based on nationality. Lately, there has however been a change in the ECJ’s approach. The Court has applied a prohibition of restrictions based on non-discriminatory grounds in several cases concerning free movement and direct taxation.\(^{16}\) The definition of a restriction is a rule that applies equally to all, regardless of nationality, but still hinders the free movement. This means that even restrictions that are applied equally to both domestic and foreign countries could infringe Article 43 EC, if they, despite their neutrality, restrict the freedom of establishment. Put in other words, prohibition of discrimination is a part of the wider concept of prohibition of restrictions. Discrimination thus can be seen as restrictions that are based on nationality.

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\(^{12}\) the rules on the free movement on capital is normally excluded from comparisons between the free movements. This is because these rules were instituted more recently and thus have been applied in fewer cases.

\(^{13}\) C-80/94 Wielockx v. Inspecteur der Direkte Belastingen [1995] ECR I-2493


\(^{16}\) Bergström, Sture: EG-rättens lojalitetsprincip och rätten till fri etablering i artikel 43 EG, några inkomstskatterättsliga principer (utkast) 2000
It has traditionally been important to differentiate between direct discrimination, indirect discrimination and restrictions. Especially the differentiation between indirect discrimination and restrictions has been problematic. If a regulation was considered to be a discrimination, it could only be justified by treaty-based justifications, such as those laid down in Article 46 EC. However, the Court already in 1979 stated that when a prohibition of discrimination is extended to a prohibition of restrictions, the possibility of justifying the restricting measure must be extended as well. Not only treaty-based exceptions, but also matters of common interest therefore can justify a restriction that applies equally to all, regardless of nationality. The different possibilities to justify a measure was hence the reason why a differentiation between discrimination and restrictions was necessary.

Today, the Court of Justice is developing the possibility to let matters of common interest justify even measures that are indirectly discriminatory. Since both restrictions and indirect discrimination could be justified in the same way, the importance of differentiating between these measures is becoming obsolete.

2.3.1 Prohibition of discrimination and Article 43 EC

As mentioned above, Article 43 EC has traditionally been interpreted as an obligation on a Member State to treat foreign nationals and companies established in the territory of that Member State, in the same way as its own nationals and companies. This prohibition of discrimination is based on Article 12 EC, where a general obligation of equal treatment is laid down. Article 12 EC should be seen as lex generalis, with implications on the freedom of establishment through Article 43, that hence is considered as lex specialis. Accordingly, Article 12 EC is not applicable where Article 43 EC is.

Not long ago, the ECJ found a direct discrimination in a Swedish tax law in the case X and Y. X AB was a company incorporated under Swedish law, with a subsidiary, Y AB. According to Swedish tax legislation, transfers within a group of companies were treated as deductible expenses for the transferor and taxable income for the transferee. However, the condition was that both companies were established in Sweden, and that the subsidiary was

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18 It is somewhat uncertain to what extent the rule of reason can justify national rules hindering the freedom of establishment. See below, chapter 3.
19 Weiss, Wolfgang: Nationales Steuerrecht und Niederlassungsfreiheit EuZW Heft 16/1999
20 Terra/Wattel p 45
owned by the other company, alone or together with other companies in the same group, by at least nine tenths. X AB and Y AB sought a preliminary decision concerning their rights to this tax relief, under three different circumstances. In the first case, Y AB would be owned exclusively by X AB and its Swedish subsidiary. In the second case, Y AB would be owned by X AB together with a Dutch subsidiary and in the third case it would be owned by X AB, a Dutch subsidiary and a German subsidiary.

The Swedish Revenue Law Commission (Skatterättsnämnden) ruled in its preliminary decision that the companies would be granted the tax relief in the first case where the subsidiary owning Y AB was Swedish, according to the merger rule in Swedish tax legislation. And although only Swedish companies could benefit from this rule, it had to be extended to comprise also the second case where the subsidiary was foreign, because of the non-discrimination clause in the double-taxation agreement between Sweden and the Netherlands. However, in the third case the same rule did not apply. The Swedish merger clause could not be extended to Dutch and German subsidiaries, even though there were non-discrimination clauses in the double-taxation agreements both with Germany and the Netherlands. This situation occurred because the cumulative application of two different double-taxation agreements was not allowed.

X AB and Y AB appealed against this decision, arguing that Article 43 EC was infringed, since the tax relief was granted only when the owning subsidiary was either Swedish or had its seat in one and the same Member State. The Swedish Supreme Administrative Court (Regeringsrätten), referred the question to the Court of Justice for a preliminary ruling.

The Court cited its judgements in Daily Mail and confirmed that the freedom of establishment means that a Member State must not hinder its own companies from using their right of establishment and owning companies in other Member States. The Swedish tax system refused in some cases tax relief that was available to all-Swedish groups, to companies who had used their right of establishment in other Member States. Since this legislation was based on the criteria of the subsidiaries’ seat, it constituted direct discrimination and was contrary to Article 43 EC. The Swedish government agreed and did not try to justify the restriction.

In Royal Bank of Scotland, the Greek corporate tax rates were contested. In Greece, two different tax rates were used. The normal tax rate was 40 %, but Greek public companies were instead taxed by a rate of 35 %. This lower tax rate was not available to permanent establishments of foreign companies. For the different tax rates to amount to a discrimination, the permanent establishment and the Greek company must be in a comparable

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22 C-81/87 Daily Mail and General Trust PLC [1988] ECR 5483
23 C-311/97 Royal Bank of Scotland plc v. Elliniko Dimosio (Greek State) [1999] ECR I-2651
situation. The Court stated that the net income in both entities was calculated by the same methods and this net income was in both cases the basis for the taxation. The provisions that excluded permanent establishments of foreign companies from the lower tax rate therefore constituted direct discrimination.

2.3.2 Prohibition of restrictions and Article 43 EC

A restriction is thus when a rule that applies equally to all, regardless of nationality, still hinders the freedom of establishment. The prohibition to restrict the freedom of movement is based on the principle of loyalty in Article 10 EC, that imposes an obligation on the Member States to implement the Community objectives. This is the ground for the prohibition of restrictions of the freedom of establishment. As mentioned above, Article 43 EC covers also non-discriminatory restrictions, for instance in cases where a Member State imposes restrictions on its own nationals or companies to hinder their establishment in other Member States. In Daily Mail, a British company objected to not being allowed to move its central management and control to the Netherlands, while keeping its legal personality and its status as a UK company. The Court established that Article 43 EC was mainly directed to ensuring equal treatment of foreign nationals and companies, but that it also prohibited “the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation…”.

As the Court observed, the obligation of equal treatment of foreign companies would be rendered meaningless, if the state of origin could prohibit companies from leaving the state to establish themselves in another Member State. From this statement it is clear that Article 43 EC covers cases of discrimination in the host Member State as well as obstacles for the Member State’s own nationals or companies to leave.

There are a few cases that by some authors and by the Court have been considered as discrimination problems, while other authors see these cases as an expression of the prohibition of restrictions. One of those cases is Futura and Singer. In this case, the companies Futura and Singer contested a provision making the deductibility of losses dependent on the keeping of accounts in Luxembourg.

Futura, a French company, had a subsidiary, Singer, in Luxembourg. Singer was considered as a non-resident taxpayer in Luxembourg and was not obliged to keep separate accounts relating to their Luxembourg activities.

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24 Bergström, Sture p1
26 C-81/87 Daily Mail and General Trust PLC [1988] ECR 5483 p16
However, if Singer wanted to deduct losses carried forward from previous years, accounts had to be kept within the country. The Court stated that the provisions of the law specifically affected companies having their seat in another Member State and that it in principle was prohibited under Article 43. But was this an expression of the prohibition of discrimination or the prohibition of restrictions? In the opinion of some authors, the rule in question, that is the obligation to keep accounts in Luxembourg, affected all companies in the same way. Both national and foreign companies had to keep their books within the country. Consequently, the rule was not discriminatory, not even indirectly. However, it still hindered the freedom of establishment, since foreign companies had difficulties keeping books both in the Member State of origin and in Luxembourg. The rule therefore should be seen as a prohibited restriction. The Court however seems to consider the national rule as discriminatory, which is a point of view that I agree with. Although the obligation to keep books within Luxembourg applies to all companies, it imposes a greater burden on foreign companies, since these companies also have an obligation to keep their books in their Member State of origin. In my opinion the national rule accordingly has a discriminatory effect.

In ICI, the Court did not accept a British legislation on consortium relief. ICI was a British company that owned 49% of a Holding company with 23 subsidiaries. Some of these subsidiaries were established in the UK, some in other Member States and others outside the Community. ICI sought relief for losses occurred in one of the British subsidiaries, however this was refused. The reason was that under British legislation, this kind of consortium relief was only available when all, or most of, the Holding company’s subsidiaries were resident in the UK. According to the Court, ICI had through the holding company exercised its freedom of establishment in founding subsidiaries in other Member States. When the tax advantage was denied because of the subsidiaries’ establishment in other Member States, the subsidiaries’ seat was the ground for differential tax treatment. Since this could not be justified, the legislation was incompatible with Article 43. In its judgement, the Court repeatedly stated that the legislation constituted a prohibited discrimination. It has however been argued that the British provisions on consortium relief were not discriminatory, but should be seen as a restriction on the freedom of establishment. It is true that the legislation prevents a company from obtaining the consortium relief if some of its subsidiaries are resident outside the UK. These rules affect every company in the same way, regardless of whether the company was founded in Great Britain or not, as long as it has foreign subsidiaries. The provisions do not connect to the nationality of the Holding company, but to the business conducted in other countries by both British and foreign Holding companies through their foreign subsidiaries. In my opinion, this approach

28 see for instance Weiss, Wolfgang EuZW p493
30 see for instance Weiss, Wolfgang EuZW Heft 16/1999
makes sense, but the national rules still have a discriminatory effect, since companies with foreign subsidiaries are treated in a less favourable way. Because of the connection in the legislation to the nationality of the subsidiaries, the provisions should be seen as direct discrimination. However, the British provisions do not constitute discrimination in the sense of less favourable treatment of foreign nationals in Britain. They should rather be seen as a restriction for the British companies to exercise their right to establishment in founding subsidiaries in other Member States, in the same way as the Swedish rules in X AB and Y AB were considered to constitute discrimination, since they restricted the company’s right to secondary establishment.

3 Justifications

In a case of an alleged violation of the freedom of establishment, the Court first has to decide whether there actually is a breach of this freedom. This includes an assessment of whether residents and non-residents should be considered to be in a comparable situation. If so, the next step is to see whether the measure restricting the freedom can be justified. There are grounds for justification laid down in the Treaty. But since the freedom of movement is one of the fundamental principles of the Treaty, these justifications should be interpreted narrowly.32

Besides the treaty-based justifications, the ECJ has developed a possibility to justify restrictions according to the rule of reason. The rule of reason has been developed especially in cases concerning the freedom of movement of goods. In Cassis de Dijon33, the Court established that certain measures of general interest could serve as justification of national rules restricting the freedom of movement of goods. Among these were effectiveness of fiscal supervision and the need to maintain the integrity of the fiscal regime.34 Since the scope of the prohibition of restrictions has not yet been completely determined by the ECJ in connection with the right of establishment, the distinction between Treaty-based justifications and the rule of reason is at this point somewhat uncertain.35 However, it seems like the Court has acknowledged that not only restrictions, but also indirect discrimination could be justified by the rule of reason.36 There is also a clear link between the rule of reason-justifications in cases concerning the right of establishment and the case-law-based exceptions to the free movement of goods and workers.37 The ECJ has recently indicated that the provisions on goods, services, workers and establishment should be similarly construed, since the same principles lay behind these.38

If a measure constitutes direct discrimination, it can only be justified by the treaty-based justifications.39 In the case of freedom of establishment, this means the justifications laid down in Article 46 EC; public policy, public security and public health. These justifications have been given a narrow

32 Craig, Paul / deBurca, Gráinne: EU Law, Text cases and materials, second edition New York 1998 p 729
34 Terra/Wattel p 24
36 Weiss Wolfgang EuZW Heft 16/1999
37 Kapteyn/Verloren p 740
38 Craig/deBurca p 746
As mentioned above under 1.1, there is a directive that defines the scope of the justifications in Article 46 EC, but it is only applicable to natural persons. The application of these justifications to companies is governed only by Article 46 EC and by general Community principles, like non-discrimination and proportionality.

In connection with tax law, only the public policy-justification seems to be relevant. There is no uniform interpretation on the scope of this justification. General Community principles set the limits, although the Member States have a certain degree of discretion in determining the content of the justification. The Court has stated that the concept of public policy may vary from one country to another and from one period to another, and that the Member States therefore should have a certain discretion in determining this concept, within the limits of the Treaty. However, Member States can never invoke the public policy-justification on economic grounds.

Direct discrimination can never be justified by the rule of reason. This has been established in several case concerning other freedoms, for instance the right to provide services, but the Court’s reasoning has been considered as applicable by analogy to the freedom of establishment. The ECJ recently confirmed its opinion in a case concerning direct taxation and the freedom of establishment. Sture Bergström is however of the opinion that the effects of this might be doubtful. Why should a state be able to justify its discriminatory legislation to a larger extent, just because the provisions have been designed in an indirectly discriminatory way? A state that is trying to conceal the discrimination by connecting the disadvantages to other criteria than nationality should not be in a better position because of this. Ståhl / Österman have found another notable aspect of the fact that direct discrimination can not by justified by the rule of reason. According to them, the same tax rule could be seen as direct discrimination in a state where the nationality of the company is connected to the registration or seat of the company, but as indirect discrimination where the nationality of the company also is connected to the location of the management. The same rule could thereby be justified differently in different states.

However, if the measure gives rise to unequal treatment without constituting discrimination, the rule of reason could justify the measure. This means that a wider range of public interest grounds than those in Article 46 EC

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40 Craig/deBurca p 786
41 Directive 64/221/EEC on free movement of workers
42 Craig/deBurca p 787
43 C-41/74 Van Duyn v. Home Office [1974] ECR 1337 p 18
44 Craig/deBurca p 787
45 Craig/deBurca p 748
46 C-311/97 Royal Bank of Scotland PLC v. Elliniko Dimosio (Greek State) [1999] ECR I-2651
47 the information was provided through an oral statement in November 2000
48 Ståhl / Österman p123
49 Craig/deBurca p 748
could be relied on to justify the restriction. These justifications will be accepted only if there has been no Community harmonization on the matter and if they are necessary and proportional. They must be applied in a non-discriminatory manner, ensure achievement of the aim in question and not go beyond what is necessary for that purpose. Even indirect discrimination could be justified by the rule of reason.

In Bachmann, the Court recognized that a national measure was justified, referring to cohesion of the tax system as a public interest. Although the case concerned the free movement of workers, the Court’s reasoning is relevant to the rule of reason-justifications in general.

Bachmann, a German national who worked in Belgium, was refused to deduct sums paid to a sickness insurance in Germany, although contributions to a Belgian insurance would have been deductible. One of the justifications invoked by the Belgian government, was preservation of the cohesion of the tax system. The Court held that there was a risk that the legislation operated to the detriment of nationals of other Member States. However, the Belgian state’s loss of revenue resulting from the deductions corresponded to the taxation received on the sums paid by the insurers. The cohesion of the tax system presupposed a connection between the deductible sums and the taxable sums. That cohesion could not be assured by any means less restrictive and the measures were considered justified.

In ICI, the British government claimed that the condition that the subsidiaries had to be British to enjoy a certain form of tax relief, was supposed to assure that no group of companies transferred its gains outside the UK and directed its losses to a British subsidiary. The restriction was by the British government considered to be necessary to ensure the cohesion of the tax system, since the profits of non-resident subsidiaries could not be taxed to offset the loss of income occurred by the deductions. The Court did not agree. It said that such diminution of tax revenue was not one of the Treaty-based justifications, nor a general interest. The Court referred to Bachmann and said that measures intended to maintain the cohesion of the tax system had previously been accepted, but only where there had been a direct link between the deductible and the taxable sums. In the present case, there was no such direct link between the tax relief for losses and the taxation of profits of non-resident subsidiaries. Consequently, the justification could not be accepted.

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33 C-264/96 Imperial Chemical Industries v. Her Majesty’s Inspector of Taxes [1998] ECR I-4695, see under 1.3.2 above
Another possible justification is fiscal control. This justification was also invoked by the Belgian government in Bachmann. The Belgian government claimed that the tax legislation was justified because of the difficulty to check the payment of contributions to other Member States; i.e. fiscal control. The Court stated that Belgium had the possibility to check the payments according to the Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, and the possibility to demand proof from the taxpayer.

In Futura and Singer, the Luxembourg government claimed that the provision obliging companies to keep their books in Luxembourg in order to be able to deduct losses was an evidential requirement and that it was justified by the need for fiscal supervision. The Court held that the effectiveness of fiscal supervision repeatedly had been recognized as an “overriding requirement of general interest” and made a reference to its judgement in Cassis de Dijon. The aims of the provision in question could not be attained if the subsidiary could keep its accounts according to the rules of another Member State. Still, the justification was not accepted, since it was considered to go beyond what was necessary. The purpose of the provision was to establish the amount of the losses and if the subsidiary could demonstrate this in any other way, the authorities should not be allowed to refuse deduction simply because accounts were not kept within the country.

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58 C-250/95 Futura Participations and Singer [1997] ECR I-2471 p 31. The reference to Cassis implies that the same justifications are relevant in all the four freedoms of movement.
4 Beneficiaries of the right of establishment

From the wording of Article 43 EC, the conclusion can be drawn that all nationals of the Member States are guaranteed the right to establish themselves as self employed persons and to set up and manage undertakings - especially agencies, branches or subsidiaries - under the same conditions that apply to the Member State’s own nationals. The criterion is the nationality of the person concerned. This means that a national of a Member State that resides outside of the Community still enjoys the right to establish himself within the Community, while a national of a third country residing within the Community does not enjoy any rights under Article 43 EC. To have a right of secondary establishment, the person first has to have a primary establishment within the Community. Consequently, a national of a Member State with a primary establishment outside the Community does not have the right to open a subsidiary in a Member State. In Article 43 EC, three types of secondary establishments are mentioned; agencies, branches and subsidiaries. The difference between these, are that subsidiaries are independent companies under the laws of the host Member State, while agencies and branches are part of the company in the Member State of origin. Subsidiaries, but not agencies or branches, are normally considered as resident and subject to unlimited tax liability in the host Member State.

In Article 48 EC, companies and firms are placed on an equal footing with natural persons. Article 48 EC states that companies and firms shall be treated in the same way as natural persons for the purposes of the chapter on the right of establishment. The definition in Article 48 EC is very broad and the circle of companies not included should be narrow. The companies and firms must however fulfil two conditions to enjoy the right of establishment.

The first condition corresponds to the nationality-criterion for national persons; a company or a firm must be formed in accordance with the laws of a Member State and have its registered office, central administration or principal place of business within the Community. Central administration means the place where the corporative management is situated. In a group of companies, each individual company is considered to have its own central administration. The principal place of business is where the economic focus or the economically most important line of business is.

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60 Kapteyn / Verloren p933
61 Kapteyn / Verloren p934
62 EU-Karnov: EU:s rättsakter med kommentar 1998/99 Första upplagan Band 1 p 450
64 EU Karnov p 470
The registered office, central administration or principal place of business do not have to be situated in the same Member State where the company was formed; anywhere within the Community is sufficient. The ECJ has stated that a company’s registered office is what connects it to a particular Member State, like nationality in the case of natural persons. This means that legal persons from third countries do not enjoy any rights under Article 43 EC. The nationality of the owners and the management of the company is of no importance.

The other condition concerns the form of the company. The second paragraph of Article 48 EC states that companies and firms have to be established under civil or commercial law. Cooperative societies and other legal persons governed by public or private law are included in the definition, but they have to be profit-making. The definition is very broad and leaves to each Member State to decide what constitutes a legal person under its laws. Accordingly, a legal person does not have to have the form of a company as such, it does not even have to have full legal capacity, as long as it is constituted under civil and commercial law and has a profit motive.

In Avoir fiscal a French tax credit only available to companies with their registered office in France was contested. This tax credit, the avoir fiscal, was granted to the recipients of dividends distributed by French companies, but only to recipients with habitual residence or registered office in France. Double-taxation agreements extended the benefit to companies with registered office in the other contracting state, if that company held shares in a French company among the assets of its French subsidiary. If the shares were part of the assets of a branch or agency, no such tax credit was granted. Thus, the tax credit was granted to insurance companies with registered office in France and to subsidiaries set up in France by foreign companies, but not to branches and agencies set up in France by foreign companies. The Commission claimed that these tax rules discriminated against agencies and branches of companies whose registered office was in another Member State, since they prevented the branches and agencies from holding French shares and placed them at a disadvantage compared to companies with registered office in France. The rules thus restricted the freedom of establishment.

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65 Groeben, Thiesing, Ehlermann p 1426
67 EU Karnov p 450
68 A convention on the mutual recognition of companies was adopted in 1969, but never came into force, since it was not ratified by the Netherlands. The most common types of companies have however been harmonized by Community directives.
69 EU Karnov p 471
70 C-270/83 Commission v. France [1986] ECR 273
The Court stated that insurance companies with registered office in another Member State who pursued their activities in France through a branch or an agency were not treated in the same way as insurance companies whose registered office was in France. The Court also concluded that a distinction based on the location of the registered office may under certain conditions be justified, but that there in this case was no objective difference in the situation of agencies and branches compared to the situation of companies with registered office in France. The purpose of the credit was to eliminate the double taxation on distributed company profits. The denial of the tax credit would therefore only make sense if the branches and agencies were not liable to French corporate income tax, which they were.

Nor could other advantages balance out the disadvantages resulting from the refusal to grant the tax credit to agencies and branches. The French argument that foreign insurance companies could choose to establish a subsidiary instead of a branch or an agency and consequently be entitled to the tax credit was not accepted either. The Court repeated that the companies are free to choose the appropriate legal form of their activities. No other arguments to justify this tax law were accepted and the Court found that the provisions constituted discrimination and were incompatible with Article 43.

In Commerzbank\(^7\), the German company Commerzbank AG had a branch in the United Kingdom, through which it granted loans and also collected interest on these loans. Commerzbank paid tax in the UK on these interests, but since the interests were exempt from tax according to a double-taxation agreement, the tax was later refunded. Under British law, such a refund should normally be increased with an amount corresponding to interest for the relevant period; a repayment supplement. However, this repayment supplement was only available to companies resident in the UK and was therefore not granted to Commerzbank. A subsidiary formed in the UK by a German company would be seen as resident in the UK for tax purposes and would be granted a repayment supplement.

The Court stated that the criterion of fiscal residence in the UK most often affected those companies who had their seat in other Member States and thus entailed unequal treatment. Non-resident companies were placed at a disadvantage compared to resident companies. The rule therefore constituted indirect discrimination. United Kingdom claimed that since only non-resident companies were exempt from tax in the first place, they were in a privileged position compared to resident companies. Resident and non-resident companies were accordingly not in the same situation and were therefore treated differently also in respect of repayment supplement. The Court did not agree and held that the fact that the refund of tax was only available to non-resident companies could not justify unequal treatment.

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\(^7\) C-330/91 The Queen v. Inland Revenue Commissioners, ex parte Commerzbank AG [1993] ECR I-4017
Consequently, the British legislation was contrary to Article 43 EC. The reason was probably that Commerzbank should not be compared to a resident company - for instance a subsidiary of a German company - that had not overpaid since it was not exempt from tax. Instead Commerzbank should be compared to a resident company that for some reason had overpaid. The reason why the company would be entitled to refunds seems to have been irrelevant.

From the above-mentioned cases, one can see that besides natural persons, companies and firms also have a right to establish themselves in other Member States. They should be free to choose the legal form that is most appropriate to their business. To ensure this freedom the different kinds of companies must be treated in the same way in the tax laws of the Member States. Provisions that put branches and permanent establishments in a worse position than subsidiaries are therefore in conflict with Article 43 EC. As we will see in the next chapter, German tax laws that granted benefits only to certain kinds of companies were considered to be incompatible with the freedom of establishment.
5 Saint-Gobain

In September 1999, the ECJ gave a preliminary ruling under Article 234 EC relating to a German case between Compagnie de Saint-Gobain, Zweigniederlassung Deutschland and Finanzamt Aachen-Innenstadt. Saint-Gobain ZN was a branch of the French company Saint-Gobain SA and was for tax purposes considered as a permanent establishment in Germany. The conflict arose when the Finanzamt refused Saint-Gobain ZN certain tax relieves that were available to German companies or German subsidiaries to companies in other Member States, but not to permanent establishments.

5.1 The facts of the case

This is a part of the owning-structure of Saint-Gobain:

Saint-Gobain SA (France)
  / 
Saint-Gobain ZN (Germany)
  / 
  Certain Teed corp. (US)  Grünzweig AG (Germany)
  10.2%  98.63%
  / 
  Isover SA (Switzerland)  Linzer AG (Austria)
  33.34%  46.67%
  / 
  Gevetex GmbH (Germany)
  99%
  / 
  Vitrofill SpA (Italy)

Saint-Gobain SA thus owned several subsidiaries in Europe and in the US, through its German branch. The German subsidiaries Grünzweig and Gevetex were bound to Saint-Gobain ZN by an “Organvertrag”, which can be described as an agreement that the companies should be treated as a

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single entity for tax purposes. This means that the profits and losses of Grünzweig and Gevetex were incorporated in the profits and losses of Saint-Gobain ZN and subject to the tax for which Saint-Gobain ZN was liable. These profits and losses included dividends received from foreign subsidiaries.

Since Saint-Gobain ZN was considered as a permanent establishment under German tax law, it was not an independent tax subject. Instead, Saint-Gobain SA in France was subject to limited tax liability in Germany, relating to the income earned and the assets held in Germany through Saint-Gobain ZN.

Grünzweig and Gevetex received the relevant year dividends from their subsidiaries in Switzerland, Austria and Italy. Since the conditions of tax integration were fulfilled, these dividends should be attributed to Saint-Gobain ZN and therefore to the income of Saint-Gobain SA.

In the taxation proceedings, Saint-Gobain ZN was refused three different tax concessions that would have been granted had it been a German subsidiary instead of a branch. First, it was refused an exemption from German corporation tax for the dividends received from the US and Switzerland. The reason was that the DTAs between Germany and these countries only granted this relief to German companies and companies subject in Germany to unlimited tax liability. Had Saint-Gobain ZN been a subsidiary to the French company instead of a branch, it would have been considered as a German company and it would have been subject to unlimited tax liability. The definition of a German company was a legal person having its business management or seat in Germany.74

Second, Saint-Gobain ZN was refused an indirect tax credit, a credit corresponding to the foreign corporation tax levied on the profits distributed by the foreign subsidiaries. The reason was the same; the German tax legislation75 only granted the credit to companies with unlimited tax liability in Germany.

Third, when calculating the capital tax, the shareholding in the American company was included in the assets of Saint-Gobain ZN. The exclusion for a direct holding in a foreign company from the German company’s business assets was available only to domestic companies limited by shares, according to the German law.76

75 § 26(2) of the Körpersteuergesetz BGBI I 1999 p817ff
76 § 102(2) of the Bewertungsgesetz BGBI I 1991 p230
5.2 The judgement

The ECJ referred to its judgement in ICI\footnote{C-264/96 Imperial Chemical Industries v. Her Majesty’s Inspector of Taxes [1998] ECR I-4695} and repeated that the freedom of establishment includes a right of Community companies or firms to pursue their activities in other Member States through a branch or an agency. A company that has exercised its right of establishment is granted the same treatment as national companies in the host Member State. It is the corporate seat of the company - that is the registered office, the central administration or the principal place of business - that determines the connection to a Member State.\footnote{C-307/97 Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt [1999] ECR I-6161 p 34-35}

According to the Court, the tax concessions in question are restricted to companies subject to unlimited tax liability in Germany, either under German law or under bilateral treaties. Under German law, companies subject to unlimited tax liability are those companies that are considered to be resident in Germany; thus companies with their registered office or business management in Germany. The Court concludes that the “refusal to grant the tax concessions in question therefore affects in principle companies not resident in Germany and is based on the criterion of the company’s corporate seat…”\footnote{C-307/97 Compagnie de Saint-Gobain v. Finanzamt Aachen-Innenstadt [1999] ECR I-6161 p 37} As a result, permanent establishments of companies in other Member States are in a less favourable situation than companies resident in Germany, including German subsidiaries of non-resident companies, who have a lighter tax burden. This restricts the freedom to choose the most appropriate legal form for the establishment. The discrimination constitutes, together with the difference in treatment between branches and resident companies, an infringement of Article 43 EC. Although the Court does not explicitly say so, the discrimination is indirect and not direct, since the DTAs and the national provisions connect the tax benefits to tax liability and not to nationality of the company. This has however an indirectly discriminatory effect, since most companies with limited tax liability are foreign.

The German government put forward four arguments to justify the infringement. To begin with, it considered that permanent establishments which were subject to limited tax liability and resident companies which were subject to unlimited tax liability were in objectively different situations. The Court did not agree, since both the receipt of dividends in Germany and the shareholding in foreign subsidiaries were actually liable to tax in Germany, regardless of whether the tax liability was limited or unlimited. According to the German law valid in 1988, permanent establishments with limited tax liability would have to pay tax for foreign

\footnotesize{77C-264/96 Imperial Chemical Industries v. Her Majesty’s Inspector of Taxes [1998] ECR I-4695  
dividends, while such dividends would be excluded from tax in companies with unlimited tax liability. This is not consistent with the general idea that companies with limited tax liability should pay tax only on income from German sources, while companies with unlimited tax liability should pay tax on their global income. The fact that the difference in treatment only applied regarding the grant of tax concessions also indicated that the situations were comparable.

The German government also invoked *the need to prevent a reduction in revenue*, since it was impossible for Germany to compensate this loss by taxing the non-resident company operating the permanent establishment in Germany. The Court, once again referring to ICI80, responded that this was not one of the grounds listed in Article 46 and it could not be regarded as a matter of overriding general interest which may justify unequal treatment. The Court also refused to accept the argument that the difference in treatment should be justified because permanent establishments had *other advantages* that German subsidiaries to foreign companies did not have, for instance regarding the transfer of profits.

Finally, the German government claimed that since the power to conclude bilateral treaties on taxation of income and profits falls within the competence of the Member States, these are free to make the decision whether a tax exemption should be granted to permanent establishments or not under such a bilateral double-taxation treaty with non-member countries. The conclusion, or the extension, of such treaties *does not fall under Community competence*.

The Court held that the Member States are free to conclude such double-taxation treaties to divide the power of taxation between themselves, but in exercising that power they must respect Community law. The national treatment principle requires the Member State to grant the same advantages to permanent establishments as to resident companies. This obligation does not affect the balance and reciprocity of the agreements concluded between Germany and the United States and Switzerland.

Consequently, the Court held that it was contrary to Articles 43 and 48 EC to exclude a permanent establishment of a company with its seat in another Member State from the three tax advantages in question, provided for by German legislation or by a DTA concluded with a non-member country.

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6 The consequences of the Saint-Gobain judgement on German tax law

In this judgement, the Court thus established or repeated following principles:

- The freedom of establishment in Article 43 EC has direct effect and shall ensure that companies having enjoyed this freedom shall be treated in the same way as the corresponding domestic companies in the host Member State.

- If a tax concession that is granted, by law or by a double-taxation agreement, to companies with unlimited tax liability but is refused to a company with limited tax liability, and if the refusal is based on the location of the company’s seat, there is an infringement of Article 43 EC, unless the different treatment can be justified.

- National companies and permanent establishments of companies in other Member States are objectively in the same situation when it comes to taxation of dividends from foreign subsidiaries. This is especially true since the permanent establishment with limited tax liability that is refused the tax concession in practice is liable to tax not only for domestic, but also for foreign income.

In my opinion, the ruling did not contain any surprising news. The Court repeats and develops its earlier standpoints on how the freedom of establishment should be interpreted. The Saint-Gobain judgement is consistent with earlier case law in this field. Some of the principles laid down in Saint-Gobain were stated already in the Avoir Fiscal-case. But since Germany only partly changed its legislation in accordance with the Avoir Fiscal-case, consequences for the German corporate tax can still arise from the Saint-Gobain judgement. The judgement in Saint-Gobain also takes the principles laid down in Avoir Fiscal one step further. In Avoir Fiscal the ECJ concluded that subsidiaries and permanent establishments were in a comparable situation when it comes to dividends received from French companies. This is not so surprising, since both subsidiaries and permanent establishments are liable to French tax for their French income. However, in Saint-Gobain, the Court concluded that subsidiaries and permanent establishments are in comparable situations even when it comes to foreign income, see below.

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There are also some new aspects on how Germany must extend the application of its DTAs to include permanent establishments of companies in other Member States.

The most important consequence of Saint-Gobain is in my opinion the fact that Germany is required to grant the advantages of a DTA not only to the German companies explicitly included in the DTA, but also to the permanent establishments of companies in other Member States. The Court states, not surprisingly, that German companies and permanent establishments are in comparable situations when it comes to the taxation of dividends received from foreign subsidiaries. Even though permanent establishments are subject to limited tax liability, foreign dividends received in Germany are subject to tax in Germany, irrespective of whether the receiver is a German company or a permanent establishment of a foreign company. The same thing goes for the taxation of shareholdings in foreign companies; the taxation is effected under German tax law. This is in my opinion a point of view that is necessary in order to guarantee the freedom of establishment, especially the right to choose the appropriate legal form of a secondary establishment. There should be no difference in fiscal treatment between permanent establishments and subsidiaries, that both are two quite common ways for companies to establish themselves in other Member States. The same kind of business can be conducted in both these legal entities, their income is taxed in Germany in both cases and should according to the prohibition of discrimination be taxed in the same way.

The consequence of the subsidiaries and permanent establishment being in comparable situations, is that the prohibition of discrimination obliges Germany to extend the application of its DTAs to grant permanent establishments the same favourable treatment as is granted to the subsidiaries. This is an important restriction of the national competence to conclude DTAs. The conclusion of bilateral agreements does not come within the Community competence, nor does the direct taxation. The fact that Community rules do affect the application of bilateral agreements in the field of direct taxation is therefore a very far-reaching effect. In my opinion this is however necessary to grant the freedom of establishment. The right to secondary establishment would be seriously restricted if Member States were free to discriminate against permanent establishments of other Member States as long as this was done through DTAs and not through legislation. However, the Court obliged Germany to extend the applications of the DTAs to permanent establishments in a case where it was clear that this would not affect the obligations of the other contracting state. If that had been the case, it is uncertain how the Court would have ruled.
For quite some time, there has been a debate on whether the prohibition of discrimination in Article 24 of the OECD Model Tax Convention means that the states are obliged to extend the benefits of their DTAs to permanent establishments of other states. This would mean that the changes of the German legislation that are necessary in order grant permanent establishments the same benefits under the German DTAs as the German companies are granted, would also have to be extended to permanent establishments of companies in non-member states. This is how most of the provisions actually have been changed in Germany. Although the relationship between Germany’s DTAs and the freedom of establishment is of great interest, it will from considerations of space not be further treated in this thesis. Instead, the focus will be on the German corporation tax law and its compatibility with the freedom of establishment. Part of the DTA problematic will however be treated, since this law in some cases extends the application of Germany’s DTAs to permanent establishments of non-Member States.

As earlier mentioned, some changes of the German legislation in this field were made even before the Saint-Gobain judgement. In 1993, a law was adopted in Germany with the purpose of maintaining and improving the attraction of Germany as a site of business; the Standortsicherungsgesetz (StandOG). Another purpose was to adjust some of the German laws to ascertain that they were in conformity with the rules of the Community. This law included amendments of several laws including the Law on Corporation Tax (das Körperschaftsteuergesetz). Had these changes been in effect in 1988, there would for instance have been no dispute between Saint-Gobain and the German Finanzamt about the indirect tax credit in §26(2) of the KStG. § 102(2) of the Bewertungsgesetz (BewG), the application of which also was contested by Saint-Gobain, was not altered through the StandOG. It has however not been applied by the German tax authorities since the 1st of January and was finally abolished in October 1997.

In the following chapter, these changes and a few others of the KStG will be described. The possible insufficiency of the changes will be analysed from the perspective of their compatibility with the freedom of establishment. There are other German laws that would be interesting to analyse from this perspective, for instance the Einkommensteuergesetz (EstG). One example is § 50(1) EstG, that contains a provision stating that losses may be carried

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82 Model Tax Convention on Income and on Capital, OECD Committee on Fiscal Affairs, 1992
83 Sass, Gert: "Verbotene Steuerdiskriminierungen inländischer Betriebstätten aufgrund der Niederlassungsfreiheit in der EU" Der Betrieb 1999 p2342
84 Law of 13 of September 1993, BGBl. I, p. 1569
85 Das Körperschaftsteuergesetz BGBl I 1999 p817ff
87 Das Einkommensteuergesetz BGBl 1997 p821
back or forward only if they can be proven by documents kept within Germany. This provision is very similar to the one that was found to be in conflict with the freedom of establishment in Futura and Singer. For consideration of space, the analyse will however be restricted to the KStG. Provisions that are described as problematic and possibly in conflict with the freedom of establishment should be seen as examples of how the German legislation does not yet fulfil the demands of the Community. They should not be seen as an exhaustive catalogue.

7 The German Körperschaftsteuergesetz

7.1 The calculation of income

§ 8 of the KStG governs the calculation of a company’s income. The shareholding in foreign companies is regulated in §8(b). §8(b)1 gives companies subject to unlimited tax liability in Germany the right to forward dividends received from a foreign company to another company subject to unlimited tax liability. Such forwarded dividends received are not considered to be taxable income. The purpose of this paragraph was to encourage the establishment of holding-structures in Germany, since there was a tendency to establish such company structures only in Member States where dividends could be sent on without tax consequences. Foreign shareholders, including permanent establishments of companies in other Member States are not entitled to this benefit according to §8(b)1.

However, through the StandOG, a new paragraph 8b(4) on shareholdings in foreign companies was added to the KStG. This new paragraph governs the fiscal treatment of shares of profit distributed by a foreign company to a German permanent establishment of a foreign company. Such dividends shall under certain circumstances be exempt from tax. According to the paragraph, the dividends shall not be included in the calculation of the income of the permanent establishment if, under a treaty for the avoidance of double taxation, such dividends would be exempt from tax for a company subject to unlimited taxation. This paragraph is thus intended to give permanent establishments the same rights as German subsidiaries.

The problem with § 8b(4) is that it only grants this benefit to permanent establishments who receive foreign dividends directly from the foreign company. If there is a forwarding of the dividends from a subsidiary in Germany (with unlimited tax liability) to the permanent establishment, those dividends will be included in the calculation of the income of the permanent establishment. For this situation is not included in §8b(4), nor in § 8b(1) where only companies with unlimited tax liability are entitled to the benefits. As mentioned above, according to § 8b(1), companies subject to unlimited tax liability in Germany has this possibility to forward dividends. This means that permanent establishments are treated in a less favourable

89 Das Körperschaftsteuergesetz BGBI I 1999 p817ff
way, compared to companies with unlimited tax liability. It has therefore been argued that certainly the legislator has recognized the problem, but has not taken sufficient measures against it. Permanent establishments are still in this aspect treated in a less favourable way than companies with unlimited tax liability in Germany. Such discrimination can not be accepted according to the Saint-Gobain judgement, since permanent establishments and subsidiaries are considered to be in comparable situations regarding the reception of foreign dividends.

§ 8b(2) deals with the situation where a company subject to unlimited tax in Germany makes a profit arising either from the selling of its shares in a foreign company, from the liquidation of such a foreign company or from the lowering of its share-capital. According to the Article 13 (3) of the OECD Model Tax Convention, profits from a disposal of foreign shares may be subject to tax only in the state of the seller. Through § 8b(2), Germany exempts this kind of profits from tax when the seller is subject to unlimited tax. If dividends received from a foreign company would not be considered in the calculation of income of the German company, profits arising from the sale of shares, from the liquidation or from the lowering of the share-capital of the foreign company shall in the same way be disregarded in the calculation of income. A condition is that the profit has not increased because of an earlier devaluation of the shares in the foreign company.

Since § 8(b)2 applies only to companies subject to unlimited tax in Germany, the equivalent situation for permanent establishments is regulated in the same way by § 8 (b)4. § 8(b)4 states that paragraph 2 is applicable by analogy to permanent establishments, so that profits arising from the selling of shares in a foreign company, from the liquidation of such foreign company or from the lowering of its share-capital shall not be included in the income of the permanent establishment. A condition is that these profits would have been disregarded, if the permanent establishment had been subject to unlimited tax liability. In my opinion, this part of the legislation fulfils the requirements of the freedom of establishment. A permanent establishment of a company in another Member State enjoys the same rights as German companies when it comes to the abovementioned kinds of profits and the disregard of these in the calculation of the income of the permanent establishment. This means that a permanent establishment of a company in another Member State can take advantage of the “holding-privilege” that is granted to German companies and the requirements laid down in the Saint-Gobain judgement seems to be fulfilled.

91 Eilers / Schmid DStR 48/99 p1977
92 OECD Model Tax Convention on Income and on Capital, OECD Committee on Fiscal Affairs, 1992
93 Eilers / Schmidt DStR 48 /99 p1980
7.2 Calculation of income for Organschaften

The German institution of “Organschaft” is quite complicated and the regulation thereof is rather comprehensive. In the following, a short summary of the basic features of the Organschaft will be presented. Subsequently, § 15 KStG that governs the calculation of an Organgesellschaft’s income will be treated in more detail. For a more thorough presentation of the Organschaft, see Herbert Brönner “Die Besteuerung der Gesellschaften” p 581ff.

Organschaft means that a company (or several companies) with formal independence in fact is dependent on a superior company. The superior company is called Organträger and the inferior is called Organgesellschaft. For an Organschaft to be accepted fiscally, there has to be a financial, organisational and businesslike integration of the Organgesellschaft into the Organträger. A condition is that a treaty between the two companies is drawn up; a Gewinnabführungsvertrag. Through this treaty, the Organgesellschaft commits itself to transfer all its profits to the Organträger for at least five years. The fiscal consequences of this are that the income of all the companies within the Organschaft for tax purposes instead is considered as the income of the Organträger. The Organträger accordingly pays tax for the whole group of companies. However, the income is determined separately for all companies belonging to the Organschaft. There are a few other conditions that also have to be complied with, for instance that the Organträger must own enough shares in the Organgesellschaft to have majority of the votes.

The conditions for an Organschaft to be accepted for purposes of corporation tax is governed by § 14 KStG. § 14(3) states that the superior company, the Organträger, must be subject to unlimited tax liability in Germany. However, § 18 states that there is a possibility for a permanent establishment of a foreign company to be considered as an Organträger. The shares in the Organgesellschaft must then be part of the business capital of the permanent establishment, the Organgesellschaft must transfer all its profits to the permanent establishment under a treaty concluded in the name of the permanent establishment, and the Organgesellschaft must be organisationally and businesslike integrated in the permanent establishment itself. When these conditions are complied with, the Organschaft can consist of a permanent establishment and its subsidiaries. This was the case in Saint-Gobain; the two German subsidiaries Grünzweig und Gewetex were integrated with Saint-Gobain ZN through an Organvertrag based on § 18 KStG.

95 Brönner, Herbert p 583
96 Brönner, Herbert p 603
The calculation of income for Organschaften is regulated in § 15 of the German KStG (even though the Court’s reasoning did not explicitly emanate from § 15) and this paragraph will be analysed in more detail, since it in my opinion is doubtful whether it is consistent with the freedom of establishment. § 15 of the KStG states that the calculation of income should be carried out somewhat differently when it comes to Organschaften. The rules in § 8(b) that governs the calculation of income arising from shares in foreign companies shall for instance not be applied in the same way when the company is an Organgesellschaft.

According to § 15 (2), rules in a DTA that exclude dividends received on shares in a foreign company, shall be applied only when the Organträger is a beneficiary person according to the provisions of the DTA or according to § 8b(4). Since there is a reference to § 8b(4), permanent establishments of companies subject to limited tax liability, for instance foreign companies, are included. This means that the rules in a DTA excluding foreign dividends from the calculation of income shall be applied where the Organträger is subject to unlimited tax liability as well as where the Organträger is a permanent establishment, even if permanent establishments are not explicitly included in the DTA. Thus, it seems like permanent establishments can profit from the double taxation agreement in this aspect to the same extent as German companies. It was stated in Saint-Gobain that a Member State has an obligation to consider the rules of the Treaty in applying its DTAs. This means that Germany has to grant to permanent establishments of non-resident companies the advantages granted to other companies by a DTA. It seems like the German § 15(2) KStG complies with the requirement laid down in Saint-Gobain. Accordingly, there is no conflict with the right of establishment when it comes to permanent establishments.

However, the assessment is different when it comes to § 15 (3), where it is stated that § 8b(1) is applicable only when the Organträger is a beneficiary person liable to tax according to this provision. The beneficiaries according to § 8b(1) are persons subject to unlimited tax liability. This means that when the Organträger is a permanent establishment of a company subject to limited tax liability, § 8b(1) is not applicable. As shown above, § 8b(1) was extended to apply to permanent establishments through § 8b(4) in situations where there is no agreement on Organschaft (even though this extension in my opinion is not sufficient, see above under 5.1). But the same extension has obviously not been made when it comes to Organschaften. Organschaften where the Organträger is a German company subject to unlimited tax can enjoy the benefit in § 8b(1) in the calculation of the Organgesellschaft’s income, while Organschaften where the Organträger is a

permanent establishment can not profit from the same advantage. In my opinion this amounts to indirect discrimination.

As the Court concluded in Saint-Gobain, foreign companies with permanent establishments in Germany and German companies are in comparable situations when it comes to dividends received in Germany from shares in foreign subsidiaries. The tax liability on these dividends should therefore be designed in the same way for both types of companies, which it is not. Eilers and Schmidt have drawn attention to this problem. It is their opinion that the definition of companies beneficiaries to the advantages in § 8b(1) must be enlarged and this must be done so that the circle of beneficiaries in § 15 (3) equally is enlarged, at least to the extent that companies in other Member States belongs to the entitled Organträger. I agree with this.

The second sentence of § 15(3) states that when it comes to the calculation of income arising from a sale of the Organgesellschaft’s shares in a foreign company, from the liquidation of such a foreign company or from the lowering of its share-capital, § 8b(2) should be applied only in some cases. The criterion is that the Organgesellschaft must belong to the beneficiaries according to that paragraph or according to § 8b(4). Consequently, both companies with unlimited tax liability and permanent establishments of foreign companies have access to the benefits of § 8b(2) even when the company concerned is part if an Organschaft. My assessment of the compatibility with Community law is therefore the same as for the abovementioned § 15(2). Since permanent establishments are not excluded from the benefits, the second sentence of § 15(3) is not in this aspect in conflict with the freedom of establishment.

### 7.3 Taxation of foreign income

The calculation of a company’s income is thus governed in § 8, while the taxation is governed by § 26 of the KStG. § 26 provides several possibilities to obtain a tax credit, meaning that a foreign tax that has already been paid could be credited against the German corporation tax. In Article 4 of the parent-subsidiary-directive, it has been laid down that dividends received by a parent company within the Community from a subsidiary in another Member State under certain circumstances should be exempt from tax, either by crediting or by exemption. This Article has been implemented in German corporation tax law through § 26 (2a) of the KStG. But if the subsidiary is situated outside of the Community, the relevant rules are

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99 Eilers / Schmidt DStR 48 /99 p1980
100 Dir. 90/435/EEC on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (O.J. 1990 L 225/6)
§ 26 (2) provides for a so called direct tax credit. This credit could be granted to companies subject to unlimited taxation who receive a foreign income and who have already paid foreign tax in the country from which the income originates. A condition is that the foreign tax has been fixed, paid and that it is no longer subject to any claim to reduction. It also has to be comparable to the German corporation tax. Here is an example of how a direct credit is calculated:

| Income of a foreign permanent establishment | 200 000 DM |
| Deduction of foreign tax | -60 000 DM |
| Net inflow into Germany | 140 000 DM |

| German corporation tax (45% of 200 000) | 90 000 DM |
| Direct tax credit (= foreign tax) | -60 000 DM |
| Remaining German corporation tax | 30 000 DM |

Saint-Gobain SA was granted this direct credit by the German Finanzamt to the amount of the foreign tax that had been withheld at source in certain foreign countries and that St Gobain had already paid. The company was however refused the indirect credit provided for in § 26 (2), since this credit only could be granted to companies subject in Germany to unlimited tax liability.

Paragraph 26 (2) of the KStG hence lays down the rules on indirect credit. According to these, a parent company who has unlimited tax liability in Germany and who holds a share of at least one tenth of the capital of a foreign subsidiary may also be entitled to a tax credit. The tax on the profits of the subsidiary may then be deducted from the German tax that the parent company has to pay in respect of dividends distributed to it by the subsidiary. The difference between the direct and the indirect credit is that the direct credit is granted to a company that itself has paid foreign tax, for instance on activities in its permanent establishment, while the indirect credit is granted to a parent company when its subsidiary has paid foreign tax. The tax credit is in both situations calculated in the same way as in the abovementioned example.

The parent company’s shareholding in the capital of the subsidiary must be direct. If the shareholding is indirect, hence a sub-subsidiary, a tax credit according to § 26 (5) could instead be granted. The shareholding also has to be uninterrupted for at least twelve months before the balance-sheet day. The dividends must originate from business pursued by the subsidiary that is of active nature and the tax paid by the subsidiary must be comparable to German corporation tax law.

Paragraph 26 (2) is also applicable in a

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101 The example is taken from Handbuch der Steuerveranlagungen 1999, p199
102 Whether a foreign tax is considered as comparable to the German corporation tax is laid down in Anlage 8 of the EStG
situation where a subsidiary is situated in a state with which Germany has a double-taxation agreement, if the dividends according to this agreement are not exempt from German tax. However, the indirect credit is only granted upon application.

According to § 26 (2a), the indirect tax credit is granted to a German parent company with a subsidiary in another Member State under the same conditions as in § 26 (2), with the exception that there is no condition that the dividends have to originate from business of active nature in the subsidiary. This is an implementation of the parent subsidiary directive.

As mentioned above, Saint-Gobain ZN was denied this indirect tax credit although the foreign subsidiaries and the shareholding in these fulfilled the conditions of § 26 (2), since Saint-Gobain ZN was not subject to unlimited tax liability in Germany. However, there had already been a change of § 26 of the KStG through the adoption of the StandOG in 1993. A seventh paragraph intended to put subsidiaries and permanent establishments on an equal footing was added to § 26. The purpose was to consider the freedom of establishment and to avoid forbidden discrimination. Paragraph seven provides that paragraphs 2 and 3 of § 26 (indirect tax credit and fictitious indirect tax credit) shall be applicable by analogy to shares of profits that a German branch establishment of a foreign company receives from a foreign subsidiary. However, the conditions laid down in § 8b (4) must be fulfilled. This means that such dividends should have been exempt from the calculation of income according to a double taxation-agreement or to § 8(5) if they had been received by a German company subject to unlimited tax liability instead of a permanent establishment. It also means that where there is a condition that a German company has to own shares in the subsidiary for a minimum period of time, by analogy in the case of a permanent establishment, the shares have to be a part of the establishments business capital for the same period of time.

The question is whether this § 26(7) fulfils the requirements of the right of establishment when it comes to the establishment of permanent establishments. In my opinion this seems to be the case. Permanent establishments shall explicitly be subject to the same rules as companies subject to unlimited tax liability and the German law seems to comply with the judgement in Saint-Gobain. If § 26(7) had been applicable to the income year 1988, Saint-Gobain would have been entitled to the indirect tax credit.

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103 Körperschaftsteuerveranlagungen (Handbuch der Steuerveranlagungen) p. 199
104 Law of 13 of September 1993, BGBl. I, p. 1569
105 Bundesrats Drucksache 1/93 p40-41
7.4 Tax rates for companies subject to unlimited tax and for permanent establishments

In Germany, the corporate tax rates have been modified several times in the last decade. The tendency seems to be that the tax rates gradually are lowered. This chapter will focus on how the rules governing the tax rates have been changed since 1994 and whether there still can be a problem of discrimination against permanent establishments of companies in other Member States.

As the Court laid down in Royal Bank of Scotland, \textsuperscript{106} the freedom of establishment precludes a national legislation that prevents permanent establishments of companies in other Member States to benefit from such lower tax rates that are accorded to companies with seat within the state. In 1994, the provisions governing the corporate tax rates laid down in the KStG were changed through the StandOG.\textsuperscript{107} § 23 (1) KStG stated thereafter that the tax rate for companies subject to unlimited tax liability in Germany was 45 % of the taxable income, whereas the tax rate for companies subject to limited tax liability, hence permanent establishments of foreign countries, was only 42 %. This may have seemed like the situation of the permanent establishments was more favourable than that of the German companies. However, according to § 27(1), companies with unlimited tax liability had the possibility to obtain a lowering of the tax where they paid dividends of 30 % or more of their profits. This tax reduction was hence explicitly not available for permanent establishments. The reason for this was that permanent establishments by definition do not pay any dividends.\textsuperscript{108}

Rädl er and Lausterer have made some calculations to find out how the different rules may affect German companies \textit{vis-à-vis} permanent establishments of companies in other Member States.\textsuperscript{109} Their conclusion was that the discrimination of permanent establishments of foreign companies was intensified through the change of the tax rates in 1994. In two out of three scenarios, the German companies were in a more favourable situation than the permanent establishments. The calculations will not be described in detail here, since the provisions governing the tax rates have been further changed since the article was written. However, one of Rädl er’s and Lausterer’s conclusions is worth drawing attention to; when a comparison between subsidiaries and permanent establishments are made, it should not be assumed that the subsidiaries pay dividends of only 30 % of

\textsuperscript{106} C-311/97 Royal Bank of Scotland plc vs. Elliniko Dimosio (Greek State) [1999] ECR I-2651
\textsuperscript{107} BGBl. I 1993 p 1569
\textsuperscript{108} Rädl er / Lausterer: Die EWG-vertragswidrige Diskriminierung inländischer Betriebsstätten von EG-Kapitalgesellschaften durch den Körperschaftsteuergesetz DB 1994 p 699
\textsuperscript{109} Rädl er / Lausterer DB 1994 p 699
the profits to the parent company. 30% is the minimum dividend that has to be paid in order to obtain the tax reduction. However, most subsidiaries transfer almost all of their profits – more than 90% according to the statistics – to the parent company. The comparison between the different tax consequences should accordingly be made from the assumption that the subsidiary pays dividends corresponding to all of its profits.

Today, the tax rate for both German companies and permanent establishments of foreign companies is 40% of the profits. However, the possibility of reduction of the tax for companies that pay dividends of 30% or more of the profits is still not available for permanent establishments. Ekkehart Reimer seems to think that considering the Royal Bank of Scotland judgement, this might constitute a not justified discrimination of permanent establishments, since the reduction means that different tax rates are applied to subsidiaries and permanent establishments. Gert Sass writes in his article that the Saint-Gobain judgement has no immediate consequences on the provisions excluding the permanent establishments from the lower tax rate. He means that the consequences of Saint-Gobain are that the differentiating tax rate may not be justified on certain grounds, such as a loss of income for the German state, since it has been laid down in the judgement that this is not an acceptable justification. Neither can the legislation be justified with reference to cohesion of the tax system, since there is no direct link between the fiscal advantages and disadvantages, nor by the argument that permanent establishments enjoy other benefits. Sass does unfortunately not motivate on what grounds the difference in tax rate could be justified, although his opinion seems to be that Saint-Gobain imposes no direct consequences for the German tax rates.

In my opinion, it is probable that a system like the German where permanent establishments effectively are excluded from a lower tax rate available to most subsidiaries is in conflict with the freedom of establishment. There is currently a case concerning these different tax rates waiting to be settled before the local tax court of Köln.

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110 Rädler / Lausterer p 702
111 Sass, Gert DB 1999 p 2381
112 Reimer Ekkehart "Die Auswirkungen der Grundfreiheiten auf der Ertragssteuerrecht der Bundesrepublik Deutschland" p 87. Published in Lehner „Grundfreiheiten im Steuerrecht der EU-Staaten“ Verlag Beck München 2000
113 Sass, Gert DB 1999 p 2382
114 Finanzgericht Köln Case 13 K 977/97 – CLT-UFA S.A.
8 Conclusions

As can be understood from this thesis, the fact that the direct taxation falls within the competence of the Member States does not mean that the Member States are free to make their own decisions in designing their tax laws and concluding DTAs with other states. They still have to consider Community law and make sure that neither their laws nor their DTAs are obstructing the free movement.

According to the freedom of establishment, permanent establishments of companies of other Member States may not be subject to any restrictions or discriminations in the national legislation, unless these can be objectively justified. One possible justification is that the permanent establishment is not in the same situation as the national companies. When the situation of the permanent establishment is evaluated, the comparison should be made using a subsidiary (that is subject to unlimited tax liability) as comparable entity. In Avoir Fiscal, the Court concluded that permanent establishments of companies in other Member States are in a comparable situation with French subsidiaries when it comes to dividends received from other French companies. In the Saint-Gobain judgement, the Court developed this viewpoint one step further; the permanent establishment was considered to be in the same situation as subsidiaries even in a situation where the tax reduction concerned dividends received from, or shareholdings in, foreign companies.

Since the permanent establishments and the subsidiaries were found to be in comparable situations, Germany was not allowed to treat the permanent establishment in a less favourable way. This has implication both on Germany’s tax laws and on its DTAs with other states. The fact that Germany’s DTAs with third countries have to be extended to give the benefits of the treaties to permanent establishments even though these are not explicitly included, are a severe restriction in Germany’s - and all other Member States’ - competence to conclude DTAs. This is especially true since neither direct taxation nor DTAs with third countries fall within the competence of the Community.

Apart from the DTAs, the national legislation in Germany is affected by this judgement. Quite a few changes were conducted in 1993 in order to comply with the freedom of establishment. As found in previous chapters, this was however not sufficient. There are still some problematic areas where the German laws might be in conflict with Article 43 EC. The possibility to, without fiscal consequences, forward dividends received from a foreign

company to another German company is not fully extended to permanent establishments. The exemption in the calculation of income is granted to permanent establishments only where the dividends are received directly from the foreign company. Neither are the provisions on tax exemptions for Organschaften fully extended to constellations where the Organträger is a permanent establishment.

When it comes to the benefit of crediting a foreign tax that was already paid in a foreign country against the German corporation tax, the German legislation seems to fulfil the Community requirements. In my opinion, it is clear why the discrimination that existed in this area was not accepted by the ECJ. According to the X AB and Y AB judgement, the right to a tax relief was not allowed to be connected to the fact that the companies involved were Swedish. In ICI, the tax relief was not allowed to be available only when most of the subsidiaries were domestic. In the same way, the German tax credit was not accepted, since the permanent establishments and the subsidiaries were found to be in comparable situations. The German legislator had however already extended this tax credit to permanent establishments of foreign companies.

There might also be a problem with the tax rates that give companies with unlimited tax liability the possibility to be taxed by a lower rate if it pays dividends of at least 30%. As mentioned above, the normal scenario for a subsidiary is that almost all of its profits are transferred to the parent company. This means that subsidiaries in most cases would be taxed by a lower rate than permanent establishments. The judgement in Royal Bank of Scotland supports the assumption that the German tax rates are incompatible with the freedom of establishment. The debate in Germany seems however more focused on whether the lower tax rate should be applied when German subsidiaries pay dividends of at least 30% to parent companies outside the EC.

As we have seen, some changes in the German legislation has been made. These changes that extends some fiscal benefits to permanent establishments do not restrict the changes to apply only to permanent establishments of companies in other Member States. Normally, permanent establishments of all foreign companies are included. However, in most cases the benefits are extended to permanent establishments and not to all companies with limited tax liability. This could be a problem since other legal entities could still be in a less favourable position than the subsidiaries.

119 C-311/97 Royal Bank of Scotland PLC v. Elliniko Dimosio (Greek State) [1999] ECR I-2651
120 Sass p2383
Something that has been quite obvious to me while studying the German tax debate on European tax law, is that many German writers would like to see more harmonisation in the field of direct taxation. Until this is done, the judgement in Saint-Gobain and other cases will however have to be considered in the upcoming German tax reform.
§ 8 b Beteiligung an ausländischen Gesellschaften

(1) Bezüge im Sinne des § 20 Abs. 1 Nr. 1 und 2 des Einkommensteuergesetzes, die eine unbeschränkt steuerpflichtige Körperschaft im Sinne des § 1 Abs. 1 Nr. 1, 2, 3 oder 6 von einer unbeschränkt steuerpflichtigen Kapitalgesellschaft oder von einer sonstigen Körperschaft im Sinne des § 43 erhält, bleiben bei der Ermittlung des Einkommens außer Ansatz, soweit dafür der Teilbetrag im Sinne des § 30 Abs. 2 Nr. 1 als verwendet gilt. Voraussetzung für die Anwendung des Satzes 1 ist, daß die Verwendung des Teilbetrags im Sinne des § 30 Abs. 2 Nr. 1 durch eine Steuerbescheinigung nach § 44 oder § 45 nachgewiesen wird. Gewinnminderungen, die
1. durch den Ansatz des niedrigeren Teilwerts des Anteils an der in Satz 1 genannten ausschüttenden Kapitalgesellschaft oder sonstigen Körperschaft oder
2. durch Veräußerung des Anteils oder bei Auflösung oder Herabsetzung des Nennkapitals dieser Kapitalgesellschaft oder sonstigen Körperschaft entstehen, sind bei der Gewinnermittlung nicht zu berücksichtigen, soweit der Ansatz des niedrigeren Teilwerts oder die sonstige Gewinnminderung auf die Gewinnausschüttungen zurückzuführen ist. Die Sätze 1 bis 3 gelten nicht für Bezüge, die in einem wirtschaftlichen Geschäftsbetrieb einer nach § 5 Abs. 1 Nr. 9 steuerbefreiten Körperschaft anfallen.


121 these paragraphs have been downloaded from the webpage www.steuerzeit.de/gesetze on the 20th of November 2000.
nachweisen, daß die in einem Abkommen zur Vermeidung der Doppelbesteuerung oder in § 26 Abs. 2 festgelegten Tätigkeiten seit der Gründung dieser Gesellschaft oder während der letzten fünf Jahre vor und in dem Veranlagungszeitraum, in dem die Einkünfte aus der Veräußerung, Auflösung oder Kapitalherabsetzung bezogen werden, ausgeübt worden sind.

(3) Absatz 2 ist nicht anzuwenden für die Anteile an einer ausländischen Gesellschaft, die
1. ein Einbringender nach § 23 Abs. 4 als Gegenleistung für die Einbringung von Anteilen an einer unbeschränkt steuerpflichtigen Kapitalgesellschaft oder nach § 23 Abs. 1 oder Abs. 3 des Umwandlungssteuergesetzes oder

(4) Gewinnanteile, die von einer ausländischen Gesellschaft auf Anteile ausgeschüttet werden, die einer inländischen gewerblichen Betriebsstätte einer beschränkt steuerpflichtigen Körperschaft zuzurechnen sind, bleiben bei der Ermittlung des der inländischen gewerblichen Betriebsstätte zuzurechnenden Einkommens außer Ansatz, soweit sie nach einem Abkommen zur Vermeidung der Doppelbesteuerung oder nach Absatz 5 befreit wären, wenn die beschränkt steuerpflichtige Körperschaft unbeschränkt steuerpflichtig wäre. Die Absätze 2 und 3 gelten sinngemäß für die Ermittlung des Einkommens einer inländischen gewerblichen Betriebsstätte einer beschränkt steuerpflichtigen Körperschaft, wenn die Voraussetzungen des Satzes 1 im übrigen erfüllt sind. Hängt die Befreiung oder Begünstigung vom Halten der Beteiligung für einen Mindesterzeitraum ab, muß die Beteiligung während dieses Zeitraums auch zum Betriebsvermögen der inländischen gewerblichen Betriebsstätte gehört haben.

(5) Sind Gewinnanteile, die von einer ausländischen Gesellschaft ausgeschüttet werden, nach einem Abkommen zur Vermeidung der Doppelbesteuerung unter der Voraussetzung einer Mindestbeteiligung von der Körperschaftsteuer befreit, so gilt die Befreiung ungeachtet der im Abkommen vereinbarten Mindestbeteiligung, wenn die Beteiligung mindestens ein Zehntel beträgt.

(6) Sind Gewinnanteile, die von einer ausländischen Gesellschaft ausgeschüttet werden, nach einem Abkommen zur Vermeidung der Doppelbesteuerung, nach Absatz 4 Satz 1 und 3 oder nach Absatz 5 von der
Körperschaftsteuer befreit oder nach § 26 Abs. 2 bis 3 oder Abs. 7 begünstigt, so sind Gewinnminderungen, die
1. durch Ansatz des niedrigeren Teilwerts des Anteils an der ausländischen Gesellschaft oder
2. durch Veräußerung des Anteils oder bei Auflösung oder Herabsetzung des Kapitals der ausländischen Gesellschaft entstehen, bei der Gewinnermittlung nicht zu berücksichtigen, soweit der Ansatz des niedrigeren Teilwerts oder die sonstige Gewinnminderung auf die Gewinnausschüttungen zurückzuführen ist.

(7) Von den Dividenden aus Anteilen an einer ausländischen Gesellschaft, die nach einem Abkommen zur Vermeidung der Doppelbesteuerung oder nach den Absätzen 4 oder 5 von der Körperschaftsteuer befreit sind, gelten fünf vom Hundert als Betriebsausgaben, die mit den Einnahmen in unmittelbarem wirtschaftlichen Zusammenhang stehen.

§ 15 Besondere Vorschriften zur Ermittlung des Einkommens der Organgesellschaft
Bei der Ermittlung des Einkommens der Organgesellschaft gilt abweichend von den allgemeinen Vorschriften folgendes:
1. Ein Verlustabzug im Sinne des § 10d des Einkommensteuergesetzes ist nicht zulässig.
2. Die Vorschriften eines Abkommens zur Vermeidung der Doppelbesteuerung, nach denen Gewinnanteile aus der Beteiligung an einer ausländischen Gesellschaft außer Ansatz bleiben, sind nur anzuwenden, wenn der Organträger zu den durch diese Vorschriften oder durch § 8b Abs. 4 begünstigten Steuerpflichtigen gehört. Ist der Organträger eine Personengesellschaft, sind die Vorschriften insoweit anzuwenden, als das zuzurechnende Einkommen auf einen Gesellschafter entfällt, der zu den begünstigten Steuerpflichtigen gehört.
3. § 8b Abs. 1 ist nur anzuwenden, wenn der Organträger zu den durch diese Vorschrift begünstigten Steuerpflichtigen gehört. § 8b Abs. 2 ist nur anzuwenden, wenn der Steuerpflichtige zu den durch diese Vorschrift oder durch § 8b Abs. 4 begünstigten Steuerpflichtigen gehört. Ist der Organträger eine Personengesellschaft, sind die in den Sätzen 1 und 2 genannten Vorschriften insoweit anzuwenden, als das zuzurechnende Einkommen auf einen Gesellschafter entfällt, der zu den begünstigten Steuerpflichtigen gehört.

§ 26 Besteuerung ausländischer Einkunftsteile

(1) Bei unbeschränkt Steuerpflichtigen, die mit ausländischen Einkünften in dem Staat, aus dem die Einkünfte stammen, zu einer der deutschen Körperschaftsteuer entsprechenden Steuer herangezogen werden, ist die festgesetzte und gezahlte und keinem Ermäßigungsanspruch mehr
unterliegende ausländische Steuer auf die deutsche Körperschaftsteuer anzurechnen, die auf die Einkünfte aus diesem Staat entfällt.


schen nach einem Abkommen zur Vermeidung der Doppelbesteuerung befreit oder nach Absatz 2 oder 3 begünstigt sind. Zu den Gewinnanteilen im Sinne des Satzes 1 gehören nicht Bezüge der Muttergesellschaft, die auf Grund einer Herabsetzung des Kapitals oder nach Auflösung der anderen Gesellschaft anfallen.

(7) Die Absätze 2 und 3 gelten sinngemäß für Gewinnanteile, die eine inländische gewerbliche Betriebsstätte einer beschränkt steuerpflichtigen Körperschaft von einer ausländischen Tochtergesellschaft bezieht, wenn die Voraussetzungen des § 8b Abs. 4 Satz 1 und 3 im übrigen erfüllt sind.
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