JUDGMENT OF THE COURT
28 April 1998 *

In Case C-118/96,

REFERENCE to the Court under Article 177 of the EC Treaty by Länsrätten i Dalarnas Län, formerly Länsrätten i Kopparbergs Län (Sweden), for a preliminary ruling in the proceedings pending before that court between

Jessica Safir

and

Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län

on the interpretation of Articles 6, 59, 60, 73b and 73d of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm, M. Wathelet and R. Schintgen (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida (Rapporteur), P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch and P. Jann, Judges,

* Language of the case: Swedish.

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Jessica Safir, by J.-M. Bexhed and G. Lundsten, Advocates, Stockholm,

— the Swedish Government, by L. Nordling, Rättschef in the Legal Service (EU) of the Ministry of Foreign Affairs, acting as Agent,

— the Danish Government by P. Biering, Head of Division in the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by J. E. Collins, Assistant Treasury Solicitor, acting as Agent, and C. Vajda, Barrister,

— the Commission of the European Communities, by A. Caeiro, Legal Adviser, and K. Simonsson, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Jessica Safir, represented by J.-M. Bexhed and G. Lundsten; of the Swedish Government, represented by L. Nordling; of the Danish Government, represented by P. Biering; of the United Kingdom Government, represented by J. E. Collins and C. Vajda; and of the Commission, represented by K. Simonsson and H. Michard, a member of the Legal Service, at the hearing on 10 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 23 September 1997,

gives the following

Judgment

1 By judgment of 22 March 1996, received at the Court on 12 April 1996, Länsrätten i Dalarnas Län, formerly Länsrätten i Kopparbergs Län (County Administrative Court, County of Kopparberg), referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Articles 6, 59, 60, 73b and 73d of that Treaty.

2 The question was raised in proceedings between Jessica Safir, domiciled in Sweden, and Skattemyndigheten i Dalarnas Län, formerly Skattemyndigheten i Kopparbergs Län (County of Kopparberg Tax Authority, hereinafter 'Skattemyndigheten'), concerning payment of tax on capital life assurance premiums which she paid in 1995 to Skandia Life Assurance Company Ltd (hereinafter 'Skandia Life'), a British insurance company operating on the Swedish market and wholly owned by the Swedish insurance company Skandia.

The Swedish legislation

3 In Sweden, taxation of savings in the form of capital life assurance (K-assurance) taken out with companies established in that country affects both companies and policyholders.

4 Insurance companies established in Sweden must pay tax under Law 1990: 661 on Yield Tax on Pension Funds. That tax takes the form of a tax on the yield from capital insurance levied on the insurer. This is calculated according to a standard method which is based on the capital of the company as it stood at the end of the year preceding the assessment to tax, less the company's financial liabilities existing at that time, then multiplied by the average government bond yield in the year before the tax year. The yield thus obtained is taxed at 27%.

5 Persons who have taken out life assurance policies with companies established in Sweden may not deduct premiums from their taxable income. On the other hand, proceeds from policies are not subject to tax.

6 The same applies in relation to persons taking out insurance with companies established abroad.

7 Savings in the form of capital life assurance taken out with companies established abroad are taxed pursuant to the Premium Tax Law (1990: 662) (hereinafter 'the Premium Tax Law'), which entered into force on 1 January 1991.

8 According to the judgment making the reference, the purpose of the Premium Tax Law is to ensure competitive neutrality between savings in the form of capital life assurance taken out with insurance companies established in Sweden and savings in the form of like policies taken out with companies established abroad.

9 Article 1 of the Premium Tax Law provides that natural or legal persons domiciled or permanently resident in Sweden who have taken out life assurance with companies not established in Sweden must pay to the State a tax on the premiums paid. Under Paragraph 3 of the Premium Tax Law, the tax is to be 15% of the amount of the premium.

10 Furthermore, these taxpayers must register themselves and declare the payment of premiums to a central body, Skattemyndigheten.

11 Finally, Paragraph 5 of the Premium Tax Law provides that this body may, at the request of the policyholder, grant an exemption from payment of tax or reduce the tax by half if the company with which the insurance was taken out is subject, in the State in which it is established, to revenue tax comparable to that payable by insurance companies established in Sweden. The tax on premiums may be reduced by half if the foreign tax is at least one quarter of the tax applicable in Sweden and not be payable at all if the foreign tax is at least one half of the tax applicable in Sweden.

12 According to Länsrätten i Dalarnas Län, that possibility of granting exemption from tax or reducing the tax payable is intended to prevent the saver who takes out capital life assurance with a company established abroad from being subject to taxation higher than that applicable to a person taking out such insurance with a company established in Sweden.

The facts

13 Having taken out capital life assurance with Skandia Life at the beginning of 1995, Jessica Safir applied to the tax authority for exemption from payment of tax on the insurance premiums, pursuant to Paragraph 5 of the Premium Tax Law.

14 By decision of 12 April 1995, the tax authority reduced the amount of the tax by one half, setting it at 7.5% of the amount paid by way of premiums to Skandia Life in 1995, the resulting sum being SKR 75.

15 Jessica Safir then appealed against that decision to the body empowered to grant exemptions, Riksskatteverket, which, on 3 July 1995, rejected her appeal by final decision.

16 On 4 January 1996, she accordingly declared to Skattemyndigheten the premium payments made but she still maintained that she was not obliged to pay tax on the premiums on the ground that the tax was incompatible with Community law.

17 After re-examining her case, Skattemyndigheten, by decisions of 17 January and 25 January 1996, maintained its tax assessment.

18 By applications of 22 January and 13 February 1996, Jessica Safir then brought proceedings in Länsrätten i Kopparbergs Län for annulment of Skattemyndighetens tax assessment.

19 That court, in its judgment referring a question to the Court of Justice, stated that, despite the Swedish legislature's declared aim to maintain competitive neutrality between savers holding Swedish insurance policies and savers holding foreign

insurance policies, the taxation arrangements are technically quite different, depending on whether the insurance company is established in Sweden or abroad and that this difference might be incompatible with the Treaty. It therefore submitted the following question to the Court for a preliminary ruling:

'Where in a Member State, the taxation of savings policies issued by domestic life assurance companies and foreign life assurance companies conducting insurance business in the Member State through an establishment takes the form of a tax on yield from insurance capital calculated in a standard way and levied on the insurer, is it contrary to Articles 6, 59, 60 or 73b and 73d of the Treaty of Rome for tax to be charged — with the aim of maintaining competitive neutrality between domestic and foreign savings policies — on insurance premiums paid by policyholders resident in the Member State under life assurance policies contracted with insurers who are established in another Member State and who are operating in the first-mentioned Member State in accordance with the rules on cross-border insurance activities, if the tax on the aforementioned insurance premiums can, upon application to the tax administration, be reduced to zero or by 50% in the event that the insurance company established abroad is subject to revenue tax in the State in which it is domiciled that is comparable to the tax charged on domestic savings policies in the other Member State?'

20 By its question, the national court is essentially asking whether Articles 6, 59, 60 or 73b and 73d of the Treaty preclude the application of national legislation on taxation of capital life assurance such as the legislation in question in the main proceedings.

21 It must be observed first of all that, although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, in particular, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21).

22 Since the provision of insurance constitutes a service within the meaning of Article 60 of the Treaty, it must next be borne in mind that, according to the case-law of the Court, Article 59 of the Treaty precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see, in particular, Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 16).

23 In the perspective of a single market and in order to enable its objectives to be attained, Article 59 of the Treaty likewise precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services exclusively within one Member State (Case C-381/93 *Commission* v *France*, cited above, paragraph 17).

24 The legislation in question in the main proceedings establishes different tax regimes for capital life assurance policies, depending on whether they are taken out with companies established in Sweden or with companies established elsewhere. According to the Swedish Government, the reason for such different treatment is that it is impossible to apply the same regime in both cases and that it is necessary to fill the fiscal vacuum which arises from non-taxation of savings in the form of capital life assurance taken out with companies not established in Sweden.

25 It must therefore be determined whether such legislation creates obstacles to the freedom to provide services and whether, should this be the case, such obstacles are justified on the grounds relied on by the Swedish Government.

26 First, unlike persons who have taken out capital life assurance with companies established in Sweden, persons so insured with companies not established in Sweden must register themselves and declare premium payments to a central body, Skattemyndigheten, which also has power to grant a tax exemption or a tax reduction. Policyholders must also pay the tax themselves and for this purpose find the necessary funds, which, as Jessica Safir points out, has negative consequences for them in terms of liquidity. It is true that such obligations cannot in themselves be

regarded as being contrary to Community law. However, those obligations, combined with the need to follow a centralised procedure, may dissuade interested persons from taking out capital life assurance with companies not established in Sweden, since no particular action on their part would be called for if they took out such assurance with companies established in Sweden, the tax being levied in this case on the company.

27 Second, it is clear from the explanations provided at the hearing by the Swedish Government that, although the surrender, after a long period, of a capital life assurance policy taken out with a company not established in Sweden is no more costly for the policyholder than the surrender of an insurance policy taken out with a company established in that State, the situation may be different where a policy is surrendered after a short period. The fact that the surrender after a short period of a life assurance policy taken out with a company not established in Sweden is more costly is another factor liable to dissuade a person from taking out such a policy in so far as he would not know, on taking it out, whether and, if so, when, he would surrender it.

28 Third, when a person holding a policy issued by a company not established in Sweden applies for an exemption from or reduction of tax on the premiums, Skattemyndigheten requires precise information concerning the income tax to which the company is subject, unless the authority already has such information. As Jessica Safir points out, such a requirement is particularly burdensome for the policyholder. It may also dissuade insurance companies which still do not operate on the Swedish market from offering their services there, since it means that those companies must provide their potential customers with precise information relating to the tax system applicable to those companies in another Member State.

29 Fourth, the legislation challenged in the main proceedings provides that the determination of the tax applicable to insurance premiums is to depend on the assessment by the administration of the tax regime applicable to the insurer not estab-

lished in Sweden. However, as is clear from the file, Skattemyndigheten and Riksskatteverket adopted in 1995 different decisions regarding applications for exemption made by certain British life assurance companies although the British tax regime had not been altered. It therefore appears that such differences of assessment of the tax regime applicable to insurers not established in Sweden are liable to create uncertainty which may dissuade individuals from taking out long-term contracts, such as capital life assurance contracts, with insurers not established in Sweden.

30 In those circumstances, legislation such as that in question in the main proceedings contains a number of elements liable to dissuade individuals from taking out capital life assurance with companies not established in Sweden and liable to dissuade insurance companies from offering their services on the Swedish market.

31 It must be added that, although the legislation in issue in the main proceedings allows account to be taken of the tax applicable in another Member State in order, according to the Swedish Government, to satisfy the principle of equal treatment laid down by Community law, there is nevertheless, as Jessica Safir points out, a threshold effect since payment of such tax is not taken into consideration where it does not amount to at least one quarter of the tax applicable in Sweden. The tax applicable in another Member State must amount to at least one quarter of the Swedish tax on insurance premiums in order to be capable of being reduced by half, and to at least a half of that tax in order to be reduced to zero. As a result of that threshold effect, the taxation of savings in the form of capital life assurance taken out with companies not established in Sweden is in most cases liable to be higher than the taxation of like savings with companies established in that State.

32 Moreover, legislation such as the Swedish legislation makes it difficult, if not impossible, for the national court called upon to determine whether the tax regime is discriminatory to compare, on the one hand, the yield tax on insurance policies

taken out with companies established in Sweden and, on the other hand, the tax on insurance premiums paid to companies not established in Sweden.

33 Other systems which are more transparent and are also capable of filling the fiscal vacuum referred to by the Swedish Government, whilst being less restrictive of the freedom to provide services, are conceivable, in particular a system for charging tax on the yield on life assurance capital, calculated according to a standard method and applicable in the same way to all insurance policies, whether taken out with companies established in the Member State concerned or with companies established in another Member State.

34 In those circumstances, the reasons cited by the Swedish Government, namely the impossibility of applying to capital life assurance policies taken out with companies not established in Sweden the same tax regime as that applied to such insurance policies taken out with companies which are established in Sweden and the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies not established in Sweden are not such as to justify the inclusion in national legislation on the taxation of capital life assurance of elements as restrictive of the freedom to provide services as those contained in the legislation in question in the main proceedings.

35 In view of the foregoing considerations, it is not necessary to determine whether such legislation is also incompatible with Articles 6, 73b and 73d of the Treaty.

36 The reply to be given to the national court must therefore be that Article 59 of the Treaty precludes the application of national legislation relating to the taxation of capital life assurance such as the legislation in question in the main proceedings.

Costs

37 The costs incurred by the Swedish, Danish and United Kingdom Governments, and by the Commission, which have submitted observations to the Court, are not recoverable. Since the proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by Länsrätten i Dalarnas Län, formerly Länsrätten i Kopparbergs Län, by judgment of 22 March 1996, hereby rules:

Article 59 of the EC Treaty precludes the application of national legislation relating to the taxation of capital life assurance such as the legislation in question in the main proceedings.

Rodríguez Iglesias Gulmann Ragnemalm

Wathelet Schintgen Mancini

Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann

Delivered in open court in Luxembourg on 28 April 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President