

OPINION OF ADVOCATE GENERAL

JACOBS

delivered on 9 December 2004¹

1. The present case raises the question whether legislation of a MemberState which provides for a corporation tax credit for research only where the research is carried out in that MemberState is compatible with Community law.

index excluding tobacco, incurred in the course of the two preceding years ...'

3. Article 49(g)H of Annex III to the said code provides:

The national legislation

2. Article 244(c)B of the French Code général des impôts (General Tax Code) provides:

'Expenditure relating to activities carried out in France gives rise to entitlement to the tax credit mentioned in Article 244(c)B of the Code général des impôts.'

'Industrial and commercial or agricultural undertakings assessed on their actual profit may receive a tax credit equal to 50% of the amount by which research expenditure in the course of a year exceeds the average expenditure of the same nature, recalculated in line with any increase in the retail price

The facts and the questions referred

4. Laboratoires Fournier SA ('Fournier'), a company established in France which manufactures and sells pharmaceuticals, commissioned research centres based in several other Member States to undertake various research projects and took the resultant

¹ — Original language: English.

expenditure into account in calculating its tax credit for research for the years 1995 and 1996. The tax inspectorate disallowed that expenditure on the basis that the research was not carried out in France. Fournier lodged an objection on the basis that those provisions contravene Article 49 EC. That objection was rejected.

Article 49 EC. I shall consider second whether such a restriction can be justified.

The scope of Article 49 EC

5. Fournier accordingly brought proceedings before the Tribunal Administratif (Administrative Court), Dijon, which has referred to the Court the questions (i) whether the provisions at issue, in so far as they restrict the benefit of the research tax credit to research carried out in France, are contrary to Article 49 EC and (ii) whether, if so, the condition that the research be carried out in France is justified by reference to the principle of coherence of corporation tax.

8. The French Government accepts that the legislation differentiates between taxpayers depending on where the service is provided which may operate to the detriment of providers of services in other Member States. It submits however that that difference of treatment flows directly from the fiscal principle of territoriality, which the Court expressly recognised in *Futura*,² and hence falls outside the scope of Article 49 EC.

6. Written observations have been submitted by Fournier and the Commission, who were both, together with the French Government, represented at the hearing.

9. In *Futura* the Court ruled that Article 43 EC does not preclude a Member State from making the carrying forward of previous losses, requested by a taxpayer which has a branch in that State but is not resident there, subject to the condition that the losses must be economically related to the income earned by the taxpayer in that State, provided that resident taxpayers do not receive more

7. I shall consider first whether the provisions at issue, in so far as they restrict the benefit of the research tax credit to research carried out in France, fall within the scope of

2 — Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 22 of the judgment.

favourable treatment. More specifically the Court stated that the condition that the losses should be economically related to local income was an expression of the principle of territoriality in fiscal law and could not therefore be regarded as entailing any discrimination, overt or covert, prohibited by the Treaty.

case can so easily be transposed to a case such as the present, which concerns the repercussions of national tax rules on providers of services in other Member States. Those rules treat a resident company which has accepted services provided from within the MemberState in question more favourably than a resident company which has accepted services provided from another MemberState. They are therefore, albeit indirectly, based upon the place of establishment of the provider of services and are consequently liable to restrict its cross-border activities; it follows that they are in manifest conflict with Article 49 EC.

10. The French Government considers that the Court's reasoning in *Futura* concerning the freedom of establishment can be transposed to the freedom to provide services. The fact that the tax credit at issue in the present proceedings is available only to research operations carried out in France flows from the principle of fiscal territoriality. The tax system requires an economic link between the research costs and the economic activity subject to corporation tax. Its coherence would be affected if research operations carried out abroad created an entitlement to a tax credit in France although they were not taxed there.

12. On the basis of an identical analysis, Advocate General Tesouro in *Safir*³ concluded that national rules which provided for the taxation of premiums paid under life assurance policies taken out with non-resident companies whereas premiums under policies issued by resident companies were not taxed were contrary to Article 49 EC, notwithstanding the argument adduced by the Member State concerned and two others which intervened that the legislation at issue implemented the principle of fiscal territoriality. The Advocate General stated

11. It is significant in my view that the Court in *Futura* was considering the compatibility with the Treaty provisions on the freedom of establishment of national tax rules applying to resident and non-resident undertakings. I am not convinced that the Court's application of the principle of territoriality in that

3 — Case C-118/96 [1998] ECR I-1897, paragraphs 20 to 25 of the Opinion.

in particular that ‘the view that, under the principle of fiscal territoriality, the legislation at issue falls outside the scope of Article [49] appears to be entirely groundless’. Although the Court did not deal expressly with that argument, it ruled that such legislation was precluded by Article 49 EC.

13. I do not therefore consider that the Court’s approach in *Futura* can be transposed to the present case.

14. It may also be noted that in *Futura* an essential premiss of the Court’s reasoning — and an explicit condition of the proposition relied on in the present case by France — was that resident taxpayers did not receive more favourable treatment than non-residents. In the present case, by contrast, the essence of the legislation at issue is that taxpayers using national research centres receive more favourable treatment than those using research centres established in other Member States.

15. In the light of the above I do not therefore consider that that legislation falls outside the scope of Article 49 EC by virtue of the principle of fiscal territoriality.

16. Fournier and the Commission submit moreover that, by analogy with *Baxter*,⁴ the legislation is contrary to Article 49 EC in that it creates a ‘fiscal barrier’ which by dissuading undertakings established in France from using research centres in other Member States hinders the cross-border provision of services.

17. I agree that *Baxter* provides an extremely close analogy. That case concerned the compatibility with the freedom of establishment enshrined in Article 43 EC of French legislation which imposed a tax on undertakings in the pharmaceutical sector while allowing deduction of expenditure incurred in respect of research carried out exclusively in France. The applicants in that case, French subsidiaries of parent companies established in other Member States, argued that the legislation discriminated between French laboratories carrying out research

4 — Case C-254/97 [1999] ECR I-4809.

mainly in France and foreign laboratories whose principal research units were outside France.

18. The Court stated that the tax allowance in question seemed likely to work more particularly to the detriment of undertakings having their principal place of business in other Member States and operating in France through secondary places of business: it was, typically, those undertakings which, in most cases, had developed their research activity outside that State. On the basis that the rules regarding equality of treatment enshrined in Article 43 EC prohibit not only overt discrimination by reason of nationality (or, in the case of a company, its seat), but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result, the Court ruled that the legislation was contrary to the freedom of establishment.⁵

19. Similarly in the present case it seems clear that the legislation at issue favours undertakings established in France which carry out research in France and discourages

such undertakings from using research centres in other Member States. Such differential tax treatment will inevitably as a direct consequence restrict the provision of services to such undertakings by research bodies established in other Member States; that much moreover appears to be accepted by France. The Court has consistently held that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction which is liable to render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.⁶

20. As discussed above, comparable legislation was held by the Court in *Safir*⁷ to be contrary to Article 49. More specifically, the Court held in *Vestergaard*⁸ that rules of a Member State which make it more difficult to deduct for tax purposes costs relating to participation in professional training courses organised abroad than to deduct costs relating to such courses organised in that

⁵ — Paragraphs 10, 13 and 21 of the judgment, citing Case C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 14.

⁶ — Case C-222/95 *Société civile immobilière Parodi* [1997] ECR I-3899, paragraph 18 of the judgment.

⁷ — Cited in footnote 3.

⁸ — Case C-55/98 [1999] ECR I-7641.

Member State involve a difference in treatment, based on the place where the service is provided, which is prohibited by Article 49 EC.

21. I accordingly conclude that the provisions at issue, in so far as they restrict the benefit of the research tax credit to research carried out in France, fall within the scope of Article 49 EC and, subject to the possible justifications to be considered below, are contrary to that Article.

Possible justifications

22. It is settled case-law that the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by provisions which are justified by overriding reasons relating to the public interest, are appropriate to ensure that the objective which they pursue is attained and do not go beyond what is necessary to attain that objective.⁹

23. Three possible justifications have been raised in the present case.

24. First, the national court asks whether the legislation is justified in accordance with the principle articulated in *Bachmann*¹⁰ and *Commission v Belgium*¹¹ by the need to preserve the coherence of the corporate tax system in France.

25. *Bachmann* and *Belgium*, the only cases in which that justification has been permitted, concerned the question whether national legislation which made the tax deductibility of pension and life assurance contributions conditional upon their being paid in the Member State concerned was compatible with Article 39 EC, which enshrines freedom of movement for workers. The Court was clearly much influenced by the connection or direct link between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts, which meant that the loss of revenue resulting from the deduction of pension and life assurance contributions from total taxable income was offset by the taxation of pensions, annuities or capital sums payable by the insurers, and ruled that such provisions were justified by the need to ensure the coherence of the tax system of which they formed part.

9 — See for example Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraphs 34 and 35 of the judgment and the cases there cited.

10 — Case C-204/90 [1992] ECR I-249.

11 — Case C-300/90 [1992] ECR I-305.

26. There have been numerous attempts by Member States since those judgments to argue that particular fiscal provisions were justified by the need to preserve fiscal coherence. The Court has repeatedly stated that in order for an argument based on such justification to succeed, a direct link had to be established between the tax advantage concerned and the offsetting of that advantage by a particular tax liability.¹² In all but two of those cases the Court has rejected the argument on the basis that there was no such direct link; in those two, the Court in any event ruled that the legislation was unlawful because it did not appear to be necessary in order to preserve the coherence of the national tax system.¹³

29. Second, the French Government argued at the hearing that the legislation was justified by the fact that it promoted research and development.

30. The Court has taken a case-by-case approach to overriding reasons relating to the public interest which are capable of justifying obstacles to the freedom to provide services arising from national law. The fact that the promotion of research and development has not hitherto been found to be a possible justification is not therefore necessarily significant.¹⁴

27. In the present case pharmaceutical undertakings subject to French corporation tax are entitled to deduct expenditure on research carried out in France. There is no direct link between the deduction and the corporation tax in the sense described above.

28. I do not therefore consider that the legislation at issue may be justified by reference to the principle of coherence of corporation tax.

31. As the Commission stated at the hearing, the rationale for promoting research must surely be to encourage excellence; excellence, however, is not necessarily restricted to French research centres. I do not therefore see how the legislation at issue can be regarded as appropriate for securing the attainment of the objective allegedly pursued. The natural inference from the

¹² — See most recently Case C-319/02 *Manninen*, ECR 7477, paragraph 42 of the judgment delivered on 7 September 2004 and the cases there cited, and for an illuminating discussion of the principle of fiscal coherence see paragraphs 51 to 80 of the Opinion of Advocate General Kokott.

¹³ — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 42 of the judgment, and *Manninen*, cited in footnote 12, paragraph 45.

¹⁴ — See *Arblade*, cited in footnote 9, paragraph 59 of the Opinion of Advocate General Ruiz-Jarabo for examples of possible justifications which have been recognised by the Court in this context.

existence of such legislation is a desire to protect the French pharmaceutical research sector; economic aims, however, such as the protection of a particular economic sector within a Member State, clearly cannot justify a barrier to the fundamental principle of freedom to provide services.¹⁵

32. Legislation such as that at issue moreover is directly contrary to the aims expressed in Title XVIII of Part Three of the Treaty, 'Research and technological development', specifically mentioned by the French Government in support of its argument concerning the promotion of research. That Title refers inter alia to the need for undertakings to be able to 'exploit the internal market potential to the full, in particular through the ... removal of ... fiscal obstacles to [cooperation between undertakings and research centres]'.¹⁶

33. Finally, the French Government has argued that the legislation is justified by the fact that it ensures the effectiveness of fiscal supervision.

34. The Court has repeatedly held that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty¹⁷ and that a Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely.¹⁸ However, it has also ruled, in a context closely analogous to that at issue in the present case, that national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred cannot be justified in the name of effectiveness of fiscal supervision: the taxpayer should not be excluded a priori from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.¹⁹

35. The legislation at issue cannot therefore be regarded as justified by the effectiveness of fiscal supervision.

15 — See Case C-398/95 *SETTG* [1997] ECR I-3091, paragraph 23 of the judgment, and Case C-158/96 *Kohl* [1998] ECR I-1931, paragraph 41.

16 — Article 163(2) EC.

17 — See for example *Futura*, cited in footnote 2, paragraph 3 of the judgment.

18 — *Baxter*, cited in note 4, paragraph 18 of the judgment.

19 — *Baxter*, paragraphs 19 and 20 of the judgment.

Conclusion

36. I accordingly conclude, in answer to the questions referred by the Tribunal administratif, Dijon, that Article 49 EC precludes legislation of a Member State which provides for a corporation tax credit for research only where the research is carried out in that Member State.