OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 24 January 1990 *

Mr President,
Members of the Court,

1. The reference made to the Court for a preliminary ruling by the Conseil d'État du Luxembourg (State Council of Luxembourg) concerns, in substance, the compatibility with Community law of a tax provision under which the repayment of any overpaid income tax is refused if the taxpayer is not resident in the territory of the Grand Duchy of Luxembourg during the entire year of assessment in question. Mr Biehl is a German national who left Luxembourg on 1 November 1983 and, as a consequence, has been refused the sums corresponding to tax deducted in excess of the tax he should have paid in accordance with the applicable scales.

2. It should be pointed out firstly that the principle of equal treatment between national workers and workers who are nationals of other Member States, laid down in Article 48(2) of the EEC Treaty and in Regulation (EEC) No 1612/68 of the Council, [1] postulates equal treatment in the field of taxation. On the one hand, by abolishing any discrimination as regards employment, remuneration and other conditions of work, the Treaty itself dictates that that principle should also apply in the field of taxation. Otherwise, the principle of equal treatment as regards remuneration could be undermined by the effects of discriminatory tax provisions. On the other hand, Article 7 of Regulation No 1612/68, relating to equal treatment as regards tax advantages, constitutes a specific embodiment of the general principle of non-discrimination in the field of taxation.

3. It should further be pointed out that the rule at issue before the national court does not impose any conditions based on nationality; it is formally applicable to nationals and Community nationals without distinction. However, that finding does not totally rule out the possible existence of indirect or covert discrimination. According to the case-law of the Court:

'The rules regarding equality of treatment, both in the Treaty and in Article 7 of Regulation No 1612/68, forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

This interpretation, which is necessary to ensure the effective working of one of the fundamental principles of the Community, is explicitly recognized by the fifth recital of the preamble to Regulation No 1612/68 which requires that equality of treatment of workers shall be ensured "in fact and in law".

* Original language: French.

1 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

It may therefore be that criteria such as place of origin or residence of a worker may, according to circumstances, be tantamount, as regards their practical effect, to discrimination on the grounds of nationality, such as is prohibited by the Treaty and the regulation'. [2]

4. Consequently, it must be determined first of all whether the rule at issue before the national court, although applicable without distinction, leads in fact to different treatment for Luxembourg nationals and for nationals of the other Member States.

5. It is sufficient to state in that regard that use of the criterion of permanent residence in the territory of Luxembourg will have the result of denying the repayment at issue essentially to persons who are not Luxembourg nationals. It is mainly they who will leave the country in the course of the year or who will take up residence there.

6. However, is the rule at issue such as to infringe the principle of equal treatment? Not every difference in treatment necessarily constitutes a breach of the principle of non-discrimination. I am thinking here of the circumstances of the Court's judgment in *Sotgiu*, in which workers of the Bundespost resident outside the Federal Republic of Germany received a lower separation allowance than workers resident within the country. The Court held in that regard that:

'It is not possible to state that there is discrimination contrary to the Treaty and the regulation, if it is apparent from a comparison between the two schemes of allowances taken as a whole that those workers who retain their residence abroad are not placed at a disadvantage by comparison with those whose residence is established within the territory of the State concerned'. [3]

The Court pointed out that, for workers whose home was within the Federal Republic of Germany, payment of the separation allowance was only temporary and was bound up with an obligation to transfer the residence to the place of employment, whereas workers whose residence was abroad were not subject to such a time-limit and to such an obligation.

7. For present purposes, it is important to bear in mind that an actual comparison of situations may show that a situation which is treated differently does not constitute unlawful discrimination if, in the final analysis, the national in question is not in a less favourable position than nationals of the host State.

8. Thus, a difference does not necessarily amount to discrimination; that is the principle which the Luxembourg Government purports to rely on when it maintains that the provision at issue seeks to ensure that the taxpayer in question remains subject to progressive rates of taxation; otherwise, by spreading his income among several Member States, the taxpayer would profit from his changes of residence, which would alter the principles of taxation. In other words, the treatment of a person who leaves Luxembourg in the course of the year or who takes up residence there is not, in the final analysis, unjustified since, if he had

2 — Judgment of 12 February 1974 in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, paragraph 11

3 — Case 152/73, cited above, paragraph 12

remained in Luxembourg, a higher rate of tax would have been payable on his income.

9. I am by no means convinced that that argument entirely disposes of the submission that the provision at issue infringes the principle of equal treatment.

10. It is of course quite clearly for the Member States alone to lay down the rules governing income tax; as Community law stands at present, direct taxation is outside the scope of the EEC Treaty. The objectives pursued by the Luxembourg legislature do not, as such, fall to be examined by reference to the principles of Community law. Nevertheless, the Member States must respect the limits laid down by Community law. Even if the objectives pursued by the national legislature in seeking to introduce the equivalent of a clause ensuring that progressive rates of taxation are not called in question, the manifestly discriminatory nature of the rule at issue is evident in particular in all cases in which the national concerned received no income during the year in question in the Member State of origin or destination.

11. Suppose, for example, a Luxembourg company dismisses its workers in October and they are unable to find new jobs immediately. As a result, those employees who are nationals of other Member States return to their country of origin where they remain unemployed until the end of the year in question. The Luxembourg nationals, who remain in Luxembourg, do not find work during the year either. In such a case, where the incomes received are exactly the same, the former receive no repayment at all, whereas the latter do. Similarly, a Community national who takes up residence in Luxembourg at the end of February and immediately finds employment there will be refused any repayment, whereas his colleague, who was recruited on the same day as he was but has been an 'unemployed resident' since 1 January, will obtain repayment of any tax overpaid. On arrival or on departure, the migrant worker is thus penalized in some cases. That manifest disadvantage is in my opinion sufficient to render the provision at issue incompatible with the principle of equal treatment.

12. Therefore, that provision infringes the principle of non-discrimination with regard to the situation of Community nationals taking up residence or leaving Luxembourg.

13. But the situation of all Community nationals, including Luxembourg nationals, wishing to exercise their right to seek employment or to be employed in another Member State may, in addition, disclose an infringement of the fundamental principle of the free movement of persons laid down in Article 48(1) of the Treaty.

14. In that case, the exercise of that right will automatically lead to loss of entitlement to repayment of overpaid tax solely by virtue of the person availing himself of freedoms recognized by Community law.

15. Of course, as I have stated, the Member States have exclusive competence, as matters stand, to lay down the rules regarding income tax. Nevertheless, as I have also pointed out, they may not infringe the freedoms which all nationals of the Member

States are guaranteed by Community law. The non-repayment of tax overpaid will constitute an obstacle, which is in any event unjustified, for a person who leaves Luxembourg to seek work in another Member State where, for example, he does not manage to find employment. The same applies for a person who, in the course of the year, arrives in Luxembourg to take up employment there after a fruitless search in another Member State. In such cases, there is no danger whatsoever of avoidance of progressive rates of income tax, and yet the provision at issue automatically denies repayment of tax overpaid to the worker who exercises his right to freedom of movement, which, as was confirmed by the Court in its judgment in *Van Duyn*,[4] has direct effect. It is therefore up to the Member States, where necessary, to achieve the fiscal objectives they wish to pursue by means other than denial of the principle of the right to obtain repayment of tax overpaid.

16. In my view, therefore, the provision at issue disregards both the fundamental principle of the free movement of persons and the principle of equal treatment which it entails.

17. I would make two final observations.

18. Firstly, at the hearing the Luxembourg Government referred to the possibilities offered by a non-contentious appeal procedure for remedying any discrimination arising from the provision at issue.

19. However, even assuming that such a procedure ultimately enabled individuals to obtain repayment of tax overpaid in every case, it certainly does not remove the uncertainty[5] created by the tax provision in question. It is sufficient here to allude to the consistent case-law of the Court according to which:

'mere administrative practices' — and a non-contentious appeal clearly falls within this category — 'which by their nature are alterable at will by the authorities and are not given the appropriate publicity, cannot be regarded as constituting the proper fulfilment of obligations under the Treaty'.[6]

20. Therefore, a provision which has the effect of infringing the fundamental principle of non-discrimination and of constituting an obstacle to the exercise by many individuals of fundamental rights accorded to them by Community law cannot be made to conform with the requirements of the free movement of workers by the existence of a non-contentious appeal procedure — to which, incidentally, neither the preliminary question nor the judgment of the Conseil d'État refer.

21. Secondly, the national court raised the possibility of assessing the provision at issue in the light of Article 7 of the Treaty. I would recall in that connection that the Court held in its judgment of 30 May 1989:[7]

'In that regard, it should be pointed out . . . that the general prohibition of discrimination on grounds of nationality laid down in Article 7 of the Treaty has been implemented, in regard to their several domains, by Articles 48, 52 and 59 of the

4 — Judgment of 4 December 1974 in Case 41/74 *Van Duyn* v *Home Office* [1974] ECR 1337.

5 — See the judgment of 4 April 1974 in Case 167/73 *Commission* v *French Republic* [1974] ECR 359, paragraphs 46 and 47.

6 — Judgment of 15 October 1986 in Case 168/85 *Commission* v *Italy* [1986] ECR 2945.

7 — Case 305/87 *Commission* v *Greece* [1989] ECR 1461.

Treaty. Consequently, any rules incompatible with those provisions are also incompatible with Article 7 . . .

Article 7 of the Treaty . . . applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. [8]

The Court did not find that there had been any specific infringement of Article 7 since the Commission had adduced only situations covered by Articles 48, 52 and 59 of the Treaty. In application of that principle, [9] it appears that non-repayment of tax deducted from the wages and salaries of *employed persons* — who are the only persons referred to in the question of the Conseil d'État du Luxembourg and the provision at issue — infringes Article 48 of the Treaty and Regulation No 1612/68 adopted in implementation of that article, without there being any need, therefore, to establish any specific infringement of Article 7 since, moreover, the only situations adduced are those of employed persons who fall within the scope of the national provisions at issue.

22. Consequently, I propose that the Court should give the following ruling:

'Article 48(1) and (2) of the Treaty and Council Regulation No 1612/68 preclude a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and are resident taxpayers during only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable.'

8 — Paragraphs 12 and 13.

9 — See also the Opinion of Mr Advocate General Jacobs of 13 April 1989 in Case 305/87, cited above, paragraph 14.