JUDGMENT OF THE COURT

8 July 1999 *

In Case C-254/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Conseil d'État (France) for a preliminary ruling in the proceedings pending before that court between

Société Baxter,

B. Braun Médical SA,

Société Fresenius France,

Laboratoires Bristol-Myers-Squibb SA

and

Premier Ministre,

Ministère du Travail et des Affaires Sociales,

Ministère de l'Économie et des Finances,

Ministère de l'Agriculture, de la Pêche et de l'Alimentation,

on the interpretation of Articles 52 of the EC Treaty (now, after amendment, Article 43 EC), 58 of the EC Treaty (now Article 48 EC), 92 and 95 of the EC Treaty (now, after amendment, Articles 87 EC and 90 EC),

* Language of the case: French.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, P.J.G. Kapteyn, G. Hirsch and P. Jann (Presidents of Chambers), C. Gulmann (Rapporteur), J.L. Murray, D.A.O. Edward, H. Ragnemalm and L. Sevón, Judges,

Advocate General: A. Saggio,

Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Société Baxter, B. Braun Médical SA and Société Fresenius France, by Alexandre Carnelutti, of the Paris Bar,

— Laboratoires Bristol-Myers-Squibb SA, by Alain Monod, of the Paris Bar,

— the French Government, by Kareen Rispal-Bellanger, Head of the Subdirectorate for International Economic Law and Community Law in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in the same Directorate, acting as Agents,

— the Commission of the European Communities, by Gérard Rozet, Legal Adviser, and Hélène Michard, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Société Baxter, B. Braun Médical SA and Société Fresenius France, represented by Alexandre Carnelutti, of Laboratoires

Bristol-Myers-Squibb SA, represented by Alain Monod, of the French Government, represented by Kareen Rispal-Bellanger and Frédérik Million, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by Gérard Rozet and Hélène Michard, at the hearing on 16 June 1998,

after hearing the Opinion of the Advocate General at the sitting on 1 December 1998,

gives the following

Judgment

1 By decision of 28 March 1997, received at the Court on 14 July 1997, the Conseil d'État (Council of State) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Articles 52 of the EC Treaty (now, after amendment, Article 43 EC), 58 of the EC Treaty (now Article 48 EC), 92 and 95 of the EC Treaty (now, after amendment, Articles 87 EC and 90 EC).

2 Those questions have been raised in actions brought before the Conseil d'État by Société Baxter ('Baxter') and other companies exploiting proprietary medicinal products by which they seek annulment, on the ground of *ultra vires*, of Article 12 of Ordonnance No 96-51 du 24 janvier 1996 relative aux mesures urgentes tendant au rétablissement de l'équilibre financier de la sécurité sociale (Order of 24 January 1996 on urgent measures for restoring financial stability in the social security system) (*Journal Officiel de la République Française* of 25 January 1996, p. 1230), for infringement of, in particular, Articles 52, 58, 93(3) of the EC Treaty (now Article 88(3) EC) and 95 of the same treaty.

3 Article 12 of that Order subjects undertakings exploiting one or more proprietary medicinal products in France to three special levies. In particular, that provision imposes on such undertakings a special levy whose basis of assessment consists of the pre-tax turnover achieved in France between 1 January 1995 and 31 December 1995 in reimbursable proprietary medicinal products and medicinal products approved for use by public authorities, after deduction of the costs accounted for during the same period corresponding to expenditure on scientific and technical research carried out in France.

4 Baxter and the other applicants in the main proceedings, which are subsidiaries of parent companies established in other Member States, argued before the Conseil d'État that the mechanism for deducting expenditure on scientific and technical research from the amount of special levy payable caused discrimination between French laboratories carrying out research mainly in France and foreign laboratories which have their principal research units outside France.

5 Since it considered that that argument raised serious questions concerning the interpretation of Community law, the Conseil d'État decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Do Articles 52 and 58 of the Treaty of 25 March 1957 establishing the European Community preclude domestic legislation, enacted in 1996, which for that year imposes a special levy, the rate of which is to be fixed between 1.5% and 2%, on the pre-tax turnover achieved in the State of taxation between 1 January 1995 and 31 December 1995 by undertakings exploiting proprietary medicinal products, in reimburseable proprietary medicinal products and medicinal products approved for use by public authorities, and under which costs accounted for during that same period only in respect of expenditure on research carried out in the State of taxation may be deducted from the taxable amount?

2. Does Article 95 of the Treaty establishing the European Community preclude such legislation?

3. In the event that either of the previous two questions is answered in the negative, is the deduction which is allowed for expenditure on research carried out in the State of taxation to be considered aid within the meaning of Article 92 of the Treaty establishing the European Community?'

The first question

6 By its first question, the national court is asking whether Articles 52 and 58 of the Treaty preclude a Member State's legislation under which undertakings established in that State and exploiting proprietary medicinal products there are charged a special levy on their pre-tax turnover in certain of those proprietary medicinal products during the last tax year before the enactment of that legislation and are allowed to deduct from the amount payable only expenditure incurred during the same tax year on research carried out in the levying State, when it applies to Community undertakings operating in that State through a secondary place of business.

7 According to the applicants in the main proceedings and the Commission, that levy, in allowing only expenditure on research carried out in France to be deducted, is such as to put the secondary places of business established on French territory of pharmaceutical companies whose headquarters are located in another Member State at a disadvantage in relation to pharmaceutical undertakings whose principal places of business are located in France, by virtue of the fact that, in the majority of cases, research units are located in the same Member State as the undertaking's principal place of business. Such a result is, it is claimed, contrary to Articles 52 and 58 of the Treaty.

8 The French Government submits that, in areas such as the pharmaceutical industry, where it is common for a research laboratory having its principal place of business in France to become a secondary place of business of an undertaking having its headquarters in another Member State or, conversely, for such a secondary place of business to be taken over by an undertaking having its headquarters in France, the place where the research expenditure of the pharmaceutical laboratories is incurred will then be independent of the location of their headquarters, central administration or principal place of business. According to the French Government, since the levy in question is exceptional and unique, and since it is based on past activities, it would be contrary to Articles 52 and 58 of the Treaty only if it appeared, taking account of the economic data for the year of reference, that, in fact, generally and by its very nature, it puts undertakings having their headquarters, central administration or principal place of business in a Member State other than that in which the levy is charged at a disadvantage in relation to undertakings for which those places are located in the levying Member State.

9 It should be observed first of all that the freedom of establishment conferred by Article 52 of the Treaty on the nationals of a Member State, giving them the right to take up activities as self-employed persons and pursue them on the same conditions as those laid down by the law of the Member State of establishment for its own nationals, comprises, pursuant to Article 58 of the Treaty, for companies constituted in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community, the right to carry on business in the Member State concerned through a branch, agency or subsidiary (see Case C-1/93 *Halliburton Services* v *Staatssecretaris van Financiën* [1994] ECR I-1137, paragraph 14).

10 Next, it follows from the case-law of the Court (see Case C-330/91 *The Queen* v *Inland Revenue Commissioners, ex parte Commerzbank* [1993] ECR I-4017, paragraph 14) that the rules regarding equality of treatment prohibit not only overt discrimination by reason of nationality or, in the case of a company, its seat, but all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result.

11 Finally, it must also be borne in mind that, as the Court has repeatedly stated (see, in particular, *Halliburton Services*, paragraph 16), since the end of the transitional period Article 52 of the Treaty has been directly applicable notwithstanding the absence, in a particular area, of the directives provided for in Articles 54(2) and 57(1) of the EC Treaty (now, after amendment, Articles 44(1) EC and 47(1) EC).

12 The point at issue in the main proceedings is the possibility for taxable persons to deduct expenditure on research carried out in France during 1995 from the turnover liable to the special levy. It is alleged, in substance, that that allowance, even if it does not create direct discrimination against undertakings having their principal place of business in other Member States and operating in France through a secondary place of business, none the less puts those undertakings at a disadvantage by virtue of the fact that they generally carry out their research activities outside France, while undertakings established in that Member State generally carry out their research activities there.

13 In that regard, it should be observed that, although there certainly exist French undertakings which incur research expenditure outside France and foreign undertakings which incur such expenditure within that Member State, it remains the case that the tax allowance in question seems likely to work more particularly to the detriment of undertakings having their principal place of business in other Member States and operating in France through secondary places of business. It is, typically, those undertakings which, in most cases, have developed their research activity outside the territory of the Member State levying the tax.

14 That finding is not affected by the fact that the special levy in question was, as the French Government submits, exceptional in nature and based on activities relating to an earlier tax year.

15 In those circumstances, the question is whether, in the light of the provisions of the Treaty on freedom of establishment, there is any justification for the unequal treatment found in paragraph 13 above

16 In that regard, the French Government submits that the special levy made it possible to tax one of the factors which had contributed to the financial imbalance in the social security system, which was the sale of proprietary medicinal products, and that it allowed a factor contributing to the reduction of expenditure on health, namely expenditure on research relating to proprietary medicinal products, to be deducted. In that context, the restriction of the deductibility of research costs to expenditure relating only to research carried out in the levying Member State was, it submits, essential so that the tax authorities of that State could ascertain the nature and genuineness of the research expenditure incurred.

17 The Commission and, in substance, the applicants in the main proceedings claim that the information in the accounts of parent companies which have their seat in another Member State, prepared pursuant to the Fourth Council Directive (78/660/EEC) of 25 July 1978 based on Article 54(3)(g) of the Treaty on the annual accounts of certain types of companies (OJ 1978 L 222, p. 11) and the Seventh Council Directive (83/349/EEC) of 13 June 1983 based on Article 54(3)(g) of the Treaty on consolidated accounts (OJ 1983 L 193, p. 1), constitute a basis from which the tax authorities can proceed in their supervision of research expenditure. The Commission also points out that, as far as the specific needs of fiscal supervision are concerned, the competent authorities have the power to require production of supplementary information, subject to the principle of proportionality.

18 The Court has repeatedly held that 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, *inter alia*, Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions* [1997] ECR I-2471, paragraph 31). A Member State may therefore apply measures which enable the amount of costs deductible in that State as research expenditure to be ascertained clearly and precisely.

19 However, national legislation which absolutely prevents the taxpayer from submitting evidence that expenditure relating to research carried out in other Member States has actually been incurred cannot be justified in the name of effectiveness of fiscal supervision.

20 The taxpayer should not be excluded *a priori* from providing relevant documentary evidence enabling the tax authorities of the Member State imposing the levy to ascertain, clearly and precisely, the nature and genuineness of the research expenditure incurred in other Member States.

21 Consequently, the answer to be given to the first question must be that Articles 52 and 58 of the Treaty preclude a Member State's legislation under which undertakings established in that State and exploiting proprietary medicinal products there are charged a special levy on their pre-tax turnover in certain of those proprietary medicinal products during the last tax year before the enactment of that legislation and are allowed to deduct from the amount payable only expenditure incurred during the same tax year on research carried out in the levying State, when it applies to Community undertakings operating in that State through a secondary place of business.

Second and third questions

22 In the light of the answer given to the first question, it is not necessary to answer the second and third questions.

Costs

23 The costs incurred by the French Government and by the Commission, 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Conseil d'État by decision of 28 March 1997, hereby rules:

Articles 52 of the EC Treaty (now, after amendment, Article 43 EC) and 58 of the EC Treaty (now Article 48 EC) preclude a Member State's legislation under which undertakings established in that State and exploiting proprietary medicinal products there are charged a special levy on their pre-tax turnover in certain of those proprietary medicinal products during the last tax year before the

enactment of that legislation and are allowed to deduct from the amount payable only expenditure incurred during the same tax year on research carried out in the levying State, when it applies to Community undertakings operating in that State through a secondary place of business.

Rodríguez Iglesias	Kapteyn	Hirsch
Jann	Gulmann	Murray
Edward	Ragnemalm	Sevón

Delivered in open court in Luxembourg on 8 July 1999.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President