residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other Member States since it is most often those companies which are resident for tax purposes outside the territory of the Member State in question.

REPORT FOR THE HEARING
in Case C-330/91 *

I — Facts and procedure

A — *The facts*

Commerzbank AG, which is a public limited company incorporated under German law, has a branch in the United Kingdom. Through the intermediary of that branch the company granted various loans to United States companies between 1973 and 1976. Commerzbank paid tax of £4 222 234 to the Inland Revenue on the interest which it received from those companies.

Subsequently Commerzbank claimed a refund of the tax on the ground that the interest in question was exempt from United Kingdom tax by virtue of Article XV of the Double Taxation Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income (S. R. & O. 1946, No 1327), as amended by the Protocol of 20 September 1966 (S. I. 1966 No 1188). That article provides in substance that interest paid by a United States company is exempt from United Kingdom tax except where the recipient is a United Kingdom company or a company which is resident for tax purposes in the United Kingdom. The overpaid tax was refunded to Commerzbank in 1990.

Commerzbank also claimed compensation by way of interest on the overpaid tax in respect of the period for which the tax was held by the Inland Revenue. The company calculated the total interest payable until the date on which the tax was refunded as £5 199 258, that is to say an amount which exceeded the tax paid.

Commerzbank based its claim on section 825 of the Income and Corporation Taxes Act 1988. By virtue of that provision a company receiving a repayment of overpaid

* Language of the case: French.

corporation tax is entitled to compensation calculated at an annual rate of 8.25% of the tax repaid, provided that it is resident for tax purposes in the United Kingdom. The provision reads as follows:

'(1) This section applies to the following payments made to a company in connection with any accounting period for which the company was resident in the United Kingdom ...

(a) a repayment of corporation tax paid by the company for that accounting period ... .

(2) Subject to the following provisions of this section, where a payment of not less than £100 to which this section applies is made by the Board or an inspector after the end of the 12 months beginning with the material date, the payment shall be increased under this section by an amount (a "repayment supplement") equal to interest on the amount paid at the rate of 8.25 per cent per annum ...'.

Commerzbank's claim was rejected by the Inland Revenue. The company therefore applied to the High Court for judicial review of the Inland Revenue's decision. It contended that the refusal to grant the repayment supplement to non-residents constituted a restriction of their freedom of establishment and also indirect discrimination based on nationality, since the companies affected were for the most part foreign.

The Inland Revenue replied that, far from being discriminated against, Commerzbank received preferential treatment by virtue of the exemption granted to it.

The High Court considers that the solution to the dispute depends on the manner in which Commerzbank's tax position is analysed. If one focuses on the actual incident in which the alleged disadvantage is to be found, namely the refusal of the supplement, there is manifest discrimination. If, on the other hand, one takes into account the exemption received by Commerzbank, the disadvantage vanishes, and it becomes difficult to compare the company's situation with that of its United Kingdom competitors.

It is against that background that the High Court of Justice decided to stay the proceedings and, by order of 12 April 1991, referred the following question to the Court for a preliminary ruling:

'Where:

(i) a company which is formed in accordance with the law of, and has its principal place of business in, one Member State carries on business through a branch in a second Member State;

(ii) the company is subject to a demand for payment of tax in the second Member State on certain profits generated by the branch, and pays the tax;

(iii) the said tax is not in fact due if the company is entitled to benefit from an exemption under a double taxation agreement between the second Member State and a third country to companies which are neither nationals of, nor resident for tax purposes in, the second Member State;

(iv) the company successfully claims the benefit of the exemption and secures recovery of the tax paid but not due;

(v) the law of the second Member State provides for statutory compensation in the nature of interest (known as "repayment supplement") where the company recovering the tax paid but not due was resident in that Member State at the material time;

(vi) the company claims the repayment supplement notwithstanding that it was not resident in that Member State at the material time;

(vii) the second Member State refuses on that ground to pay repayment supplement to the company;

is the refusal of the second Member State to pay the company any repayment supplement on the ground of its non-residence inconsistent with Community law and in particular Articles 5, 7 and 52 to 58 of the EEC Treaty, and in answering that question is it relevant that the company would not have been exempt from the tax (so that no question of recovery of the tax and therefore of repayment supplement would arise) if the company had been resident in that Member State?'

B — *Procedure before the Court*

The order of the High Court was received at the Court Registry on 18 December 1991.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted:

— on 15 April 1992, by the Commission of the European Communities, represented by Thomas Cusack, Legal Adviser, acting as Agent,

— on 22 April 1992, by Commerzbank AG, represented by Gerald Barling QC and David Anderson, Barrister, and

— on 23 April 1992, by the United Kingdom Government, represented by John Collins, Assistant Treasury Solicitor, assisted by Alan Moses QC and Derrick Wyatt, Barrister.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

A — *Observations of Commerzbank*

Commerzbank contends first that the difference in treatment to which it is subject by reason of its non-resident status constitutes a restriction on its freedom of establishment contrary to Article 52 (in conjunction with Article 58) of the Treaty.

Commerzbank refers first to the judgment in Case 270/83 *Commission* v *France* [1986] ECR 273 ('freedom of establishment in regard to insurance — corporation tax — shareholders' tax credits'), the facts of which are in its view in all material respects identical to this case. According to Commerzbank, the French Law in question granted shareholders a tax credit on condition that they had their habitual residence (in the case of a natural person) or their registered office (in the case of a company) in France. The purpose of the Law was to prevent income which had been taxed in the hands of the company from being taxed again when it was distributed to the shareholders. In order to prevent such double taxation, the Law permitted the shareholder to deduct from his tax liability part of the tax paid on the same income by the company.

Commerzbank observes that in that case the Court held that, by reserving tax credits to persons resident in France, France discriminated against non-residents and thus restricted their freedom to set up a secondary establishment. Commerzbank considers that the Court's ruling is equally applicable to the present case since, as in that case, a tax advantage was refused on the ground that the company concerned was not resident in the United Kingdom.

Commerzbank contends further that the prohibition on treating nationals of Member States differently according to their place of residence derives not only from Articles 52 and 58 of the Treaty but also from the General Programme for the abolition of restrictions on the freedom of establishment (OJ, English Special Edition, Second Series IX, p. 7). That programme provides for the elimination of any measure which, although applicable irrespective of nationality, exclusively or principally hinders the taking up or pursuit of an activity as a self-employed person by nationals of other Member States. Commerzbank considers that a measure imposing a residence condition for the payment of the repayment supplement is such as to hinder the taking up or pursuit of such an activity by nationals of other Member States.

The prohibition of discrimination on grounds of residence also flows indirectly from the provisions on the free movement of workers, services and capital. Those provisions prohibit such discrimination in their respective areas. Since the right of establishment is 'based on the same principles' as those provisions, it should also be interpreted as embodying such a prohibition.

Secondly, Commerzbank argues that the difference in treatment to which it is subject

may also be analysed as indirect discrimination based on nationality prohibited by Articles 7 and 52 (in conjunction with Article 58) of the Treaty.

In order to demonstrate that such discrimination exists, Commerzbank points out that the companies which are refused the supplement are mainly foreign companies. According to Commerzbank, this is due to the fact that the companies affected are resident in another Member State and — since a number of Member States use the residence of companies as the criterion for determining their nationality — are also nationals of that other State.

In support of its view Commerzbank refers to the judgment in Case C-175/88 *Biehl* [1990] ECR I-1779, where the Court held that the use of the criterion of permanent residence in the national territory as a condition for entitlement to an advantage (namely the repayment of an overdeduction of tax) was liable to work against taxpayers who were nationals of other Member States even though it applied irrespective of the nationality of the taxpayer concerned.

After examining the manner in which non-residents are treated, Commerzbank observes, thirdly, that different treatment, whether it be based on residence or on nationality, may be compatible with the Treaty where it is justified by an objective reason.

It argues that the justification put forward by the United Kingdom Government does not meet that requirement.

Commerzbank denies that the payment of the supplement to companies whose registered offices are in another Member State would involve extra administrative costs and inconvenience owing to the need to verify the status or to ascertain the income of such companies.

It also criticizes the United Kingdom Government's argument that the refusal to grant the supplement compensates for or limits the exemption from tax which the company enjoyed. The company puts forward two arguments on this point. First, it emphasizes that the circumstances in which the refund was made, in particular the reason why the tax is not due, are not material for the purpose of determining whether the different treatment is justified; in its view, the only relevant consideration is that taxpayers incurring the same loss in the case of an overpayment of tax are treated differently when they are reimbursed. Secondly, Commerzbank points out that, according to the judgment in *Commission* v *France*, cited above, the refusal of a tax advantage to companies resident in another Member State cannot be justified on the ground that they compensate for the tax advantages which they enjoy; on the assumption that such advantages exist, they cannot justify a breach of the obligation laid down in Article 52 to grant companies of other Member States the same treatment as nationals.

Commerzbank also challenges the United Kingdom's view that there is no breach of the Treaty unless non-residents suffer a loss. In that regard it refers to the judgment in *Biehl*, cited above, in which — according to Commerzbank — national legislation which caused no loss in the circumstances of the case was held to be contrary to the Treaty on the ground that it was potentially damaging

to non-residents in other situations. According to Commerzbank, that ruling should be applied to the present case. In its view, the United Kingdom legislation is potentially damaging even if the United Kingdom's analysis were correct and the company suffered no damage in this case. In support of that view Commerzbank refers to a case where a resident and a non-resident are both entitled to a repayment of tax; under the United Kingdom legislation the supplement would be payable to the resident and refused to the non-resident, who would therefore be disadvantaged.

Commerzbank observes further that Article 220 of the Treaty, which requires the Member States to enter into negotiations with each other with a view to securing the abolition of double taxation within the Community, does not authorize Member States to derogate from the obligations deriving from Article 52 by treating non-residents less favourably. In that regard Commerzbank points out that, in its judgment in *Commission* v *France*, the Court held that the rights conferred by Article 52 of the Treaty are unconditional and that a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State.

Finally, Commerzbank observes that the United Kingdom is aware of the discrimination and undertook in 1975 to consider amending the contested measure and has since decided that the supplement will also be paid to non-residents from a date to be appointed by Her Majesty's Treasury.

In conclusion Commerzbank proposes that the questions put by the national court be answered as follows:

'Articles 5, 7, 52 and 58 of the Treaty must be interpreted as meaning that a Member State may not refuse to pay a sum in the nature of interest on tax wrongly overpaid solely on the ground that the company claiming such interest was not at the material time resident in that Member State, in circumstances where the company is incorporated and resident in the territory of another Member State.'

B — *Observations of the United Kingdom Government*

The *United Kingdom Government* considers that the contested measure is contrary neither to Article 7 nor to Articles 52 and 58 of the Treaty.

Its arguments are built around an analysis of the tax position of Commerzbank's branch. The dispute concerning the payment of the supplement arises from a repayment to which only non-residents are entitled. It is because of its status as a non-resident that the branch qualified for exemption, whereas a United Kingdom bank operating in the United Kingdom would in the same circumstances have been subject to tax.

The United Kingdom adds that it appears that Commerzbank is not liable to tax in any Member State in respect of the interest received from the United States companies.

It states that the interest is exempt not only in the United Kingdom but also, by virtue of the same convention, in the United States and, by virtue of a similar convention concluded between Germany and the United Kingdom, in Germany as well.

United Kingdom draws the following conclusions from the exemption enjoyed by Commerzbank's branch.

First, it is necessary to place the refusal to grant the supplement to non-residents in its context by examining it in the light of the exemption granted. The Court adopted such an approach in its judgment in Case 152/73 *Sotgiu* [1974] ECR 153 with respect to an allowance payable to workers which was higher where the person was recruited within the national territory rather than in another Member State. The United Kingdom emphasizes that, notwithstanding that difference, the legislation was held to be compatible with the Treaty because the lower rate of the allowance applicable to workers recruited in another Member State was offset by the allowance being payable for a longer period.

Secondly, Commerzbank's right of establishment has not been restricted contrary to the Treaty since the company enjoyed an exemption and suffered no loss. Granting a supplement to Commerzbank in such circumstances would render even more favourable the preferential treatment which it already enjoys. It would exceed the purpose of Article 52 to construe it in such a way as to grant a further advantage to non-residents.

In support of its view the United Kingdom refers to the judgment in Case 153/80 *Rumhaus Hansen* [1981] ECR 1165, concerning discriminatory internal taxation (Article 95). According to that judgment, Community law does not require Member States to accord more favourable treatment to imported products than to their own domestic products.

Thirdly, the United Kingdom denies that Commerzbank has been the subject of any discrimination whatsoever. It points out, first, that discrimination presupposes different treatment of persons who are in an identical situation. In view of the exemption enjoyed by Commerzbank, it must be concluded that the latter is not in a comparable situation to that of its United Kingdom competitors; consequently, it is impossible to conclude that there is discrimination.

The United Kingdom also observes that, according to the judgment in *Commission* v *France*, Article 52 prevents an advantage granted to residents from being refused to non-residents where the two categories of taxpayers are treated in the same way for the purpose of taxing profits. It follows that there can be no discrimination where companies are not treated in the same way for the purpose of taxing their profits, which is the case here since Commerzbank enjoyed an

exemption which is not granted to resident companies.

The United Kingdom observes further that the alleged discrimination cannot be based on nationality. In its view, discrimination based on nationality presupposes a measure which principally affects nationals of other Member States. That rule must, however, be qualified in matters of taxation, in which there is no discrimination where a 'significant' number of national taxpayers are also affected. That exception, which has been developed in the Court's case-law relating to indirect taxation, should be extended to direct taxation. The United Kingdom Government claims that the legislation in question affects numerous United Kingdom companies which are resident for tax purposes abroad.

Finally, the United Kingdom Government argues that the refusal to grant the supplement to non-residents is justified on objective grounds. The supplement is intended to compensate for the delay in the repayment of overpaid tax. Such delay is in many cases due to the neglect of the non-residents, who are late in making their repayment claims. The delay is also due to the sharing of tax liability between several Member States, as a result of which the amount of the repayment may depend on the tax levied or exemptions granted in other Member States. The United Kingdom tax authorities cannot be required to compensate for a delay for which they are not responsible.

For those reasons the United Kingdom Government proposes that the following reply be given to the question put by the national court:

'In deciding for the purposes of Article 52 of the EEC Treaty whether a non-resident taxpayer has received equal treatment under national rules in respect of a repayment supplement on a repayment of tax overpaid, all the circumstances of the case should be considered, including the fact that the repayment of tax was made by virtue of the non-national non-resident status of the beneficiary. It follows that an undertaking registered in one Member State with a branch in a second Member State may not rely upon Article 52 of the EEC Treaty against the revenue authorities of the second Member State in order to secure payment of a supplement to a repayment of overpaid tax where the repayment was made under a double taxation convention by virtue of the non-residence of the company in question, and such a repayment could not have been claimed under any circumstances by an undertaking registered in the second Member State.'

C — *Observations of the Commission*

The *Commission* considers that the United Kingdom legislation constitutes a manifest infringement of Articles 7, 52 and 58 of the Treaty.

It observes, first, that Article 7 lays down the general principle prohibiting discrimination based on nationality, a principle which is applied and given specific form by Article

52 with respect to the freedom of establishment. From the relationship between those provisions it is clear that legislation contrary to Article 52 also infringes Article 7.

Secondly, the Commission contends that, in order to determine whether the refusal to grant the supplement to non-residents is contrary to the Treaty, it is necessary to place it in its context and examine it in the light of the exemption granted to that category of taxpayers; that 'global' approach is said to have been adopted by the Court in its judgments in *Sotgiu* and *Biehl*.

Thirdly, the Commission claims that the refusal of the supplement to certain companies on the ground that they are not resident within the national territory constitutes discrimination prohibited by Articles 7, 52 and 58 of the Treaty.

In support of its view it observes, first, that, as the Court held in its judgment in *Commission* v *France*, a tax advantage granted to residents cannot be refused to non-residents where the two categories of taxpayers are placed 'on the same footing for the purposes of taxing their profits'. The Commission observes that residents are taxable in the United Kingdom on the whole of their profits whereas non-residents are taxable only in respect of their income from United Kingdom sources. Notwithstanding that difference, the two categories of taxpayers are on the same footing for tax purposes in so far as both are subject to United Kingdom tax.

The Commission refers to a case where two companies, one resident in the United Kingdom and one in another Member State, have made an overpayment of tax. In the Commission's view, the two companies must be treated in an identical manner and receive the repayment supplement provided for by the law. The fact that the supplement is refused to one of the companies on the ground that it is resident in another Member State is sufficient in itself to conclude that there is discrimination contrary to Articles 7, 52 and 58 of the Treaty.

The Commission contends that, according to the Court's judgment in *Commission* v *France*, a Member State cannot compensate for favourable treatment enjoyed by non-residents by refusing them a tax advantage granted to residents. The exemption enjoyed by Commerzbank does not constitute preferential treatment but is the result of the division of tax jurisdiction between the different Member States concerned. In this case, it is Germany which is recognized as having the right to tax the interest paid to the United Kingdom branch of Commerzbank, since German companies are in principle subject to German tax on their world income even where it arises from foreign branches.

The Commission further emphasizes that the repayment supplement no more constitutes a tax advantage than the exemption. The supplement merely compensates for the loss of income sustained because the tax authorities held money that did not belong to it.

In conclusion the Commission proposes that the Court give the following reply to the question put by the national court:

'(a) The refusal of the second Member State to pay the company any repayment supplement on the ground of its non-residence is inconsistent with Community law, in particular Articles 7 and 52 to 58 of the EEC Treaty.

(b) It is not relevant that the company would not have been exempt from the tax (so that no question of recovery of the tax and therefore of a repayment supplement would arise) if the company had been resident in that Member State.'

R. Joliet
Judge-Rapporteur