OPINION OF ADVOCATE GENERAL SAGGIO

delivered on 1 December 1998 *

1. The reference for a preliminary ruling from the French Conseil d'État (Council of State) submits to the Court three questions of interpretation asking it to assess the compatibility with Articles 52 and 58 and 92 and 95 of the EC Treaty of domestic tax legislation which subjects undertakings trading in proprietary medicinal products to a special tax for 1996 and which allows expenditure incurred during that same period in respect of research carried out exclusively in the State of taxation, that is, France, to be deducted from the amount taxable.

Facts and national legislation

2. Order 96/51 of 24 January 1996 [1] introduced in France urgent measures for restoring financial stability in the social security system. In particular, Article 12 thereof imposed three new special levies on undertakings trading in proprietary medicinal products. The first had as its basis of assessment expenditure on promotion and advertising; the second the increase in turnover achieved in 1995 as compared with the previous financial year; and the third the turnover achieved during the 1995 tax period from sales of reimbursable medicinal products and medicinal products approved for use by public bodies.

3. The plaintiffs in the main proceedings have challenged the abovementioned order before the Conseil d'État, seeking its annulment. The questions referred by the national court on the compatibility of that order with the provisions of the Treaty all concern the third case.

Article 12 of the contested order, while specifying as the basis of assessment the net turnover achieved in France between 1 January and 31 December 1995 from sales of reimbursable proprietary medicinal products and medicinal products approved for use by public bodies, provides that the

* Original language: Italian.

1 — See *Journal Officiel de la République Française* of 25 January 1996, p. 1230.

costs accounted for during that same period in respect of expenditure on the carrying out in France of scientific and technical research relating to those same proprietary medicinal products may be deducted when calculating the taxable amount.[2] It is precisely the compatibility of that deduction with Community law which is at issue since, in essence, it allows the taxable amount to be abated only with regard to research carried out in the territory of the French Republic.

4. More specifically, the Conseil d'État submits the following questions to the Court:

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

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

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

The first question

5. By its first question, the national court seeks to ascertain whether the freedom of establishment guaranteed by the Treaty, both for natural persons who are nationals of a Member State and for companies or firms on the basis of Article 58, precludes domestic legislation which, in defining the characteristics of a special fiscal levy limited to a single tax period, allows the deduction from the taxable amount formed by the turnover from sales of certain

2 — Article 12(III) of the contested order was amended by a subsequent order, 96/345 of 24 April 1996 (*Journal Officiel de la République Française* of 25 April 1996, p. 6311), which made it clear that deductible expenditure for research related only to proprietary and other medicinal products sales of which determined the taxable amount.

proprietary medicinal products (those which are reimbursable and those which are approved for use by public bodies) of expenditure incurred during that tax period in respect of scientific and technical research carried out exclusively in French territory.

6. The Court is therefore required once again to rule on the compatibility with Community law of a national tax measure, and more specifically one concerning direct taxation. Although, unlike indirect taxation, where Community competence has been widely exercised, direct taxation does not as such fall within the competence of the Community, the general principle of cooperation contained in Article 5 of the Treaty means that the Member States must nevertheless exercise their competence consistently with Community law.[3] Thus, in the field of direct taxation, they must not adopt measures which would have the effect, without justification, of hindering the free movement of natural or legal persons.[4]

7. In particular, *according to the plaintiffs* in the main proceedings, the levy and the deduction relating thereto apply equally, without discrimination based on nationality, to French companies, to undertakings or companies formed in France by foreign nationals and to foreign companies established in France through subsidiaries, branches or agencies (secondary establishments). In reality, however, the conditions cannot be considered equal. Indeed, in the majority of cases, the subsidiaries (or branches or agencies) of pharmaceutical companies established in other Member States are engaged in France only in distribution whilst research, or the bulk of it, remains concentrated in the country of origin where the parent company has its principal place of business. Since French pharmaceutical companies have a large proportion of their research activity located in France, they enjoy, at parity of turnover, a manifest tax advantage since they are able to deduct a larger amount of research expenditure from the taxable amount. This is therefore a case of indirect discrimination against the plaintiffs, which is also prohibited by the principle of equal treatment contained in Articles 52 and 58 of the Treaty.

8. According to the *French Government*, the reason for discrimination is said to lie in the factual circumstance that the location of research expenditure in the pharmaceutical sector is linked to the company's principal place of business. This results in French companies having the advantage of reducing their taxable amount achieved from sales of medicinal products since they are able to deduct expenditure on research carried out in France, whereas foreign companies and the agencies, branches and subsidiaries of foreign companies, which carry out research in their respective countries, are said to be treated unfavourably since they are unable to reduce the taxable amount by the cost of research relating to

3 — See the judgment in Case C-264/96 *ICI* [1998] ECR I-4695, at paragraph 19; the judgment in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, at paragraph 19; the judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraph 36; and the judgment in Case C-279/93 *Schumacker* [1995] ECR I-225, at paragraph 21.

4 — See the judgment in *ICI*, cited in the previous footnote, at paragraph 20. Prior to that, see the judgment in Case C-330/91 *Commerzbank* [1993] ECR I-4017, at paragraph 2.

products sold in France, since such research is normally carried out in the country of establishment of the parent company. However, according to the French Government, that description of the situation does not correspond to reality. Indeed, having first stated that this is a matter for the national court to assess, the French Government observes that French pharmaceutical research centres are rapidly becoming secondary establishments of companies whose principal place of business is abroad and that, moreover, research relating to a single product is normally carried out in laboratories scattered over several States, so that the picture of French pharmaceutical companies carrying out research exclusively or mainly in France and foreign pharmaceutical companies carrying out research exclusively or mainly in their respective States of origin does not correspond to reality.

9. According to the *Commission*, the tax measure at issue is discriminatory from the point of view of exercise of the right of establishment since it ultimately favours pharmaceutical companies which carry out research in France and, hence, in the majority of cases, companies whose principal place of business is in France, as against pharmaceutical companies which merely distribute in France the products of research carried out in other Member States where their parent companies have their principal place of business. Such discrimination is not justified either by the requirements laid down in Article 56 of the Treaty or on the grounds of fiscal cohesion as defined in the Court's case-law.

10. It seems to me that there can be no doubt that, in several respects, the measure in question is indirectly discriminatory. First, the French legislation allows tax relief on the proceeds of the sales in France of certain medicinal products, provided that the research relating to those products has been carried out (and therefore the research costs incurred) in France. It is obvious that, in an economic context in which research is normally carried out at the parent company, two companies which distribute comparable proprietary medicinal products in France will be treated differently depending on whether or not they are subsidiaries, branches or agencies of a parent company situated in another Member State where the research is carried out. In other words, however neutral tax legislation may appear to be in allowing the deduction of research expenditure on the basis of the objective condition that it is undertaken in France, in point of fact it penalizes companies with their principal place of business abroad which have exercised the right of establishment in the form of a secondary establishment and which sell in French territory proprietary medicinal products for which the research is carried out in the State of the parent company's seat.

Secondly, the French legislation at issue also gives rise to a 'leaving' restriction in the form of tax treatment which makes it less attractive, for companies established in France, to set up offshoots abroad through

which to carry out research in other Member States. As the Court has now consistently held, even though, according to their wording, the Treaty provisions on establishment '... are directed mainly to ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, they also prohibit the Member State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation which comes within the definition contained in Article 58'. [5] In so far as the restriction, in the sense of exclusion from the enjoyment of a tax concession, affects affiliated companies which have their principal place of business in other Member States where they incur expenditure on research relating to products sold in France, the legislation in question constitutes an obstacle to the exercise of the freedom of establishment guaranteed by Articles 52 and 58 of the Treaty.

11. In view of the restrictive nature of the legislation in question with respect to the exercise of the right of establishment, it is necessary to ascertain whether it may possibly be justified in the light of Community law.

It is hardly necessary to point out that the rules governing the justifications which may be invoked vary depending on whether it is a matter of direct or indirect discrimination in the matter of establishment. In the former case, discriminatory national rules are compatible with Community law only if they can be brought within the scope of an express derogation. [6] In the latter case, on the other hand, if the measure is applicable without distinction, the restriction may be justified, not only on the grounds laid down in Article 56, but also by other overriding requirements relating to the public interest, provided that the principle of proportionality is observed.

12. In the present case, as stated above, the French tax legislation which is the subject-matter of the main proceedings is only indirectly discriminatory, in so far as it makes the tax concession subject, not to the nationality of the company, determined on the basis of its seat, but rather to the circumstance that the company carries out in France research relating to products marketed there. In so far as the research is carried out at the (foreign) seat of the parent company, the non-deductibility of the research expenditure gives rise to indirect discrimination affecting the exercise of the right to set up a secondary establishment.

13. Grounds of public policy, public security or public health, which are the only general requirements mentioned by Article 56 of the Treaty, certainly cannot reasonably be invoked in this case, particularly

5 — See the judgment in Case 81/87 *Daily Mail and General Trust* [1988] ECR 5483, at paragraph 16, and, more recently, the judgment in *ICI*, cited in footnote 3, at paragraph 21. With regard to natural persons, the prohibition of discrimination against those leaving their Member State was affirmed in the judgment in Case C-370/90 *Surinder Singh* [1992] ECR I-4265.

6 — See the judgment in Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, at paragraph 32.

in view of the restrictive interpretation which the Court of Justice has placed upon those derogations by making it clear that they do not include economic aims [7] such as the reduction in tax revenue which could result from the deductibility of research expenditure even if that expendure is carried out in other Member States.

14. It is nevertheless true that the Court has held that the need to maintain cohesion of national tax systems may, at least in certain situations, constitute an overriding reason relating to the public interest capable of justifying a restriction on the fundamental principles concerning freedom of movement, with due regard, of course, to the principle of proportionality, implying that tax system cohesion cannot be ensured by means of less restrictive measures. [8] In the judgments in *Commission* v *Belgium* and *Bachmann*, the Court held that domestic legislation which made the deductibility of pension and life assurance contributions conditional on the contributions being paid in the State concerned was justified by the need to maintain the cohesion of the tax system concerned. That restrictive approach was explained by the necessity to offset the loss of revenue resulting from deduction of tax on pensions, annuities or capital sums payable by insurers, when that tax was not payable if the insurers were established abroad. In subsequent case-law, the need for fiscal cohesion has been the subject of interpretations which have reduced its scope for purposes of justifying indirect discrimination. Thus, the Court has accepted that, whenever one State recognises another's power to tax its own residents in respect of income obtained in the first State, the balance between the fiscal benefit and the need for revenue must be achieved at an overall level, and not necessarily within a single State. [9] In other cases, the Court has emphasised the need for a direct link between the granting and the financing of the benefit, ruling out any reliance on fiscal cohesion whenever such a link cannot be established. [10] Again, it was the absence of a direct link between the discriminatory provision and the protected fiscal interest which led the Court to hold that it was incompatible with the right of establishment for Netherlands legislation to apply a higher rate of income tax to a non-resident on the ground that the latter was not obliged to pay contributions to the national social security scheme. [11]

7 — With particular reference to tax legislation, see the judgment in Case C-484/93 *Svensson and Gustavsson* [1995] ECR I-3955, at paragraph 15.

8 — The first references to fiscal cohesion as an overriding requirement capable of justifying restrictions on freedom of movement for persons were in the judgment in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305 and Case C-204/90 *Bachmann* [1992] ECR I-249.

9 — See the judgment in Case C-80/94 *Wielockx* [1995] ECR I-2493.

10 — In the judgment in *Svensson and Gustavsson*, cited in footnote 7, the Court excluded the existence of a direct link between the grant of an interest rate subsidy to borrowers for the acquisition of a dwelling and its financing by means of the profit tax on financial establishments. See also the Opinion of Advocate General Elmer in the same case, at point 31.

11 — Judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, at paragraphs 58 to 61. The need for a 'direct link' between the consortium relief granted for losses incurred by a resident subsidiary and the taxation of profits made by non-resident subsidiaries was regarded by the Court as an essential condition for establishing 'fiscal cohesion' as a ground of justification in the judgment in *ICI*, cited in footnote 3, at paragraph 29.

15. The French levy at issue here does not enable any link to be established between the levy, which, it should be remembered, is a direct tax on pharmaceutical companies' turnover from sales of reimbursable proprietary products less expenditure on research carried out in France, during the period in question, and the purpose of the tax, which is to balance the accounts of the national social security scheme. In particular, the prohibition on deducting expenditure on research carried out in other Member States is not justified by the need to offset any loss of tax revenue caused by the carrying out of scientific and technical research in other Member States. Put simply, the contested levy represents a greater tax burden (or, which amounts to the same thing, a lesser tax relief) for companies of other Member States marketing medicinal products in French territory by means of a secondary establishment.

It follows from the foregoing that Articles 52 and 58 of the Treaty preclude domestic legislation which imposes, for 1996, a special tax on turnover from sales of reimbursable proprietary medicinal products and medicinal products approved for use by public bodies and which allows costs accounted for during that same period in respect of expenditure only on research carried out in the State of taxation.

The second question

16. By its second question, the national court asks the Court to interpret Article 95 of the Treaty in order to establish whether or not it precludes domestic tax legislation such as that provided for by Order 96/51 of 24 January 1996. Article 95 of the Treaty prohibits Member States from imposing discriminatory internal taxes on imported products. It reinforces the protection against any other pecuniary charges affecting a product when, or at any rate because, that product crosses frontiers, which is afforded by the prohibition contained in Articles 9 to 12 of the Treaty, thus complementing the aim of eliminating obstacles to the free movement of goods in the Community.

The application of Article 95 requires the verification of a number of conditions. First of all, the subject-matter of the provisions of Article 95 is 'internal taxation' which is discriminatory in its impact. It should immediately be pointed out that, even though the wording of that provision defines its scope in fairly general terms by referring to 'internal taxation of any kind' and academic writers have therefore supported the theoretical applicability of that provision to direct as well as indirect taxation, the fact nevertheless remains that the actual cases in which the Court has applied Article 95 concern only indirect taxation. That is because, in reality, such taxation appears to fit in with the fundamental rationale of the provision, which is to prohibit discrimination against imported

products *vis-à-vis* similar or competing domestic products. Less relevant, but equally significant for the purpose of applying the provision in question only to indirect taxation, is the argument which can be drawn from its schematic position. Apart from Article 95, Chapter 2 of Title V of the EC Treaty, which is devoted to tax provisions, contains provisions which all refer only to indirect taxation, providing in Article 99 in particular for powers to harmonise legislation concerning turnover taxes, excise duties and other forms of indirect taxation to the extent that such harmonisation is necessary to ensure the establishment and functioning of the internal market.

On the other hand, it must be borne in mind that tax systems relating to direct taxation which contain rules likely to produce discriminatory effects are incompatible with other provisions of the Treaty, and in particular those on freedom of movement for persons or those concerning the free movement of goods. [12]

17. Even disregarding the last point, Article 95 could, in theory, apply to a tax system which subjects the profits made by importing undertakings to a tax burden greater than that imposed on domestic products. However, in the present case, the French tax legislation does not distinguish the tax system applicable to importers of medicinal products from that applicable to domestic producers of similar or competing products. The distinction relates, not to the origin of the product, taken to mean the place where its production process is carried out, but rather to the location of the scientific and technical research from which that product has resulted. Indeed, even if they carried out the entire production process in France, the branches or subsidiaries of foreign companies could not avail themselves of the right to deduct research expenditure if the scientific research preceding the manufacture of that product were in any case carried out at the parent establishment in another Member State. In such a case there would be discrimination and Article 95 could not reasonably be invoked. [13] For that reason also, I take the view that Article 95 cannot be used to assess the compatibility with Community law of the tax legislation contested before the national court.

Should the Court take a different view and find it necessary to assess the French tax legislation with reference to Article 95 of the Treaty, I am of the opinion, thus sharing the Commission's objections, that it is not possible to give a proper answer to the question in the absence of any information on how the levy at issue has an actual effect on the price to the ultimate consumer of the medicinal products. To determine whether

12 — In particular, a system of reliefs on profits taxes, which were reserved for publishing undertakings which printed their products in France, has been held to be incompatible with Article 30 (see judgment in Case 18/84 *Commission* v *France* [1985] ECR 1339, at paragraph 16).

13 — The Court has made it clear that the prohibition contained in Article 95 cannot be relied on by domestic producers of the Member State in question. See judgment in Case 68/79 *Just* [1980] ECR 501, at paragraph 15.

the internal tax has a discriminatory or protective effect, it must be examined whether '... it may deter consumers' from purchasing the imported product to the benefit of the product of domestic manufacture. [14] In the case of the French tax legislation, it is in no way possible to determine from the order for reference whether and to what extent the non-deduction of research expenditure carried out abroad is reflected in the cost, and therefore in the price, of products sold by branches or subsidiaries of parent companies established in other Member States, even having regard to the fact that those products are proprietary medicinal products which are reimbursable or, at any rate, approved for use by public bodies.

The third question

18. The third question is raised by the national court in the event that the Court answers the two previous questions in the negative. Since I am of the view that the levy at issue is contrary to the rules on the exercise of the right of establishment, I do not need to give an opinion on this question. However, should the Court take the view that neither Articles 52 and 58 nor Article 95 of the Treaty preclude tax legislation such as that contested before the national court, I shall make the following observations. By its third question, the Conseil d'État asks the Court to assess whether the deduction from the taxable amount of only the expenditure relating to research carried out in the State of taxation is to be considered State aid to undertakings as referred to in Article 92 of the Treaty.

19. The submission of the question on State aid in the alternative in relation to the two previous questions on the right of establishment and internal taxation of a discriminatory nature is also justified in the light of the relationship between the different Community rules which apply in each case. Indeed, according to the Court's case-law on the relationship between the rules on the free movement of goods, those concerning the repeal of discriminatory tax provisions and those on aid, the mere fact that a national measure may possibly be defined as aid within the meaning of Article 92 is not an adequate reason for exempting it from the prohibition contained in Article 30. [15] The same considerations apply to the relationship between the rules governing aid and those on the right of establishment. The prohibition of discriminatory measures affecting the exercise of the freedom of establishment, which is a specific application of the general principle of equal treatment in the fundamental sphere of freedom of movement for natural and legal persons, results in individual rights which

14 — See the judgment in Case C-113/94 *Casarin* [1995] ECR I-4203, at paragraph 22, in which the Court held that a system of taxation cannot be considered discriminatory solely because only imported products come within the most heavily taxed category, but that the effect of the tax on the pattern of consumer purchasing must be examined.

15 — See the judgment in *Commission* v *France*, cited in footnote 12, at paragraph 13. Previously, although with reference to those aspects of aid which were not necessary for the attainment of its object or for its proper functioning, the Court had already held that the scheme of Articles 92 to 94 could not prevent the application of Article 30 (see judgment in Case 74/76 *Iannelli and Volpi* [1977] ECR 557, at paragraphs 16 and 17).

can be invoked directly before a national court and extends, through the concept of indirect discrimination, which is equally prohibited, well beyond the national treatment rule. Indeed, all covert forms of discrimination which, by the application of criteria other than nationality, lead in fact to a disadvantage for foreign nationals are prohibited. [16]

As in the case of the free movement of goods, the extension of the scope of the rules on the right of establishment eventually comes up against situations of discrimination affecting operators from other Member States which could also fall within the ambit of other provisions of the Treaty, such as those on State aid. However, the partial overlapping of the areas of application of the respective rules must not lead to the provisions on establishment or on the free movement of goods being considered inapplicable when, as in the present case, certain aspects of the system of aid organised by the State in question are capable of being examined independently in the light of those provisions. I am therefore of the opinion that the French tax system introduced by the order being contested before the national court can be assessed in the light of the rules on the right of establishment and that, once it has been established that those rules preclude such taxation, it will not be necessary to examine its compatibility with the rules on State aid.

16 — The prohibition formula goes back to the judgment in Case 152/73 *Sotgiu* [1974] ECR 153, at paragraph 11.

20. The following observations therefore apply only if the tax legislation which is the subject-matter of the proceedings before the national court must be regarded as compatible with the rules contained in Articles 52 and 58 or Article 95 of the Treaty.

Article 92, which states that any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, in so far as it affects trade between Member States, is incompatible with the common market, contains a very broad concept of aid, which has since been clarified by the Court's case-law. In particular, aid is considered to embrace not only positive benefits such as subsidies '... but also interventions which, in various forms, mitigate the charges which are normally included in the budget of an undertaking and which, without therefore being subsidies in the strict meaning of the word, are similar in character and have the same effect'. It follows that a tax exemption which, although not involving a transfer of State resources, places the persons to whom it applies in a more favourable financial situation than other taxpayers constitutes State aid within the meaning of Article 92. [17]

17 — See the judgment in Case C-387/92 *Banco Exterior de España* [1994] ECR I-877, at paragraphs 13 and 14, which applies a much earlier decision (see the judgment in Case 30/59 *Steenkolenmijnen* [1961] ECR 1, and in particular at page 39.

Generally speaking, provided that the other conditions are satisfied, the possibility of deducting certain costs from the taxable amount, resulting in a lower tax burden for the beneficiary undertakings, may therefore constitute State aid within the meaning of Article 92 of the Treaty. [18]

21. The beneficiary of the aid must be identifiable as a particular undertaking or particular undertakings or the production of particular goods. In other words, the aid must consist of selective measures to the advantage of particular activities or groups of undertakings. On the other hand, the concept of aid excludes general economic-policy measures designed to develop the system as a whole.

The tax burden introduced by Order 94/96 is imposed on the entire pharmaceutical industry which distributes its products in France. Deduction from the taxable amount applies exclusively to companies which carry out scientific and technical research in France and which, in the majority of cases, are companies having their principal place of business in the State of taxation and which are therefore French companies. On the other hand, since it is apparent from the factual situation that companies forming part of groups whose parent companies are established in other Member States do not carry out research in France, such companies bear the tax burden in full as they are not eligible to deduct research costs from the taxable amount. It follows that this is a measure which will favour pharmaceutical research in France and, more generally, the French pharmaceutical industry. Accordingly, the requirement concerning the sectoral character of the aid in question can be regarded as satisfied.

22. With regard to the effect of the aid on intra-Community trade, the case-law regards this condition as satisfied even where the beneficiary operates exclusively on the domestic market, since the advantage enjoyed represents a barrier to entry into that market of companies operating in other Community countries. [19] In the present case, it would be difficult to argue that the French undertakings in receipt of the aid operate exclusively on the domestic market, since the sector concerned, that of the pharmaceutical industry, is characterised by great openness of markets and fierce international competition. In any case, the existence of intra-Community trade in the market in question can be deduced from the very presence of branches or subsidiaries of foreign companies, which are responsible for distributing their products in France.

18 — The Commission has characterised as aid within the meaning of Article 92 a preferential system of tax credit on income tax, municipal tax or VAT, introduced in favour of a particular category of national operators (see Commission Decision 93/496/EEC of 9 June 1993 concerning State aid procedure C 32/92 (ex NN 67/92) — Italy (tax credit for professional road hauliers) (OJ 1993 L 233, p. 10). The decision was not contested and the failure of the Italian Republic to comply with it was established by judgment in Case C-280/95 *Commission* v *Italy* [1998] ECR I-259.

19 — See the judgment in Case 102/87 *France* v *Commission* [1988] ECR I-4067, in which the Court nevertheless emphasised that it was irrelevant, for the purposes of consideration as aid, that the advantage was relatively small. See also, to this effect, the judgment in Case C-142/87 *Belgium* v *Commission* [1990] ECR I-959, at paragraph 43.

23. In conclusion, I am of the opinion that a tax measure such as that provided for by the French legislation in question constitutes aid within the meaning of Article 92 of the Treaty.

Conclusion

24. In the light of the foregoing I propose that the Court answer the questions submitted by the French Conseil d'État as follows:

(1) Articles 52 and 58 of the EC Treaty preclude domestic legislation, enacted in 1996, which imposes for that year a special levy, the rate of which is to be fixed between 1.5% and 2%, on the pre-tax turnover achieved in the State of taxation between 1 January 1995 and 31 December 1995 by undertakings exploiting proprietary medicinal products, reimbursable proprietary medicinal products and medicinal products approved for use by public authorities and under which costs accounted for during that same period only in respect of expenditure on research carried out in the State of taxation are deductible.

(2) Article 95 of the EC Treaty does not preclude such legislation.

In the alternative, only if the Court holds that Articles 52 and 58 of the Treaty do not preclude domestic legislation such as that described under (1) above, I propose that the Court answer the third question as follows:

(3) The deductibility from the taxable amount of expenditure on research carried out in the State of taxation is to be considered aid within the meaning of Article 92 of the EC Treaty.