OPINION OF ADVOCATE GENERAL JACOBS

delivered on 21 March 2002 [1]

1. The present case, referred by the Kuopion Hallinto-Oikeus (Kuopio Administrative Court, Finland), concerns in essence the compatibility with the freedom to provide services of Finnish tax law provisions which preclude or restrict the deductibility for income tax purposes of voluntary pension insurance contributions paid to foreign pension insurance institutions. The case is in many respects similar to *Bachmann* [2] and *Commission* v *Belgium* [3] and provides the Court with an excellent opportunity to see how the principles established in those cases have evolved over the last 10 years.

The Finnish provisions on the deductibility of pension insurance contributions

2. Under Paragraph 96(1) of the Tuloverolaki (Income Tax Law, 'the TVL') pension insurance contributions to certain compulsory or statutory schemes are fully deductible from taxable income. It appears that that rule applies also to contributions to analogous foreign schemes.

3. Contributions to voluntary pension insurance schemes are subject to different rules depending on whether the insurance was taken out with a Finnish or with a foreign insurance institution and in the latter case depending on the year of assessment.

4. Under Paragraph 96(2) to (6) of the TVL contributions to voluntary pension schemes run by Finnish insurance institutions are under certain conditions and within certain limits either fully or partially deductible. A full deduction of contributions is for example allowed within 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. [4] It is common ground that until 1996 the rules in Para-

1 — Original language: English.

2 — Case C-204/90 [1992] ECR I-249.

3 — Case C-300/90 [1992] ECR I-305.

4 — Paragraph 96(2) to (4) of the TVL.

graph 96(2) to (6) applied without distinction to contributions to Finnish and foreign insurance institutions.

5. Paragraph 96(9) of the TVL — which was introduced less than 12 months after Finland's accession to the European Union [5] and entered into force on 1 January 1996 — now excludes the deduction of contributions for voluntary pension insurance taken out with a foreign insurance institution. By way of exception contributions to a foreign pension insurance institution remain deductible in two situations, namely

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

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

6. Paragraph 96(9) is also subject to a transitional provision. For the tax years 1996 and 1997 contributions for voluntary pension insurance taken out with foreign institutions before 1 September 1995 are subject to the provisions which were in force in 1995, but only up to FIM 15 000 a year.

7. The working party on whose proposal the new Paragraph 96(9) was based considered that it was necessary to prohibit the deduction of contributions to foreign voluntary pension insurance because the pension to be received in due course would in practice often be excluded from taxation in Finland either because the recipient had moved abroad or because of lack of information about the pension payments. [6]

8. In the course of the legislative process leading to the adoption of Paragraph 96(9) the Finnish Government stated that the tax regime concerning voluntary pension insurance formed a coherent whole in which the deductibility of pension insurance contributions was based on the assumption that at a later stage the related pension benefits would be subject to tax. The new provision was thus justified by the fact that it was impossible to ensure that pensions provided by foreign institutions would be taxed in Finland or to verify that they fulfilled the

5 — By Law No 1594 of 18 December 1995.

6 — The referring court has submitted the memorandum of that working party to the Court.

various conditions for deductibility laid down in Paragraph 96(2) to (8) of the TVL. [7]

Factual background and the order for reference

9. Mr Danner is a doctor of German and Finnish nationality. Apparently [8] he lived and worked in Germany until 1977 when he moved to Finland.

10. In 1976 he started to pay pension insurance contributions to the German Bundesversicherungsanstalt für Angestellte (BfA) and to the Berliner Ärzteversorgung. According to information provided by Mr Danner the BfA operates a general pension insurance scheme which is in principle compulsory for all employees employed in Germany. The contributions to and the benefits granted by the BfA are governed by law. The Berliner Ärzteversorgung operates a supplementary pension insurance scheme set up by a professional organisation of doctors which is in principle compulsory for all doctors working in the geographical area (Berlin) to which it applies. The contributions and benefits granted by the Berliner Ärzteversorgung are governed by its own rules.

11. After moving to Finland Mr Danner continued to pay contributions to the two German schemes. According to Mr Danner, whilst he was not legally required to do so, he had in fact to continue paying contributions to the BfA if he wanted to benefit from a pension in case of invalidity. Moreover the payments to the two schemes increased his pension entitlements.

12. In 1996, which is the tax year at issue, Mr Danner paid pension insurance contributions to the two German institutions of a total of DEM 11 176. In the same year he took out a pension insurance policy with Suomen Keskinäinen Henkivakuutusyhtiö and paid to that Finnish institution pension insurance contributions of FIM 17 635. In his tax declaration for 1996 he claimed that pension insurance contributions of a total of FIM 51 163 should be deducted from his income.

13. The tax authorities allowed him to deduct contributions for voluntary pension insurance only to the extent of 10 % of his taxable income, that is FIM 22 562. Mr Danner's request for a rectification of that assessment was rejected by decision of 17 February 1998.

7 — Legislative proposal HE 76/1995.

8 — Mr Danner has made some contradictory statements in that regard.

14. Mr Danner appealed against that decision to the Kuopion Hallinto-Oikeus where he claims that the pension insurance contributions paid in 1996 should be deducted in their entirety. He submits, first, that the contributions to the two German institutions schemes must be regarded as contributions to a compulsory scheme and thus pursuant to Paragraph 96(1) of the TVL as fully deductible. In the alternative he submits that the newly introduced Paragraph 96(9) which precludes the deductibility of contributions for voluntary pension insurance taken out with foreign insurance institutions and the related transitional provision with its FIM 15 000 ceiling are contrary to Community law. The deductibility of the contributions to the two German institutions must therefore be assessed according to the rules applicable to contributions to voluntary pension insurance taken out with Finnish institutions.

15. By order of 22 March 2000 the Kuopion Hallinto-Oikeus referred to the Court the following question 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 TVL, contrary to Article 59 of the EC Treaty referred to in the appeal (now Article 49 EC), or to the other articles referred to in the appeal (Articles 6, 60, 73b, 73d and 92 of the EC Treaty) or the corresponding present articles (Articles 12, 50, 56, 58 and 87 EC)?'

16. Written observations were submitted by Mr Danner, the Finnish and Danish Governments, the Commission and the EFTA Surveillance Authority. Mr Danner and the Finnish Government submitted written answers to questions put by the Court. At the hearing all those who had submitted written observations were represented.

Scope and relevance of the question referred

17. By its question the referring court asks essentially whether rules such as Paragraph 96(9) of the TVL and the related transitional provision which exclude or restrict the deductibility of contributions to voluntary pension insurance provided by foreign institutions are contrary to

— Article 49 EC which protects the freedom to provide services,

— Article 56 EC which protects the free movement of capital,

— Article 12 EC which prohibits discrimination on grounds of nationality, and

— Article 87 EC which concerns State aid.

18. In the light of the facts of the main proceedings and the Court's case-law the Commission suggests that the Court should also examine the compatibility of such national rules with Article 39 EC or Article 43 EC which protect respectively the freedom of movement of workers and the freedom of establishment. [9]

19. In my view, it can be assumed that the referring court — which is fully aware of the Court's judgments in *Bachmann*, *Safir* [10] and other relevant cases — deliberately chose not to refer a question on those articles. Moreover none of the other parties has submitted observations on their interpretation. I propose therefore to deal only with the provisions expressly mentioned in the order for reference.

20. The Commission also expresses doubts whether the Finnish tax authorities actually applied the contentious Paragraph 96(9) of the TVL or the related transitional provision in Mr Danner's case.

21. In my view, even if the Finnish tax authorities did not apply the provision in issue, the Court's reply to the question referred might be of relevance for the main proceedings (for example if the referring court has the power not only to review the legality of the tax authorities' decision, but also to decide which rule they should apply). In any event the question is not manifestly irrelevant, so that the Court has to answer the question referred.

Article 49 EC

Applicability of the Treaty provisions on freedom to provide services

22. It will be recalled that Mr Danner is affiliated to two German insurance

9 — The Commission refers to both freedoms since it is not sure whether Mr Danner worked as an employee or as a self-employed person.

10 — Case C-118/96 [1998] ECR I-1897.

schemes whose nature is not entirely clear. They are apparently governed by public law or similar rules. They seem to be compulsory for doctors employed in Germany, whilst doctors working abroad may continue to participate on a voluntary basis. As regards the nature of the contributions to and the benefits provided by those schemes no precise information has been provided.

23. That raises the preliminary issue — which is for the referring court to resolve — whether the contributions to those schemes must be viewed as contributions to compulsory or statutory schemes within the meaning of Paragraph 96(1) of the TVL or as contributions to voluntary schemes falling under Paragraph 96(2) to (9) thereof.

24. A second issue is whether the services which the two institutions provide fall within the scope of the provisions on freedom to provide services. It is clear that services provided by private pension providers are within the scope of Article 49 et seq. EC. [11] The Court has however not yet decided whether those provisions apply to, for example, pensions provided by compulsory pension schemes which are governed by State social security legislation and operate according to the redistribution principle. In that connection it must be borne in mind that according to the Court's case-law courses given in an establishment of higher education which is financed essentially out of public funds do not constitute services within the meaning of Article 50 EC. [12]

25. In the present case it seems that Mr Danner pays his contributions on a voluntary basis since he is not employed in Germany. There is thus no need to decide whether services the receipt of which is compulsory may fall within the scope of freedom to provide services.

26. Moreover, as to the nature of the rules governing the two schemes in issue it follows from the Court's case-law that the application of Articles 49 and 50 EC is not excluded merely because those rules might be social security rules. [13]

27. Finally, pursuant to Article 50 EC the provisions on freedom to provide services apply to services which are 'normally provided for remuneration'. According to the Court's case-law the essential characteristic of 'remuneration' lies in the fact that it constitutes consideration for the

11 — See *Safir*, cited in note 10, paragraph 22 of the judgment.

12 — Case C-109/92 *Wirth* [1993] ECR I-6447.

13 — Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 21 of the judgment and Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473, paragraph 54.

service in question. [14] Even if the details are unclear, it seems that Mr Danner pays on a voluntary basis insurance contributions of an amount related to the pensions which he will receive.

28. I conclude therefore that the pension insurance services provided by the two German institutions to Mr Danner constitute services within the meaning of Article 50 EC.

Restriction on freedom to provide services

29. Under the first two sentences of Paragraph 96(9) of the TVL 'contributions for voluntary pension insurance taken out with a foreign insurance institution are not deductible. An insurance policy is, however, regarded as taken out in Finland, if it is granted by a fixed establishment in Finland of a foreign insurance institution.' Under the transitional rule for the tax years 1996 and 1997 the deduction of contributions paid to foreign institutions is allowed up to a ceiling of FIM 15 000. Contributions to Finnish institutions are not subject to that ceiling.

30. None of those submitting observations contests that those rules constitute a restriction on the freedom to provide services, and it is clear in my view that they do. They have the effect of making the provision of pension insurance services between Member States more difficult than the provision of such services purely within one Member State [15] in that they are liable to dissuade individuals from taking out voluntary pension insurance with foreign institutions and to dissuade foreign institutions from offering their services on the Finnish market. [16] It is obvious that the availability of fiscal advantages is an important factor in an individual's choice of a pension insurance institution. Indeed the advantage of deductibility is in all probability so significant that no one will wish to take out insurance with a foreign institution.

31. Moreover, the refusal to allow the deduction of contributions for pension insurance taken out with foreign institutions also discriminates on grounds of nationality against foreign insurance providers. In that regard the Court has held that Article 49 EC entails the abolition of any discrimination against a person providing services on account of his nationality or the fact that he is established in a Member State other than the one in which the service is provided. [17] In the present case the discrimination on grounds of the

14 — *Geraets-Smits and Peerbooms*, paragraph 58 of the judgment.

15 — Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17 of the judgement.

16 — *Safir*, cited in note 10, paragraph 30 of the judgment.

17 — Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 14 of the judgment with further references.

nationality of the service provider is overt and clear-cut since Paragraph 96(9) of the TVL distinguishes expressly between foreign and Finnish insurance institutions. Only foreign institutions are burdened with the cost of setting up another establishment. Furthermore, on the basis of a literal interpretation of the rules in issue, it might even be argued that contributions for pension insurance taken out with a permanent establishment located abroad of a Finnish insurance institution benefit from the advantageous deduction regime laid down in Paragraph 96(2) to (6) of the TVL.

33. In the present case those submitting observations discuss essentially four grounds of justification, namely the need to ensure the coherence of the Finnish tax system, the effectiveness of fiscal controls, the need to prevent tax evasion and the need to protect the integrity of the tax base. Those grounds have in common that they are not mentioned in the Treaty. They could therefore be recognised as possible justifications, if at all, only if they were overriding requirements in the general interest.

Which grounds of justification may be invoked?

34. Since the Finnish rules in issue are overtly discriminatory may the four grounds of justification be invoked at all? Unfortunately the Court's case-law is not clear on that important question.

32. It is well known that a measure restricting freedom to provide services may be justified on the basis of two different categories of grounds, namely

— by an exemption expressly provided for by the Treaty (e.g. Articles 45 and 46 EC which are applicable pursuant to Article 55 EC), or

— by other grounds of justification which are not provided for by the Treaty but which have been recognised by the Court and accepted by it as overriding requirements in the general interest.

35. According to one line of cases, national rules which discriminate as regards the origin of the service in question are compatible with Community law only if they can be brought within the scope of an express exemption, such as those contained in Articles 45 and 46 EC. [18] The Court has never formally abandoned that principle.

18 — Case 352/85 *Bond van Adverteerders* [1988] ECR 2085, paragraphs 32 and 33 of the judgment; *Commission* v *Netherlands*, cited in note 17, paragraph 15; and Case C-288/89 *Collectieve Antennevoorziening Gouda* [1991] ECR I-4007, paragraph 11.

On the contrary, the Court continues to refer to it in leading judgments [19] and from time to time applies it: thus in *Royal Bank of Scotland*, which involved direct and overt discrimination on grounds of nationality in the field of freedom of establishment, the Court refused to examine those grounds of justification which were not expressly mentioned in the Treaty. [20] The Court adopted the same approach in *Ciola* [21] in the field of freedom to provide services. The judgment in *Ciola* is particularly puzzling since it involved not direct but merely indirect discrimination on grounds of nationality.

36. In most of the recent cases, however, involving national rules which might have been regarded as (directly) discriminatory, the Court has avoided assessing whether the rules in issue were discriminatory, and has examined grounds of justification not expressly mentioned in the Treaty. For that purpose the Court has either classified the rule in issue merely as an obstacle to freedom to provide services [22] or referred to a 'difference in treatment' which might be justified on grounds not mentioned in the Treaty. [23] *Bachmann* and *Commission* v *Belgium* are examples of that line of cases. In both judgments the discriminatory nature of the measures in issue as regards freedom to provide services was neither examined nor even mentioned and the measures were held to be justified by the need to preserve the coherence of the Belgian tax system, a justification not expressly mentioned in the Treaty and not previously recognised by the case-law.

37. In view of the fundamental importance of the question whether (overtly) discriminatory measures such as those at issue in the main proceedings can be justified on grounds not expressly mentioned in the Treaty, the Court should clarify its position in order to provide the necessary legal certainty. Such clarity and legal certainty are essential for national courts, litigants, the governments of the Member States, the institutions and citizens in general.

38. I would add that the Court's primary task in preliminary rulings is not to decide specific cases on the basis of narrowly distinguished facts, or to solve a problem for the national court in the particular case, but to state clearly and coherently for the benefit of everyone in the Community what the correct understanding of the law is, and to give rulings of general significance. It is only that broader function which justifies

19 — Case C-124/97 *Läärä and Oy Transatlantic Software* [1999] ECR I-6067, paragraph 31 of the judgment.

20 — Case C-311/97 [1999] ECR I-2651, paragraph 32 of the judgment.

21 — Case C-224/97 [1999] ECR I-2517, paragraph 16 of the judgment.

22 — See, for example, *Safir*, cited in note 10, paragraphs 25 to 30 of the judgment.

23 — See, for example, Case C-200/98 *X and Y* [1999] ECR I-8261, paragraph 28 of the judgment; Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 22; and Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraph 36.

the system of preliminary rulings and explains the unique procedure whereby Member States and the Commission are systematically invited to submit observations and indeed why the judgment of the Court and the Opinion of the Advocate General in every case are published in no fewer than 11 languages.

39. The present case well illustrates why the current state of uncertainty on this core issue of Community law is unsatisfactory. In the course of the legislative process leading to the adoption of the contentious rules the Finnish authorities were aware of the Court's judgments in *Bachmann* and *Commission* v *Belgium*. They were uncertain however — as is shown by the *travaux préparatoires* submitted to the Court — whether according to those judgments overtly discriminatory rules might be justified in order to preserve fiscal coherence. It is apparent that that type of uncertainty can cause governments, companies and citizens substantial economic damage.

40. As to which grounds of justification may be invoked, I think it is inappropriate to have different grounds depending upon whether the measure is discriminatory (directly or indirectly) or whether it involves a non-discriminatory restriction on the provision of services. Once it is accepted that justifications other than those set out in the Treaty may be invoked, there seems no reason to apply one category of justification to discriminatory measures and another category to non-discriminatory restrictions. Certainly the text of the Treaty provides no reason to do so: Article 49 EC does not refer to discrimination but speaks generally of 'restrictions on freedom to provide services'. In any event, it is difficult to apply rigorously the distinction between (directly or indirectly) discriminatory and non-discriminatory measures. Moreover, there are general interest aims not expressly provided for in the Treaty (e.g. protection of the environment, consumer protection) which may in given circumstances be no less legitimate and no less powerful than those mentioned in the Treaty. The analysis should therefore be based on whether the ground invoked is a legitimate aim of general interest and if so whether the restriction can properly be justified under the principle of proportionality. In any event, the more discriminatory the measure, the more unlikely it is that the measure complies with the principle of proportionality. Such a solution would be consistent with the Court's implicit approach in most of the recent cases on freedom to provide services. I would add that the same solution may be appropriate for the free movement of goods. That solution would meet the need to give equal weight, when assessing restrictions on the free movement of goods, to interests no less vital that those set out in Article 30 EC, notably the protection of the environment. [24]

24 — See my Opinion in Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraphs 220 to 233.

41. Since I consider that it is proper not to draw a rigid distinction between the grounds of justification for discriminatory and non-discriminatory measures I will deal with the four grounds invoked.

The need to preserve the coherence of the Finnish tax system

42. It will be recalled that in *Bachmann* and *Commission* v *Belgium* the Court accepted that restricting the deductibility of contributions paid to foreign institutions might be justified by the need to preserve the coherence of the Belgian tax system. The Court's judgment was based on the assumption that there existed under Belgian law a direct connection between the deductibility of contributions and the liability to tax on sums payable by the insurers under pension and life assurance contracts: under the Belgian 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 the insurers; where such contributions had not been deducted the sums payable by the insurers were by contrast exempted from tax.

43. The Finnish and Danish Governments submit that the rules in issue in the present case can be justified on similar grounds. In their view the Finnish tax system is based on the same connection between the deductibility of voluntary pension insurance contributions and the liability to income tax of the pensions payable by the insurers. The loss of revenue resulting from the deduction of contributions is in principle offset by the taxation of pensions at a later stage. Referring to the recent Commission Communication on 'The elimination of tax obstacles to the cross-border provision of occupational pensions' [25] the two Governments state that the Finnish system encourages savings and the making of retirement provision by providing a tax deferral on the contributions paid; it thus helps to cope with demographic ageing as it reduces tax revenues today in exchange for higher tax revenue at a later stage.

44. The Finnish Government states that it taxes not only the pensions paid by Finnish and foreign institutions to residents (residence taxation) but also, according to Paragraph 10 of the TVL, pensions paid by Finnish institutions to non-residents (source taxation). Where a taxpayer has paid contributions to a Finnish undertaking there is thus a guarantee that the pension payable will be taxed in Finland even where the taxpayer moves abroad. The same guarantee does not however exist where the departing taxpayer has paid contributions to a foreign undertaking. In order to preserve the coherence of the Finnish tax system pension contributions to foreign insurance undertakings should therefore not be deductible.

25 — OJ 2001 C 165, p. 4.

45. According to the Finnish Government it is not possible to ensure the coherence of that system by means which are less restrictive than those in issue. A 'claw-back' mechanism for example by which a departing taxpayer would have to 'reimburse' the fiscal advantages derived from the deductibility of voluntary pension contributions [26] would constitute a disproportionate restriction of freedom of movement of workers or of freedom of establishment. Paragraph 96(9) moreover allows (under certain conditions and for a limited amount of time) the deduction of contributions to a foreign scheme where the person concerned has moved to Finland from abroad.

46. I am not convinced by those arguments and agree with Mr Danner, the Commission and the EFTA Surveillance Authority that in view of the design of the Finnish income tax system the Finnish Government cannot invoke the need to preserve fiscal coherence and that the rules in issue in any event infringe the principle of proportionality.

47. It is worth noting that as a preliminary point that the very notion of fiscal coherence introduced by the Court in *Bachmann* and *Commission* v *Belgium* has been widely criticised. [27] In its subsequent case-law the Court has stressed that Member States may rely on the need to preserve fiscal coherence only if there is a *direct* link between any fiscal advantage and a corresponding disadvantage, and in no subsequent case has it allowed Member States to rely on fiscal coherence.

48. In the present case there is in my view no true direct link between the deductibility of contributions and the taxation of pensions. Under the Finnish tax system the pensions payable by foreign insurance undertakings to residents in Finland will be taxed, independently of whether the contributions paid to those undertakings were deductible. If Mr Danner stays in Finland, the pensions which he will receive from the two German schemes will be subject to Finnish income tax despite the fact that he is not allowed to deduct the contributions paid to those schemes. In that respect the Finnish system is asymmetric and differs in a crucial point from the symmetrical system which the Court assumed to exist in *Bachmann* and *Commission* v *Belgium*. Since in respect of taxpayers such as Mr Danner there is no direct link between deductibility and taxation, I consider that Finland cannot invoke the need to preserve fiscal coherence.

26 — Those submitting observations state that the Netherlands have introduced such a mechanism.

27 — See for example B. Knobbe-Keuk, 'Restrictions on the fundamental freedoms enshrined in the EC Treaty by discriminatory tax provisions — ban and justification', *EC Tax Review* 1994, p. 74; D. Fosseland, 'L'Obstacle fiscal à la réalisation du marché intérieur', *Cahiers de Droit Européen* 1993, p. 472.

49. In order to counter that argument the Finnish Government contends that by virtue of general tax law principles Mr Danner might be able to ask for a so-called 'natural deduction' when the pensions become payable on the ground that the related insurance contributions were not deductible. The Finnish Government itself admits however that it is not at all clear whether the Finnish courts would recognise such a 'natural deduction' in Mr Danner's case. In my view, the principle of legal certainty precludes any such future tax advantage from being brought into the fiscal coherence equation unless there is a clear entitlement to it. Furthermore a right to deduct is not the same as a full exemption from tax of future pension payments such as was presumed to exist in *Bachmann* and *Commission* v *Belgium*. I am therefore not satisfied that the so-called 'natural deduction' has the effect of ensuring the required symmetry of the Finnish system.

50. Second, it follows from the Court's judgment in *Wielockx* [28] that in the present case fiscal coherence is secured by a bilateral convention concluded with Germany.

51. Under Article 21 of the convention between Finland and Germany for the avoidance of double taxation on income and capital and as regards other taxes [29] items of income of a resident of a Contracting State not dealt with in the preceding articles of the convention are to be taxable only in the recipient's State of residence. The pensions paid by pension insurance undertakings under voluntary pension insurance contracts fall under that catch-all clause. [30] Under Article 18(2) of the convention the benefits which a resident of a Contracting State receives under the social security legislation of the other Contracting State are by contrast exempt from tax in the recipient's State of residence. [31]

52. In *Wielockx* the Court stated in a factual and legal context similar (albeit not identical) to that of the present case:

'The effect of double-taxation conventions which, like the one referred to above, follow the OECD model is that the State taxes all pensions received by residents in its territory, whatever the State in which the contributions were paid, but, conversely, waives the right to tax pensions received abroad even if they derive from contributions paid in its territory which it treated as deductible. Fiscal cohesion has not therefore been established in relation to one and the same person by a strict

28 — Case C-80/94 [1995] ECR I-2493.

29 — Convention of 5 July 1979; the German version is published in BGBl. 1981 II, p. 1165.

30 — As annuities based on previous contributions, see K. Vogel, *Klaus Vogel on Double Taxation Conventions* (3rd ed., 1997), Kluwer, p. 1072.

31 — Since it is not clear whether the pensions payable by the two German schemes would fall under Article 21 or Article 18(2) of the convention I must take both alternatives into account.

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. Since fiscal cohesion is secured by a bilateral convention concluded with another Member State, that principle may not be invoked to justify the refusal of a deduction such as that in issue.' [32]

53. By concluding the convention with Germany Finland has under Article 21 thereof waived its right to tax pensions paid by Finnish voluntary pension insurance undertakings to recipients resident in Germany. Conversely Finland may tax all the pensions received by residents in its territory. Under Article 18(2) benefits received under the social security legislation of the other contracting State are exempt from tax in the recipient's State of residence. If Mr Danner stays in Finland and that rule applies to the pensions granted by either or both of the German schemes Finland has in effect waived its right to tax income of one of its residents.

54. Fiscal coherence is thus not 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 two contracting States. An overtly discriminatory refusal of a deduction for contributions to foreign pension insurance does not serve to protect that different type of fiscal coherence.

55. Finland seeks to meet the argument based on the double taxation convention by suggesting that the solution cannot be based on whether there is such a convention in a given case. It points out that there might have been no convention with Germany, and that Member States cannot be required as a matter of Community law to conclude such conventions.

56. The Finnish Government's argument appears difficult to reconcile with the judgment in *Wielockx*. However, even if it were correct that the solution cannot be based on the existence of a double taxation convention which is applicable in a given case, the argument would not in my view succeed. What is significant in my view is not the existence of a particular convention which applies in the instant case but the existence among the Member States of a general network of double taxation con-

32 — Cited in note 28, paragraphs 24 and 25 of the judgment.

ventions to which Member States are parties (even if not with every other Member State). The rationale of the *Wielockx* judgment applies by virtue of the existence of that general network, which demonstrates that Member States are generally content to renounce on the basis of reciprocity the right to tax at source pensions paid to persons resident in another Member State. Consequently a person who has been able to deduct pension contributions from his taxable income in one Member State but subsequently moves to another Member State will often not be liable to pay tax on his pension in the first Member State. Moreover a person who has been able to deduct in Member State A contributions to a pension scheme in Member State B might draw his pension in Member State C and be liable to pay tax on his pension neither in A nor in B but in C. The argument based on fiscal coherence is therefore not made out.

57. Third, and in any event, it is disproportionate to prohibit all persons paying insurance contributions to foreign insurance undertakings from deducting those contributions merely because some of those persons might later leave the country. Without wishing to take a position on the compatibility with Community law of, for example, a 'claw-back' mechanism — whereby departing taxpayers must reimburse the fiscal advantages gained from deducting pension contributions — I think it is clear that even such a mechanism would be less restrictive than a general refusal of deductibility affecting all those who stay in Finland. The excessive nature of the restriction is perfectly illustrated by Mr Danner's case: he is not allowed to deduct the contributions to the German schemes despite the fact that he has strong attachments to Finland and is therefore — as he convincingly explained — unlikely to leave Finland merely for fiscal reasons (he added that in any event it was inaccurate to regard Germany as a fiscal paradise).

The need to ensure the effectiveness of fiscal supervision and to prevent tax evasion (fraude fiscale)

58. The Finnish and Danish Governments argue that the refusal to allow deduction of contributions to schemes operated by foreign insurance institutions is justified by the need to ensure the effectiveness of fiscal supervision and to prevent tax evasion.

59. In their view it is difficult or even impossible to verify whether the foreign schemes fulfil the various conditions for deductibility laid down in Paragraph 96(2) to (6) of the TVL. Even where they fulfil those conditions at the time of deduction, foreign schemes cannot be prevented from modifying those insurance conditions at a later stage.

60. According to those Governments it is also impossible to monitor and therefore

tax effectively the payment of pension or other benefits by foreign schemes to Finnish residents. In that connection the Finnish Government maintains that some foreign pension providers advertise their services stating that the pensions payable by them would escape taxation in Finland.

61. According to those Governments those difficulties of monitoring the fulfilment of the conditions for deductibility and the payment of pensions are due, first, to the fact that, whilst 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. Second, whereas a taxpayer seeking to deduct contributions to foreign schemes has an interest in providing all required information, there is no comparable incentive for a taxpayer to provide full and precise information on subsequent modifications of the insurance contract or on the pensions and benefits received from abroad. Third, 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 [33] is also not a sufficiently effective tool to overcome the difficulties involved.

33 — OJ 1977 L 336, p. 15.

62. I am not convinced by those arguments and agree with Mr Danner, the Commission and the EFTA Surveillance Authority that the rules in issue infringe the principle of proportionality. In my view, it is possible to attain the legitimate objectives of ensuring the effectiveness of fiscal controls and preventing tax evasion by means considerably less restrictive than a general refusal of deductibility for all contributions to foreign insurance institutions.

63. It is settled case-law that the effectiveness of fiscal supervision constitutes an overriding requirement in the general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty. [34] The need to prevent fiscal evasion coincides in the present case with the need to guarantee effective fiscal supervision.

64. Finland seeks to protect through the contested measures two different fiscal interests.

65. First, Finland wishes to ensure that no deduction is granted in cases where there is no entitlement to such a deduction (effec-

34 — Case 120/78 *Rewe-Zentral* [1979] ECR 649; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471; and *Vestergaard*, cited in note 23.

tive supervision of the deductibility of contributions). The deduction of contributions should be allowed only where the contributions are effectively paid, where the foreign insurance scheme fulfils the requirements which the Finnish legislature imposes for the purposes of deductibility (e.g. as regards the nature and level of benefits or the age of retirement) [35] and where those requirements continue to be fulfilled even after the deduction has been granted.

66. As regards that first interest it is clear from *Bachmann* and *Commission* v *Belgium* that a Member State may invoke Directive 77/799/EEC [36] in order to check whether payments have been made in another Member State, where it is necessary for those payments to be taken into account in order correctly to assess the income tax payable. In any event, the tax authorities may demand from the taxpayer such proof of payment of the contributions and of the conditions governing the pension insurance as they consider necessary and refuse, where appropriate, to allow the deduction where such proof is not forthcoming. Since the deduction is conditional upon the approval of the authorities there is a strong incentive for the taxpayer to provide accurate and full information. It follows that even where the Member State requested under Directive 77/799/EEC to provide information has no legal basis for requiring insurers to provide the necessary information, that cannot justify the non-deductibility of pension insurance contributions paid to institutions established abroad. [37]

67. Second, Finland wishes to ensure that the pensions payable by the insurance institution to residents in Finland will in fact be taxed (effective supervision of the taxation of pensions).

68. It is true that in *Bachmann* and *Commission* v *Belgium* the Court accepted that the measures there in issue were proportionate in that it was not possible to ensure the coherence of the Belgian system by less restrictive measures. However, in view of the severity of the restriction in issue, it is necessary to examine afresh the proportionality of the Finnish measure in the context of the present case.

69. As to the severity of the restriction it must be borne in mind that the effect of the measure is likely to be to exclude foreign insurance institutions altogether from the Finnish market. It is thus a measure designed not to ensure effective control of cross-border insurance provision, but to

35 — As regards the question whether the deductibility can be made conditional on such requirements where a worker moving temporarily to another Member State is concerned see the discussion in the Commission Communication, cited in note 25, point 3.4.

36 — The Court refers to Article 1(1) of the Directive.

37 — See paragraphs 18 to 20 of the judgment in *Bachmann*, cited in note 2.

exclude the cross-border provision of services altogether on the assumption that no effective control is possible. It is also clear that such a total exclusion works not only against dishonest economic actors but also to the detriment of honest insurance undertakings and honest taxpayers who have no interest in favouring or participating in unlawful practices.

70. As regards the possibility of safeguarding the application of Member States' tax rules by means less restrictive than the *de facto* elimination of all cross-border pension insurance services, the tax authorities of the Member States may, in my view, rely on three potential sources of information, namely the taxpayer concerned, the Member State of the paying institution and perhaps most importantly the paying insurance institution itself.

71. In the first place, there is obviously no problem if the taxpayer concerned honestly includes in his tax declaration pensions received from abroad. But the tax authorities are not fully dependent upon such a declaration. Before a taxpayer receives a pension from a foreign institution he will normally have applied for deduction of the contributions paid to that institution. The applications for deduction and the documentary evidence provided by the taxpayer at that moment constitute in my view a valuable source of information about the pension payments which he will receive at a later stage. On the basis of the information provided at the deduction stage the tax authorities may perhaps even presume that pension payments are made unless the taxpayer provides appropriate evidence to the contrary.

72. Second, the Member States could engage in an exchange of information on benefits paid by pension institutions to residents of another Member State which would allow Member States to verify compliance by their residents with their tax obligations. The framework for such an exchange of information already exists under Directive 77/799/EEC. In its Communication quoted above the Commission makes detailed proposals for a workable automatic information exchange on occupational pensions. [38]

73. Independently of those specific proposals the Court has held that the authorities of a Member State can invoke Directive 77/799/EEC in order to obtain from the competent authorities of another Member State all the information which appears to them to be necessary to ascertain the correct amount of income tax payable by a taxpayer in relation to the legislation which they have to apply. [39]

38 — See point 4 of the Communication, cited in note 25.

39 — *Vestergaard*, cited in note 23, paragraph 28 of the judgment.

74. Third, and perhaps most importantly, it seems to me that a Member State can ensure that insurance undertakings established abroad cooperate and provide the necessary information about the payments which they make to residents. A Member State may for example make the deductibility of contributions to a given foreign institution scheme conditional on a prior arrangement between that institution and the authorities of the Member State concerned. In such an arrangement the Member State could require the provision of full and accurate information about the pension payments made by that institution. It could also be agreed that the insurance conditions are not to be substantially modified when the deductions have already been granted. It should be assumed that insurance institutions — which are, after all, generally undertakings of some standing and permanence closely supervised by their State of establishment — will not try to breach or circumvent such arrangements. But even in the event of non-compliance it would be open to the Member State to apply appropriate sanctions such as for example an immediate suspension of deduction in respect of contributions paid by residents. [40] Even a rigorous policy of excluding from a Member State's market those foreign institutions which do not cooperate in good faith would clearly be less restrictive than a policy of *de facto* excluding all foreign institutions from the market.

75. Accordingly, the contested measures cannot be justified by the need to ensure effective fiscal supervision or to prevent tax evasion.

The need to preserve the integrity of the tax base

76. The Danish Government argues that the restriction of the right to deduct contributions paid to foreign institutions is justified by the need to preserve the integrity of the tax base. In its view the Court recognised in *Safir* that that need constituted an overriding requirement in the general interest. If insurance contributions paid to 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 entail fiscal forum shopping, abuse and circumvention of tax rules in Member States with high income taxes and a race to the bottom in the field of taxation 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 made abroad.

40 — P. Farmer and R. Lyal, *EC Tax Law* (1994), p. 333.

77. I am not convinced by those arguments.

78. I do not accept that the Court has recognised the need to ensure the integrity of the tax base as a legitimate ground of justification. The Court has held on the contrary that preventing a reduction of tax revenue is not one of the grounds listed in Article 46 EC and cannot be regarded as an overriding requirement in the general interest. [41] In *Safir* the Court merely stated that in the circumstances of the case the need to fill a fiscal vacuum was not such as to justify the restrictive national measure in issue.

79. In any event, the Danish Government's 'race to the bottom' argument appears to be based on the erroneous assumption that lower income taxes in the State of establishment of the foreign pension insurance institution are an incentive for taxpayers to take out pension insurance with institutions in that State. Since in the vast majority of cases the pensions paid by those institutions will be taxed by the State of residence of the taxpayer (and not by the source State) at the rates applicable in the State of residence there is, in my view, no tax incentive to take out pension insurance with foreign insurers.

80. The Danish Government's last point might be read as admittingthat rules such as those at issue are essentially there to protect insurance institutions established in one Member State against competition from other Member States. It must however be recalled that the fundamental freedoms of the Treaty are designed to preclude not only restrictions on the purchase of goods or services from other Member States but also incentives devised by the Member States to encourage the purchase of primarily national goods or services to the exclusion of goods or services from other Member States. [42]

81. Accordingly, since measures such as those in issue in the main proceedings cannot be justified on any of the grounds invoked they are prohibited by Article 49 EC.

Articles 12, 56 and 87 EC

82. In view of the clear result under Article 49 EC and since there has been little debate about Articles 12, 56 and 87 EC before either the referring court or this Court, it seems unnecessary and inappropriate to examine those provisions.

41 — Case C-307/97 *St Gobain* [1999] ECR I-6161, paragraph 51 of the judgment.

42 — See, for example, Case C-249/81 *Commission* v *Ireland* [1982] ECR I-4005, paragraphs 27 to 29 of the judgment, and Case C-21/88 *Du Pont de Nemours Italiana* [1990] ECR I-889, paragraph 11.

Conclusion

83. Accordingly the question referred in this case should in my opinion be answered as follows:

Tax law provisions of a Member State which restrict or preclude the deductibility for income tax purposes of voluntary pension contributions paid to pension providers in other Member States, whilst allowing the deductibility of contributions to equivalent voluntary pension schemes operated by pension providers in the first Member State, are contrary to Article 49 EC.