OPINION OF ADVOCATE GENERAL DARMON

delivered on 6 October 1992 *

Mr President,
Members of the Court,

1. Can income tax which, in certain circumstances, is more onerous for a non-resident than for a resident constitute a restriction on freedom of establishment prohibited by Article 52 of the Treaty? That is the substance of the question submitted by the national court.

2. The material facts are as follows: Mr Werner, a German national, has lived in the Netherlands since 1961 and was employed in a dental practice in Aachen until October 1981. He then opened a practice on his own account as a self-employed dentist in the same city but continued to live in the Netherlands. The double taxation agreement between Germany and the Netherlands renders him liable to tax on the income from his professional activity as a self-employed person and on the assets used for his practice in Germany. [1] Mr Werner therefore declared the income from his dental practice to the Finanzamt Aachen. He received no other income, and in particular none from the Netherlands. [2]

3. Pursuant to the national legislation, in this case Paragraph 1(4) of the Einkommensteuergesetz (Income Tax Law) and Paragraph 2(1)(1) of the Vermögensteuergesetz (Assets Tax Law), persons who have no residence in Germany and do not habitually reside there are 'subject to limited taxation', by contrast with residents, who are 'subject to unlimited taxation'.

4. The difference of treatment between these two classes of taxpayer manifests itself on several levels.

5. Persons who are 'subject to unlimited taxation' are taxed on the totality of their income, whereas those who are 'subject to limited taxation' are taxed only on the income that they receive in Germany.

6. The latter are subject to a higher rate and tariff for the tax and, in addition, they cannot benefit from the preferential tariff for married couples (the 'splitting tariff'). Furthermore, year-end adjustment of monthly deductions is not available to them. Finally, certain deductions or reliefs which are available to taxpayers who are 'subject to unlimited taxation' are not available to the others. [3]

* Original language: French.

1 — Articles 9(1) and 19(1)(d) of the Agreement of 16 June 1959 between the Federal Republic of Germany and the Kingdom of the Netherlands on the avoidance of double taxation as regards income and assets tax and various other taxes and regulating other tax matters (*Bundesgesetzblatt* 1960 II, No 30, p. 1781).

2 — See p. 5 of the French translation of the order of the national court.

3 — See the examples given in the annex to the Commission's observations and p. 2 of the reply from the Finanzamt Aachen Innenstadt to the question put by the Court.

7. In other words, whereas a person 'subject to unlimited taxation' has his personal, subjective, situation taken into account (the State where a taxpayer resides is most familiar with his personal situation), the taxation of a taxpayer 'subject to limited taxation' is objective, as in the case of indirect taxation. This no doubt explains the 'equity clause' which makes it possible, in exceptional cases, to limit the amount of tax to be paid by people who are subject to limited taxation.

8. The plaintiff in the main proceedings asked that he and his wife be made subject to the system of unlimited taxation so that they could benefit from the 'splitting tariff'. The application was rejected since he did not reside in Germany. He lodged a formal objection, which was dismissed, and then brought the matter before the Finanzgericht, Cologne.

9. The Finanzgericht essentially asks this Court whether:

(1) Article 52 of the EEC Treaty is limited to imposing a requirement to accord national treatment to Community nationals or whether it goes so far as to prohibit any restriction — even non-discriminatory — on the freedom of establishment;

(2) If so, whether such a restriction exists where a taxpayer, established in a self-employed capacity in a Member State in which he earns all or almost all of his taxable income or possesses there almost all his taxable assets suffers a tax disadvantage because of his residence in another Member State;

(3) Whether such a condition, imposed in Germany on German nationals, constitutes an infringement of Article 7 of the Treaty.

10. Let us try to define clearly the questions referred to the Court.

11. It is undisputed that (1) the plaintiff in the main proceedings, who resides in the Netherlands, is subject to limited taxation, (2) he receives almost all his income in Germany, and (3) the amount of tax payable by him is considerably greater than that which he would have had to pay if he had been resident in Germany and was thus subject to unlimited taxation. [4]

12. The plaintiff is clearly at a disadvantage by comparison with residents because he is non-resident *and because he receives all his income in Germany*. If he had received income in his State of residence he would have been taxed, in that State, in a manner which took account of his personal situation and there is no certainty that, in this particular case, he would have been placed at a disadvantage from the tax point of view by comparison with other taxpayers residing in Germany and in a comparable financial situation.

13. Mr Werner is, let us remember, a German national. It has not been maintained that he qualified as a dental surgeon anywhere other than Germany, and he practises in Germany. The only foreign element is therefore the fact of his residence in the Netherlands.

14. The right of establishment is provided for in Chapter 2 of Title III, of the Treaty and is twofold: the right to take up activities

4 — See the Finanzgerichts's answer to the question put to it by the Court, p. 3.

as self-employed persons and the right to pursue such activities. The wording of the second paragraph of Article 52 and of Article 57(1) permits no ambiguity in this respect, any more than does the case-law of the Court. Thus the Court has pointed out that

'under the second paragraph of Article 52 of the EEC Treaty freedom of establishment includes the right to take up and pursue activities as self-employed persons under the conditions laid down by the legislation of the country of establishment for its own nationals'; [5]

or again:

'freedom of establishment, as provided for by that article, includes the right not only to take up activities as a self-employed person *but also to pursue them in the broad sense of the term*'. [6]

15. It is clear that in this case the plaintiff has not been subject to any restrictions on *access* to the profession of dental surgeon. As a German national, having the degrees and qualifications required by the German legislation, he was able without difficulty to establish himself in Germany without being made subject to any restriction; he did not acquire in another Member State rights protected by Community law which he is trying in vain to have recognized in Germany.

16. Let us suppose, for a moment, that he had established himself in Germany where he already had his permanent residence and had only moved to the Netherlands *subsequently*. No foreign element would have justified, with regard to access to his profession, the application of Article 52 of the Treaty.

17. But it is precisely for the *pursuit* of his professional activities that the plaintiff claims to be the victim, by reason of his status as a taxpayer subject to limited taxation, of a restriction on the freedom of establishment.

18. The 'restriction on the freedom of establishment' at issue here must be clearly identified: a self-employed person is subject to less favourable taxation of his income from his professional activity as a result of his being resident in another Member State.

19. Before the questions submitted by the national court can be answered, one observation is called for: the plaintiff has never made use of the right of freedom of movement with a view to establishing himself in a Member State other than that of which he is a national. He is established in his own State. The wording of the second question submitted by the national court does not refer to that point which is, however, dealt with at some length in the grounds of the decision. [7] Does the situation of the plaintiff therefore come within the scope of Community law and of Article 52 in particular? Is his not a purely internal situation which is not covered by Community law?

20. The Court has already held on several occasions that Article 52 may be relied on by a self-employed person *who is a national of the host Member State* provided that some foreign element justified the application of Community law, such as a degree or profes-

5 — Case 221/85 *Commission* v *Belgium* [1987] ECR 719, paragraph 9.

6 — Case 197/84 *Steinhauser* v *City of Biarritz* [1985] ECR 1819, paragraph 16, emphasis added.

7 — Last paragraph of p. 13 of the French translation.

sional qualification acquired in another Member State. [8]

21. Thus, in *Knoors*, [9] a Netherlands national residing in Belgium worked there as a plumber in charge of an independent firm. His application to pursue that occupation in the Netherlands was met with a refusal from the Netherlands authorities on the ground that he did not possess the qualifications required by Netherlands legislation. The Court was asked whether Council Directive 64/427/EEC of 7 July 1964 concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons falling within ISIC Major Groups 23-40 (Industry and small craft industries) [10] applied to persons who have the nationality of the host Member State. In its judgment of 7 February 1979. The Court held that:

'... these liberties, which are fundamental in the Community system [free movement of persons, freedom of establishment and the freedom to provide services guaranteed by Articles 3(c), 48, 52 and 59 of the Treaty], could not be fully realized if the Member States were in a position to refuse to grant the benefit of the provisions of Community law to those of their nationals who have taken advantage of the facilities existing in the matter of freedom of movement and establishment and who have acquired, by virtue of such facilities, the trade qualifications referred to by the directive in a Member State other than that whose nationality they possess;

... Although it is true that the provisions of the Treaty relating to establishment and the provision of services cannot be applied to situations which are purely internal to a Member State, the position nevertheless remains that the reference in Article 52 to "nationals of a Member State" who wish to establish themselves "in another Member State" cannot be interpreted in such a way as to exclude from the benefit of Community law a given Member State's own nationals when the latter, owing to the fact that they have lawfully resided in the territory of another Member State and have there acquired a trade qualification which is recognized by the provisions of Community law, are, with regard to their State of origin, in a situation which may be assimilated to that of any other persons enjoying the rights and liberties guaranteed by the Treaty'. [11]

22. The Court inferred that the provisions of the directive could be relied on by the nationals of all the Member States who met the conditions for the application of the directive, even in relation to the State of which they were nationals.

23. Thus, in *Broekmeulen*, [12] the plaintiff in the main proceedings — a Netherlands national in possession of a Belgian qualification as a doctor who sought the right to establish himself in the Netherlands — was

8 — Judgments in: Case 115/78 *Knoors* [1979] ECR 399; Case 136/78 *Auer* [1979] ECR 437 (veterinary surgeon); Case 271/82 *Auer* [1983] ECR 2729 (idem); Case 246/80 *Broekmeulen* [1981] ECR 2311 (medical practitioners); Case 270/83 *Commission* v *France* [1986] ECR 273; Case 130/88 *van de Byl* [1989] ECR 3039 (painters and decorators); Case C-61/89 *Bouchoucha* [1990] ECR I-3551 (osteopaths); Case C-370/90 *Singh* [1992] ECR I-4265.

9 — See references, footnote 8, above.

10 — Directive laying down detailed provisions concerning transitional measures in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23-40 (Industry and small craft industries) (OJ, English Special Edition, 1963-1964, p. 148).

11 — Paragraphs 20 and 24.

12 — See references, footnote 8, above.

in the same situation as a Belgian in possession of the same qualification and seeking the same right, and the Court accepted that he could rely on the provisions of the Council Directive of 16 June 1975 concerning the mutual recognition of diplomas, certificates and other evidence of formal qualifications in medicine, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services. [13]

24. However, the fact is that a national of a Member State who pursues a professional activity as a self-employed person in that State, being in possession of a professional qualification obtained in that State, is not in a situation that can be compared to that of a Community national, no matter what his nationality, relying on a professional qualification obtained in another Member State. As the United Kingdom correctly observes, the situation of the plaintiff in the main proceedings is not comparable to that of a Netherlands national living in the Netherlands who wishes to work as a self-employed person in Germany in reliance on Netherlands qualifications. [14]

25. In his Opinion in *Middleburgh*, Advocate General Mischo stated that

'In any case, the Court, in the *Knoors*, *Broekmeulen* and *Bouchoucha* cases, made the right of a national to be treated in the same way as any other person enjoying the rights and liberties guaranteed by the Treaty subject to the condition not only that the national had resided in the territory of another Member State but also that he or she had there acquired rights recognized by the provisions of Community law: the persons involved in those cases *wished to make use* in their State of origin *of rights thus acquired in another Member State as a result of the exercise of their right to freedom of movement*'. [15]

26. Quite apart from the acquisition of a professional qualification, the rights acquired in another Member State may thus derive, for example, from the pursuit of a professional activity on either an employed or a self-employed basis.

27. Thus, the Court recognizes that a Community national may rely on Article 52 as against his State of origin when, after having been employed in the territory of another Member State, he returns in order to establish himself as a self-employed person in the first State.

28. In the *Singh* case, [16] the issue was whether Community law confers a right of residence on a national of a non-member country who is the husband of a Community national when the latter returns to her own country to work as a self-employed person after having worked as an employed person in another Member State. The Court considered that such a person acquires, by virtue of Article 52 of the Treaty, the right to be accompanied in her Member State of origin by her husband, a national of a non-member country, 'under the same conditions' as those laid down by the Community rules. [17] After having moved within the Community, a national of a Member State must, on returning to his Member State, enjoy conditions of entry and residence at least equivalent to those which he could

13 — Directive 75/362/EEC (OJ 1975 L 167, p. 1).

14 — See p. 8 of the United Kingdom's observations.

15 — Judgment in Case C-15/90 (not yet reported in the ECR), paragraph 45 of the Opinion, emphasis added; see also paragraph 5 of the Opinion of Advocate General Tesauro in *Singh*, cited in footnote 8.

16 — See references in footnote 8, above.

17 — See paragraph 21.

enjoy under the Treaty in the territory of another Member State. [18]

29. Since in this case the only foreign element concerns, as I have said, *residence*, has the plaintiff acquired on that account rights which are recognized by Community law?

30. Until the adoption on 28 June 1990 of the Council directives relating to the right of residence, [19] which make that right more widely available, the free movement of persons within the Community was determined — and delimited — by the economic character of the Treaty. It follows that the freedom of movement granted to Community nationals is deemed to involve movement *for the purposes of an economic activity.*

31. The Court stated recently in *Singh*:

'... the provisions of the Treaty relating to the free movement of persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State.

For that purpose, nationals of Member States have in particular the right, which they derive directly from Articles 48 and 52 of the Treaty, to enter and reside in the territory of other Member States *in order to pursue an economic activity there as envisaged by those provisions*'. [20]

32. But what is the situation as regards a Community national who has never availed himself of the freedom of movement provided for in Articles 48 and 52 of the Treaty *with a view to working* or *with a view to establishing himself* in a Member State other than that of which he is a national? In that case he has not pursued any professional activity in the Member State where he resides either as an employee or as a self-employed person.

33. If he cannot rely on rights acquired under Articles 48 or 52 of the Treaty in another Member State, can a self-employed professional person who has established himself in his State of origin and resides in a second Member State invoke rights acquired in the latter State under Article 59 of the Treaty?

34. That question must be examined in detail since the Court has adopted an extensive definition of what constitutes a restriction on the freedom to provide services — a fact which the Commission has not failed to note. [21]

35. The residence of the plaintiff in the Netherlands is not connected with any activity as a *provider* of services: he did not, for example, choose to reside in the Netherlands in order to seek prospective clients there.

18 — See Paragraph 19.

19 — Directives adopted pursuant to Article 8a of the Treaty: Directive 90/364/EEC on the right of residence, Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity, and Directive 90/366/EEC on the right of residence for students (OJ 1990 L 180, pp. 26, 28 and 30), *which were not in force at the material time*. The latter was annulled by the judgment of the Court in Case C-295/90 *Parliament* v *Council* [1992] ECR I-4193.

20 — Above, paragraphs 16 and 17, emphasis added.

21 — Commission's observations, paragraph 5.7.

36. Admittedly, the Court has recognized that tourists, those receiving medical care and those on study or business trips who go to another Member State may rely on Article 59 as *recipients* of services. They may therefore receive services without being subject to restrictions such as, for example, those deriving from rules restricting the export of foreign currencies. [22]

37. In its judgment in *Cowan*, [23] reaffirming the principle established in *Luisi and Carbone*, the Court stated that

'the freedom for the to provide services includes the freedom for the recipients of services to go to another Member State in order to receive a service there, without being obstructed by restrictions, and ... *tourists, among others,* must be regarded as recipients of services'. [24]

38. I do not think that the situation of a tourist who goes to a Member State can be assimilated to that of a Community national who resides there. Whilst the former comes within the scope of Article 59 as a recipient of services, the latter does not. [25]

39. Indeed, according to the very terms of Article 59, 'restrictions on freedom to provide services within the Community shall be ... abolished ... in respect of nationals of Member States who are *established* in a State of the Community *other* than that of the person for whom the services are intended'. [26]

40. Whenever the recipient of the services has his principal residence in the State of the provider, the services in question cease to be cross-frontier services.

41. The Community directives governing the right to travel and the right of residence which refer expressly to the recipient of services as a person vested with certain rights confer on him a right of residence *coterminous with the duration of the service.* [27] In the case both of providers and of recipients of services, the provision of services is, by its nature, an activity limited in time which can give rise only to a right of residence or protection of an equivalent duration. Such a right is therefore hardly consonant with the status of person who has his principal residence in the country in question and with the *indefinite* period of residence which is the corollary of this.

42. That was what the Court expressly held in *Steymann.* [28] The plaintiff in that case, a German national who had settled in the Netherlands, first worked as an employee and subsequently joined a religious community. Mr Steymann's application for a residence permit was refused on the ground that

22 — Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

23 — Case 186/87 [1989] ECR 195.

24 — Ibid., paragraph 15, emphasis added.

25 — Subject to those special cases — outside the scope of the present case — in which the provider and recipient of the service are from the same Member State and the service is provided in a second Member State. See the judgments in Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, Case C-154/89 *Commission* v *France* [1991] ECR I-659 and Case C-198/89 *Commission* v *Greece* [1991] ECR I-27.

26 — Emphasis added.

27 — See the second recital in the preamble and the first subparagraph of Article 4(2) of Council Directive 73/148/EEC of 21 May 1973 on the abolition of restrictions on movement and residence within the Community with regard to establishment and the provision of services (OJ 1973 L 172, p. 14).

28 — Case 196/87 *Steymann* v *Staatssecretaris van Justitie* [1988] ECR 6159.

he was not working, so he instituted proceedings claiming the benefit of Article 59 since, as a member of the community in question, he was a recipient of services from it and a provider of services to it. The Court held that

'In essence the second and third questions ask whether Articles 59 and 60 of the Treaty cover the situation where a national of a Member State goes to the territory of another Member State and establishes his principal residence there in order to provide or *receive* services there for an indefinite period.

In that connection, the Netherlands Government and the Commission rightly observed that Articles 59 and 60 of the Treaty do not apply in such a case. It is clear from the actual wording of Article 60 that an activity carried out on a permanent basis or, in any event, without a foreseeable limit to its duration does not fall within the Community provisions concerning the provision of services. On the other hand, such activities may fall within the scope of Articles 48 to 51 or Articles 52 to 58 of the Treaty, depending on the case.

Consequently, the answer given to the second and third questions must be that Articles 59 and 60 of the Treaty do not cover the situation where a national of a Member State goes to reside in another Member State and establishes his principal residence there in order to provide or receive services there for an indefinite period'. [29]

29 — Ibid., paragraphs 15 to 17, emphasis added.

43. In the same way, a Community national in the same circumstances as those of the plaintiff in this case is not entitled to make use of rights acquired as a recipient or provider of services in the State where he has established his principal residence which would be capable of bringing him on that account within the scope of the Treaty.

44. So long as he has not made use of the freedoms provided for in Articles 48, 52 and 59 of the Treaty, he cannot invoke in his country of origin, where he is established, rights recognized by Community law.

45. As has been seen, the plaintiff has exercised his freedom of movement only in order to reside in the Netherlands, *without any connection with any economic activity*. Thus, Article 8 of the Council directive of 15 October 1968 [30] which governs the right of residence of frontier workers does not, of course, govern the situation of people working in their own countries whilst residing in another Member State. [31]

46. It follows that, in the absence of any relevant foreign element derived from the application of Articles 48, 52 or 59 of the Treaty, the situation of a professional self-employed person established in the Member State of which he is a national, holding the qualifications required by that State and never having pursued any professional activity elsewhere than in that State, does not come within the scope of Article 52 where he has his principal residence in another Member State.

30 — Council Directive 68/360/EEC on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition, 1968 II, p. 485).

31 — P. Van Nuffel, 'L'Europe des citoyens: vers un droit de séjour généralisé', *Revue du marché unique européen*, 4-1991, p. 89, note 48.

47. In concluding, one final observation seems to be called for.

48. Even supposing that we are within the scope of the application of Community law, a non-resident taxpayer could invoke the application of Article 52 only if he showed the existence of a restriction of freedom of establishment. It seems highly unlikely that such proof can be adduced in a situation such as that in point in this case.

49. The German tax legislation does not dissuade people from establishing themselves in Germany. It may, where a person is established in that State, dissuade him from going to *reside* in another Member State. I do not see in this any restriction on freedom of *establishment*.

50. The last question concerns Article 7 of the Treaty.

51. That provision prohibits, within the field of application of the Treaty, any discrimination, whether overt or covert, on grounds of nationality. [32]

52. By application of the principle *specialia generalibus derogant*, that article 'applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination'. [33]

53. It is not claimed in this case that if the German fiscal rules constituted disguised discrimination they would affect rights other than the freedom of establishment governed by Article 52.

54. It follows that Article 7 cannot fall to be applied in this case either.

55. Consequently, I propose that the Court rule as follows:

Neither Article 52 nor Article 7 applies to a situation which is purely internal to a Member State, such as that of a national of a Member State who, being established in that State, where he acquired the requisite professional qualifications, has never made use of his freedom of movement in order to establish himself in another Member State.

32 — Judgment in Case 152/73 *Sotgiu* [1974] ECR 153.

33 — Case 305/87 *Commission* v *Greece* [1989] ECR 1461, paragraph 13; see also Case C-41/90 *Höfner and Elser* v *Macroton* [1991] ECR I-1979, paragraph 36.