OPINION OF ADVOCATE GENERAL TESAURO

delivered on 23 September 1997 *

1. The question referred for preliminary ruling by Länsrätten (County Administrative Court) (hereinafter 'the national court') of Kopparberg County relates to the compatibility with Community law of a Swedish Law on the taxation of certain life assurance policy premiums (*Lag* (1990: 662) *om Skatt på vissa Premiebetalningar*, hereinafter 'the Premium Tax Law').

More specifically, the national court asks the Court whether this Law, which subjects to tax payments of premiums under life assurance policies contracted with insurance companies not established in Sweden, is contrary to the provisions of Community law on the freedom to provide services and the free movement of capital and to the prohibition of discrimination.

The provisions of national law

2. To better understand the meaning and the scope of the question referred for a preliminary ruling, it is appropriate to start with a summary of the relevant provisions of the Swedish legislation on the taxation of savings in the form of life assurance, as described by the national court in its order for reference.

Taxation of companies established in Sweden

3. Both insurance companies and policyholders are subject to taxation in respect of life assurance policies taken out with companies which are 'Swedish or established in Sweden'. [1] For tax purposes, a distinction is drawn between two categories of life assurance: pension insurance (P-assurance) and capital insurance (K-assurance). Only life assurance policies which meet special conditions for pension savings instruments are classified in the P-assurance group, one of

* Original language: Italian.

1 — The referring court uses, sometimes indiscriminately, the terms 'Swedish company' and 'company established in Sweden' on the one hand, and the terms 'foreign company' and 'company not established in Sweden', on the other. However, considering the characteristics and the rationale behind the Law at issue, the grounds put forward by the Swedish Government in justification thereof, as well as certain statements made in the order for reference, it is my view that the decisive criterion for application of the Premium Tax Law — in lieu of the normal tax arrangement — is that of the place of establishment of the insurance company (outside Sweden) rather than its nationality. This assumption will therefore be adopted throughout this Opinion and the terms 'domestic companies' and 'foreign companies', occasionally used by the referring court and quoted in inverted commas in the text, are to be taken to refer to established and non-established companies respectively.

those conditions being that the relevant policy must be contracted with an insurance company established in Sweden.

Life assurance companies established in Sweden must pay yield tax under Law (1990: 661) on Yield Tax on Pension Funds. Yield tax is calculated according to a standard method where the basis of assessment is the life assurance company's assets at the end of the year preceding the tax year. More precisely, the basis of assessment is determined by multiplying the insurance company's total assets, after deduction of financial liabilities, by the average interest rate on Government bonds over the year preceding the tax year in question. The applicable tax rates are 15% for P-assurance and 27% for K-assurance.

The tax charge on policyholders varies depending on whether the insurance taken out falls into the P category or the K category. In the case of P-assurance, premiums are tax-deductible in the year in which they are paid whereas insurance proceeds falling due are subject to payment of income tax. In the case of K-assurance, premium payments are not tax-deductible but insurance proceeds falling due are not subject to tax.

Taxation of companies not established in Sweden

4. Savings policies taken out with companies established outside Sweden are taxed under the Premium Tax Law, which came into force on 1 January 1991. Article 1 of this Law provides that natural or legal persons domiciled in Sweden or residing there permanently who take out life assurance policies with companies not established in Sweden are to be liable to premium tax. Pursuant to Article 3 of the Law, the tax rate is equivalent to 15% of the premium payment. [2]

Article 5 of the Premium Tax Law further provides that the competent tax authorities may, on the policyholder's application, either grant full exemption or reduce the premium tax by one-half if the insurance company with whom the policy was contracted is liable, in the State in which it is established, to revenue tax which is comparable to the taxation borne by domestic insurance companies in Sweden.

5. From the description given of the relevant provisions of national law, it appears that savings policies issued by insurance companies established in Sweden are taxed (in part)

2 — Premiums are not tax-deductible in the year in which they are paid, but insurance proceeds falling due are not subject to further tax.

on the basis of the assets of the issuing insurance company and (in part) by way of a yield tax on the return to policyholders; savings policies issued by insurance companies established abroad and consequently not liable to tax in Sweden are, however, taxed on the premiums paid by the policyholders. In other words, as the referring court points out, 'the tax on savings policies issued by Swedish life assurance companies applies to the yield on individual life assurance policies whilst the tax on equivalent policies issued by foreign life assurance companies applies to the premiums.'

The purpose of this differentiated arrangement, whereby policyholders resident in Sweden who contract insurance policies with companies established in Sweden are subject to different tax treatment than those who contract insurance policies with companies not established in Sweden, is, again according to the order for reference, to 'maintain competitive neutrality between Swedish savings policies and foreign savings policies'. The intent of the Swedish legislature is demonstrated by the fact that the Premium Tax Law introduces the possibility of a tax exemption (or reduction) for savings policies issued by assurance companies which are not established in Sweden but which are subject to taxation comparable to that borne by domestic insurers.

The facts

6. The facts in the main proceedings are straightforward and date back to early 1995 when Jessica Safir (hereinafter the 'applicant'), having taken out a life assurance policy with Skandia Life Assurance Company Ltd, an English insurance company which also operates on the Swedish market, [3] applied to the tax authorities for an exemption from premium tax under Paragraph 5 of the Premium Tax Law.

The tax authorities reduced the taxation by half so that the applicant, having declared a premium payment of SKR 1 000, paid premium tax amounting to SKR 75. Subsequently, however, following the negative outcome of two reviews of the tax reduction decision undertaken by the same tax authorities, the applicant challenged that decision before the competent County Administrative Court, requesting that it be set aside.

The question referred by the national court

7. In doubt as to the compatibility with Community law of the different tax treatment accorded under the Premium Tax Law to policyholders insured with companies not established in Sweden, the national court decided to stay the proceedings and to refer

3 — And, paradoxically, wholly owned by the Swedish company Skandia.

the following question to the Court for a preliminary ruling:

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

The relevant provisions of Community law

8. The national court is therefore asking the Court whether the Premium Tax Law is compatible with the provisions of the EC Treaty on the freedom to provide services and free movement of capital as well as with Article 6 thereof, which lays down in general terms the prohibition of discrimination on grounds of nationality. At first view, the Law at issue formally distinguishes, for tax purposes, between holders of insurance policies issued by foreign (non-established) insurers and holders of policies issued by domestic insurers; this built-in discrimination being likely to restrict both the provision of cross-border services and the corresponding movement of capital.

I would immediately exclude application of Article 6. It is settled case-law that this article applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific prohibition of discrimination. [4] It is therefore under Articles 59 and 73b of the Treaty, which give effect to the principle of non-discrimination in the specific areas of free provision of services and free movement of capital, that the legality of the legislation at issue should be examined.

4 — See, *inter alia*, Case 305/87 *Commission* v *Greece* [1989] ECR 1461, at paragraph 13, and Case C-379/92 *Peralta* [1994] ECR I-3453, at paragraph 18.

9. In this connection, I consider that a further clarification is necessary. It is clear from an examination of the rules governing the freedom to provide services and the free movement of capital, their place in the Treaty and a careful reading of all the relevant case-law that the provisions of Article 59 et seq., on the one hand, and of Article 73b et seq., on the other, are not intended to apply cumulatively and still less indiscriminately, but that they govern, at least in principle, different cases: the first require abolition of all restrictions on the free provision of services — including financial services — within the Community whereas the second prohibit all restrictions on the free movement of capital and payments between Member States and between Member States and third countries.

As a result, the compatibility with Community law of the national legislation at issue should — unless it *simultaneously* hinders both the free provision of services and the free movement of capital — be examined under either Article 59 et seq. or under Article 73b et seq. I might add that combined application of these articles, without distinguishing whether the case involves freedom to provide services or free movement of capital, would not, to say the least, be a very rigorous approach.

10. The approach I propose is supported both by the wording of the aforesaid provisions and by their place in the Treaty, which devotes to them two specific chapters (the third and fourth respectively) under Title III.

The deliberate distinction drawn by the authors of the Treaty between the sphere of application of the rules governing services and that of the rules governing capital is confirmed by Article 60, which identifies the notion of services with services normally provided for remuneration, 'in so far as they are not governed by the provisions relating to freedom of movement of goods, capital and persons'. The wording of Article 61(2), pursuant to which 'the liberalisation of banking and insurance services connected with movements of capital shall be effected in step with the progressive liberalisation of movement of capital', [5] is also significant in this respect.

11. The Court's case-law also tends generally in the same direction. Already in *Société Générale Alsacienne de Banque*, the Court, sharing the Advocate General's detailed reasoning on this point, stressed that it was first necessary to establish if the transactions at issue in those proceedings (execution of stock exchange orders and other current

5 — This provision may be considered to be of little practical consequence today, following the near-total liberalisation of capital movements implemented with the coming into force of Council Directive 88/361/EEC of 24 June 1988 (OJ 1988 L 178, p. 5) and of the Treaty of Maastricht. It can, however, still effectively govern events which occurred prior to this liberalisation (for a recent example, see Case C-222/95 *Société Civile Immobilière Parodi* v *Banque H. Albert de Bary* [1997] ECR I-3899).

account transactions) were to be treated as services or as movements of capital before ascertaining the compatibility with Community law of the restrictions placed on such transactions by the provisions of national law in question. [6]

In its judgment in *Casati*, rendered shortly thereafter, the Court then specified the difference in scope, in terms of application in time and detailed rules for application, between the provisions relating to capital movements and those relating to the other freedoms guaranteed by the Treaty. In particular, the Court underscored the fact that free movement of capital, unlike other freedoms, could not be considered to be automatically achieved at the end of the transitional period; and that Article 67, still in force at the time, [7] imposed the obligation to liberalise movements of capital only 'to the extent necessary to ensure the proper functioning of the common market'. [8]

12. The position adopted by the Court in the *Bachmann* case is clearer still. Asked to rule on the compatibility with Community law of a provision of Belgian law which subjected the deductibility of health, pension and life insurance contributions for tax purposes to the condition that such contributions had to be paid in the State itself, the Court examined the case only in relation to Articles 48 and 59 of the Treaty. Moreover, in precluding application of the rules relating to capital movements, despite these having been expressly invoked, the Court stated that 'Article 67 does not prohibit restrictions which do not relate to the movement of capital but which result indirectly from restrictions on other fundamental freedoms'. [9]

13. Subsequent case-law follows the same logic. In *Bordessa*, for example, the Court expressly excluded application of Article 59 (and Article 30) to measures subjecting the exportation of coins, banknotes and bearer cheques to the requirement of preliminary authorisation and examined those measures under Article 67 alone (and the directive implementing that provision). [10] In that case, the movement of capital was not connected to trade in services (or goods). Moreover, the Court stated in this connection that, even if the transaction at issue in the main proceedings had been shown to constitute a payment

6 — Case 15/78 *Société Générale Alsacienne de Banque* v *Koestler* [1978] ECR 1971, at paragraph 3; see especially the Opinion of Advocate General Reischl, paragraphs I-1 and I-2 of which are entirely devoted to the importance of distinguishing between the scope of application of the provisions governing services and that of the provisions relative to capital, in particular in borderline cases (such as that then before the Court) involving services provided by credit institutions.

7 — It is hardly necessary to point out that Articles 67 to 73 of the EEC Treaty were replaced by Articles 73b to 73g of the EC Treaty.

8 — Case 203/80 *Casati* [1981] ECR 2595, at paragraph 10.

9 — Case C-204/90 *Bachmann* v *Belgium* [1992] ECR I-249, at paragraph 34. See also the Opinion, in the same case, of Advocate General Mischo who, in proposing to the Court the conclusion which it adopted on this issue, observed that the transfer of capital necessary to pay contributions abroad was not subject to any difficulty and that consequently the causal nexus between the provision at issue and the free ('completely free') movement of capital was too tenuous and indirect.

10 — Joined Cases C-358/93 and C-416/93 *Criminal proceedings against Bordessa, Melado and Barbero Maestre* [1995] ECR I-361, at paragraphs 13 and 14.

for goods or services, it would in any case be governed not by Articles 30 and 59, but by Article 106 of the Treaty. [11]

Although it reached the opposite result, the Court reasoned in the same way when ruling that the compatibility with Community law of United Kingdom legislation prohibiting the advertisement and sale of foreign lottery tickets as well as the conduct of such lotteries on British territory was to be examined under Article 59 of the Treaty and expressly, although incidentally, excluded application of the rules relating to capital (and those relating to goods and persons). [12]

14. In *Svensson and Gustavsson,* [13] the Court departed from this — on the whole rather consistent — regulatory and case-law framework. In that case, the national court asked the Court to rule on the compatibility with Articles 67 and 71 of the Treaty of a provision of Luxembourg law which restricted entitlement to interest rate subsidies for the construction, acquisition or improvement of housing to persons having taken out a loan from a credit institution approved (and therefore established) in Luxembourg.

Going against the Opinion of the Advocate General who, in line with the *Bachmann* judgment, had proposed that the case be dealt with only in relation to Article 59 et seq. of the Treaty, [14] the Court chose instead to apply, in combination, the rules governing services and those governing capital movements and concluded that the national legislation was contrary to both. More precisely, the Court first declared that the legislation at issue, because it was 'liable to dissuade those concerned from approaching banks established in another Member State', constituted an obstacle to movements of capital in the form of bank loans. Secondly, the Court stated that the legislation was contrary to Article 59 — thereby recognising the transaction at issue to be a service in the sense of that provision — because it entailed discrimination against credit institutions established in other Member States.

11 — *Bordessa* (cited in the preceding footnote), at paragraph 14. Reasoning in these terms, the Court in substance elaborated on the distinction already outlined in *Luisi and Carboni* (Joined Cases 286/82 and 26/83 [1984] ECR 377, at paragraphs 21 and 22) between payments and capital movements: 'current payments are transfers of foreign exchange which constitute the consideration within the context of an underlying transaction, whilst movements of capital are financial operations essentially concerned with the investment of the funds in question rather than remuneration for a service'. Moreover, stressing the proper relevance of the payments category as against the capital category and expressly linking only the first — and not the second — to the trade in goods or services underlying the transfer, the Court concluded by distinguishing, in this judgment, between the movement of capital category and the services (and goods) category.

12 — Case C-275/92 *Her Majesty's Customs and Excise* v *Schindler and Schindler* [1994] ECR I-1039, at paragraph 30.

13 — Case C-484/93 *Svensson and Gustavsson* v *Ministre du Logement et de l'Urbanisme* [1995] ECR I-3955.

14 — Opinion of Advocate General Elmer delivered on 17 May 1995 (ECR I-3957, at paragraphs 8 to 11).

15. Without going into the merits of the classification attributed to the transaction at issue (movement of capital and/or provision of services), it may be questioned why the Court, having established that the provision in dispute was contrary to Article 67 of the Treaty, thought it necessary to examine it under Article 59 as well. [15]

In my view, this approach is consistent with neither the letter nor the spirit of the relevant Community provisions, considering in particular the residual value that the Treaty specifically and indisputably places on the rules governing the freedom of services. Moreover, without providing proper reasoning it goes against earlier case-law, outlined above, in the matter. [16]

16. Furthermore, indiscriminate application of the provisions of the Treaty governing services and capital might be further precluded by the fact that the scope of the prohibition laid down in Article 59, on the one hand, and that laid down in Article 73b of the Treaty, on the other, is different. While freedom to provide services is, of course, subject only to the exceptional restrictions permitted or envisaged by Article 56 (and, on the conditions reviewed below, to restrictions justified by overriding requirements), free movement of capital, on the other hand, is subject to the broader restriction laid down in Article 73d(a), which expressly permits the enactment of fiscal provisions which distinguish between taxpayers on grounds of residence (even though, under the 'classic' formula, they must not constitute a means of arbitrary discrimination or a disguised restriction). This is a subtle difference in the ambit of the two provisions which makes it even more important for their respective scopes of application to be determined accurately.

17. The foregoing observations lead me to the conclusion that it is always necessary to establish precisely whether a provision of national law at issue, especially when related to the banking or insurance sectors, is to be defined as a (potential) restriction on freedom to provide services or as a (potential) restriction on free movement of capital, depending on the nature and type of restriction which such a provision is likely to entail. In my view, this is absolutely necessary in order to identify the proper basis for determining the provision's legality.

This should be done on the basis of the criteria laid down in the case-law existing prior to *Svensson*: if the measure at issue *directly* restricts the *transfer* of capital, rendering it impossible or more difficult, for example by

15 — The judgment has been universally criticised in legal literature precisely because of this 'double' assessment. See, *inter alia*, P. Bentley, *Tax obstacles to the free movement of capitals*, in *The EC Tax Journal*, 1996-1997, p. 49; and W. Devroe and J. Wouters, *Liberté d'établissement et libre prestation de services*, in *Journal des tribunaux, droit européen*, 1996, p. 49.

16 — Case C-148/91 *Verenigung Veronica Omroep Organisatie* v *Commissariaat voor de Media* [1993] ECR I-487 was clearly quite different. There the Court ruled that the national provisions at issue (the Dutch *Mediawet* on radio and television broadcasting) were compatible with Community law given that they restricted neither the freedom to provide services nor the free movement of capital.

subjecting it to mandatory authorisation or in any event by imposing currency restrictions, Article 73b et seq. of the Treaty will apply; [17] if, conversely, it only indirectly restricts movement of capital and primarily constitutes a non-monetary restriction on the freedom to provide services, then Article 59 et seq. of the Treaty will apply. [18] It would still be possible for both sets of provisions to apply together, but only in relation to the provisions restricting simultaneously, although from different angles, both provision of services and movement of capital. [19]

18. On application of those criteria to the present case, it is clear that the contested national legislation could well constitute an obstacle for insurance companies which intend to conduct their business in Sweden without having a fixed place of business there. Savings policies taken out with the latter are by law subject to different tax treatment than those issued by insurers established in Sweden. It need only be noted here that the premium tax to which policyholders are subject could well deter persons from taking out policies with companies that are not established in Sweden, particularly if domestic insurers offer comparable insurance products with tax-exempt premiums.

As regards movements of capital (and payments), the national legislation does not appear to prevent these nor to make them more difficult, unless simply as a consequence of being an obstacle to the freedom to provide services, which is both obvious and irrelevant. The legislation at issue does not provide for any special formalities (approvals or declarations), nor does it impose currency restrictions on the transfer of premium payments on policies contracted with companies not established in Sweden; on the contrary, the transfer of such funds abroad appears to be totally unrestricted.

19. In my view, those aspects are sufficient to preclude application of Article 73b and at the same time to bring the case within the purview which Article 59 of the Treaty has if no other provisions apply. Consequently, it is in relation to that article that the compatibility with Community law of the national legislation at issue should be examined.

17 — To be precise, Article 73b(1) in the case of movements of capital not connected to a trade in goods or services; or Article 73b(2), which applies to payments, where the capital in question represents consideration for trade in goods or services.

18 — On this point, in addition to the cases cited in footnotes 11 to 13 above, see the recent judgment in *Parodi* (cited in footnote 5), in which the Court — after having ruled out that a provision of French law subjecting the grant of mortgage loans by foreign credit institutions to authorisation could be justified, under Article 61(2) of the Treaty, by (at the time) non-liberalised restrictions on movement of capital — then examined the case solely under Article 59, expressly classifying the transaction in question (mortgage loan from a credit institution) as a service.

19 — For example, a provision like the one at issue in *Svensson* but which would *also* prohibit loans in foreign currency from credit institutions established abroad.

The restrictive effects of the measure at issue

20. I now come to the question referred for a preliminary ruling. The Governments which have intervened in the proceedings share the view that the Swedish legislation is compatible with Community law, on the ground that, because it is not discriminatory, it does not contravene Article 59. They point out that the Court's recent case-law recognises the principle of fiscal territoriality and that the legislation at issue implements that principle. As regards direct taxation, which falls within the competence of Member States, this principle permits differences in the tax treatment of residents and non-residents. Here they cite in particular the judgment in *Schumacker*. [20]

According to those same Governments, even if the legislation at issue were established to be discriminatory, it would in any case be justified by virtue of its aims. It is designed to maintain effective fiscal supervision while ensuring fiscal cohesion of the national tax system: these are general interests which have been expressly recognised in case-law as worthy of protection (see *Futura* and *Bachmann* respectively). The legislation at issue is, they say, also necessary and proportionate because its objectives could not be effectively attained by less restrictive measures. [21]

21. I would again point out that the legislation at issue subjects premiums paid by policyholders on life assurance policies contracted with insurers not established in Sweden to premium tax: premiums paid on policies issued by domestic companies, or companies established in Sweden, are, however, free of such tax since these savings policies are taxed under different arrangements. Furthermore, policyholders insured with insurance companies that are not established in Sweden are entitled, subject to application, either to an exemption or to a reduction of premium tax, as the case may be, provided it is established that the insurer is subject, in its home State, to revenue tax which is comparable with the taxation borne by insurance companies established in Sweden.

22. In other words, the Premium Tax Law provides for differentiated tax treatment of

20 — Case C-279/93 *Finanzamt Köln-Altstadt* v *Schumacker* [1995] ECR I-225: but see also Case C-80/94 *Wielockx* v *Inspecteur der Directe Belastingen* [1995] ECR I-2493 and Case C-107/94 *Asscher* v *Staatssecretaris van Financien* [1996] ECR I-3089; and, finally, Case C-250/95 *Futura Participations and Singer* v *Administration des Contributions* [1997] ECR I-2471.

21 — Actually, the United Kingdom Government proposes to leave this assessment to the national court in view of the particular circumstances of the case.

different groups of legal persons. Firstly, it is self-evident that policyholders (recipients of services) are treated differently depending on whether their policies have been taken out with insurers not established in Sweden, in which case they are liable to premium tax, or with insurers established in Sweden, in which case they are not liable to premium tax. Secondly, those same policyholders who have taken out life assurance with companies not established in Sweden may be subject to different tax treatment in so far as they may or may not obtain an exemption from premium tax or, as the case may be, a reduction thereof, depending on the outcome of the review by the Swedish tax authorities of the taxation arrangements to which those insurers are subject in their home States.

While it is true, moreover, that such different tax treatment affects all policyholders domiciled or resident in an individual Member State and that consequently, under the rules of Community law on freedom of services, this treatment is not relevant *as such*, it none the less has repercussions on the providers of the services concerned, depending on whether or not they have a permanent establishment in Sweden. In other words, insurance companies without an establishment in Sweden — since only the premiums paid by their policyholders are liable to tax — are at a clear disadvantage in relation to insurance companies established in Sweden, which entails, or in any case could entail, a not inconsiderable restriction on the pursuit of their business in the State concerned.

23. These restrictions are clearly, albeit indirectly, based upon the place of establishment of the provider of services [22] and are consequently liable to restrict its cross-border activities: they are therefore in patent conflict with Article 59 of the Treaty. [23]

That article prohibits 'restrictions on freedom to provide services within the Community ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'. As the Court has itself stated on several occasions, Articles 59 and 60 '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

22 — It need hardly be pointed out that the discrimination would be even more obvious if the Premium Tax Law regime was applied not on the basis of establishment of the insurer but on the basis of the insurer's nationality. On this point, see footnote 1 above.

23 — It may be recalled moreover that already the General programme for the abolition of restrictions on freedom to provide services (adopted on 18 December 1961, OJ 15 January 1962, p. 32) included among the restrictions to be abolished also those which indirectly affect providers of services, for example through the recipients thereof.

provided'. [24] The legislation at issue is certainly a good illustration of the second category of restriction mentioned in the passage quoted.

24. In these circumstances, the view that, under the principle of fiscal territoriality, the legislation at issue falls outside the scope of Article 59 appears to be entirely groundless. The following brief observations are in my view sufficient in this respect:

First, the *Schumacker* case-law is itself based on the explicit proposition that 'although as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law', [25] and Member States shall 'therefore avoid any overt or covert discrimination on grounds of nationality'. [26] Second, while it is true, as the Court has made clear, that differences in the tax treatment of residents and non-residents do not as such constitute discrimination prohibited under the Treaty, it is also true that the objective difference between two categories of taxpayers must be taken into account, in particular 'from the point of view of the source of the income and the possibility of taking account of their ability to pay tax or their personal and family circumstances'. [27]

25. At first view, there is a significant difference with the present case, given that the discriminatory treatment under the Premium Tax Law concerns taxpayers resident in the same Member State and affects them *distinctly* according to the company (established or not established) with whom they have elected to take out an insurance policy.

Furthermore, the principle of fiscal territoriality, which the Court has recognised in respect of the rules on free movement of persons and freedom of establishment, cannot be transposed *sic et simpliciter* to freedom of services. The very provisions of the Treaty which enshrine that freedom require that a provider of services conducting his business in a Member State other than that in which he is established *at the very least* be given equivalent treatment with a provider established in that same State. It follows that acceptance of a principle which allowed different tax treatment of recipients of services according to the place of establishment of the provider of the services would not only be contrary to the very concept of freedom

24 — Case 205/84 *Commission* v *Germany* [1986] ECR 3755, 'the *Insurance* case', at paragraph 25; Case C-180/89 *Commission* v *Italy* [1991] ECR I-709, at paragraph 15.

25 — See the judgments in *Schumacker*, *Wielockx* and *Asscher* (cited in footnote 20), at paragraphs 21, 16 and 36 respectively.

26 — *Futura* (cited in footnote 20), at paragraph 19.

27 — *Wielockx* (cited in footnote 20), at paragraph 18; in the same sense, see the judgments in *Schumacker* and *Asscher* (cited in footnote 20), at paragraph 31 et seq. and paragraph 41 respectively. In those judgments, the Court did not consider the cases of different treatment submitted to it to be objectively justified.

to provide services but would, all things considered, totally undermine it. [28]

Lastly, I would recall that in *Bachmann*, where the facts were in many ways simlar to the present case, the Court stated that 'provisions requiring an insurer to be established in a Member State as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to deter those seeking insurance from approaching insurers established in another Member State, and thus constitute a restriction of the latter's freedom to provide services'. [29]

26. All things considered, the legislation at issue is certainly capable of restricting the freedom to provide services and, consequently, is in principle contrary to Article 59 of the Treaty. It need hardly be stressed that this conclusion cannot be challenged on the grounds that the same legislation makes it possible for policyholders insured with non-established companies to obtain an exemption from, or reduction of, premium tax. This possibility is only contingent and in any case requires not only the policyholder to take the initiative but also a review to be carried out by the competent national tax authority of the taxation arrangements applicable in the State of establishment of the insurer.

The grounds relied on to justify the measure at issue

27. At this juncture, it remains only to examine whether, in view of its characteristics and rationale, the legislation is none the less capable of being justified. Both the Swedish and United Kingdom Governments submit that there is here a general interest, specifically the need to ensure national fiscal cohesion and effective fiscal supervision.

28. I would point out first of all that, according to the Court's case-law, a national provision which is discriminatory can be justified, and therefore be declared compatible with Community law, only if it is covered by one of the derogations expressly laid down in the Treaty. In *Bond van Adverteerders*, subsequently confirmed in other cases, the Court made clear that 'national rules which are not applicable to services without distinction as regards their origin and which are therefore discriminatory are compatible with

28 — In this regard, I would recall this well-known statement of the Court: 'If the requirement of an authorisation constitutes a restriction on the freedom to provide services, *the requirement of a permanent establishment is the very negation of that freedom.*' (the '*Insurance*' case, cited in footnote 24, at paragraph 52; the italics are mine). Although the legislation at issue does not formally subject services provided by foreign insurers to the requirement of establishment, it does, however, as we have seen, entail similar effects in so far as it subjects to this requirement the grant of significant tax advantages to policyholders.

29 — *Bachmann* (cited in footnote 9), at paragraph 31.

Community law only if they can be brought within the scope of an express derogation'. [30]

In this connection, it is appropriate to mention the derogation provided for by Article 56 of the Treaty, to which Article 66 refers, pursuant to which Member States may apply special tax rules to foreign nationals provided that these are justified in the interest of public policy, public security or public health. I might add that this provision, precisely because it is a derogation, must be interpreted strictly, so that it certainly does not cover the economic objectives of a restrictive measure. [31]

29. I would also point out that national provisions restricting freedom to provide services may also be justified where they safeguard needs of public interest, provided, however, that certain well-defined conditions are met. It is settled case-law that freedom to provide services, one of the fundamental freedoms enshrined in the Treaty, may only be restricted by provisions which comply cumulatively with certain specific conditions: they must be justified by the general interest and apply (*without distinction*) to all persons or undertakings operating within the territory of the State in which the service is provided; they must be objectively necessary to achieve the aims pursued and be proportionate thereto; and, finally, the protected interest must not be safeguarded by provisions to which the provider of services is subject in his State of establishment. [32]

In recognising that national provisions which apply without distinction are incompatible with Community law when they are restrictive and not justified by public interest, the Court was in substance following, in the matter of freedom to provide services, the same approach as that which it used in relation to goods from the time of the well-known '*Cassis de Dijon*' judgment. [33]

30. Given the foregoing, it must now be established, in order to decide which justifications are admissible, whether the measure at issue is to be treated as formally discriminatory or, on the contrary, as applicable

30 — Case 352/85 *Bond van Adverteerders and Others* v *Netherlands State* [1988] ECR 2085, at paragraph 32; also Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda and Others* v *Commissariaat voor de Media* [1991] ECR I-4007, at paragraph 11, and Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, at paragraph 15; Case C-17/92 *Federación de Distribuidores Cinematográficos* ('*Fedecine*') v *Estado Español et Unión de Productores de Cine y Televisión* [1993] ECR I-2239, at paragraph 16; and, finally, *Svensson* (cited in footnote 13), at paragraph 15.

31 — See, for example, *Bond van Adverteerders*, at paragraph 34, and *Fedecine*, at paragraph 16 and 21.

32 — See the '*Insurance*' case (cited in footnote 24) at paragraph 27, and also, lastly, *Parodi* (cited in footnote 5) at paragraph 21.

33 — This approach was explicitly recognised in particular in *Gouda* and in *Commission* v *Netherlands* (cited in footnote 30), as well as in Case C-76/90 *Säger* v *Dennemeyer & Co.* [1991] ECR I-4221, in which the Court, adopting for freedom of services the same terminology as applied to free movement of goods, defined as 'imperative reasons relating to the public interest' those which it had until then classified as reasons of general interest and reiterated the needs worthy of protection. Considering, however, that right from its first judgments in the matter (see, for example, the judgment in Case 33/74 *Van Binsbergen* v *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299) the Court had considered measures restricting the freedom to provide services as being justified by the general interest, it is quite clear that the judgments in *Gouda*, *Säger* and *Commission* v *Netherlands*, far from innovating, merely make explicit the approach adopted and provide a fuller systematic and theoretical reconstruction of it.

without distinction. I might add that this question is not as banal as it may seem, given that such a classification is not always easy to make in relation to freedom to provide services, or rather, that it is difficult to arrive at a clear and unequivocal definition of discriminatory measures from the relevant case-law.

It is unquestionable that a national provision which provides for different treatment on the basis of nationality is formally discriminatory. [34] However, the classification of the same measure is less evident where the difference in treatment is based on the residence or on the establishment of the provider of a service. While it is true that the Court has effectively found national provisions applying different tax treatment according to place of establishment to be discriminatory and consequently justifiable only under the derogation provided for by Article 56, [35] the Court has also found national provisions subjecting the exercise of activities to the requirement of residence [36] or of establishment, [37] to be justified in the general interest, or has at least examined such provisions in the light of the objectives pursued. This notwithstanding the fact that this requirement, as the Court has pointed out on several occasions, makes it absolutely impossible to exercise the activity in question on an (only) occasional basis and therefore has the effect of denying providers established in other Member States of the benefit of Community rules on freedom to provide services. [38]

31. All things considered, however, the case-law just cited has its own logic in that it classifies as applicable without distinction (also) those national measures which, while subjecting the exercise of a given activity to the requirement of residence or establishment, none the less apply to all persons intending to exercise that activity on the territory of that Member State. In other words, the Court considers as formally discriminatory only those national provisions which lay down a different regime for foreign nationals and/or providers of services 'originating' in another Member State. However, where the legislation in question is intended to apply to

34 — See, to this effect, in this sense Case C-20/92 *Hubbard (Testamentvollstrecker)* v *Hamburger* [1993] ECR I-3777, at paragraphs 14 and 15; and Case C-45/93 *Commission* v *Spain* [1994] ECR I-911, at paragraphs 9 and 10.

35 — See, *inter alia*, *Bond van Adverteerders* (cited in footnote 30), at paragraphs 26 and 29; Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, at paragraphs 9, 10 and 11; and *Fedecine* (cited in footnote 30), at paragraph 14.

36 — See, for example, *Van Binsbergen* (cited in footnote 33) at paragraph 14; and Case 39/75 *Coenen and Others* v *Sociaal-Economische Raad* [1975] ECR 1547, at paragraphs 7 and 8 and at paragraphs 9 and 10.

37 — See, in particular, the '*Insurance*' case (cited in footnote 24), at paragraphs 52 to 57, as well as Case C-101/94 *Commission* v *Italy* [1996] ECR I-2691, at paragraph 31. I would add that in both cases the Court reached the conclusion that the requirement of establishment was not indispensable for attaining the objective pursued.

38 — In this sense, see, *inter alia*, *Parodi* (cited in footnote 5), in which the Court again underscored that the requirement of establishment 'has the result of depriving Article 59 of the Treaty of all effectiveness, a provision whose very purpose is to abolish restrictions on the freedom to provide services of persons who are not established in the State in which the service is to be provided'. The Court none the less added that 'If such a requirement is to be accepted, it must be shown that it constitutes a condition which is indispensable for attaining the objective pursued' (paragraph 31).

all persons exercising the activity concerned on the territory of a given Member State, even where it expressly lays down a residence or establishment condition (thereby making it impossible for providers established in another Member State to exercise the activity), it is classified as applicable without distinction.

The obvious consequence is that legislation which treats providers established in another Member State differently than those established domestically can only be justified under the derogations provided for by the Treaty, whereas legislation directly denying providers established in another Member State access to a given activity, precisely because it requires them to be resident or established in the State in which the service is to be provided, may be justified by imperative reasons relating to the public interest. This result is, I admit, unsatisfactory, just as its underlying reasoning may be considered perverse; the fact remains, however, that a measure requiring establishment in the matter of services is, *formally* of course, applicable without distinction.

32. Now let us look at the measure at issue here. Clearly, it does not, at least not directly, apply a different system for insurance companies which are not established in Sweden. The difference in treatment applies in fact, at least formally, to the policyholders who are all resident in Sweden. However, considering that the difference in tax treatment depends on the choice of insurer (established or not), it is only too clear that this measure entails a disparity of treatment based on the place of establishment of the provider.

In the circumstances, how one determines whether it falls into the 'formally discriminatory' category or into the 'applicable without distinction' category depends on where one puts the emphasis: on the fact that it is not directly discriminatory on grounds of establishment or on the fact that, all things considered, it is a measure laying down a different regime depending on whether or not insurance companies are established in Sweden. I would add that the most relevant caselaw, that involving similarly structured provisions, is of no help here, on the contrary.

33. This is firstly true of the judgment in *Bachmann*, a case which involved national rules making the deductibility of certain insurance contributions conditional on their being paid in the same State. The Court in fact considered that the rules be justified by the need to ensure national fiscal cohesion, thereby recognising it to be by nature applicable without distinction. It is worth stressing that, to this end, the Court simply recalled that 'the requirement of an establishment is compatible with Article 59 of the Treaty where it constitutes a condition which is indispensable to the achievement of the

public-interest objective pursued'. [39] In view of that finding it could be concluded that, if public interest can justify even the prohibition — imposed by an establishment requirement — on the exercise of certain activities in the territory of a given State, then provisions entailing certain disadvantages or not allowing certain advantages to persons choosing to deal with providers not established in the State concerned should *a fortiori* be capable of justification.

Although the Court would appear to have duly distanced itself from the *Bachmann* ruling in its subsequent judgment in the *Svensson* case, which involved similar provisions, the latter judgment created a number of uncertainties precisely on the point at issue here. In fact, in response to the contention of the Luxembourg Government that the provision of national law concerned was necessary to ensure fiscal cohesion, the Court pointed out that 'the rule in question entails discrimination based on the place of establishment' and consequently 'can only be justified on the general interest grounds referred to in Article 56(1) of the Treaty, to which Article 66 refers, and which do not include economic aims'. [40] However, the Court, not without evident contradiction, none the less went on to address the merits of the Luxembourg Government's arguments and concluded that, conversely to its finding in *Bachmann*, the legislation at issue could not be considered necessary for safeguarding fiscal cohesion. [41]

34. It seems to me that a particular piece of legislation can be capable of justification *either* under the derogations expressly provided for in the Treaty *or* on grounds relating to the public interest, [42] depending on whether it is discriminatory or applicable without distinction. After all, even granted that it is not always easy to classify a given rule of national law — either because its discriminatory effects (in fact) are all too clear or because the specific nature of a given service demands greater caution — it stands to reason that there cannot and should not be a third category of measure (applicable without distinction and formally discriminatory or applicable with distinction but not discriminatory). This case gives the Court an opportunity to clarify the issue by expressly declaring whether the national legislation at issue is to be held to be discriminatory — and thus capable of justification only on the basis of the derogations laid down in the Treaty itself — or whether, being applicable without distinction, it is capable of justification also on grounds of overriding reasons relating to the public interest.

39 — *Bachmann* (cited in footnote 9), at paragraph 32.

40 — *Svensson* (cited in footnote 13), at paragraph 15.

41 — As above, at paragraphs 16 to 18.

42 — It should, however, be noted here that it is not the first time that the Court has taken into consideration, with the aim of assessing the compatibility with Community law of a national provision restricting freedom to provide services, both the requirements specified in Article 56 and overriding reasons relating to the public interest (see, to this effect, paragraphs 31 and 32 of the judgment in *Commission* v *Italy*, cited in footnote 37).

More precisely, I consider that the Court should, in the present case, *either* find that provisions which *indirectly introduce* differences in treatment between providers of services according to whether or not they are established in the Member State concerned are to be classified as formally discriminatory, as *Svensson* would appear to suggest, *or* it should affirm that provisions *which do not formally apply* different rules to established and non-established providers remain measures that are applicable without distinction, as *Bachmann* would appear to suggest.

35. Applying the first approach to the present case, it is sufficient to note here that the national legislation at issue does not fall within any of the derogations provided for in Article 56 of the Treaty, to which Article 66 refers. Moreover, it cannot be disputed that fiscal cohesion and effective fiscal supervision, the grounds invoked by the Swedish Government, pursue an objective that is essentially economic, so that the measure in question can in no case be justified, and cannot therefore be declared compatible with Community law, on those grounds.

36. I do not believe that the conclusion would be any different if the Court were to decide, adopting the second approach, to classify the measure at issue as applicable without distinction. While it is not contested that the grounds submitted in justification are recognised by the relevant case-law [43] as warranting protection, the fact remains that the provision at issue is far from being necessary in order to attain the objectives pursued and does not withstand the test of proportionality.

Firstly, the purported need to ensure effective fiscal supervision obviously does not apply in this instance. Considering the characteristics and the rationale of the legislation at issue, as these were explained by the Swedish Government itself, it must be recognised that the legislation bears no significant causal nexus to the objective pursued.

37. Nor do I believe that the national legislation at issue can be justified by the need to ensure national fiscal cohesion: reference to the *Bachmann* case is certainly not sufficient for this purpose. It is quite true in fact that

43 — It should be noted that the Court recognised both effective fiscal supervision, in particular in *Futura* (cited in footnote 20) and the safeguarding of fiscal cohesion, in particular in *Bachmann* (cited in footnote 9), as being needs in the public interest. In this respect, see also my observations in the Opinion delivered on 16 September 1997 in Cases C-120/95 (*Decker*) and C-158/96 (*Kohll*), in particular under paragraph 53.

in that case the Court considered that fiscal cohesion would have been seriously jeopardised if the Belgian State had been obliged to grant the same tax advantages to policyholders insured with companies established abroad, given the difficulty of taxing income paid from outside the country. It is also true, however, that the Court reached this conclusion only after having pointed out that the objective of the national rules concerned was to create a mechanism of direct compensation between the deductibility of the contributions in question and the tax charge imposed on the yield subsequently received by the beneficiary.

Without going into the substance of this analysis, it is sufficient to note that the circumstances of the present case are quite different. Here in fact the discriminatory treatment lies in the modes of taxation, in that policyholders insured with companies established abroad are taxed on their premium payments, whereas policies issued by companies established in Sweden are taxed partly on the savings capital with the insurer and partly on the yield paid to policyholders. This is done with the express aim, as the referring court explains, 'of maintaining competitive neutrality between domestic and foreign savings policies'. However, the proceeds of the premium tax do not appear to be applied in a manner which is relevant in the sense of the *Bachmann* ruling; nor do they seem to be used to offset advantages otherwise obtained. Consequently, it would, to say the least, be inappropriate to apply that precedent to the present case.

38. In any case, the Swedish provision certainly does not seem to be proportionate to the aim it expressly seeks to attain. Competitive neutrality between established and non-established companies could surely be maintained by means less restrictive of the freedom to provide services while still respecting the principle of fiscal territoriality. One possibility, for example, could be to extend the premium tax regime to policyholders contracting with insurance companies established in Sweden; it would also be conceivable for the yield which policyholders receive to be taxed as domestically-earned income, without making any distinction between policyholders.

Lastly, it is worth emphasising that, subsequently to the facts under examination, the law in dispute was substantially amended. According to the applicant, this amendment has introduced an undifferentiated system for the taxation of insurance policy yields received by policyholders; it thus applies irrespective of the place of establishment of the insurance company. This fact, which can be interpreted in only one way, is significant to say the least.

Conclusion

39. In the light of the foregoing, I propose that the Court answer the question referred to it by the Länsrätt i Kopparbergs Län as follows:

Article 59 of the Treaty is to be interpreted as precluding legislation of a Member State which taxes premiums paid by resident policyholders under life assurance policies contracted with an insurer established in another Member State, even where that tax can be reduced to zero or by half if the insurance company established abroad is subject, in its home State, to revenue tax which is comparable to that charged on savings policies issued by domestic insurance companies.