JUDGMENT OF THE COURT (Fifth Chamber)

3 October 2002 *

In Case C-136/00,

REFERENCE to the Court under Article 234 EC by the Kuopion hallinto-oikeus (Finland) for a preliminary ruling in the proceedings brought by

Rolf Dieter Danner,

on the interpretation of Articles 6 and 59 of the EC Treaty (now, after amendment, Articles 12 EC and 49 EC), 60, 73b and 73d of the EC Treaty (now Articles 50 EC, 56 EC and 58 EC) and 92 of the EC Treaty (now, after amendment, Article 87 EC),

* Language of the case: Finnish.

THE COURT (Fifth Chamber),

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

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Danner, by P. Manninen, varatuomari,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Danish Government, by J. Molde, acting as Agent,

— the Commission of the European Communities, by R. Lyal and M. Huttunen, acting as Agents,

— the EFTA Surveillance Authority, by E. Wright, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Danner, represented by P. Manninen; of the Finnish Government, represented by E. Bygglin and K. Seppälä, acting as Agents; of the Danish Government, represented by J. Molde; of the European Commission, represented by R. Lyal and M. Huttunen; and of the EFTA Surveillance Authority, represented by E. Wright and P. Bjorgan, acting as Agent, at the hearing on 6 December 2001,

after hearing the Opinion of the Advocate General at the sitting on 21 March 2002,

gives the following

Judgment

1 By order of 22 March 2000, received at the Court on 10 April 2000, the Kuopion hallinto-oikeus (Kuopio Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 6 and 59 of the EC Treaty (now, after amendment, Articles 12 EC and 49 EC), 60, 73b and 73d of the EC Treaty (now Articles 50 EC, 56 EC and 58 EC) and 92 of the EC Treaty (now, after amendment, Article 87 EC).

2 That question was raised in proceedings brought by Mr Danner against the refusal by the Siilinjärven Verotuksen Oikaisulautakunta (Siilinjärvi Taxation Verification Committee) to grant him a full deduction for pension insurance contributions paid by him to pension insurance schemes operated by German insurance institutions.

Legal context

Finnish legislation on the deductibility of pension insurance contributions

3 Paragraph 96(1) of the Tuloverolaki (Income Tax Law, hereinafter 'the TVL') provides that pension insurance contributions to certain compulsory or statutory schemes are fully deductible from net salary income. That rule also applies to contributions to analogous foreign schemes.

4 By contrast, different rules apply to voluntary pension insurance contributions, depending on whether the contributions are paid to institutions established in Finland or abroad and, in the latter case, when the insurance was taken out.

5 Under Paragraph 96(2) to (5) of the TVL, contributions to voluntary pension schemes operated by Finnish insurance institutions are fully or partially deductible, under certain conditions and within certain limits. For example, a full deduction of contributions is allowed subject to a limit of FIM 50 000 if the pension is payable as an old-age pension at the earliest when the insured reaches the age of 58 and the insured can prove that his theoretical pension cover does not exceed a certain percentage of his income.

6 Paragraph 96(6) of the TVL provides that if the voluntary pension insurance does not satisfy the criteria set out in Paragraph 96(1) to (5), the taxpayer is entitled to deduct 60% of his contributions, subject to an upper limit of FIM 30 000 per year.

7 It is common ground that until 1996 the rules in Paragraph 96(2) to (6) of the TVL applied without distinction to contributions paid to Finnish or foreign insurance institutions.

8 Paragraph 96(9) of the TVL — which was inserted into the legislation within 12 months of Finland's accession to the European Union and entered into force on 1 January 1996 — thenceforth now excludes the deduction of contributions for voluntary pension insurance taken out with a foreign insurance institution, except in two cases:

— where the pension is granted by a permanent establishment in Finland of a foreign insurance institution, and

— where the person concerned has moved to Finland from abroad and was not liable to taxation in Finland during the five years preceding that move. In such a case, however, contributions are only deductible in the year of the move and the three following years.

9 Paragraph 96(9) is subject to transitional provisions. For the tax years 1996 and 1997, contributions paid in respect of voluntary pension insurance taken out with foreign institutions before 1 September 1995 continue to be subject to the provisions in force in 1995, subject to a ceiling of FIM 15 000 on the annual deductible amount.

10 Under another transitional provision contained in the fifth subparagraph of Paragraph 143 of the TVL, deductibility is greater for insurance policies taken out and paid before 1 October 1992 which do not satisfy the criteria referred to in Paragraph 96(2) and (4) of the TVL. In that case, the insured can deduct up to 10% of his net annual salary for the tax year, subject, however, to a ceiling of FIM 50 000.

11 In the course of the legislative process leading to the adoption of Paragraph 96(9), the Finnish Government took the view that the tax regime applicable to voluntary pension insurance formed a coherent whole in which the deductibility of contributions was based on the premiss that the pension benefits paid to the pensioner would be subject to tax at a later stage. The new rule was thus justified by the fact that it was impossible to ensure the taxation in Finland of pensions paid by foreign institutions or to verify whether the conditions for deductibility laid down in Paragraph 96(2) to (8) of the TVL were satisfied. In that connection, the working party which proposed the insertion of the new Paragraph 96(9) considered that, in practice, such pensions often escaped taxation in Finland, either because the recipient had moved abroad or because of insufficient information about pension payments.

The Convention on double taxation concluded between the Republic of Finland and the Federal Republic of Germany

12 On 11 August 1979, the Republic of Finland and the Federal Republic of Germany concluded a bilateral convention for the avoidance of double taxation on income and wealth (SopS 18/1982; BGB1. 1981 II, p. 1072, hereinafter 'the Convention').

13 Article 18(2) of the Convention, concerning compulsory social insurance, provides:

'Without prejudice to the provisions of paragraph 1 of this article, the benefits which a resident of a Contracting State receives under the social security legislation of the other Contracting State are exempt from tax in the former State....'

14 Article 21 of the Convention, which concerns the taxation of voluntary pensions, provides:

'Income of a resident of a Contracting State not expressly dealt with in the preceding articles of the convention is taxable only in that State.'

The main proceedings and the question referred for a preliminary ruling

15 Mr Danner is a doctor of German and Finnish nationality. He appears to have lived and worked in Germany until 1977, at which time he established himself in Finland.

16 In 1976, he started to pay pension insurance contributions to two German insurance institutions, the Bundesversicherungsanstalt für Angestellte (hereinafter

'the BfA') and the Berliner Ärzteversorgung. According to information provided by Mr Danner, the BfA operates a general pension insurance scheme which is in principle compulsory for anyone working as an employee in Germany. The contributions payable to the BfA and the benefits provided by it are determined in accordance with law. The Berliner Ärzteversorgung, for its part, operates a supplementary pension insurance scheme for doctors which was set up by a professional organisation of doctors and is in principle compulsory for all doctors working in the geographical area to which it applies, that is to say, the city of Berlin (Germany). The contributions paid to and the benefits provided by the Berliner Ärzteversorgung are governed by that institution's internal rules.

17 After moving to Finland, Mr Danner decided to continue to pay contributions to the two schemes referred to in the preceding paragraph. He justified that decision on two grounds. First, while he was no longer required to do so, he had in fact to continue to pay contributions to the BfA if he wished to receive a pension in case of invalidity. Secondly, the contributions paid to those two schemes increased his pension entitlements.

18 According to the documents appended to his income tax declaration, in 1996 Mr Danner paid a total of DEM 11 176.20 (FIM 33 582 or EUR 5 700) to those schemes and FIM 17 636.06 (EUR 3 000) to a Finnish life insurance company. His total pension contributions for the tax year 1996 were thus FIM 51 217 (approximately EUR 8 700).

19 In his income tax declaration for 1996, he sought to deduct his pension insurance contributions from his net taxable income.

20 The tax authorities allowed him to deduct his contributions for voluntary pension insurance only to the extent of 10% of his taxable income, that is to say, FIM 22 562 (about EUR 3 800).

21 Mr Danner's application to the Siilinjärven Verotuksen Oikaisulautakunta for review of that decision was rejected on 17 February 1998. Mr Danner then challenged the latter decision before the Kuopion hallinto-oikeus.

22 He submitted, first, that the contributions to the BfA and the Berliner Ärzteversorgung were compulsory contributions and thus were to be treated as fully deductible pursuant to Paragraph 96(1) of the TVL. In the alternative, he submitted that those contributions should be deductible to the same extent as contributions paid to voluntary pension insurance schemes taken out with Finnish institutions, that is to say, subject to an upper limit of 60% of the contributions paid and FIM 30 000 per year, according to the rule laid down in Paragraph 96(6) of the TVL.

23 In those circumstances, the Kuopion hallinto-oikeus decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the restriction... of the right to deduct for tax purposes pension insurance contributions payable from Finland to a foreign institution, laid down in the first sentence of Paragraph 96(9) of the Finnish Income Tax Law, contrary to Article 59 of the EC Treaty... or to the other articles referred to in the appeal (Articles 6, 60, 73b, 73d and 92 of the EC Treaty...)?'

24 In its question, the referring court is essentially asking whether tax legislation of a Member State restricting or disallowing the deductibility from income tax of voluntary pension scheme contributions to pension providers established in other Member States while allowing such contributions to be deducted when they are paid to insurance institutions established in the first-mentioned Member State are contrary to Articles 6, 59, 60, 73b, 73d and 92 of the Treaty.

Freedom to provide services

Applicability of Treaty provisions relating to freedom to provide services

25 At the outset, it should be stated that the Treaty provisions relating to freedom to provide services apply to a situation such as that in the main proceedings.

26 Article 60 of the Treaty provides that the chapter concerning services applies to services normally provided for remuneration. It has already been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (see Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5365, paragraph 17).

27 In the present case, the contributions paid by Mr Danner plainly constitute consideration for pensions which will be payable to him when he stops working and they unquestionably represent remuneration as regards the two German institutions which receive them (see, to that effect, Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraph 58).

Restriction on freedom to provide services

28 At the outset it should be recalled that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19 and Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32).

29 In the perspective of a single market and in order to permit the attainment of the objectives thereof, Article 59 of the Treaty precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see, *inter alia*, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17).

30 In that regard, it was not disputed before the Court that national legislation such as that at issue in the main proceedings restricts freedom to provide services.

31 In fact, in view of the important role played, at the time when a pension insurance contract is taken out, by the possibility of obtaining tax relief under that head, such legislation is liable to dissuade individuals from taking out voluntary pension insurance with institutions established in a Member State other than Finland and to dissuade those institutions from offering their services on the Finnish market (see, to that effect, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 30).

Justificatory grounds relied on

32 The need to ensure the coherence of the national tax system and the effectiveness of fiscal controls, to which the Danish Government has added the need to protect the basis of tax revenue of the Member State concerned, have been put forward as grounds justifying the legislation at issue.

Fiscal cohesion

33 The Finnish and Danish Governments submit that the legislation at issue in the main proceedings can be justified by the need to ensure the cohesion of the Finnish tax system. According to those governments, that system is based on the existence of a direct link between the deductibility of contributions to voluntary pension insurance schemes and the liability to income tax of the pensions payable by insurers. The loss of revenue resulting from the deduction of insurance contributions is in principle offset by the taxation of pensions at a later stage. Referring to the Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee on the elimination of tax obstacles to the cross-border provision of occupational pensions (OJ 2001 C 165, p. 4), the two governments maintain that the Finnish taxation system encourages savings and the development of pension plans by providing a tax deferral on the contributions paid, thus making it possible to cope with the aging of the population by reducing current tax revenue in exchange for higher revenue later.

34 The Finnish Government adds that, under the TVL, it taxes not only the pensions paid by Finnish and foreign institutions to residents, but also those paid by Finnish institutions to non-residents (taxation at source). Therefore, if con-

tributions are paid to a Finnish insurance company, the pension will be taxed in Finland even if the taxpayer has moved abroad. That is not the case if the taxpayer who leaves the country has paid contributions to a foreign insurance company. The need to preserve the cohesion of the Finnish fiscal system thus precludes the deduction of the latter contributions.

35 That line of argument cannot be upheld.

36 In that regard, it should be noted that the judgments of 28 January 1992 in *Bachmann* (Case C-204/90 [1992] ECR I-249) and *Commission* v *Belgium* (Case C-300/90 [1992] ECR I-305) were based on the finding that, in Belgian law, there was a direct connection between the deductibility of contributions and the liability to tax on sums payable by insurers. Under the Belgian tax system, the loss of revenue resulting from the deduction of insurance contributions was offset by the taxation of pensions, annuities or capital sums payable by insurers. By contrast, where such contributions had not been deducted, those sums were exempted from tax.

37 In the case in the main proceedings, however, there is no direct connection between the deductibility of insurance contributions and the taxation of sums payable by insurers.

38 In fact, under the Finnish tax system, pensions payable by foreign institutions to Finnish residents are taxed, irrespective of whether the insurance contributions paid to build up such pensions were or were not deducted from the taxable

income of their recipients. If Mr Danner continues to live in Finland, the pensions which he will receive from the BfA and the Berliner Ärzteversorgung will be subject to income tax in that Member State, despite the fact that he has not been entitled to deduct the contributions paid to those schemes.

39 That analysis of the Finnish tax system is without prejudice to the declaration by the Finnish Government that, under the general principles of national tax law, the applicant in the main proceedings might be able to apply for a so-called 'natural' deduction. Apart from the fact that this possibility does not appear in the description of the national legislation drawn up by the referring court, the Finnish Government stated in its written observations that there has not yet been any case-law on that question.

40 Moreover, the Republic of Finland and the Federal Republic of Germany have concluded a convention for the avoidance of double taxation in the areas of tax on income, tax on wealth and other taxes (see paragraphs 12 to 14 of the present judgment).

41 It follows from paragraphs 24 and 25 of the judgment in *Wielockx* (cited above) that where, as a result of double-taxation conventions like those which follow the model of the Organisation for Economic Cooperation and Development (OECD) — such as the convention between the Republic of Finland and the Federal Republic of Germany — fiscal cohesion is no longer established in relation to one and the same person by a strict correlation between the deductibility of contributions and the taxation of pensions but is shifted to another level, that of the reciprocity of the rules applicable in the Contracting States, the principle of fiscal cohesion may not be invoked to justify the refusal of a deduction such as that at issue.

42 Nevertheless, the Finnish Government maintains that the resolution of a dispute such as that in the main proceedings cannot be dependent on whether there is such a convention in a given case. There might also have been no convention with the Federal Republic of Germany.

43 That argument must in any event be dismissed. The fact that there might have been no convention is immaterial. Such a convention does in fact exist, which means that the conclusion reached in paragraph 24 of the *Wielockx* judgment, which shifts the requirement for fiscal cohesion to the level of the reciprocity of rules applicable in the Contracting States, may be transposed to the main proceedings.

The effectiveness of fiscal controls

44 The Finnish and Danish Governments also submit that the non-deductibility of contributions paid to schemes operated by foreign insurance institutions is justified by the need to ensure the effectiveness of fiscal controls and to prevent tax evasion.

45 First, they consider it difficult, if not impossible, to verify whether such schemes fulfil the various conditions for deductibility laid down in Paragraph 96(2) to (6) of the TVL. Moreover, even where those conditions are met at the time the deduction is made, it cannot be excluded that those schemes may subsequently alter their operating rules.

46 Secondly, it is also impossible to monitor and therefore tax effectively the payment of pensions or other benefits to Finnish residents by schemes operated by

foreign institutions. In that connection, the Finnish Government maintains that some foreign pension providers advertise their schemes mentioning that the benefits which they pay would escape income tax in Finland.

47 The Finnish and Danish Governments maintain that those difficulties are due, first and foremost, to the fact that, while the Finnish authorities can impose an obligation on domestic institutions to inform the tax authorities of any payment, they have no such powers as regards insurers established abroad. Also, whereas a taxpayer seeking to deduct contributions to schemes run by foreign institutions has a genuine interest in providing any information required, there is no comparable incentive to provide full and precise information on subsequent modifications of the insurance contract or on the pensions and benefits paid by such institutions. Finally, exchange of information between Member States as provided for by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) is also not a sufficiently effective tool to overcome the difficulties involved.

48 That argument cannot be upheld.

49 It should first be recalled that Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax (see Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26) or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (see *Wielockx*, cited above, paragraph 26).

50 A Member State is therefore in a position to check whether contributions have actually been paid by one of its taxpayers to an institution coming under the authority of another Member State. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, to that effect, *Bachmann*, paragraphs 18 and 20 and *Commission* v *Belgium*, paragraphs 11 and 13).

51 As regards the effectiveness of the supervision of the taxation of pensions paid to Finnish residents, it may be ensured by measures which restrict freedom to provide services to a lesser degree than a national measure such as that at issue in the main proceedings.

52 Apart from the possibilities afforded by Directive 77/799, referred to in paragraph 49 of the present judgment, it should be pointed out that, before receiving a pension from a foreign institution, the taxpayer will normally have applied for deduction of the contributions relating thereto. The application for deduction and the documentary evidence provided by taxpayers at the time such applications are made will constitute a valuable source of information about the pensions which will be paid to taxpayers at a later stage.

53 The Danish Government goes on to maintain that the restriction applied to the right to deduct insurance contributions is justified by the need to preserve the integrity of the tax base and that the Court has held, in *Safir*, that this need is a consideration of overriding general interest. If insurance contributions paid to schemes run by foreign insurers were deductible, residents in Member States with high income taxes would have a very strong incentive to take out insurance with institutions established in Member States with low income taxes. That would

result in ploys by persons seeking to benefit from the most favourable tax system, abuses and 'fiscal forum shopping', with devastating consequences for Member States which finance high quality social services through tax revenue. Furthermore, Member States have a legitimate interest in not granting the fiscal advantage of deductibility of insurance contributions where the savings encouraged by the deduction are accumulated abroad.

54 Those arguments cannot be upheld.

55 In that regard it should be recalled that, contrary to the Danish Government's assertion, the Court has held, in paragraph 34 of *Safir*, that the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies established in a Member State other than the one where the saver is resident was not such as to justify the national measure at issue, which restricted freedom to provide services.

56 The Court has also held that the need to prevent the reduction of tax revenue is not one of the grounds listed in Article 56 of the EC Treaty (now, after amendment, Article 46 EC) or a matter of overriding general interest (see, to that effect, Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 51). In addition, it held that any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State (see Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraph 44).

57 In light of the foregoing considerations, the answer to the question submitted must be that Article 59 of the Treaty is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers.

Articles 6, 73b, 73d and 92 of the Treaty

58 In view of the answer given to the question submitted concerning Article 59 of the Treaty, there is no need to examine that question in the light of the other Treaty provisions cited by the referring court in its question.

Costs

59 The costs incurred by the Finnish and Danish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Kuopion hallinto-oikeus by order of 22 March 2000, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) is to be interpreted as precluding a Member State's tax legislation from restricting or disallowing the deductibility for income tax purposes of contributions to voluntary pension schemes paid to pension providers in other Member States while allowing such contributions to be deducted when they are paid to institutions in the first-mentioned Member State, if that legislation does not at the same time preclude taxation of the pensions paid by the abovementioned pension providers.

Jann von Bahr Edward

La Pergola Wathelet

Delivered in open court in Luxembourg on 3 October 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber