OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 17 September 1991 *

Mr President,
Members of the Court,

1. Cases C-204/90 and C-300/90 both concern the compatibility with Community law of Belgian tax law provisions pursuant to which the deductibility for income tax purposes of certain insurance contributions is conditional on those contributions being paid in Belgium, either to a Belgian undertaking or to the Belgian establishment of a foreign undertaking. For that reason, I propose to deal with them both in a single opinion, notwithstanding that they do not concern precisely the same provisions of national legislation, which have been amended over the course of time, and despite the fact that the provisions of Community law to which reference is made by the national court and by the Commission respectively are only partially the same.

2. As is apparent from the judgment of the Belgian Cour de Cassation making the preliminary reference in Case C-204/90 *Bachmann* v *Belgium*, Article 54 of the Belgian Code des Impôts sur les Revenus (Income Tax Code, hereinafter referred to as the 'CIR') provided, in the version thereof applying to the main proceedings, as follows:

'The following shall be deducted from the taxpayer's total occupational income:

1. Voluntary sickness and invalidity insurance contributions, or supplementary insurance contributions covering the same risks, paid by the taxpayer to a mutual insurance company recognized by Belgium, whether on his own behalf or on behalf of dependent members of his household;

2. Supplementary pension and life assurance contributions definitively paid by the taxpayer in Belgium, otherwise than pursuant to a legal obligation, with a view to the creation of a pension or capital sum payable during the insured's lifetime or on his death:

(a) through the intermediary of his employer, by way of deduction from his remuneration, in so far as such contributions fulfil the conditions laid down in Article 45(3)(b) in respect of employers' contributions;

(b) in performance of a life assurance contract concluded by him personally;

...'.

Moreover, Article 45 of the Royal Decree implementing the CIR provided that

* Original language: French.

'single or periodical premiums paid by the taxpayer pursuant to life assurance contracts personally concluded by him shall be ... deducted from the insured's total occupational income only where:

1. The contracts are concluded with Belgian undertakings, or with the Belgian establishments of foreign undertakings ... ;

... '.

It further appears from the judgment of the Cour de Cassation making the reference, repeating a finding made by the Brussels Cour d'Appel (Court of Appeal), against whose judgment Mr Bachmann has appealed, that 'to date no foreign mutual insurance company has been recognized' by Belgium.

The application of the above provisions has resulted in a refusal to allow Mr Bachmann to deduct, in relation to the period from 1973 to 1976, the contributions paid pursuant to voluntary sickness and invalidity insurance contracts and a life assurance contract which were entered into by him in 1971 with German insurance companies prior to his taking up residence in Belgium on 16 May 1972. Mr Bachmann's persistent argument before the Belgian Cour de Cassation that such refusal is incompatible with Community law has resulted in that court referring the following question to the Court of Justice for a preliminary ruling:

'Are the provisions of Belgian revenue law relating to income tax pursuant to which the deductibility of *sickness* and *invalidity* insurance contributions or pension and life assurance contributions is made conditional upon the contributions being paid "in Belgium" compatible with Articles *48*, *59* (in particular the first paragraph thereof), *67* and *106* of the Treaty of Rome?'

3. The Commission's action for infringement of the Treaty (Case *C-300/90*) is directed solely against Article 54(2)(a) and (b) of the CIR and Articles 45 and 33e of the Royal Decree implementing it. Paragraph 1 of the latter provision stipulates that

'the supplementary pension and life assurance contributions referred to in Articles 45(3)(b) and 54(2)(a) of the Code des Impôts sur les Revenus shall be deducted from taxable income as provided for in the said articles, subject to the following conditions:

1. The contributions must be paid to a life assurance company or pension fund having its registered office, principal establishment or managerial or administrative headquarters in Belgium or to an establishment maintained in Belgium by such a company or fund having its registered office or principal establishment abroad ... '.

With effect from the beginning of the 1990 tax year, Article 54(2)(a) and (b) of the CIR was replaced by Articles 12(2)(1) and 13(1)(1) of the Law of 7 December 1988 (*Moniteur belge* of 16 December 1988), in which the following provisions appear in Part 7, entitled 'Miscellaneous deductions':

'12(2). The following shall be regarded as occupational expenses:

1. Supplementary pension and life assurance contributions definitively paid by the taxpayer in Belgium, otherwise than pursuant to any legal obligation, with a view to the creation of a pension or capital sum payable during the insured's lifetime or on his death, by way of deduction at source from his remuneration through the intermediary of his employer . . . ;

. . .

13(1). The following shall be deducted from the taxpayer's total occupational income:

1. Supplementary pension and life assurance contributions definitively paid by the taxpayer in Belgium, otherwise than pursuant to any legal obligation, with a view to the creation of a pension or capital sum payable during the insured's lifetime or on his death, in performance of a life assurance contract concluded by him personally;

. . .'

It is apparent, both from Article 54(2)(a) and (b) of the CIR and from Articles 12(2)(1) and 13(1)(1) of the Law of 7 December 1988, that in order to be deductible from the taxpayer's taxable income, the supplementary pension and life assurance contributions must be 'definitively paid in Belgium' and that contributions paid to insurance companies established in another Member State cannot therefore be deducted. That is the position even where the contributions are paid into a bank account opened by the foreign company in Belgium and then transferred to the Member State in which the company's registered office is situated.

The Commission claims that the Court should declare that such legislation is contrary to Articles 48 and 59 of the EEC Treaty and to Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475). It should be borne in mind that that latter provision, whereby a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same tax advantages as national workers, merely applies, in the field of taxation, the principle of non-discrimination based on nationality between workers of the Member States, as laid down in Article 48(2) of the Treaty. This was confirmed by the Court in paragraph 12 of its judgment in Case C-175/88 *Biehl* [1990] ECR I-1779, according to which:

'The principle of equal treatment with regard to remuneration would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax.'

Consequently, if the contested legislation is incompatible with Article 48 of the Treaty, it must also be incompatible with Article 7(2) of Regulation 1612/68, and *vice versa*.

Infringement of Article 48 of the Treaty

4. It should be noted, first of all, that the legislation in question applies to all persons

liable to income tax in Belgium. There is thus no discrimination based directly on nationality.

However, in paragraph 13 of the judgment in *Biehl*, cited above, the Court also referred to its consistent case-law, laid down for the first time in its judgment in Case 152/73 *Sotgiu* v *Deutsche Bundespost* [1974] ECR 153, whereby

'the rules regarding equality of treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result'.

Mr Bachmann and the Commission consider that the criterion at issue in this instance, namely that of the payment of insurance contributions in Belgium, applying as it does to all workers regardless of their nationality, leads to indirect discrimination based on nationality. According to them, as with the criterion at issue in the *Biehl* case,

'there is a risk that it will work in particular against taxpayers who are nationals of other Member States' (paragraph 14 of the *Biehl* judgment).

The Belgian Government denies this, since it maintains that Belgian workers are just as much affected as workers from other Member States. It asserts, first, that 'Belgian workers previously employed abroad who opt, upon their return to Belgium, to retain the benefit of contracts entered into abroad whilst they were out of the country are caught by that limitation, in just the same way as workers originating from other EEC countries who work in Belgium and choose to retain the benefit of contracts previously entered into in their country of origin' (see paragraph II.1.2 of the Report for the Hearing in Case C-204/90). Secondly, the Belgian Government points out in its reply to the letter of formal notice — and the Commission appears to concede the point (see paragraph 8 of its application in Case C-300/90) — that many cross-border workers of Belgian nationality pay supplementary insurance contributions which are retained by their foreign employers pursuant to a group insurance contract or in accordance with the rules of a provident fund for subsequent payment into a pension fund or to an insurance company established abroad and which, for that reason, are not tax deductible in Belgium either.

My own view is that, even if the total number, in absolute terms, of 'Belgian workers previously employed abroad' and of cross-border workers of Belgian nationality who have concluded supplementary insurance contracts outside Belgium were approximately the same as the number of foreigners liable to tax in Belgium who have concluded similar contracts abroad, nevertheless in relative terms it would be primarily nationals of other Member States who would be disadvantaged by the condition complained of. In relation to the proportion of the total working population of Belgium who have concluded supplementary insurance contracts abroad, Belgian nationals certainly represent a far smaller percentage than the percentage which they constitute of the total working

population as a whole. Conversely, nationals of other Member States who have concluded such insurance contracts must as a general rule represent a far higher percentage than the percentage which they constitute of the working population as a whole.

5. As regards the place of employment of workers of Belgian nationality, however, I hesitate to adopt the stance of the Commission in relying on the *Stanton* [1] judgment in support of its assertion that 'even as regards Belgian workers, the measures complained of are contrary to the fundamental principle of the free movement of persons, in that they constitute a restriction on the freedom of any national of a Member State to carry on an occupation in any Member State' (see paragraph 7 of the Commission's observations in Case C-204/90). It is true that in paragraph 13 of that judgment the Court declared that

'the provisions of the Treaty relating to the free movement of persons are thus intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude national legislation which might place Community citizens at a disadvantage when they wish to extend their activities beyond the territory of a single Member State'.

However, the issue in that judgment and in the parallel case of *Wolf and Others* [2] was a Belgian rule the effect of which was to handicap the exercise of occupational activities by Community nationals, including Belgians, outside Belgian territory (see paragraph 14 of the judgment), whereas, were the present case to concern a rule having the same effect on Belgian nationals, the rule in question could only be one imposed by other Member States in which they wished to take up residence and which, like the Belgian rule complained of, refused to allow them to deduct insurance contributions on the ground that such contributions were not paid in the Member State in question. The only restrictive effect which the Belgian legislation complained of in the present case may have, particularly on 'Belgian workers previously employed abroad' who have concluded insurance contracts outside Belgium, will be to deter them from returning to Belgium. Disregarding the question whether such a 'restriction' upon the free movement of persons falls within the ambit of Community law, it was certainly not referred to in the case of *Stanton*, nor in that of *Wolf and Others*, where the facts in the main proceedings concerned *inter alia* a Belgian citizen (Mr Dorchain) who was working as an employee in Germany but who was at the same time a managing partner of a company the registered office of which was in Belgium.

6. I now turn to the other arguments upon which the Belgian Government relies in contesting the existence of any indirect discrimination (see paragraph II.1.2.(a) to (d) of the Report for the Hearing in Case C-204/90). The Belgian Government asserts, first of all, that the Belgian tax system 'will not deter a national of a Member State who likewise does not enjoy the benefit of the tax deductibility in question in his country of origin from accepting employment in Belgium'. That is certainly true, but in order to assess whether the Belgian legislation is or is not indirectly discriminatory, it is not appropriate to take into account the fact that workers have or have not been able to deduct their contri-

1 — Judgment in Case 143/87 *Stanton* v *Inasti* [1988] ECR 3877.

2 — Judgment in Joined Cases 154/87 and 155/87 *RSVZ* v *Wolf and Others* [1988] ECR 3897.

butions under the laws of another country. Furthermore, it is possible in that regard to adopt the same reasoning as that applied by the Court in paragraph 16 of the *Biehl* judgment, cited above, and to find that

'a national provision such as the one at issue is liable to infringe the principle of equal treatment in various situations'.

Following the logic of the Belgian Government's argument, that would certainly be the case if a foreign worker were entitled to deduct his insurance contributions in the country in which he was formerly working.

7. That latter observation applies equally to the other argument relied upon in that context by the Belgian Government, to the effect that 'a Community national who enjoys in his Member State of origin the benefit of tax deductibility in respect of the contributions concerned may continue to deduct those contributions from his occupational income in his Member State of origin after accepting employment in Belgium': that could only be the case as regards those foreign workers who continue, after accepting employment in Belgium, to receive sufficient income in their country of origin to give rise to a tax liability.

8. As regards the argument that 'the (Belgian) legislation does not provide ... that the contributions have to be paid to a Belgian undertaking', it would be just about feasible to show that the measure at issue is not such as to favour insurance undertakings having their registered office in Belgium to the detriment of agencies and branches of undertakings having their registered office in other Member States (direct discrimination between companies). However, that argument does not disprove the assertion of the Commission and Mr Bachmann that the inability to deduct insurance premiums paid outside Belgium from taxable income operates in the main to the disadvantage of nationals of other Member States who work in Belgium.

9. Lastly, the Belgian Government asserts that even though a Community national may not be able to deduct insurance contributions which are not paid in Belgium, nevertheless, as regards voluntary sickness and invalidity insurance contracts, he can always terminate contracts concluded in his country of origin and conclude new ones in Belgium. Furthermore, as regards life assurance, the non-deduction of contributions is compensated for by the fact that the capital or income created is not liable to tax, so that the contested rule has no direct or indirect financial effect which is generally more disadvantageous to nationals of other Member States than to Belgian nationals.

With regard to the first point, it may be observed, first of all, that the very fact of having to terminate existing contracts and conclude new contracts in order to be able to benefit from the deductibility of insurance contributions in Belgium constitutes in itself sufficient evidence that a worker who is a national of another Member State may be restricted in the exercise of his right to freedom of movement. Furthermore, Mr Bachmann rightly points out that the conclusion of a new contract with a company established in Belgium is not free from inconvenience and uncertainty. The same observation may apply to the termination of an existing contract.

As regards the argument that the non-deduction of contributions is compensated for by the exemption from tax of the capital created, the Commission rightly points out that only taxpayers who have retained their fiscal domicile in Belgium will be able to benefit from this. Once again, the likelihood is that it will be primarily Belgian nationals who fall into that category, rather than nationals of other Member States. Furthermore, whereas a taxpayer paying his contributions in Belgium may choose between the deduction of the contributions and the exemption from tax of the capital created, the same choice is not available to a taxpayer who pays his contributions to an insurance company established outside Belgium, because he does not enjoy the benefit of deductibility.

10. The Belgian Government (like the German Government, which has submitted observations in Case C-204/90) also seeks to argue its case on the basis of the absence of fiscal harmonization in the matter. It is certainly correct in stating that 'a Community national, in exercising his right to freedom of movement, will take into account the tax system in the Member State in which he wishes to take up employment' and that 'the tax system to which he will be subject may easily dissuade a worker from accepting an offer of a job in another Member State' (see paragraph II. B.1 of Belgium's defence in Case C-300/90). In reality, however, that argument relates to the disparity which may exist between the tax laws of two or more Member States, and it ignores the point that the present case concerns only the laws of a single Member State. The fact that a person was unable to deduct his contributions whilst working in his country of origin cannot justify a similar refusal of that advantage by Belgium if, at the same time, it grants it to its own nationals. For the same reasons, the German Government's statement that 'a person leaving State A to go to State B has to accept the loss of certain tax advantages granted by State A but not by State B' is irrelevant: the point at issue in this case is not the loss of certain tax advantages granted by State A but discrimination in State B.

11. Lastly, I would add, for the sake of completeness, that the reference by the Belgian Government to the field of social security, whereby it maintains that the Court has held restrictions on the free movement of persons arising from disparities between national laws in that field to be compatible with the Treaty, is likewise irrelevant in the present context. The restrictions on the free movement of persons which are at issue in this case do not arise from disparities between the laws of the Member States, and are unconnected with the field of social security. Furthermore, even if any social security issue were involved, the absence of Community harmonization in that field could not absolve the Member States from the obligation to comply with the rule against discrimination on the ground of nationality. This emerges, for example, from paragraph 10 of the judgment of the Court in the case of *Stanton*, cited above, in which it held, in relation to Article 52 of the Treaty, that with regard to a directly applicable rule of Community law

'Member States were therefore under the obligation to observe that rule even though, in the absence of Community legislation . . . , they retained legislative jurisdiction in this field'.

12. It follows from all the foregoing considerations that the effect of the provision at issue is to place nationals of other Member States at a particular disadvantage. It must therefore be regarded as incompatible with Article 48(2) of the Treaty, unless it is possible to show that such 'discrimination' is objectively justified. I will deal with that question after first examining the compatibility of the measure with Article 59 of the Treaty.

Infringement of Article 59

13. There can be little doubt that the Belgian legislation complained of in this case also involves a restriction on freedom to provide services within the Community, within the meaning of Articles 59 and 60 of the Treaty. As the Court has consistently held, most recently in its judgment in Case C-353/89 *Commission* v *Netherlands*,

'those articles require the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a Member State other than that in which the service is to be provided' (see paragraph 25 of the judgment in the 'insurance' case, Case 205/84 *Commission* v *Germany* [1986] ECR 3755).

As the German Government acknowledges, 'to restrict the scope of application of a tax advantage to contributions paid to certain insurance undertakings is to impede the freedom to provide services of insurance undertakings not included therein' (see paragraph 2 of its observations in Case C-204/90), which in this case means insurance undertakings established in a Member State other than Belgium. The additional point may be made, as the Commission has stated, that it is apparent from the case-law of the Court, and in particular paragraph 9 of its judgment in Case C-49/89 *Corsica Ferries France* v *Direction générale des douanes* [1989] ECR 4441, that a restriction on freedom to provide services may also result 'from national tax measures which affect the trader's exercise of that right'. Lastly, from the point of view of those to whom the services are provided, as opposed to those providing them, it is appropriate to note, as does the Commission, that the contested measure 'may deter not only nationals of other Member States but also nationals of the State in question from taking out supplementary insurance with an insurer established in another Member State' (see in particular paragraph II.2.3. of the Report for the Hearing in Case C-204/90).

14. The Belgian Government nevertheless denies that there exists any restriction whatsoever on freedom to provide services, principally on the ground that such freedom has not yet been achieved in the field of insurance.

15. As regards life assurance in particular, the Belgian Government asserts (see paragraphs II. C.1 and 2 of its defence in Case C-300/90) that the First Council Directive of 5 March 1979[3] does not concern

3 — First Council Directive (79/267/EEC) of 5 March 1979 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of direct life assurance (Official Journal 1979 L 63, p. 1).

freedom to provide services and that it was not until after the complete liberalization of movements of capital effected by Council Directive 88/361/EEC of 24 June 1988[4] that the Council adopted a second directive to facilitate the effective exercise of freedom to provide services in the field of life assurance.[5] It refers in that context to Article 61(2) of the Treaty and points out that even the Second Directive, which does not come into force until the end of 1992, will not achieve more than a very modest liberalization of life assurance services.

As regards the reference to Article 61(2) of the Treaty, which provides that

'the liberalization of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalization of movement of capital',

the Court has already held, in paragraphs 19 and 20 of its aforementioned judgment in Case 205/84, that

'the First Council Directive for the implementation of Article 67 of the Treaty of 11 May 1960 (Official Journal, English Special Edition 1959-1962, p. 49) already provided that Member States were to grant all foreign exchange authorizations required for capital movements in respect of transfers in performance of insurance contracts as and when freedom of movement in respect of services was extended to those contracts in implementation of Article 59 et seq. of the Treaty',

and that

'the rules on movements of capital are therefore not of such a nature as to restrict the freedom to conclude insurance contracts in the context of the provision of services under Articles 59 and 60'.

16. The Commission rightly regards as irrelevant the consideration that the provision of services in the field of life assurance was not 'liberalized' until the Second Directive came into effect, and that the scope of such 'liberalization' was in any case very limited. As the Court held in the aforementioned paragraph 25 of its judgment in Case 205/84,

'Articles 59 and 60 of the EEC Treaty became directly applicable on the expiry of the transitional period, and their applicability was not conditional on the harmonization or the coordination of the laws of the Member States'.

This is confirmed by the second recital in the preamble to the Second Directive, which states:

'under the Treaty, any discrimination with regard to freedom to provide services based on the fact that an undertaking is not established in the Member State in which the services are provided has been prohibited since the end of the transitional period'.

4 — Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (Official Journal 1988 L 178, p. 5).

5 — Second Council Directive (90/619/EEC) of 8 November 1990 on the coordination of laws, regulations and administrative provisions relating to direct life assurance, laying down provisions to facilitate the effective exercise of freedom to provide services and amending Directive 79/267/EEC (Official Journal 1990 L 330, p. 50).

17. However, the Court also acknowledged in the same judgment the existence, in the field of insurance, of 'imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services' (paragraph 33).

It is therefore necessary to give further consideration to the question whether the Belgian provision can be justified as being in 'the public interest', as is maintained by the German Government and, in the alternative, by the Belgian Government.

18. It is not easy to answer that question. In acknowledging, in the context of Case 205/84, that freedom to provide services may in exceptional circumstances be restricted by rules which are justified in the public interest, the Court had in mind professional rules governing the exercise of the activities in question by providers of services which are intended to protect policy-holders and insured persons and which apply to any person or undertaking exercising such activities within the territory of the State in which the service is provided (see in particular paragraph 27 of the judgment in Case 205/84). Moreover, in order for the requirements imposed on the providers of services by the rules of the State in which they are provided to be regarded as compatible with Articles 59 and 60 of the Treaty, it is not enough to show the existence, 'in the field in question', of imperative reasons relating to the public interest; it must in addition be established that

'the public interest is not already protected by the rules of the State of establishment and that the same result cannot be obtained by less restrictive rules' (see the judgment in Case C-198/89 *Commission* v *Greece* [1991] ECR I-727, paragraph 19).

The public interest relied on in this case by the Belgian Government, namely the monitoring by the tax authorities of certificates confirming the payment of insurance contributions, which would be impossible in the case of payments made abroad, certainly has no connection with the protection of policy-holders and insured persons. Furthermore, such monitoring, even though it may relate, as regards matters of form, to certificates issued by insurance companies, does not concern the activities of those companies but constitutes in reality the fiscal supervision of taxpayers wishing to deduct their contributions, that is to say, workers. Thus it does not constitute supervision of the compliance by the provider of the services with the professional rules applying in the State in which the services are provided, which was held in Case 205/84 to justify certain restrictions on freedom to provide services.

19. In the final analysis, therefore, the question to be decided by the Court is whether a restriction on freedom to provide services may also be justified by the need for effective fiscal control and, if so, whether the general and absolute exclusion of contributions paid to providers of services established abroad from the benefit of deductibility goes beyond what is objectively necessary to ensure the protection of that interest.

20. It should be noted, first, that the Court stated in its judgment of 28 January 1986 on the 'avoir fiscal' (tax credit)[6] that

'the possibility cannot altogether be excluded that a distinction based on the location of the registered office of a

6 — Judgment in Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 19.

company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law'.

Consequently, even though the judgment in Case 205/84 deals only with supervision which can be carried out (by the Member State in which the services are provided) with a view to protecting the interests of policy-holders, it is not possible to draw from that the contrary inference that the Court wished totally to deny that Member State the option of being able also to make the grant of tax reliefs subject to certain conditions or supervisory measures.

Moreover, it should be borne in mind that, even as regards the movement of goods, the Court accepted in the 'Cassis de Dijon' judgment[7] that

'obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as necessary in order to satisfy mandatory requirements relating in particular to *the effectiveness of fiscal supervision*, the protection of public health, the fairness of commercial transactions and the defence of the consumer'.

It is true that in the present case the obstacle to the free movement of persons and services within the Community does not arise, strictly speaking, from any disparities between national laws. However, the case involves the type of obstacle which could be eliminated by the harmonization of laws and by cooperation between authorities.

21. It should also be noted that the Court held in paragraph 52 of the 'insurance' judgment cited above (Case 205/84), on the one hand, that the requirement of a permanent establishment for an insurance undertaking in the country in which it provides its services is the very negation of that freedom but added, on the other, that

'if such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for the attainment of the objective pursued'.

Thus the Court did not totally exclude the possible existence of circumstances in which the requirement of a permanent establishment is justified, but simply considered that that necessity had not been demonstrated in the context of Case 205/84. On the other hand, it accepted that Community insurance law, as it stands at present, did not preclude the State in which the services are provided from requiring the assets corresponding to the technical reserves or provisions relating to the activities carried out in its territory to be located within that territory.

22. Nor, as regards the present case, am I suggesting that the Court should accept that an insurance company must necessarily operate an establishment in the country in which its services are provided in order for effective fiscal control to be possible.

7 — Judgment in Case 120/78 *Rewe* [1979] ECR 649, paragraph 8.

Conversely, however, I do not think that the competent authorities of the Member State in which the services are provided can be required to content themselves, where a payment to another Member State is involved, with fiscal controls which are less rigorous than those which they would carry out if the contract had been concluded with an undertaking established in the country concerned.

What I am suggesting is the retention of the middle course emerging from the position adopted by the Commission in the course of the written procedure (but abandoned, it would seem, during the hearing), in the context of the Treaty infringement proceedings against Belgium (Case C-300/90). On page 4 of its reply, the Commission acknowledged that Belgium could apply the provisions of Article 9(2) of the proposal for a directive submitted by it to the Council on 21 December 1979 concerning the harmonization of income taxation provisions with respect to freedom of workers within the Community (Official Journal 1980 C 21, p. 6).

That Article is worded as follows:

'1. Where a Member State grants an advantage for the purposes of income tax within the meaning of Article 2, whether by way of deduction from the tax base or otherwise, for payments made by a natural person to an insurance company, bank, pension fund, building society or any other recipient, such a tax advantage shall not be refused solely because that recipient is established or resident in another Member State.

2. The Member State which is first mentioned in paragraph 1 may, as a condition for applying that paragraph, require the recipient to be subject to similar tax obligations to those which would be required of the corresponding recipient resident in its own territory.'

In accordance with the spirit of that provision, I think that it would be possible for Belgium, first, to make deductibility for tax purposes conditional on the insurance company being granted approval for the provision of its services within Belgium. Secondly, it could include in the approval document a requirement obliging the company periodically to send to it, in addition to the documents referred to by the Court in paragraph 55 of the judgment in Case 205/84, a statement of the contributions paid by Belgian residents to that company, duly certified, like the other documents, by the authorities of the Member State from which the services are provided.

23. I would add, however, that in the field of sickness and invalidity insurance there can be no question of requiring the companies to which approval is granted to be in the nature of 'mutual companies'. Even though that type of business appears in Belgium to be the province of 'mutual companies', this is not the case in other Member States. Companies not having that legal form should not be indirectly excluded from freedom to provide services.

24. An additional argument in favour of a subtle approach to the issue emerges from the fact that there exists, in the case of life assurance contracts (see Article 32a of the

CIR), a correlation between the non-deduction of premiums and the non-taxability of the capital built up by means of those premiums. The effect of that correlation is that the Belgian State accepts the deduction of premiums only on condition that it is thereafter able, on the normal expiration of the contract or on the death of the assured, to tax the capital realized (see Article 93(1)(2)(f) of the CIR). It must therefore be in a position to ensure that the capital is taxed where the premiums have been deducted.

In the event that an insurance contract has been concluded with an insurance company established abroad and the premiums are consequently paid abroad, it may well find it more difficult to do this. If the capital fund created is also realized abroad, as will certainly be the case where the worker concerned has left Belgium and returned to the country in which he concluded his insurance contract, it is highly doubtful that it will be possible to tax him in Belgium and that the Belgian State will thus be able to ensure that the deduction of the premiums is 'compensated' by the taxing of the capital fund. Where, on the other hand, an insurance company established in Belgium is involved, it will always be open to the Belgian State to ensure directly, by applying to that company, that the capital is taxed, in particular by means of the retention at source of the tax due.

25. The Governments of Denmark and the Netherlands observed at the hearing that in those countries the tax exemption of insurance contributions was inextricably linked to the taxation of the capital created at the time when that capital is paid out. That system is regarded in those countries as a carrying over of liability to tax. The insurance companies are obliged to retain the tax at source and to pay it over to the State, to which they are liable to make such payment. Consequently, legislation has been brought into force requiring such tax to be paid even where the policy-holder no longer resides in the country at the time when the capital is paid out.

26. The Commission's argument that according to paragraph 25 of the judgment of the Court in Case 270/83 *Commission* v *France* [1986] ECR 273 the risk of tax evasion cannot be relied upon by way of derogation from the fundamental principle of freedom of movement of persons cannot be upheld. The issue in Case 270/83 was direct discrimination based on the location of a company's registered office, which, according to the Court, 'serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons' (see paragraph 18 of the judgment), whereas in this case the issue concerns a rule applying without distinction to nationals and non-nationals which is lawful if it is objectively justified, despite the fact that it is principally non-nationals who are disadvantaged by it.

There is thus a strong temptation to conclude that the Belgian legislation is objectively justified by the need to prevent tax evasion.

27. Conversely, however, it became apparent at the hearing that in the Netherlands, where similar legislation exists, a person finding himself in Mr Bachmann's situation would be able to deduct his insurance contributions from his income tax. Furthermore, the Belgian Government's agent explained that his country had concluded with France, Luxembourg and the Netherlands agreements whereby contri-

butions could be deducted in respect of group insurance taken out with an undertaking established in one of those countries. In particular, those undertakings have pledged to inform the Belgian tax authorities of the capital paid out to the persons in question.

That demonstrates that it is possible to devise administrative machinery which is able to obviate the risk of tax evasion.

Nor should it be impossible to discover a solution in respect of countries which impose on insurance undertakings the obligation to retain at source the tax on the capital paid out. Thus a person residing in Denmark who wishes to conclude an insurance contract with a German undertaking could be denied the benefit of the tax deductibility of contributions made in Denmark if he is unable to provide an undertaking on the part of the insurance company to pay to the Danish tax authorities the tax due under Danish law when the capital is paid out.

28. In those circumstances, I conclude that a provision such as Article 54 of the Belgian income tax code, which makes it completely impossible to deduct contributions paid to insurance companies having no establishment in Belgium, goes beyond what is objectively necessary to achieve its intended aim. It is thus incompatible with Article 59 of the Treaty.

29. Since it has not been objectively justified, it also constitutes a restriction on freedom of movement for workers and is incompatible with Article 48.

Infringement of Articles 67 and 106 of the Treaty

30. Article 67(1) of the Treaty provides that

'During the transitional period and to the extent necessary to ensure the proper functioning of the common market, Member States shall progressively abolish between themselves all restrictions on the movement of capital belonging to persons resident in Member States and any discrimination based on the nationality or on the place of residence of the parties or on the place where such capital is invested'.

The Commission has not relied on any infringement of that provision in its direct action against Belgium (Case C-300/90). However, in the context of the reference for a preliminary ruling (Case C-204/90), the Commission maintains that Article 54 of the CIR constitutes discrimination based on 'the place where such capital is invested'.

Mr Bachmann has given no indication of having experienced the slightest difficulty in effecting the transfers of capital corresponding to the payment of his insurance premiums, and the Commission has not cited any such difficulties in the case of other persons.

31. Thus the essence of the reasoning put forward by Mr Bachmann and the Commission is in fact that if the Belgian provision relating to the non-deductibility of

insurance contributions did not exist, more people would conclude supplementary insurance contracts with companies established in other Member States, and the flow of capital out of Belgium into the other Member States would be greater than it is at present.

I am not persuaded by that reasoning, since the link which it establishes between the contested provision and the movement of capital (which is completely free) is too tenuous and too indirect. Thus when the Court finds that there exists a measure having equivalent effect to a quantitative restriction, it does not generally also proceed to find that there has been an infringement of Article 67. And yet a measure which prevents certain imports also prevents the capital transfers corresponding to payment for the goods which cannot be imported. I suggest, therefore, that the Court should not find a provision such as the one at issue in the main proceedings incompatible with Article 67 of the Treaty.

32. As regards Article 106 of the Treaty, I share the Commission's doubts that the reference to that provision has any relevance to the present case. Article 106(1) obliges the Member States to authorize payments connected, *inter alia*, with the movement of services 'in the currency of the Member State in which the creditor or the beneficiary resides'. The Belgian legislation does not prohibit the payment of insurance contributions to an undertaking established in another Member State; what is more, it does not preclude such payment from being made in the currency of the Member State in which the insurance undertaking is established.

33. In the light of all the foregoing considerations, I propose that the Court should rule as follows in Case C-204/90:

'Articles 48 and 59 of the EEC Treaty are to be interpreted as meaning that they preclude tax legislation of a Member State which provides that insurance contributions in respect of sickness and invalidity cover or pensions and life assurance may only be deducted from a worker's taxable income where they are paid to an insurance undertaking established in the territory of that Member State.'

34. It follows from the foregoing that the Treaty infringement proceedings brought by the Commission are well founded, and it is therefore appropriate to rule as follows in Case C-300/90:

'By making the deductibility from a worker's taxable income of supplementary pension or life assurance contributions conditional on the payment of those contributions to an undertaking established in Belgium or to the Belgian establishment of a foreign undertaking, the Kingdom of Belgium has failed to fulfil its obligations under Articles 48 and 59 of the EEC Treaty and under Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968.'

35. There remains the question of the conclusion to be drawn by the Belgian Cour de Cassation from the foregoing considerations as regards the solution to the dispute

between Mr Bachmann and the Belgian State. On the one hand, I have concluded that the Belgian legislation, as it stands, contains a restriction which is disproportionate to the objective which it seeks to achieve; on the other hand, I recognize that Belgium is entitled to make the deductibility of insurance contributions conditional on the procurement of certain guarantees on the part of companies established in other Member States, and that those guarantees were not available to it during the period in respect of which Mr Bachmann is claiming the right to deduct his insurance contributions from his total Belgian occupational income.

In my view, however, the decisive point is that provisions of national law which prevent the deduction of insurance premiums from total taxable income are not compatible with the Treaty. The Cour de Cassation should therefore disapply those provisions.

36. As regards the costs in Case C-204/90, the costs incurred by the German, Danish and Netherlands 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 before the national court, the decision on costs is a matter for that court.

As regards Case C-300/90, I propose that the Court should order the parties to bear their own costs, since in my view neither of them is entirely right or entirely wrong.