OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 16 October 1985 *

Mr President,
Members of the Court,

1. The Court has been asked to rule on an application under Article 169 of the EEC Treaty brought by the Commission of the European Communities against the French Republic. The Commission complains that the French Republic failed to grant to branches and agencies set up in France by insurance companies of other Member States the benefit of the shareholders' tax credit known as 'avoir fiscal', from which corresponding French undertakings benefit. That omission and the discrimination which results from it is alleged to be a breach of Article 52 of the Treaty.

2. Let me refer briefly to the relevant French provisions. Taxable income is determined in accordance with the provisions of the Code général des impôts [General Tax Code], Article 205 of which provides for a tax 'on all profits or income' payable by the companies and other legal persons referred to in Article 206, the rate of which is fixed at 50% of profits. Article 209 provides that for the purposes of that tax account is taken 'only of profits made by undertakings operating in France or by those which France is entitled to tax under an international double taxation agreement'.

In order to avoid the double burden imposed on company dividends, liable both to the tax payable by the company which distributes them and, in the hands of the recipients, to income tax in the case of natural persons or corporation tax if they are received by legal persons, the French legislature, at the end of 1965, granted a tax concession known as an 'avoir fiscal' to the recipients of dividends. According to Article 158 bis of the General Tax Code, 'persons who receive dividends distributed by French companies dispose in that respect of an income consisting of the sums which they receive from the company and a shareholders' tax credit in their favour with the Treasury. That credit is equal to half the sums actually paid by the company. It may only be utilized in so far as the above-mentioned income forms part of the sum on which the recipient is liable to income tax. It is accepted in payment of that income tax. It is refunded to natural persons in so far as the total amount of the credit exceeds that of the tax to which they are liable.' However, that concession is available only 'to persons who have their habitual residence or registered office in France' (Article 158 ter) unless provision is made for its extension to foreign nationals in double taxation agreements entered into by France (Article 242 quater).

It follows from those provisions therefore that the 'avoir fiscal' is available only to companies whose registered office is in France, including subsidiaries established by foreign companies ('società affiliate' rather than 'filiali' used in Article 52 of the Treaty is the term which in Italian legal usage corresponds to the Dutch 'dochterondernemingen', English 'subsidiaries', French 'filiales', German 'Tochtergesellschaften'),

* Translated from the Italian.

that credit is not granted to agencies and branches which foreign companies have opened on French territory. A circular of 30 July 1976 also states that dividends distributed by French companies to foreign companies having an establishment in France do not benefit from the 'avoir fiscal' even if those dividends are part of the income of that establishment.

Finally, the finance law for 1978 (Law No 77-1467 of 30 December 1977, Journal Officiel de la République Française 1977, p. 6316) provides that insurance, re-insurance, capitalization and savings companies may deduct from the tax to which they are liable the entirety of the tax credit including the 'avoir fiscal' granted under Article 158 bis of the General Tax Code in respect of dividends received from their investments in shares (Article 15).

3. Since it considered that the difference in treatment described above was discriminatory and infringed Article 52 of the Treaty, the Commission, by a letter of 29 July 1981 initiated the procedure for a declaration that the French Republic had failed to fulfil its obligations. By letter of 30 December 1981 the French Government refuted the complaint. It contended that the legal form which an undertaking gave to its subordinate structures was not without consequences from the point of view of taxation since it could affect the forms of taxation to which such structures were liable. Thus, a subsidiary of a foreign undertaking was a legal person and, in so far as it was subject to French law, was regarded as 'resident' for the purposes of taxation. On the other hand, branches and agencies were secondary establishments of the undertaking and were not autonomous. For the purposes of taxation therefore they were regarded as being 'non-resident' in the State in which they operated.

The French Government concluded that in order to benefit from the tax credit, insurance undertakings incorporated in the various Member States merely had to establish a subsidiary in France. In any event, it was clear that the problems connected with the tax liability of branches and agencies could not be resolved on the basis of Article 52. That could only be done in the context of an approximation of the various tax laws and in the meantime, the matter had to be regulated by the bilateral double taxation agreements.

The Commission was not convinced by those arguments. In its view, the French provisions had to be assessed in the light of the rules governing the right of establishment. Article 52 would be deprived of all meaning if in order to benefit from the tax credit, foreign companies were obliged to establish subsidiaries rather than operate through agencies and branches. The Commission added that the failure to grant the concession to the latter was even less justifiable because they were assimilated to French companies for all other tax purposes and in particular, for the purposes of determining taxable income (reasoned opinion of 4 May 1983).

In its reply dated 6 July 1983, the French Government once again denied that the General Tax Code created obstacles to the freedom of establishment. In fact, precisely because they were regarded as non-resident, branches and agencies of foreign companies avoided the burden of certain taxes to which legal persons were subject (taxes payable upon constitution, transformation, merger, division, or dissolution). There were thus no grounds for claiming that they were placed at a disadvantage compared to

French companies. What is more, because the Commission's complaint referred *solely* to agencies or branches of insurance companies, the reform which it envisaged would be discriminatory vis-à-vis similar establishments of foreign companies operating in sectors other than insurance. In any event, France was prepared to consider the problem raised by the Commission in the framework of bilateral agreements. Protocols dealing with the extension of shareholders' tax credits on a reciprocol basis could be added to its existing agreements with its Community partners.

However, even that undertaking did not cause the Commission to change its mind. On 19 October 1983, it decided to bring the matter before the Court of Justice in accordance with the second paragraph of Article 169. Its application dated 30 November was registered at the Court on 12 December 1983.

4. The application consists of two complaints: the above-mentioned arrangements for granting the 'avoir fiscal' infringe Article 52 of the Treaty because they constitute:

(a) discrimination against foreign companies and

(b) an indirect restriction on the freedom to set up secondary establishments.

The argument advanced in support of the first complaint is based on an example: the Commission observes that in regard to a dividend of 100 francs, a company whose registered office is in France pays 25 francs in corporation tax (150 x 50%) — 50), whereas an agency or branch of a company incorporated in another Member State is required to pay 50 francs (100 x 50%).

Thus, although it may exercise the same activity, a company incorporated under French law is subject to different rules in regard to taxation than are applied to foreign companies operating through agencies or branches. That difference of treatment comes within the scope of the second paragraph of Article 52 which provides that freedom of establishment includes 'the right . . . to set up and manage undertakings . . . under the conditions laid down for its own nationals by the law of the country where such establishment is effected'. On the one hand, that difference of treatment is based on nationality and on the other, it makes the management of foreign companies subject to conditions which are certainly less advantageous. Since they do not benefit from the tax credit, such companies are therefore obliged to fix their tariffs at a higher level than those offered by their French competitors. Thus, because of the so-called 'matching assets rule', their investments are less profitable than those available to companies whose registered office is in France.

As the second point gave rise to not inconsiderable discussion, let us examine it more closely. According to Article 15 of the First Directive on the co-ordination of laws, regualtions and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance (Official Journal 1973, L 228, p. 3), each Member State in whose territory an undertaking carries on business is to require the undertaking to establish sufficient technical reserves. Such reserves 'shall be required to be covered by equivalent and matching assets localized in each country where business is carried on'. However, the Member States may attenuate the rule of 'matching assets', that is to say, the rule requiring representation of 'under-writing liabilities expressed in a particular currency by assets expressed or realizable in the same currency' (Article 5 (b)).

The amendments made to the French legal provisions in order to make them comply with that directive required insurance companies to hold assets expressed in French currency and in the Commission's

view, it is precisely that requirement that constitutes discrimination against agencies and branches of foreign companies. Whereas French companies are able to purchase foreign shares and securities and thus vary the composition of their portfolios in line with developments in the financial market, the effect of the matching assets rule is that agencies or branches of foreign insurance companies may not hold shares in foreign companies. Since they are not accorded the benefit of the 'avoir fiscal', it is not advantageous for them to invest in French shares and all that remains is for them to invest in bonds. Thus, Article 158 ter of the General Tax Code limits the choice of investments in securities which foreign companies may make and from that point of view also, infringes the principle of equality in regard to the management of undertakings laid down in the second paragraph of Article 52.

The other complaint is easier to summarize. As the Court will be aware, the first paragraph of Article 52 prohibits any restrictions 'on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State'. The Commission claims that the conditions under which the tax credit is granted and the effects thereof cause foreign insurance companies to establish subsidiaries rather than agencies or branches. Their right of establishment is thus indirectly limited.

5. In answer to the Commission's complaints, the French Government relies on a defence consisting of seven principal arguments which I propose to consider in the following order:

(1) the maintenance in force of the disputed rules is justified by the lack of harmonization in the field of tax law;

(2) until such harmonization has taken place, the problem can be resolved only in the context of bilateral agreements;

(3) the exclusion of agencies and branches of foreign companies from the benefit of the tax credit is also justified because of the danger of large-scale tax avoidance;

(4) the disadvantages which agencies and branches suffer are amply compensated for by the tax and financial advantages which they enjoy *vis-à-vis* companies incorporated under French law;

(5) far from being based on nationality, the differences between the treatment of agencies or branches and that of subsidiaries are the consequence of objective factors, and in particular, of the distinction which exists in all tax systems between 'residents' and 'non-residents';

(6) since they are allowed to establish subsidiaries, foreign undertakings benefit fully from the right to set up secondary establishments;

(7) the effect of granting the Commission's application would be to discriminate against undertakings operating in sectors other than insurance.

Let me say straight away that in my opinion, only one of those arguments (the sixth, in fact) is really convincing. As I shall attempt to show, the others are not well founded.

6. The French Government contends firstly that the tax credit scheme will continue to be lawful until the laws of the Member States concerning the taxation of legal persons have been completely harmonized. That argument is unconvincing, as is shown by the Court's case-law concerning the relationship between Article 30 and Article 100 of the Treaty. I would draw attention in particular to what the Court said in its judgment of 9 December 1981 in Case 193/80 (*Commission* v *Italy* [1981] ECR 3019):

'The fundamental principle of a unified market and its corollary, the free movement of goods, may not under the circumstances be made subject to the condition that there should first be an approximation of national laws for if that condition had to be fulfilled the principle would be reduced to a mere cipher. Moreover, it is apparent that the purposes of Articles 30 and 100 are different. The purpose of Article 30 is . . . to abolish in the immediate future all quantitative restrictions on the imports of goods and all measures having an equivalent effect, whereas the general purpose of Article 100 is . . . to enable obstacles of whatever kind arising from disparities between (the national provisions) to be reduced' (paragraph 17 of the decision).

In my opinion, those remarks are altogether apposite to the present case which is concerned with a principle no less important that that laid down in Article 30: the freedom of establishment. Accordingly the condition that there should first be an approximation of national laws does not apply in the case of the right of establishment and the prohibition of discrimination it entails. In more concrete terms, delay on the part of the Community legislature does not suspend the Member States' obligation to apply their tax laws in a non-discriminatory way.

7. Let me now turn to the second argument which is presented more in the form of a proposition. The French Government contends that in order to resolve the present problem, it is sufficient to add additional provisions to the existing bilateral double-taxation agreements between France and its Community partners. In those protocols, however, the shareholders' tax credit would have to be extended on the basis of reciprocity. Thus, foreign undertakings will be allowed to benefit from the tax credit if and when the same concession is granted to French companies having secondary establishments in the other contracting Member State.

That argument cannot be accepted since, as was decided in the judgment of 25 October 1979 in Case 159/78 (*Commission* v *Italy* [1979] ECR 3247), the scope of Article 52 may not be restricted by any reciprocity clause. The Italian customs legislation contained a provision under which the licence to act as a customs agent was granted only to Italian nationals or nationals of foreign countries 'that grant equal treatment ... to Italian citizens'. The Court held that provision to be incompatible with Article 52 precisely because it did not make an exception in favour of Community citizens.

It may also not be argued in defence of the contested rules that they are the counterpart of the absence of a corresponding concession for agencies and branches of French undertakings established in other Member States. As the Commission points out, that argument was adopted by a Luxembourg social security agency in order to justify discrimination in regard to freedom to provide services. The reply which was made to that argument, and which the Court accepted, was that in assessing an infringement of Community

law, extraneous factors such as, in the case of a discriminatory act, the likelihood that it will counterbalance discrimination elsewhere, must be left out of consideration (judgment of 3 February 1982 in Joined Cases 62 and 63/81 *Seco* v *EVI* [1982] ECR 223).

The argument that the French Government could not extend the benefit of the tax credit without disturbing the balance established in the aforementioned double taxation agreements is also rather weak. One counter argument is that under Articles 234 and 5 of the EEC Treaty, international agreements concluded after the entry into force of the Treaty may not contain provisions incompatible with it. The principle of the primacy of Community law must also not be forgotten. That principle requires that the effectiveness of a rule of the Treaty should not be subordinated to an internal rule, and, under Article 55 of the French Constitution, an international agreement which has been ratified and published is such a rule.

8. The third argument relies on the danger of tax avoidance if the measure at issue were abolished. It is argued that foreign companies which owned French shares might be prompted to include them in the assets of the agencies or branches operating in France solely in order to benefit from the tax credit on the distribution of dividends.

That argument is without foundation. The Commission has persuasively shown that far from involving a reduction in tax revenue for the French State, the hypothesis advanced by the French Government would result in an increase in the tax burden on foreign companies. Let us suppose that the French shares remained at the company's principal place of business: the dividends on them would be subject to a deduction of 15%, that is to say, the average rate laid down in the bilateral agreements which do not extend the benefit of the shareholders' tax credit to non-residents. If on the other hand the same shares were included in the assets of the branches and agencies, the dividends would be liable to corporation tax which, after deduction of the tax credit, amounts to 25%.

9. The fourth argument is the one to which the French Government attaches the greatest importance. It alleges that the Commission has claimed that the rules at issue are unfavourable to foreign companies operating through agencies and branches in regard to tariffs and investments. The French Government argues that those disadvantages do not exist and even if they did, they would be more than compensated for by the tax and financial advantages which those undertakings enjoy compared to French companies and the French subsidiaries of foreign companies. In any event, if they actually wish to be treated in the same way as French companies, foreign undertakings need only establish subsidiaries rather than open secondary establishments.

The first contention is correct and the Commission itself ultimately recognized that fact. On the basis of clear statistical data, the French Government has shown that such agencies and branches are not in fact compelled to fix their tariffs at a higher level, moreover, if they did so, they would

be immediately excluded from the market and there is not the slightest indication that such an event is likely. With regard to investments, the French Government pointed out that the French legislation is considerably less restrictive than the Commission claims. It in fact merely fixes a minimum percentage of bonds which insurance companies operating in France must maintain as representation of their regulated liabilities whereas it does not lay down a maximum authorized percentage for ownership of shares or other assets as representation of the said liabilities. It is also permissible to hold foreign shares provided that they are quoted on a French stock exchange, and the statistics for 1981 show that 55% of the securities held by agencies and branches were precisely in that category.

However, the second part of the French Government's argument is without foundation. The French Government observes that precisely because they are not legally autonomous, agencies and branches avoid the many taxes payable when companies modify their structure. However, it can easily be objected that it is not possible to draw parallels between burdens which recur every year, such as corporation tax, and sums levied at most only when the company is established. Thus, the exemption provided for in respect of contributions of capital by agencies and branches cannot be considered an advantage granted to such bodies. That is clear from Article 2 (1) of the Directive of 17 July 1969 concerning indirect taxes on the raising of capital (Official Journal, English Special Edition 1969 (II), p. 412) which provides that 'transactions subject to capital duty shall only be taxable in the Member State in whose territory the effective centre of management of a capital company is situated at the time when such transactions take place'.

The French Government's third arguments cannot be accepted either. It is in general more onerous to establish a subsidiary than to open an agency or branch, if for no other reason that that the former involves far greater expenditure (payment of the minimum capital, guarantee fund, etc.) than is required for the latter case in which enrolment in the register of commerce is sufficient. It could be added that the establishment of a subsidiary with its own legal personality and solvency to a certain extent obscures the prestige of insurance companies whose registered office is in another country. In the case of secondary establishment however, that screen does not exist and such establishments benefit directly from the reputation of the parent company.

10. Let me now turn to the fifth argument. The French Government observes that the principle of equality does not prohibit treating similar situations differently if the difference is objectively justified (judgment of 8 October 1980 in Case 810/79 *Uberschär* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2747; judgment of 16 October 1980 in Case 147/79 *Hochstrass* v *Court of Justice* [1980] ECR 3005). That is exactly the situation in this case. The different rules applied to subsidiaries, on the one hand, and agencies and branches, on the other, have nothing to do with the nationality of those bodies. They are in fact based on an objective distinction, to be found in the legal systems of practically all the Member States, between 'residents' and 'non-residents'.

The Commission takes a different view. It contends that like citizenship for natural persons, the location of the registered office serves in France as a criterion for deciding whether companies are subject to the national rules. It follows that to treat them

differently by reason of the location of their registered office (in France or another Member State) amounts to discrimination on the basis of their nationality. The discrimination is admittedly not explicit; in point of fact it is well hidden. However, as was stated in the judgment of 12 February 1974 in Case 152/73 (*Sotgiu* v *Deutsche Bundespost* [1974] ECR 153) that does not prevent it being incompatible with the Treaty.

I agree with the Commission as to the discriminatory nature of the rules at issue. However, the argument that I have just referred to leaves me puzzled, just as I doubt, to return to the subject of the preceding paragraph, whether it is really useful to weigh up the advantages and disadvantages from which companies incorporated under French law and the agencies and branches of foreign companies benefit or suffer. There is a much more direct way of arriving at the Commission's objective taking as the point of departure the arrangements for determining the amount of corporation tax owed in France. Let me remind the Court that account is taken for that purpose 'solely of profits made in the undertakings operating in France' (Article 209 of the General Tax Code). Thus, the nationality of the undertaking, the location of its registered office, the nature of its profits and the country in which they are invested are relevant. Liability to corporation tax is governed by a sole criterion: the principle of territoriality. It applies, moreover, in a perfectly symmetrical way in the sense that foreign companies are taxed in respect of their activities in France and French companies are not taxed in respect of activities carried out abroad.

With regard to the basis on which tax is levied therefore, French companies and secondary establishments of foreign undertakings are treated in the same way. That is not so with regard to the calculation of the amount of tax due. As the Court will be aware, the shareholders' tax credit, which from practical point of view corresponds to a partial refund, is granted to companies having 'their registered office in France' (Article 158 ter of the General Tax Code) but not to non-residents. What are the reasons for that exclusion? They were set out by Mr Valéry Giscard d'Estaing when, as Minister for Finance and Economic Affairs, he presented the bill implementing the reform of 12 July 1965 to the National Assembly in the following terms: 'We wanted this concession under the budget of the French State to be reserved either to the French themselves or to persons resident in France. We obviously do not exclude the possibility of extending the concession by way of suitable agreements which may be negotiated to nationals of other countries which adopt an approach corresponding to our own . . . '. Later in the same speech, he also said: 'Before extending the concessions which we are introducing to nationals of other countries, we must therefore ensure that French residents of those countries are able to benefit from the same advantages on a reciprocal basis' (Journal Officiel de la République Française, Débats Assemblée Nationale, 11 May 1965, p. 1233).

All is thus clear: the basis of the rules under consideration is the conviction, which I have already shown to be without foundation in the Community context (*supra*, point 7), that the shareholders' tax credit should be applied to companies incorporated in other Member States only in so far as those States grant the same concession to French companies. Moreover, since both types of company are subject to the same criterion in regard to determining the amount of tax due, it is clear that the said rules affect 'the management of undertakings' inasmuch as they impose a greater burden on the management of foreign companies operating through secondary establishments. There is thus no doubt that at least from that point

of view, they infringe the principle that there must be equal conditions of establishment laid down in the second paragraph of Article 52 of the Treaty.

11. As the Court has seen, the Commission complains that the French rules give rise not merely to discrimination but also to an indirect restriction on the establishment of secondary establishments by foreign undertakings. Provided that the conditions laid down in Article 58 have been satisfied, those undertakings are free to choose the legal form in which they exercise the right granted to them by Article 52, and it is precisely that freedom which the rules at issue limit by refusing to grant them the benefit of the shareholders' tax credit and thereby discouraging the establishment of agencies and branches.

The French Government contended that that argument was without foundation and I share its opinion. Discrimination and restrictions on establishment are different phenomena and it does not necessarily follow that a measure likely to give rise to the one will also contribute to the other. Thus, the discouragement of agencies and branches may be an aspect of the discriminatory treatment of foreign companies but does not affect their right to establish themselves in France. According to Article 52, that right includes the abolition of restrictions on 'the setting up of agencies, branches or subsidiaries'. In my opinion, those words cannot be interpreted as meaning that the three forms of secondary establishment must be subject to absolutely identical rules whether in regard to taxation or to anything else.

12. The French Government's final argument is, so to speak, in the nature of a 'counterclaim'. It contends that if it were to accede to the Commission's wishes, France would discriminate against agencies and branches of foreign companies operating in sectors other than insurance.

For its part, the Commission has explained why it has acted solely in relation to insurance, putting forward three reasons: the complaints it had received from insurance companies; its interest in ensuring effective implementation of the right of establishment in this sector, including the impetus that this would give to the approximation of national laws; and the magnitude of the problem for the insurance companies having regard to the 'matching assets' rule and to the obligation to constitute technical reserves. The Commission adds that if the Court accepts its argument, France will ultimately have to extend the shareholders' tax credit to *all* secondary establishments of foreign companies operating on its territory. However, contrary to the French Government's view, the fact that such an effect may be foreseen does not constitute a modification of the purpose of the application, which is concerned solely with discrimination suffered by insurance companies.

I confess that I do not find that argument at all persuasive. It does not dissipate the impression that by limiting its intervention to the insurance sector, the Commission has made a mountain out of a mole-hill. However, from a formal point of view, such a course of conduct is not open to criticism. In particular, it cannot be said that the purpose of the application has changed in such a way that its admissibility is in doubt. The complaints made in the pre-litigation phase are identical to those in the application.

13. For all the foregoing reasons, I propose that the Court uphold the application brought by the Commission of the European Communities against the French Republic on 12 December 1983. Consequently, I propose that the Court declare that by failing to extend to branches and agencies set up in France by companies whose registered office is in other Member States the benefit of the shareholders' tax credit enjoyed by French insurance companies, the French Republic has infringed the principle of non-discrimination laid down in the second paragraph of Article 52 of the EEC Treaty.

Since the French Republic has failed in its submissions, it should be ordered to pay the costs.