JUDGMENT OF THE COURT
15 May 1997 *

In Case C-250/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Conseil d'État du Grand-Duché de Luxembourg for a preliminary ruling in the proceedings pending before that court between

Futura Participations SA,

Singer

and

Administration des Contributions

on the interpretation of Article 52 of the EEC Treaty,

* Language of the case: French.

THE COURT,

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

Advocate General: C. O. Lenz,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Futura Participations SA and Singer, by Jean Kauffman, of the Luxembourg Bar,

— the French Government, by Catherine de Salins, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Frédéric Pascal, seconded to that directorate from the central administration, acting as Agents,

— the Luxembourg Government, by Nicolas Schmit, Director of International Economic Relations and Cooperation at the Ministry of Foreign Affairs, acting as Agent,

— the United Kingdom Government, by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent,

— the Commission of the European Communities, by Hélène Michard and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Futura Participations SA and Singer, represented by Jean Kauffman; of the Luxembourg Government, represented by Patrick Kinsch, of the Luxembourg Bar; of the United Kingdom Government, represented by Lindsey Nicoll and David Anderson, Barrister; and of the Commission, represented by Hélène Michard, at the hearing on 24 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 5 November 1996,

gives the following

Judgment

1 By judgment of 12 July 1995, received at the Court on 19 July 1995, the Conseil d'État du Grand-Duché de Luxembourg (Council of State of the Grand Duchy of Luxembourg) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Article 52 of the EEC Treaty, now the EC Treaty.

2 The question has been raised in proceedings between (i) Futura Participations SA (hereinafter 'Futura'), a company with its seat in Paris, and (ii) its Luxembourg branch, Singer (hereinafter 'Singer'), and the Luxembourg tax authorities concerning the determination of the basis for assessing Singer's liability to revenue tax for the year 1986.

3 Article 4(2) of the agreement concluded on 1 April 1958 between France and the Grand Duchy of Luxembourg for the avoidance of double taxation and establish-

ing rules for mutual administrative assistance in the matter of taxes on income and on capital provides that, where an undertaking has permanent establishments in both contracting States, each State may tax only the income arising from the activity of the permanent establishments located on its territory. For the purposes of the aforementioned double-taxation agreement, a branch constitutes a permanent establishment (Article 2(3), point 2(b)).

4 Articles 159 and 160 of the Luxembourg Law on Taxation of Revenue of 4 December 1967 (hereinafter 'the Luxembourg Law') make all collective bodies subject to revenue tax.

5 In the case of collective bodies which are to be treated as resident in Luxembourg, revenue tax is in principle charged on all their income, regardless of the place where it was earned (Article 159(2) of the Luxembourg Law). However, if they earn income outside Luxembourg, they benefit from certain exemptions for avoidance of double taxation. Thus, where an international double-taxation agreement is applicable, the amount of income earned abroad is exempt from the Luxembourg tax (Article 134 of the Luxembourg Law). If no such agreement exists, a resident taxpayer must pay the Luxembourg tax on all income earned abroad, less the amount of any tax he has already paid abroad on the income concerned (Article 134*bis* of the Luxembourg Law).

6 Under Article 109(2) of the Luxembourg Law, resident taxpayers may also deduct from the total amount of their net income losses carried forward from previous years, provided that they have kept 'proper accounts during the financial year in which the losses were incurred' (Article 114(2), point 3, of the Luxembourg Law).

7 As regards collective bodies which are to be treated as non-resident, only 'locally received' income, that is to say income earned, directly or indirectly, by their permanent establishments located in Luxembourg, is chargeable to tax (Article 160(1) of the Luxembourg Law).

8 Non-resident taxpayers are not obliged to keep separate accounts relating to their Luxembourg activities. If they do not keep such accounts, they are allowed to determine the amount of their taxable income in Luxembourg on the basis of an apportionment of their total income whereby a proportion of that income is treated as arising from the taxpayer's Luxembourg activities.

9 Furthermore, Article 157(2) of the Luxembourg Law allows non-resident taxpayers to deduct from the total of their net income previous losses carried forward from previous years, 'provided that they are economically related to income received locally and that accounts are kept within the country'. At the hearing, the Luxembourg Government confirmed that, in order to meet this condition, the accounts relating to the taxpayer's activities in Luxembourg must comply with the relevant Luxembourg rules (hereinafter referred to as 'proper accounts').

10 Not having proper accounts for 1986, Singer determined its taxable income for that year on the basis of an apportionment of Futura's total income. In its tax declaration for that year, the branch also requested the tax authorities to set off against its 1986 income losses amounting to more than LFR 23 000 000 incurred between 1981 and 1986. Since Singer did not have proper accounts for that period either, the amount of the losses was also determined on the basis of an apportionment of all Futura's losses during that period.

11 The Luxembourg tax authorities refused to allow a set-off on the ground that in Luxembourg law a non-resident taxpayer may carry forward a loss only if the conditions laid down in Article 157(2) of the Luxembourg Law are respected and not on the basis of an apportionment. That decision was confirmed on 14 July 1993 by the Directeur des Contributions.

12 Futura and Singer then appealed to the Conseil d'État, seeking variation or annulment of that decision. In those proceedings they claimed that the refusal to take account of the losses in question impaired the freedom of establishment guaranteed to them by Article 52 of the Treaty.

13 The Conseil d'État therefore decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Are Article 157 of the Law on Taxation of Revenue and, in so far as is necessary, Article 4 and the second subparagraph of Article 21(2) of the France-Luxembourg Convention on Double Taxation compatible with Article 52 of the EEC Treaty inasmuch as they make application to non-resident taxpayers having a permanent establishment in Luxembourg of provisions on the carrying forward of losses subject to the condition that the losses should be related to income received locally and that accounts should be duly kept and held within the country?'

Admissibility of the question referred to the Court

14 According to the French Government, the judgment making the reference does not contain sufficient information on the facts and law involved in the main proceedings for the Member States to be able to submit observations on the case or for the Court to be able to give the national court an answer to its question which would be of use. Consequently, it considers that the reference for a preliminary ruling should be declared inadmissible.

15 As the Advocate General points out in paragraphs 21 and 22 of his Opinion, all the information needed to assess the factual and legal background of this case is clear from the terms of the question and from the order for reference itself. The reference for a preliminary ruling is therefore admissible.

The question submitted

16 By its question the national court asks in substance whether Article 52 of the Treaty precludes a Member State from making the carrying forward of previous losses, requested by a taxpayer which has a branch in that State but is not resident there, subject to the condition that the losses must be economically related to the income earned by the taxpayer in that State and that, during the financial year in which the losses were incurred, the taxpayer must have kept and held in that State, in respect of activities he carried on there, accounts complying with the relevant national rules.

17 The carrying forward of losses is thus subject to two conditions which will be examined in turn, one concerning the existence of an economic link and the other the keeping of accounts. Whereas the first condition concerns the items which can be brought into account in calculating the charge to tax, the second concerns only the evidence admissible when making that calculation.

The first condition: existence of an economic link

18 The first condition is that losses carried forward must be economically linked to the income earned in the Member State in which tax is charged, so that only losses arising from the non-resident taxpayer's activities in that State can be carried forward.

19 According to settled case-law, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality (Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 21 and 26; Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36).

20 In the present case, the Luxembourg Law provides that, as regards resident taxpayers, all of their income is taxable, the basis of assessment to tax not being limited to their Luxembourg activities. Consequently, although there are exemptions under which a part or even, in certain cases, all of their income earned outside Luxembourg is not subject to tax in that country, the basis for assessment for resident taxpayers at any rate includes profits and losses arising from their Luxembourg activities.

21 On the other hand, for the purpose of calculating the basis of assessment for non-resident taxpayers, only profits and losses arising from their Luxembourg activities are taken into account in calculating the tax payable by them in that State.

22 Such a system, which is in conformity with the fiscal principle of territoriality, cannot be regarded as entailing any discrimination, overt or covert, prohibited by the Treaty.

The second condition: keeping of accounts

23 The second condition is that, during the financial year in which the losses the taxpayer seeks to carry forward were incurred, he must have kept, in the Member State in which tax is to be charged, accounts complying with the relevant national rules applicable during that year, relating to his activities in that State.

24 Such a condition may constitute a restriction, within the meaning of Article 52 of the Treaty, on the freedom of establishment of a company or firm which, in terms of Article 58 of the Treaty, is to be treated in the same way as a natural person who is a national of a Member State, where that company or firm wishes to establish a branch in a Member State different from that in which it has its seat.

25 It means in practice that if such a company or firm wishes to carry forward any losses incurred by its branch, it must keep, in addition to its own accounts which must comply with the tax accounting rules applicable in the Member State in which it has its seat, separate accounts for its branch's activities complying with the tax accounting rules applicable in the State in which its branch is established. Furthermore, those separate accounts must be held, not at the company's seat, but at the place of establishment of its branch.

26 Consequently, the imposition of such a condition, which specifically affects companies or firms having their seat in another Member State, is in principle prohibited by Article 52 of the Treaty. It could only be otherwise if the measure pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. Even if that were so, it would still have to be of such a nature as to ensure achievement of the aim in question and not go beyond what was necessary for that purpose (see, to this effect, the judgments in Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; in Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; and in Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 104).

27 In the present case, the Luxembourg Government and the United Kingdom Government submit that a national measure such as the second condition is essential in order for the amount of income taxable in a Member State to be ascertainable by that Member State's tax authorities.

28 The Luxembourg Government explains that its domestic rule requiring a non-resident taxpayer to have kept, during the financial year in which it incurred losses

which it wishes to carry forward, proper accounts relating to its activities in Luxembourg is an evidential requirement which is justified by the need for the Member State concerned to make sure that the losses which the taxpayer wishes to carry forward did in fact arise from its Luxembourg activities and that the amount of the losses corresponds, under Luxembourg rules relating to the calculation of income and losses applicable during the year in which the losses were incurred, to the amount of losses actually incurred by the taxpayer.

29 The Luxembourg Government further explains that the reason for which the taxpayer is required to hold proper accounts in Luxembourg during the relevant year is to enable the Luxembourg tax authorities to inspect the accounts at any time.

30 The Commission, on the other hand, argues that, whilst the aims which the second condition pursues are legitimate under the Treaty, the condition is still not essential for their attainment. In its view, the Luxembourg authorities could ascertain the amount of losses by referring to the accounts kept by the non-resident taxpayer at the place where it has its seat. Furthermore, under 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 (OJ 1977 L 336, p. 15), those authorities could always contact the authorities of another Member State to obtain any information which proves necessary for determining the tax which a taxpayer must pay.

31 The Court has repeatedly held that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction on the exercise of fundamental freedoms guaranteed by the Treaty (see, for example, the judgment in Case 120/78 *REWE-Zentral* ('*Cassis de Dijon*') [1979] ECR 649, paragraph 8). A Member State may therefore apply measures which enable the amount of both the income taxable in that State and of the losses which can be carried forward there to be ascertained clearly and precisely.

32 As Community law stands at present and contrary to the Commission's submission, the aims pursued by the second condition would not be attained if, in order to ascertain the constituent amounts of the basis of assessment, the Luxembourg authorities had to refer to accounts kept by the non-resident taxpayer pursuant to another Member State's rules.

33 As yet, no provision has been made for harmonizing domestic rules relating to determination of the basis of assessment to direct taxes. Consequently, each Member State draws up its own rules governing the determination of profits, income, expenditure, deductions and exemptions as well as the amounts in respect of each of them which may be included in the calculation of taxable income or of losses which may be carried forward.

34 The fact that Article 54(3)(g) of the Treaty provides for a degree of coordination of the rules relating to the annual accounts of certain forms of companies or firms is not in point. Even if a company's accounts, drawn up according to common rules, were to distinguish between the activities of its various branches — which those rules do not require —, the figures set out in the accounts in respect of each of them would not necessarily be relevant to the determination of the amount on the basis of which they are to be charged to tax.

35 Consequently, there is no guarantee that a company's or firm's accounts drawn up in accordance with common coordinating rules or accounts drawn up with a view to determining the basis of assessment to tax in the Member State in which the company or firm has its seat will provide relevant figures concerning the amount of income chargeable to tax and of the losses which can be carried forward in another Member State in which the company or firm has a branch.

36 However, it still remains to examine whether the requirements of the second condition go beyond what is necessary to enable the amount of losses deductible from income earned by a taxpayer during a financial year subsequent to that in which the losses were incurred to be ascertained.

37 Under Luxembourg law, non-resident taxpayers are not, as a rule, obliged to keep proper accounts relating to their Luxembourg activities, so that the Luxembourg authorities have, in principle, foregone all possibility of carrying out an inspection of their accounts.

38 It is only when a non-resident taxpayer asks to be allowed to carry forward losses which he has incurred in a previous year that he is obliged to show that during that period he kept — and held in Luxembourg — proper accounts relating to his activities in that State.

39 However, once such a request is made, the sole concern of the Luxembourg authorities is to ascertain clearly and precisely that the amount of losses to be carried forward corresponds, under the Luxembourg rules governing the calculation of income and losses applicable in the financial year in which the losses were incurred, to the amount of losses actually incurred in Luxembourg by the taxpayer. Consequently, provided that the taxpayer demonstrates, clearly and precisely, the amount of the losses concerned, the Luxembourg authorities cannot refuse to allow him to carry them forward on the ground that in the year concerned he had not kept and not held in Luxembourg proper accounts relating to his activities in that State.

40 In a situation such as that arising in this case, it is not essential that the means by which the non-resident taxpayer demonstrate the amount of the losses he seeks to carry forward be limited to those provided for by Luxembourg law.

41 Under Directive 77/799, the competent authorities of a Member State may always request the competent authorities of another Member State to provide them with all the information enabling them to ascertain, in relation to the legislation which they have to apply, the correct amount of revenue tax payable by a taxpayer having his residence in that other Member State.

42 However, the fact that a Member State allows a non-resident taxpayer to substantiate the amount of his taxable income on the basis of an apportionment of his total income does not mean that it is obliged to accept a calculation of the amount of losses to be carried forward made on the basis of an apportionment of total losses. Given that the apportionment method involves inaccuracies, a Member State is not under any obligation to determine the taxable base for a taxpayer by means of that method alone.

43 In the light of all the foregoing considerations, the reply to the question submitted to the Court must be that Article 52 of the Treaty does not preclude a Member State from making the carrying forward of previous losses, requested by a taxpayer which has a branch in its territory but is not resident there, subject to the condition that the losses must be economically related to the income earned by the taxpayer in that State, provided that resident taxpayers do not receive more favourable treatment. On the other hand, that article does preclude the carrying forward of losses from being made subject to the condition that, in the year in which the losses were incurred, the taxpayer must have kept and held in that State accounts relating to his activities carried on there which comply with the relevant national rules. The Member State concerned may, however, require the non-resident taxpayer to demonstrate clearly and precisely that the amount of the losses which he claims to have incurred corresponds, under its domestic rules governing the calculation of income and losses which were applicable in the financial year concerned, to the amount of the losses actually incurred in that State by the taxpayer.

Costs

44 The costs incurred by the French, Luxembourg and United Kingdom Governments and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these 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 the Conseil d'État du Grand-Duché de Luxembourg by judgment of 12 July 1995, hereby rules:

Article 52 of the EC Treaty does not preclude a Member State from making the carrying forward of previous losses, requested by a taxpayer which has a branch in its territory but is not resident there, subject to the condition that the losses must be economically related to the income earned by the taxpayer in that State, provided that resident taxpayers do not receive more favourable treatment. On the other hand, that article does preclude the carrying forward of losses from being made subject to the condition that, in the year in which the losses were incurred, the taxpayer must have kept and held in that State accounts relating to his activities carried on there which comply with the relevant national rules. The Member State concerned may, however, require the non-resident taxpayer to demonstrate clearly and precisely that the amount of the losses which he claims to have incurred corresponds, under its domestic

rules governing the calculation of income and losses which were applicable in the financial year concerned, to the amount of the losses actually incurred in that State by the taxpayer.

Rodríguez Iglesias Moitinho de Almeida Murray

Sevón Kapteyn Gulmann

Edward Puissochet Ragnemalm

Wathelet Schintgen

Delivered in open court in Luxembourg on 15 May 1997.

R. Grass G. C. Rodríguez Iglesias

Registrar President