OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 10 October 2007 [1]

1. By the present reference the Bundesfinanzhof essentially asks the Court about the scope of Article 49 EC, which guarantees the freedom to provide services, and the justifications on which a Member State may rely in cases where, as a result of its income tax rules, an individual's right to exercise this freedom is restricted.

I — The proceedings before the national court and the questions referred

2. The facts of the case are quite straightforward. The appellant in the main proceedings ('Mr Jundt'), a German national, is a lawyer by profession who lives and works in Germany. For the purposes of income tax liability he is assessed jointly with his wife, which is why she is also a party to the case. In 1991 he took up a 16-hour teaching appointment at the University of Strasbourg for a fee of FRF 5 760; after the deduction of French social security contributions he received a net payment of FRF 4 814.79.

3. When the Finanzamt (German Tax Office) charged income tax on the gross payment, Mr Jundt raised an objection, arguing that Paragraph 3(26) of the Einkommensteuergesetz (Law on Income Tax) ('Paragraph 3(26) EStG') fell to be applied. This provision exempts from tax any income up to DEM 2 400 (EUR 1 848) received by way of an 'expense allowance' for part-time activities as trainer, instructor or educator or for comparable part-time activities, for part-time artistic activities or for part-time care of elderly, ill or handicapped persons for or on behalf of a national public law legal person or an establishment for the promotion of non-profitable, charitable, and ecclesiastical purposes.

4. The objection was dismissed and Mr Jundt brought proceedings before the Finanzgericht (Finance Court) which found

1 — Original language: English.

for the Tax Office. The Bundesfinanzhof (Federal Finance Court) granted him leave to appeal on points of law. His main ground of appeal was that the refusal of the tax authorities to grant him the exemption was incompatible with Community law as it discriminated against activities performed for public law institutions in other Member States.

5. The Bundesfinanzhof stayed the proceedings and referred three questions to the Court:

'(1) Is Article 59 of the EC Treaty (now Article 49 EC) to be interpreted as including within its scope also part-time teaching activity for or on behalf of a public law legal person (a university) where only an expense allowance is paid for that activity, as being an activity in a quasi-honorary capacity?

(2) If the first question is answered in the affirmative, is the restriction on freedom to provide services whereby allowances are taxed favourably only if they are paid by national public law legal persons (here Paragraph 3(26) of the Einkommensteuergesetz [Income Tax Law]) justified by the fact that the State tax concession applies only where the activity is for the benefit of a national public law legal person?

(3) If the second question is answered in the negative, is Article 126 of the EC Treaty (now Article 149 EC) to be interpreted as meaning that a provision of tax law designed to help supplement the organisation of the education system (such as Paragraph 3(26) of the Einkommensteuergesetz, here) is lawful in the light of the fact that the Member States continue to have responsibility in that regard?'

II — The first question: the scope of Article 49 EC

6. It is common ground among the parties that the national rule in question restricts the freedom of Mr Jundt, as guaranteed by Article 49 of the Treaty, to provide his services in another Member State, in so far as it deprives him of a tax benefit he would have enjoyed had he offered the same services to recipients in his own country. Clearly, if Mr Jundt had received the same

amount of money for being a part-time tutor at a German public university, Paragraph 3(26) EStG would have been applied and he would have been granted the tax exemption.

7. The Bundesfinanzhof has doubts as to whether Mr Jundt's activity falls within the ambit of Article 49 EC, because Paragraph 3(26) EStG refers to 'expense allowances'. According to Article 50 EC '[s]ervices shall be considered to be "services" within the meaning of this Treaty where they are normally provided for remuneration ...'. Therefore, for an activity to qualify as a 'service' and enjoy the protection of Article 49 EC, the individual engaged in providing that service must receive remuneration. If the provider of the service is only paid an allowance to cover the 'expenses' associated with his activities but makes no profit, the Bundesfinanzhof asks, are we still within the Treaty concept of 'services'? Or, to put it differently, does an 'expense allowance' constitute 'remuneration', thus bringing the relevant activity within Articles 49 and 50 EC?

8. First, the Court has taken a broad view of what constitutes 'remuneration' for the purposes of the Treaty, focusing its attention on the economic nature of the relevant activity. In *Bond van Adverteerders*,[2] which concerned the cross-border transmission of radio and television programmes, it held that the fact that broadcasters in the transmitting State did not pay the cable network operators in the receiving State for relaying their programmes did not mean that the service was not provided for 'remuneration' as the latter were paid by their subscribers and Article 60 of the EEC Treaty (now Article 50 EC) does not require the service to be paid for by those for whom it is performed.

9. In *Steymann*[3] the applicant performed various manual tasks, such as plumbing work and general household duties, for the religious community of which he was a member, and which, in turn, covered his material needs. The Court ruled that his work, which was an essential part of participation in that community, could constitute an 'economic activity' and the services he received from the group an 'indirect quid pro quo' for his work. The case makes clear that remuneration does not need to take the form of a pecuniary payment, but can be in kind and have only an *indirect* link with the service provided.

2 — Case 352/85 [1988] ECR 2085, paragraph 16. See also Joined Cases C-51/96 and C-191/97 *Deliège* [2000] ECR I-2549.

3 — Case C-196/87 [1988] ECR 6159.

10. More recently, the concept of remuneration was discussed by the Court in *Geraets-Smits and Peerbooms*[4] in relation to the provision of medical services. A number of Member States argued that there is no remuneration where a patient receives medical care in a hospital without paying for it himself or where he is reimbursed under a medical insurance scheme. The Court, however, rejected this view and held that the fact that the treatment is paid for directly by the insurer and at a flat rate does not mean that it falls outside the scope of Community law. In explaining the correct approach to the concept of remuneration, the Court reiterated the principle that 'the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question' and concluded that 'the payments made by the sickness insurance funds ... albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in *an activity of an economic character*' (my emphasis).[5]

11. Moreover, there is nothing — either in the Treaty or the case-law of the Court — to imply that an individual must be making a profit in order to benefit from the Treaty guarantee of freedom to provide services. The Commission rightly points out in its observations that 'remuneration' and 'profit' are two different concepts and Article 50 EC refers only to the former as denoting the existence of an economic activity. In fact, certain Member States had submitted in *Geraets-Smits and Peerbooms* that a service can fall within the scope of Article 50 only if the individual providing it does so with a view to making a profit, but that argument was rejected by the Court. As stated by Advocate General Jacobs, 'an activity does not necessarily cease to be economic simply because there is no aim to make a profit'.[6] The lack of intention to make a profit does not, in itself, place an activity outside the scope of Article 50.

12. The decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character: the activity must not be provided for nothing, but there is no need for the provider to be seeking to make a profit.

4 — Case C-157/99 [2001] ECR I-5473.

5 — Ibid., paragraph 58.

6 — Case C-5/05 *Joustra* [2006] ECR I-11075, point 84. I also dealt with this issue in my Opinion in Case C-205/03 *FENIN* [2006] ECR I-6295, which concerned the definition of the concept of an 'undertaking' for the purposes of competition law. As I explained there, 'even if no profit making activity is carried on, there may be participation in the market capable of undermining the objectives of competition law'.

13. Finally, the Commission argues that, in the present case, the payments made by the University of Strasbourg to Mr Jundt were not in any way limited to his actual expenses. That is a question of fact to be determined by the national court. In any event, given the preceding discussion of the concept of 'remuneration', there is no need to examine this issue separately.

14. I propose that the Court answer the first question as follows: 'Article 49 EC includes within its scope part-time teaching activity for or on behalf of a public law legal person for which the tutor receives an expense allowance'.

III — The second question: justifications for the restriction on the freedom to provide services

15. It is possible for a Member State to adopt measures which restrict the freedom to provide services if those measures are justified by reasons relating to the public interest and are proportionate to the legitimate aim pursued. [7] The Bundesfinanzhof asks whether the fact that the tax exemption in question applies only when the activity benefits a national public law legal person is such a reason. The focus of its analysis is the need to preserve the coherence of the tax system. Further, the German Government argues that the relevant national legislation can be justified as a measure promoting education, research and development in German public universities.

A — *Advancement of education, research and development*

16. The essence of the argument put forward by the German Government is that the objective of Paragraph 3(26) EStG is to promote education and research, which, the Court of Justice has held, may constitute an overriding reason relating to public interest. [8] That provision enables public universities to attract tutors who agree to teach part-time for a modest fee that is exempt from income tax. Thus, it functions as an incentive for qualified people to get involved in activities,

7 — See, for example, Case C-433/04 *Commission* v *Belgium* [2006] ECR I-10653, paragraph 33 and the cases cited therein.

8 — Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057, paragraph 23.

such as university teaching and research, which benefit the general public, receiving as consideration for their services a fee to cover their professional expenses. In that way, universities can perform their functions without having to compete with each other for suitably qualified tutors by using their limited resources to offer them financial incentives. Germany, the argument goes on, has the right to use its fiscal system to support its own national universities but is under no obligation to offer similar support to universities in other Member States by exempting from income tax the fees paid by the latter to tutors who are taxed in Germany. This is a consequence of the fact that both direct taxation and the organisation of the education system are fields which are still regulated primarily by national law and in relation to which the Member States have a very broad margin of discretion in adopting the relevant national rules.

17. This argument must be rejected. While Member States may adopt policies and measures to promote education and research in their academic institutions they must do so in a way which is compatible with Community law. Article 149(1) EC provides that 'the Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action ...' and Article 149(2) EC states that 'Community action shall be aimed at ... encouraging mobility of students and teachers'. The national legislation at issue is clearly contrary to these aims as it discourages teachers from exercising their fundamental freedom to offer their services in a Member State other than their own by denying them a tax benefit they would have received had they remained in their home country. Obviously, when a tutor taxed in Germany is faced with the option of either remaining in Germany and receiving a tax-free fee or going to France and paying tax on the same fee, he or she will be inclined to remain in Germany. In *Commission* v *Austria*, [9] a case concerning the mobility of students and access to higher education, the Court expressed its disapproval of this type of national measure in the following terms: 'The opportunities offered by the Treaty relating to free movement are not fully effective if a person is penalised merely for using them. That consideration is particularly important in the field of education in view of the aims pursued by Article 3(1)(q) EC and the second indent of Article 149(2) EC, namely encouraging mobility of students and teachers' (paragraph 44). In the present case, the provision of national law at issue could be justified only by reference to reasons of overriding necessity which would render that particular measure indispensable for the promotion of education and research in German universities. However, it appears that it is possible to achieve this aim by using alternative means that do not artificially distort the choice of teachers as to where they should offer their services, and the German Government has provided no argu-

9 — Case C-147/03 [2005] ECR I-5969.

ments to demonstrate that unless the fiscal measure in question is allowed the legitimate aim it pursues would not be achieved.

18. The Court has recently had occasion to discuss the effect of this justification in relation to research institutions in *Laboratoires Fournier*. [10] The relevant national law granted a tax credit to industrial and commercial undertakings for research expenditure but only if the research was carried out in France. One of the justifications relied on by the French government was the need to promote research and development. The Court, while acknowledging that this could be a legitimate public interest reason, held that it could not justify the measure in question as it was incompatible with the Community policy objectives expressed in Article 163 EC, which, like Article 149 EC on education, emphasises the need for cooperation among Member States in order to exploit the full potential of the internal market. [11] The German Government has submitted that the present case should be distinguished from *Laboratoires Fournier* because in the latter the national law affected the investment decisions of undertakings while here the effect of Paragraph 3(26) EStG is to offer an objective advantage to German universities without affecting in any way the functioning of foreign universities that may wish to employ German tutors. In my view, this reflects a misunderstanding of what is at stake in the present case. As I have already explained, the problem with the provision of national law at issue is that it pursues an objective which is in principle legitimate by distorting the options of tutors in a way that cannot be reconciled with the Treaty. By exerting an influence similar to that of the national legislation at issue in *Laboratoires Fournier*, Paragraph 3(26) EStG affects the decisions of teachers as to where within the European Community to provide their services.

19. Finally, it should be noted that the German Government is correct in stating that no Member State is under an obligation to subsidise the academic or other educational institutions of another Member State. However, this is not a valid reason for interfering with the exercise of the fundamental freedoms guaranteed by the Treaty. It is one thing for a Member State to be under no obligation to subsidise certain activities in another Member State; it is quite another to deny certain financial benefits to its own nationals or nationals of another Member State merely by virtue of the fact that they have exercised their rights of free movement. In a project such as the European Union,

10 — Cited in footnote 8.

11 — Article 163(1) EC states that '[t]he Community shall have the objective of strengthening the scientific and technological bases of Community industry' and Article 163(2) EC states that '[f]or this purpose the Community shall, throughout the Community, encourage undertakings, ... research centres and universities in their research and technological development activities of high quality; it shall support their efforts to cooperate with one another, aiming, notably, at enabling undertakings to exploit the internal market potential to the full, in particular through ... the removal of legal and fiscal obstacles to that cooperation'.

and, notably, as a consequence of the exercise of rights under the Treaty provisions on free movement, it is inevitable that some of the resources of Member States will also benefit individuals or institutions of other Member States. As the Court explained in *Grzelczyk*, there should be 'a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States'. [12] The idea underlying this approach is that although national governments retain exclusive jurisdiction to regulate areas such as social security or educational policy, they cannot restrict the exercise of the rights guaranteed by the Treaty in order to ensure that the relevant funds and resources are enjoyed only by their own nationals. [13]

B — *The coherence of the tax system*

20. In *Bachmann* [14] the Court examined the compatibility with the provisions on free movement of workers of a national law that allowed the deduction of pension and life assurance contributions from taxable income if they had been paid in Belgium, but not if they had been paid in another Member State. It found that the provision could be justified by the need to ensure the coherence of the tax system, given that there existed a direct link between the deductibility of contributions and the liability to tax of sums payable by insurers, as the loss of revenue resulting from the deduction of assurance contributions from total taxable income was offset by the taxation of pensions, annuities or capital sums paid by the insurers.

21. Subsequent cases have made it clear that the requirement for a direct link between the relevant tax credit and its offsetting by a specific tax levy is a rather onerous condition which cannot be easily satisfied. Member States have invoked on a number of occasions the need to preserve fiscal coherence, but the Court has rejected this argument on finding that no such direct link existed. [15] Even in the very few cases where the Court stated that a link could in principle exist, it rejected the purported justification because the respondent governments had not demonstrated that the national measure was necessary. [16]

12 — Case C-184/99 [2001] ECR I-6193, paragraph 44. See also Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 56, and point 53 of the Opinion of Advocate General Jacobs in *Commission* v *Austria*, cited in footnote 9.

13 — See Giubboni, S., 'Free Movement of Persons and European Solidarity', *European Law Journal*, Vol. 13 (2007), issue 3, pp. 360-379.

14 — Case C-204/90 [1992] ECR I-249. See also Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305.

15 — See, for example, Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I-2647, paragraphs 62 to 64, and Case C-386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I-8203, paragraph 53 and the cases cited therein.

16 — Case C-279/93 *Schumacker* [1995] ECR I-225; Case C-319/02 *Manninen* [2004] ECR I-7477; Case C-292/04 *Meilicke and Others* [2007] ECR I-1835.

22. In the order for reference in the present case, the Bundesfinanzhof states that the object of Paragraph 3(26) EStG is to relieve the German State of certain responsibilities incumbent on it by means of a fiscal measure: on the one hand, tutors are granted a tax exemption if they teach at public universities; on the other, the German State enjoys a corresponding benefit because it can cover the teaching and research needs of those universities at a modest price. Thus, the referring court concludes, there exists a direct link between the tax exemption and the teaching activity for the benefit of a State institution.

23. However, I do not see how this can be the case in the light of the post-*Bachmann* case-law. In reviewing national legislation that interfered with the exercise of fundamental freedoms, the Court has consistently held that there must be a clear and unambiguous link between the tax concession and any specific levy that offsets it. In the present case, it is suggested that the exemption from income tax is offset by the benefit derived by the German State from the teaching and research activity of part-time tutors. Yet, such a general, vague and remote link between the concession for the individual and the benefit for the State falls well below the *Bachmann* threshold. [17]

24. Accordingly, I think that Paragraph 3(26) EStG cannot be justified by reference to the need to ensure the coherence of the tax system.

25. I propose that the Court answer the second question as follows: 'The fact that the State tax concession applies only where the activity is for the benefit of a national public law legal person cannot justify the restriction on the freedom to provide services'.

17 — In Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, I suggested that the *Bachmann* test is too strict and should be relaxed so as to make the aim of the national law the criterion for acceptance of the fiscal coherence justification. Advocate General Kokott had also made a similar suggestion in her Opinion in *Manninen*, ibid. The Court, though, did not depart from the view adopted in *Bachmann*. In any event, Paragraph 3(26) EStG cannot pass even that less demanding test as, even if it is in principle accepted that its aim and logic are compatible with Community law, it has not been demonstrated that the interference with Mr Jundt's right to provide his services in another Member State is necessary in order to achieve this aim.

IV — The third question: the organisation of the education system

26. Article 149(1) EC provides that '[t]he Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity'. The Bundesfinanzhof asks whether Paragraph 3(26) EStG can be saved as an expression of the power of the Member States to decide themselves how their education systems should be organised. The Bundesfinanzhof takes the view that this power entails the freedom to limit a tax concession to activities provided for or on behalf of a national public university. According to the Bundesfinanzhof, the aim of Paragraph 3(26) EStG is not to restrict freedom to provide services but to encourage people to contribute on an honorary basis to the education services offered by public institutions.

27. There are only two points that must be made in relation to this question. Firstly, as the Commission rightly submits, Paragraph 3(26) EStG is not a measure pertaining to the content of teaching or to the organisation of the education system. It is rather a fiscal measure of a general nature which provides for a tax concession where an individual is engaged in activities of benefit to the general public. Of course, teaching and research, the beneficiaries of which are public educational institutions, clearly fall within its scope; the same is true, however, of a variety of other activities (ranging from participation in artistic projects to care of the elderly) and institutions (ranging from charities to ecclesiastical organisations). Clearly, such a provision is not an expression of a Member State's power to organise its education system; otherwise, every national law that could be said somehow to relate to education would fall within the ambit of Article 149 EC.

28. Secondly, it is trite law that even where a Member State is regulating an area that falls within its exclusive competence it must do so in a way that is consistent with the Treaty and, especially, with the fundamental freedoms.[18] The Court has recently had the opportunity to reaffirm this principle in relation to the organisation of education in *Commission* v *Austria*.[19] I have already

18 — See, for example, *Manninen*, cited in footnote 16 (direct taxation); Case C-55/00 *Gottardo* [2002] ECR I-413 (social security); Case C-324/98 *Teleaustria* [2000] ECR I-10745 (public procurement contracts falling outside the scope of the procurement directives).

19 — Cited in footnote 9.

explained in my analysis of the second question that the provision of national law at issue imposes artificial obstacles in relation to the choices open to tutors as to where to offer their services. Therefore, even if that provision were a measure relating to the organisation of the education system, it would still be incompatible with the Treaty.

29. I propose that the Court answer the third question as follows: 'Article 149 EC, which provides that Member States are to retain responsibility for the organisation of their education systems, cannot be interpreted as meaning that Paragraph 3(26) EStG falls outside the scope of the Treaty provisions on freedom to provide services or as meaning that refusing to grant the relevant tax concession to tutors teaching in universities in other Member States is lawful'.

V — Conclusion

30. For these reasons I propose that the Court give the following answers to the questions referred by the Bundesfinanzhof:

(1) Article 49 EC includes within its scope part-time teaching activity for or on behalf of a public law legal person for which the tutor receives an expense allowance.

(2) The fact that the State tax concession applies only where the activity is for the benefit of a national public law legal person cannot justify the restriction on the freedom to provide services.

(3) Article 149 EC, which provides that Member States retain the responsibility for the organisation of the education system, cannot be interpreted as meaning that Paragraph 3(26) of the Einkommensteuergesetz is excluded from the scope of the provisions on freedom to provide services or as meaning that refusing to grant the relevant tax concession to tutors teaching in universities in other Member States is lawful.