OPINION OF ADVOCATE GENERAL LENZ
delivered on 5 November 1996 *

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A — Facts

1. In this case, the Comité du Contentieux du Conseil d'État (Contentious Proceedings Committee of the Council of State) of the Grand Duchy of Luxembourg has referred to the Court for a preliminary ruling a question concerning direct taxes. It arises in connection with the taxation of a permanent establishment in Luxembourg (Singer) of a public company governed by French law which has its seat in France (Futura) (hereinafter 'the applicants').

2. The profits of the branch which are to be taxed in Luxembourg were established on the basis of an apportionment of the total profits on the basis of accounts kept in

* Original language: German.

France, where Futura has its seat. This apportionment was made on the basis of the turnover figures relating to each business entity. The main proceedings concern the taxation of the branch for the year 1986. Profits for that year were calculated at LFR 4 390 000, giving rise to revenue tax (l'impôt des collectivités) amounting to LFR 1 808 680.

3. Futura and Singer wished to offset against the profits for 1986 the losses incurred by the branch since 1981 (that is during the five preceding years). Those losses amounted to more than LFR 23 million. The Luxembourg tax authorities emphasized, however, that 'where permanent establishments are concerned, it is losses arising from actual business activity, as they appear in accounts kept separately for their business transactions, which can be carried forward; a loss established on the basis of apportionment cannot be carried forward'. It was only possible to carry losses forward if they were established on the basis of accounts duly kept and held in Luxembourg. This decision was confirmed by the Directeur des Contributions in July 1993.

4. According to Article 157(2) of the Law on Taxation of Revenue of the Grand Duchy of Luxembourg, [1] the provisions on the carrying forward of losses (as set out in Article 109(1)(4)) apply to non-resident taxpayers subject to the condition that the losses should be economically related to income received locally and that accounts should be kept within the country. (This provision came into effect from the 1986 financial year.)

5. Article 109(1)(4) allows previous losses to be deducted in so far as they satisfy the conditions laid down in Article 114.

6. Article 114(2)(2) provides, finally, that losses can be carried forward if the undertaking can produce proper accounts for the period in which the losses were incurred.

7. In his decision of 14 July 1993, confirming the decision of the tax authorities, the Directeur des Contributions also relied on the double-taxation convention between Luxembourg and France. [2] The second subparagraph of Article 21(2) thereof provides that where a taxpayer resident in France has a permanent establishment in Luxembourg, the provisions concerning the carrying

1 — Loi du 4 décembre 1967 concernant l'impôt sur le revenu (*Memorial* A 1967, p. 1228), in the version of 4 December 1986 amending Article 157 (*Memorial* A 1986, p. 1104).

2 — Convention entre le Grand-Duché de Luxembourg et la France tendant à éviter les doubles impositions et à établir des règles d'assistance administrative réciproque en matière d'impôts sur le revenu et sur la fortune (*Memorial* 1959, p. 1064).

forward of losses are to be applicable in the assessment to tax of that establishment on the same conditions as they are to taxpayers resident in Luxembourg.

8. In the main proceedings the Luxembourg tax authorities maintained that any Luxembourg business must produce, for the year in which the losses were incurred, accounts duly kept and held in Luxembourg. The same condition applies to a permanent establishment. The Luxembourg tax authorities also rely on Article 4 of the France-Luxembourg Double-Taxation Convention, from which it follows, they say, that the actual profits of the permanent establishment must be taxed and that the apportionment rules apply only where there are no proper accounts showing clearly and precisely the profits referable to the particular establishment.

9. Article 4(2) of the Double-Taxation Convention provides that where an undertaking has permanent establishments in both Contracting States, each of them may charge to tax only the income arising from economic activity conducted in its own territory.

10. Article 4(4) provides that the competent authorities of both Contracting States shall, where necessary, agree to lay down apportionment rules if there are no proper accounts showing clearly and precisely the profits attributable to the establishments in their respective territory.

11. The applicants claim that the refusal to allow losses to be carried forward where no proper accounts have been kept in Luxembourg discriminates against non-resident taxpayers in relation to resident taxpayers. The tax authorities' interpretation of the tax provisions is incompatible with Article 52 of the EC Treaty.

12. Article 52 of the Treaty is the first article in Chapter 2 of Part Three, Title III, of the Treaty. It regulates the right of establishment. It provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished by progressive stages in the course of the transitional period. Such progressive abolition shall also apply to restrictions on the setting up of agencies, branches, or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 58, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.'

13. Article 58 provides:

'Companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community shall, for the purposes of this Chapter, be treated in the same way as natural persons who are nationals of Member States.

"Companies or firms" means companies or firms constituted under civil or commercial law, including co-operative societies, and other legal persons governed by public or private law, save for those which are non-profit making.'

14. The applicants further claim that Article 52 expressly gives traders the possibility of choosing the appropriate legal form for pursuing their activities in another Member State. According to the case-law of the Court, that freedom of choice must not be restricted by discriminatory tax laws.

15. The court making the reference considered it necessary to examine the compatibility of the aforementioned tax laws with Community law. It therefore referred 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 business 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?

B — Analysis

I — *Admissibility of the question referred for a preliminary ruling*

16. In its written observations, the Grand Duchy of Luxembourg states that the Comité du Contentieux du Conseil d'État in Luxembourg is regarded as part of the State judiciary and is therefore entitled to refer a question to the Court for a preliminary ruling under Article 177 of the Treaty.

17. Nevertheless, the French Government sees a problem in relation to admissibility. It considers that the question referred for a preliminary ruling contains insufficient information about the provisions applicable to Luxembourg companies on the carrying forward of losses. For this reason, it is not possible to compare the situation of the non-resident branch, Singer, with a company resident in Luxembourg. In addition, it considers that no details have been given about the factual and legislative context of the original case or that the details which have been given are insufficiently precise. The type and origin of the income of the branch is therefore unknown. There is no information about the basis on which its Luxembourg income is taxed and no more precise details are given either about the carrying forward of losses or about the accounting requirements imposed on resident undertakings.

18. In this regard, France refers to the case-law of the Court, according to which an interpretation of Community law helpful to the national court will only be possible if the Court has information on the legislative and factual context of the main proceedings. [3] In addition, this information must enable the governments of the Member States to make observations on the case. [4]

19. The details given in this reference for a preliminary ruling are, however, insufficient to judge the compatibility of national law with Community law. The applicants' and the defendant's arguments are reproduced only summarily. The French Government is therefore of the opinion that the question referred for a preliminary ruling is inadmissible.

20. At the hearing, both the applicants and the Luxembourg Government indicated that, in their opinion, the question referred for a preliminary ruling was comprehensible and allowed Member States to take a position. The Luxembourg Government refers in this regard to the written observations of the United Kingdom, which show that the

3 — Judgment in Case C-83/91 *Meilicke* [1992] ECR I-4871, at paragraph 26, and order of 23 March 1995 in Case C-458/93 *Saddik* [1995] ECR I-511, at paragraph 12.

4 — Order in Case C-458/93 (cited in footnote 3, at paragraph 13).

question referred for a preliminary ruling contains sufficient information to enable an interested Member State to express its view on the matter.

21. I agree. The information which the national court has given to the Court about the factual context of the main proceedings is enough to enable it to reply to the question referred to it. We learn that the proceedings relate to losses made by a permanant establishment in Luxembourg, but which cannot be offset because proper accounts are not kept in Luxembourg. It is not necessary to know the type of income — or indeed the losses — of the branch or how they arose in order to reply to the question.

22. The details about Luxembourg tax law provided in the reference are also sufficient. The conditions under which Luxembourg companies can carry losses forward can be deduced from the tax authorities' observation, quoted by the national court, that both Luxembourg undertakings and permanent establishments must produce accounts duly kept and held in Luxembourg for the year in which the losses were incurred.

II — *Compatibility of the Luxembourg Law on Taxation of Revenue with Articles 52 and 58 of the EC Treaty*

23. The question referred for a preliminary ruling concerns revenue tax and therefore the area of direct taxation. These taxes fall within the competence of the Member States. According to consistent case-law of the Court, the Member States must nevertheless exercise that competence consistently with Community law and therefore avoid any overt or covert discrimination on grounds of nationality. [5] For those reasons, Article 52 of the EC Treaty can be examined to see whether or not a rule, such as the disputed Article 157 of the Luxembourg Law on Taxation of Revenue, is compatible with Community law.

24. In examining the income taxation rules for possible discrimination, it is necessary to look again closely at the individual provisions. Article 114(2)(2) provides that losses can be carried forward if there are proper accounts for the period in which the losses were incurred. This is a rule which applies to Luxembourg companies. Under Article 157(2), it is applied to non-resident taxpayers provided that the losses are economically

5 — Judgments in Case C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 21, and in Case C-80/94 *Wielockx* [1995] ECR I-2493, at paragraph 16; judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 36.

related to income received locally and that accounts are kept within the country. This provision is interpreted by the Luxembourg tax authorities as requiring non-resident taxpayers to produce proper accounts kept and permanently held in Luxembourg. According to the explanations given by the Luxembourg Government at the hearing, proper accounts are accounts kept in accordance with the rules applicable in the Grand Duchy of Luxembourg.

25. Under those rules there are therefore three conditions which must be satisfied before non-resident taxpayers can carry losses forward:

(1) The losses must be economically related to income received locally;

(2) There must be proper accounts kept in Luxembourg;

(3) Those accounts must be held permanently in Luxembourg.

26. For permanent establishments of foreign companies in Luxembourg, this means that they must produce separate accounts, kept in accordance with Luxembourg rules and permanently held in Luxembourg.

1. The economic relationship between losses and income received locally

27. As far as the first condition is concerned, none of the parties is in any doubt that the requirement for losses to be economically related to income received locally is compatible with Community law. As the Commission indicates in its written observations, such a rule represents the operation of the territoriality principle in the field of taxation. From the France-Luxembourg Double-Taxation Convention it also follows that only losses which relate to income earned in Luxembourg can be offset in Luxembourg. [6]

28. I agree with the Commission. Far more problematical, however, is the question whether the second and third conditions are compatible with Article 52 of the Treaty.

6 — Article 4(2) of the Double-Taxation Convention.

2. The requirement for proper accounts to be kept and permanently held in Luxembourg

29. At the hearing the Commission and Luxembourg pointed out that the second and third conditions relate to the question how a taxpayer can or must prove that the losses claimed actually relate to income received locally. According to the Commission and the applicants, these conditions discriminate against permanent establishments of foreign companies or firms in Luxembourg.

(a) Discrimination against non-resident companies and firms

30. The applicants claim that the requirement to keep separate accounts for a branch causes additional administrative costs which a branch is not willing or not able to bear. In this regard, the applicants again point out that in Luxembourg law a branch is not a separate legal entity even though it is treated separately for tax purposes. It is precisely because branches give rise to lower costs that they are established. A requirement for separate accounts would mean increasing costs for a form of establishment precisely intended to operate as cost-effectively as possible.

31. It makes no difference that the carrying forward of losses constitutes a tax advantage, for which additional burdens, here additional costs, must be accepted. The applicants consider that they are discriminated against in comparison with companies resident in Luxembourg as well as with foreign companies which set up a subsidiary in Luxembourg and then establish different branches in the country. Those Luxembourg companies can carry losses forward, whereas the applicants cannot do so because the company's seat is in France.

32. The Grand Duchy of Luxembourg maintains, however, that there is no discrimination in the rule on the carrying forward of losses for non-resident companies. It is merely a question of applying to the permanent establishments of foreign companies obligations which affect Luxembourg companies in the same way.

33. The United Kingdom, too, considers that there is no discrimination in this case. It bases this view primarily on the first condition, which, as indicated above, cannot be considered discriminatory. All the parties agree on this point. As far as the second and third conditions are concerned, the United Kingdom states that these concern the way

in which the economic relationship with income received locally can be proved and that in this regard Luxembourg companies are not treated differently from branches of foreign companies.

34. Prima facie, there appears to be no difference in treatment of foreign *branches*. However, the Law itself imposes additional conditions on non-resident *companies*, namely the requirements for there to be a relationship between losses and income received locally and for separate accounts to be kept and held in Luxembourg. There are no such obligations imposed on Luxembourg companies. It is self-evident that they must keep accounts in accordance with Luxembourg rules and hold these in Luxembourg. Keeping accounts at the undertaking's seat in accordance with the rules which apply there is not an additional requirement for a Luxembourg company. For a branch of a foreign company, however, it means that it must keep a second set of accounts, separate from those kept at the undertaking's seat, even though the branch has no legal personality of its own. Although the demands placed on a branch are no greater than those placed on a Luxembourg company, it must be borne in mind that we are dealing, in this case, with the taxation of a non-resident company whose seat is in France. The requirement to produce a second set of accounts for the branch will result in additional costs for that company. That means that a foreign company will be able to carry forward losses for its branch in Luxembourg only if it accepts additional costs and draws up separate accounts in Luxembourg. As the applicants point out, however, a Luxembourg company is under no obligation to produce separate accounts for its Luxembourg branch.

35. For this reason, I cannot accept the argument of the United Kingdom and the Grand Duchy of Luxembourg that there is no difference in treatment between the branches of foreign firms and Luxembourg companies. The requirement for separate accounts results in additional administrative costs for the branch and consequently for the non-resident taxpayer, namely the company having its seat in France.

36. It is no answer to say, as Luxembourg does, that the requirements relating to accounts would not be different if Futura had set up a subsidiary in Luxembourg. Article 52 of the Treaty provides for different forms of establishment in another Member State. Branches are expressly mentioned here and thus included in the protection afforded by Article 52. They are not in fact subsidiaries which have their own seat in Luxembourg but are a more cost-effective form of establishment since they entail fewer costs. Freedom to set up a branch in another Member State would, however, be restricted if the branch were to incur additional costs. As the Commission and the applicants have rightly explained, different tax rules would restrict freedom to choose between the various

possible forms of establishment, which is not allowed under the case-law of the Court. [7]

37. The next point to examine is whether companies whose seat is abroad are treated differently on the grounds of nationality. As the Court ruled in Case 270/83, a company's seat serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. [8] As regards the Luxembourg legislation at issue here, there is no question of a difference in treatment on the grounds of nationality. The criterion used is the residence of a person or a company. For the company this means that the decisive factor is the place where it has its seat. This also means, however, that the company is treated differently on the grounds of the place where it has its seat, in other words, on the grounds of the company's nationality. The Commission therefore considers that in this case there is indirect discrimination on the grounds of nationality.

38. As the Court also stated in Case 270/83, the possibility cannot altogether be excluded that a distinction based on the location of a company's seat or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law. [9] In the *Schumacker* case and most recently in the *Asscher* case, in which a distinction was made according to the place of residence of natural persons, the Court examined whether the situations of residents and non-residents are comparable and thus whether discrimination arises through a difference in treatment or, whether their situations are not comparable, so that a difference in treatment would be justified. [10] In Case 270/83 the Court held in this regard: 'Since the rules at issue place companies whose [seat] is in France and branches and agencies situated in France of companies whose [seat] is abroad on the same footing for the purposes of taxing their profits, those rules cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits. By treating the two forms of establishment in the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.' [11]

39. No difference of treatment of Luxembourg companies and branches in the area of the taxation of profits is apparent in this case either. If the Luxembourg legislature treats them in the same way in respect of the taxation of profits, it cannot follow that they are

7 — Judgment in Case 270/83 *Commission* v *France* [1986] ECR 273, at paragraph 22.

8 — Case 270/83 (cited in footnote 7, at paragraph 18).

9 — Paragraph 19.

10 — Case C-279/93 (cited in footnote 5, at paragraphs 31 to 38) and Case C-107/94 (cited in footnote 5, at paragraphs 41 to 49).

11 — Case 270/83 (cited in footnote 7, at paragraph 20).

in a different situation as regards an advantage such as the carrying forward of losses. Nor does this case entail taking into account personal circumstances, as in the *Asscher* case, which can ultimately only be taken into account by another State, the State of residence, [12] but only concerns income earned in *one* State (Luxembourg) and the losses incurred there.

40. If permanent establishments of foreign companies in Luxembourg are required to keep accounts in Luxembourg (which means that they must be drawn up in accordance with Luxembourg rules and specifically for the branch concerned) and to hold the accounts permanently there, this will amount to discrimination in contravention of the right to freedom of establishment.

(b) Justification

41. This discrimination could, however, be justified. In determining whether it is justified, the second and third conditions must be considered separately.

12 — Case C-107/94 (cited in footnote 5, at paragraphs 44, 48 et seq.).

(i) The requirement for accounts to be kept in the country

42. The Grand Duchy of Luxembourg and the United Kingdom maintain that only proper accounts enable losses related to income received locally to be identified precisely. In this respect, the United Kingdom refers to the rules laid down in the OECD Model Convention and the commentary thereon. According to those texts, the Contracting States are not obliged to require their taxpayers to keep separate accounts, but the commentary suggests that this is the most accurate and reliable method of establishing losses. Since the signatory Member States have a margin of discretion in deciding the most appropriate way for establishing losses, a State cannot be prevented from choosing the best and most accurate method.

43. According to Luxembourg and the United Kingdom, effective fiscal control is only possible if losses are ascertained on the basis of proper accounts.

44. The Commission does not deny that a Member State cannot be prevented from allowing losses to be carried forward only if

there are precise figures based on accounts. It considers, however, that the requirement to produce separate accounts in Luxembourg is disproportionate. As regards the requirement for proper accounts, in other words accounts drawn up in accordance with Luxembourg rules, the Commission rightly points out that this case is not about how accounts are to be drawn up, but simply about how to obtain precise figures for losses incurred in Luxembourg. It cannot follow that accounts produced in accordance with the rules of another Member State are less precise or even inaccurate. This is even less likely to be the case since the rules on annual accounts of certain types of companies have been sufficiently harmonized so that annual accounts can very well be compared, [13] as the Commission explained without being challenged on this point. Why should figures from accounts kept at the company's seat in another Member State (in this case, Paris) not provide sufficient information for tax purposes in Luxembourg?

45. In addition, the Grand Duchy of Luxembourg states that only proper accounts support the presumption that the figures they contain are precise and accurate. However, that assertion does not explain whether it is justified to demand from foreign companies separate accounts relating to their branches in Luxembourg.

13 — Fourth Council Directive 78/660/EEC of 25 July 1978 based on Article 54(3)(g) of the Treaty on annual accounts of certain types of companies (OJ 1978 L 222, p. 11).

46. I tend to agree with the Commission's submission that it is quite sufficient if there are accounts at the company's seat, from which the loss figures for Luxembourg can be taken.

47. The OECD Model Convention does not expressly require separate accounts either. The commentary to the Model Convention merely points out that precise figures relating to profits and losses can be obtained only on the basis of proper accounts and that this method is therefore to be used in normal cases. But this does not mean, however, that the accounts must also be kept at the branch or indicate whether it is sufficient if the figures can be deduced from accounts kept at the undertaking's seat for both the undertaking itself and its branch. Incidentally, it should be pointed out that the OECD Model Convention cannot provide a conclusive reply in Community law to the question raised in this case.

48. The United Kingdom maintains, with further reference to the commentary to the OECD Model Convention, that it is quite normal for a well-run business to produce separate accounts for its branches, in order to have information about their profitability. It has to be said that this observation likewise does not mean that a requirement for separate accounts to be kept at the branch is

justified. Figures giving information about the profitability of a branch can also be deduced from the accounts kept at the company's seat.

49. At the hearing the Commission described quite graphically what accounts are and what they do. The Grand Duchy of Luxembourg itself listed all the things that go into accounts: they include customers' statements of account, which give information about income; also invoices of the branch, which show expenses, such as rent. The Commission then explained that in each undertaking income and expenses are recorded daily and appropriate receipts are kept. So a branch with no accounts of its own in Luxembourg will send these figures to the undertaking's headquarters where they will be entered in the general accounts. It is therefore hard to see why the figures relevant to the taxation of the branch in Luxembourg should not be deducible from the accounts kept at the undertaking's seat.

50. In reply to questions put to it at the hearing, the Luxembourg Government confirmed that separate accounts are not drawn up for Luxembourg branches of a Luxembourg company but that a register is kept, as is also the case, according to the Commission, with the branches of foreign companies. That means that even in this case there is only one set of joint accounts kept at the company's seat (in this case, in Luxembourg). It is therefore unnecessary to produce separate accounts for the branch, in order to obtain precise figures for the branch's losses.

51. For this reason it is not necessary for separate accounts to be kept in order to establish precisely the losses of a branch. A joint set of accounts is sufficient. Nor do these have to be drawn up in accordance with Luxembourg rules. Any such obligation imposed by the tax authorities is disproportionate.

52. The applicants also contend that there is another less onerous way of establishing the losses of the branch, namely through apportionment. This possibility cannot be denied to foreign branches, particularly since the tax base itself can be calculated on this basis. The tax return form offers a choice between both possibilities: apportionment or the production of accounts. There is no indication that the two possibilities are not considered to be equivalent. Above all, however, the tax form for non-residents does not draw attention to the fact that if apportionment is chosen, losses cannot be carried forward. They also point out that in Luxembourg apportionment is also allowed for the purposes of local business tax.

53. Both the Grand Duchy of Luxembourg and the United Kingdom contend that the figures obtained from apportionment are not sufficiently precise to establish clearly the losses related to income received in Luxembourg. Luxembourg considers that an advantage such as the carrying forward of losses cannot be granted on the basis of the imprecise figures which arise from apportionment. This method is used in relation to the taxation of undertakings or of their branches because that is the only way of charging tax where no tax declaration has been made.

54. I must agree with them. An apportionment, as carried out in this case for the purposes of taxing the branch, is an apportionment of income on the basis of the turnover figures for the individual establishments. Therefore, the results can only be estimates or approximate values. It does not automatically follow that losses cannot be established on the basis of an apportionment. This would depend on the taxing State accepting the resultant inaccuracies, which could work to its disadvantage, but also to its benefit. On the other hand, a Member State should be allowed to allow losses to be carried forward only if the undertaking or branch can provide precise figures relating to the losses, provided that this condition applies in the same way to Luxembourg undertakings and to branches of foreign companies. In other words, as long as there is no discrimination against non-resident companies and no restriction on the freedom of establishment, it is for the Member State to choose the way in which losses are to be determined.

55. As I have shown above, the requirement for precise figures for establishing losses is not discriminatory on its own because those figures can be determined from the joint accounts kept at the company's seat. This is therefore an appropriate, less onerous way of establishing losses. It is only the requirement for separate and proper accounts to be kept at the branch (in this case, in Luxembourg) which results in discrimination against non-residents which is disproportionate and therefore unjustified in view of the fact that a less onerous method is available.

56. It follows from the foregoing that Luxembourg is entitled to stipulate that losses may only be carried forward if the undertaking provides precise figures for those losses. There is no obligation to allow losses to be carried forward on the basis of an apportionment, so that this possibility need not be examined further. This view is also taken by the Commission, as became clear at the hearing.

57. The fact that the Grand Duchy of Luxembourg allows apportionment in relation to local business tax does not affect its entitlement to refuse to allow losses to be carried forward for income tax purposes on the basis of an apportionment because, as the Luxembourg Government has explained, these two types of tax are not comparable, even if apportionment in relation to business tax can affect the amount of tax payable. The way in which apportionment is carried out in relation to business tax need not therefore be considered any further.

58. As regards the taxation of the branch on an apportionment basis, as the Grand Duchy of Luxembourg rightly argues, taxation cannot be completely waived if the taxpayer makes no tax declaration. In this case, recourse *must* be had to the apportionment procedure.

59. It is for the court of reference to examine, should the need arise, whether an apportionment must ultimately be allowed in this case, in view of the applicants' claim that the tax declaration form is misleadingly drafted. The answer to this question does not form part of the reply to the question referred to the Court on the relationship between Article 157 of the Luxembourg Law on Taxation of Revenue to Article 52 of the Treaty.

60. It must accordingly be held that Luxembourg is not obliged to allow losses to be carried forward on the basis of an apportionment: it is entitled to demand precise figures in return for this advantage. The requirement for separate and proper accounts to be kept at the branch itself (in this case, in Luxembourg) is, however, not justified since it is disproportionate.

(ii) The requirement for separate accounts to be kept in the country

61. This requirement needs to be examined only in so far as it might be necessary for details of the losses to be kept permanently in Luxembourg or in the event that the Court does not follow my arguments concerning the first requirement, which led to my conclusion that there is no need for separate accounts to be kept in Luxembourg.

62. The Luxembourg Government maintains that this requirement is justified by the need for effective fiscal supervision. Effective fiscal control is possible only if all the documents and accounts are kept permanently in Luxembourg and the Luxembourg tax authorities can gain prompt, unannounced access to them.

63. At the hearing, the Commission explained why such a requirement, intended to achieve effective fiscal supervision, cannot succeed in its aim. At a branch, which has no legal personality of its own, there are documents which concern not only the branch, but also the company in France. If all documents concerning the branch, for example invoices, were also required to be kept in Luxembourg, this might mean that invoices would have to be divided or copied. But this would then mean that no original documents would be available in Luxembourg or in France, thus diminishing their evidential value. On being questioned, the Luxembourg Government explained that this is not required of Luxembourg branches of Luxembourg companies. Here again, it is possible for all documents to be kept at the company's seat and for their existence to be simply recorded in a register kept at the branch.

64. The Commission also points out that it is primarily for the branch to make available the documents necessary for the purposes of determining the amount chargeable to tax or the losses to be carried forward. If it does not do so, it cannot be allowed to carry losses forward.

65. As regards the problem of effective fiscal controls, the Commission also refers to the directive concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, [14] under which the Luxembourg tax authorities can ask the French tax authorities for assistance if they need information to enable them to effect a correct assessment of taxes on income. [15] The Court has repeatedly ruled that certain legal measures can no longer be justified ever since the possibility for tax authorities to exchange information was introduced by Council Directive 77/799/EEC.

66. That was the case, for example, in *Halliburton Services*. In that case, the Netherlands Government contended that the tax authorities were unable to check whether the legal forms of entities constituted in other Member States were equivalent to those of public and private limited companies within the meaning of the relevant national legislation. The Court ruled that information pertaining to the characteristics of the forms in which companies may be constituted in other Member States could be obtained under the arrangements provided for in Directive 77/799. [16]

67. In *Schumacker* the Court ruled that there was no administrative obstacle to account being taken of a non-resident's personal and family circumstances in his State of

14 — Council Directive 77/799/EEC of 19 December 1977 (OJ 1977 L 336, p. 15).

15 — Article 1(1) of the Directive.

16 — Judgment in Case C-1/93 *Halliburton Services* [1994] ECR I-1137, at paragraph 21 et seq.).

employment because under Directive 77/799/EEC there were ways of obtaining the necessary information comparable to those existing between tax authorities at national level. [17]

68. Luxembourg maintains that Council Directive 77/799/EEC cannot help in this case. Assuming that Futura draws up separate accounts for the Luxembourg branch which are kept not in Luxembourg but in Paris, the Luxembourg Government considers it doubtful whether these accounts can be checked by the French tax authorities, since they concern tax obligations which have nothing to do with French legislation. Under the Directive, the Member State whose assistance has been requested can use only those prerogatives which it has under its own legislation. For this reason the Luxembourg Government doubts whether a French tax authority can check accounts which do not concern French tax law.

69. Article 1(1) of the Directive provides that the competent authorities of the Member States are to exchange any information that may enable them to effect a correct assessment of taxes on income and on capital. Article 8 regulates the limits to exchange of information, but these limits are not to be interpreted as narrowly as the Luxembourg Government does. Article 8(1) of the Directive provides that there is no obligation on a Member State to have enquiries carried out or to provide information if the Member State would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using the information for its own purposes. This rule is a protective provision intended to prevent the protection to which a taxpayer is entitled in his own country from being undermined by a foreign tax authority asking for information, the disclosure of which would infringe the taxpayer's rights in the country in question. However, this does not mean that the French tax authorities can only provide information if it relates to French tax obligations. This would undermine the effect of the Directive.

70. Even where such collaboration could not be required because it would infringe the protective provisions of the State from which information is sought, this does not justify not allowing losses to be carried forward. As the Court ruled in *Bachmann* and *Commission* v *Belgium*, there is nothing to prevent the tax authorities from requiring the person concerned to provide such proof as they consider necessary and, where appropriate,

17 — Case C-279/93 (cited in footnote 5, at paragraph 43 et seq.).

refusing to allow losses to be carried forward where such proof is not forthcoming. [18]

71. Where the provision of any information requested would contravene French protective legislation, it must be borne in mind first of all that non-disclosure of protected information would protect the applicants. It will then be for the foreign company to consider whether to waive its protection in France and have the information released which would enable it to carry losses forward. If it does not do so, it will not be allowed to carry losses forward.

72. For this reason, too, the requirement to keep accounts in Luxembourg also appears disproportionate and the resultant discrimination unjustified.

73. In conclusion, it must therefore be held that Article 52 of the Treaty is to be interpreted as meaning that the provisions of the Luxembourg Law on Taxation of Revenue are incompatible with Community law to the extent that they require accounts to be kept and held permanently in Luxembourg as a condition for the carrying forward of losses.

III — *Compatibility of the Double-Taxation Convention with Article 52 of the EC Treaty*

74. Like other provisions of domestic law, double-taxation conventions as elements of domestic law must not contravene the requirements of EC law.

75. The Luxembourg court refers here to Article 4 and Article 24(2)(2) of the France-Luxembourg Double-Taxation Convention. Article 4 provides that each Contracting State can only tax income earned in its own territory. This is in keeping with the principle of territoriality, the application of which, as already explained, does not contravene Community law, even in relation to the carrying forward of losses.

76. As far as Article 24 is concerned, it seems to me that it is rather Article 21(2) of the Double-Taxation Convention which is the relevant provision. This provides in fact

18 — Judgments in Case C-204/90 *Bachmann* [1992] ECR I-249, at paragraphs 18, 19 and 20 and in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, at paragraphs 11, 12 and 13.

that where a taxpayer resident in France has a permanent establishment in Luxembourg, the provisions dealing with losses are to be applicable to the taxation of the establishment on the same conditions as they are applicable to taxpayers resident in Luxembourg. This rule simply refers to the tax law of the Member States which requires resident taxpayers to keep proper accounts. Extension of this condition to branches of a non-resident company is, however, incompatible with Community law, as we have seen.

C — Conclusion

77. In view of the foregoing considerations, I therefore propose that the Court should give the following reply to the question referred for a preliminary ruling:

Article 52 of the EC Treaty is to be interpreted as meaning that a provision such as Article 157 of the Luxembourg Law on Taxation of Revenue and the provisions of the Double-Taxation Convention referring to rules of domestic law are incompatible with Community law inasmuch as they make application to non-resident taxpayers having a permanent establishment in Luxembourg of the provisions on the carrying forward of losses subject to the condition that accounts must be duly kept and held in Luxembourg.