OPINION OF ADVOCATE GENERAL DARMON

delivered on 31 March 1993 *

Mr President,
Members of the Court,

1. The Hoge Raad der Nederlanden asks the Court to interpret the first paragraph of Article 14 of the Protocol on the Privileges and Immunities of the European Communities [1] ('the Protocol').

2. Until February 1982 X resided in the Netherlands, where he worked in a private undertaking. As the undertaking was to be reorganized at the end of 1981, he decided to start looking for new employment. He accepted, as from 1 March 1982, a post as director at the European Communities in Luxembourg, where he established his residence.

3. In 1983 and 1984 the Netherlands tax authorities sent him various income tax returns, which he completed, stating that he was a resident taxpayer with the occupation of company director for the period from 1 January to 1 March 1982 and a non-resident taxpayer with no occupation for the remainder of the year.

4. After some hesitation on the part of the tax authorities as to whether he should be classified as non-resident or resident, the Gerechtshof, The Hague, gave a judgment on 2 July 1990 finding liability in principle and determining the amount of additional income tax for 1982.

5. In the context of the appeal against that decision, the Hoge Raad has referred to the Court two questions, set out in the Report for the Hearing, [2] concerning the interpretation of Article 14 of the Protocol.

6. In substance the questions seek to determine:

— first, whether, in applying that provision, account must be taken of the intention which an official has formed, prior to entering the service of the Communities, to move his residence to the Member State of the place of performance of his duties;

— secondly, whether Article 14 gives the person concerned a choice as to his domicile for tax purposes.

7. To define the context of the dispute, it should observed that the Member States have not in principle conferred any powers on the Communities in the field of direct taxation. The Member States may not, however, when determining the rules applicable in this field,

* Original language: French.

1 — *Treaties establishing the European Communities*, 1987, vol. 1, p. 853.

2 — II, 6.

prejudice the freedoms guaranteed by Community law for all nationals. Thus, in relation to both income tax on individuals [3] and corporation tax, [4] noting 'that the laws of the Member States ... have not been harmonized', [5] the Court has on a number of occasions accepted subordination to national law, provided that it does not affect the fundamental principles of the Treaty.

8. However, the Member States have waived their fiscal sovereignty in a specific field, that of taxation of the salaries of officials and other servants of the Communities. This is the subject of Article 13 of the Protocol which, in particular, provides:

'... officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities ... .

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

9. Apart from the underlying objective common to all the provisions of the Protocol which concern the servants of the Communities, which is set out in Article 18 and to which I shall return, Article 13 seeks to attain two ends: to ensure that Community officials receive their remuneration on terms of equality which cannot be distorted by applying national tax rates which are not harmonized; and to avoid giving the Member State in which the official performs his duties (the State in which the institution is situated) an unjustified tax advantage.

10. On the first point, the Court's case-law stresses the need to avoid discriminatory situations in which Community officials of the same grade but of different nationality receive equal gross remuneration, but different net remuneration. [6]

11. As to the second point, it is clear that if the State in which the institution is situated were allowed to tax the salaries of Community officials, it would be collecting a levy for its own benefit on common funds to which all the Member States contribute. This is the reason for choosing to subject the remuneration in question to a Community tax rather than a national tax.

12. Article 13 of the Protocol cannot be considered in isolation. With regard to the income of officials from non-Community sources, Article 13 is supplemented by Article 14, the first paragraph of which provides as follows:

'In the application of income tax, wealth tax [7] and death duties and in the application of conventions on the avoidance of double

3 — See, in particular, Case C-175/88 *Biehl* [1990] ECR I-1779.

4 — See, in particular, Case 270/83 *Commission* v *France* [1986] ECR 273.

5 — Ibid., paragraph 24.

6 — See, in particular, Case 6/60 *Humblet* v *Belgian State* [1960] ECR 559, especially the judgment at p. 577 and the Opinion of Advocate General Lagrange at p. 590-591. See also Case 7/74 *Brouerius van Nidek* v *Inspecteur der Registratie* [1974] ECR 757, paragraph 11.

7 — As Advocate General Jacobs points out in his Opinion in Case C-263/91 *Kristoffersen* [1993] ECR I-2755, it appears that a comma has been omitted in the French version between 'fortune' and 'des droits de succession'.

taxation concluded between Member States of the Communities, officials and other servants of the Communities who, *solely by reason of the performance of their duties in the service of the Communities*, establish their residence in the territory of a Member State other than their country of domicile for tax purposes at the time of entering the service of the Communities, shall be considered, both in the country of their actual residence and in the country of domicile for tax purposes, as having maintained their domicile in the latter country provided that it is a member of the Communities ...'. [8]

13. The division effected by Articles 13 and 14 is therefore as follows: 'salaries, wages and emoluments' from a Community source are exempt from national tax, but all other income remains within the tax ambit of national law. [9]

14. It is indeed because he received income other than from a Community source, which apparently he failed to declare, that the issue arises in relation to X on the sole basis of Article 14 of the Protocol. The dispute does not relate to the income received by him in his capacity as director with the Communities, but to income from the surrender of life assurance policies, to interest and to investment income.

15. Having established the context of the reference, I shall deal with the two questions from the national court. Rather than answering them in the order in which they were raised, it seems to me to be more appropriate — before considering whether the phrase 'solely by reason of' in Article 14 leaves room for assessing an official's intention — to consider the underlying objective of Article 14 and to determine whether, if applicable, it gives X the option of choosing his domicile for the purposes of taxation of income other than that earned as a servant of the Communities.

16. In the first place, it should be noted that the Protocol, annexed to the Treaty, forms an integral part thereof by virtue of Article 239 of the EEC Treaty. It is therefore primary law.

17. The sole recital in the preamble to the Protocol states that the 'Communities ... shall enjoy in the territories of the Member States such privileges and immunities as are necessary for the performance of their tasks', and the first paragraph of Article 18, which forms part of Chapter VII, headed 'General Provisions', states:

'Privileges, immunities and facilities shall be accorded to officials and other servants of the Communities *solely in the interests of the Communities*'. [10]

18. The privileges, immunities and facilities accorded by the Communities to officials must therefore be regarded as intended

8 — Emphasis added.

9 — The dividing line between the taxation powers of the Communities and those of the Member States, which separates the affected from the unaffected portions of the salary paid to the official, is clearly set out in the *Humblet* judgment cited above (p. 578).

10 — Emphasis added. Article 23 of the Staff Regulations of Officials of the European Communities repeats the substance of Article 18 and adds that 'officials shall not be exempt from fulfilling their private obligations or from complying with the laws and police regulations in force'.

solely for the performance of the tasks of the Communities.

19. This objective is common to all the provisions of the Protocol concerning Community officials and necessarily forms the underlying objective of Article 14. It therefore governs the interpretation of that article.

20. The division of powers between the Community and the Member States does not encroach upon the sovereignty of the Member States in the field of taxation but in the Protocol they concede a partial restriction of that sovereignty solely in the interests of the Communities for the purpose of the performance of their tasks. The provisions of the Protocol must therefore be interpreted strictly in relation to that purpose.

21. It is impossible to see how the Communities' tasks would be facilitated by giving the slightest discretion to officials to determine their domicile for the purposes of taxation of income other than their Community salary. For such income Article 14 expressly maintains the domicile for tax purposes which an official has 'at the time of entering the service of the Communities' if such domicile is in a Member State and, when read in conjunction with Article 13, it prevents the provisions of the Protocol from being misused to allow some sort of 'tax shopping'.

22. It cannot be objected that this would discriminate against Community officials by comparison with other nationals of Member States who exercise the freedom of movement of workers or freedom of establishment.

23. No meaningful comparison can be made between the application of general provisions and an exceptional arrangement.

24. In the *Humblet* judgment, cited above, the Court correctly formulated the problem when stating that 'the essential comparison which is required here must be between Community officials of different nationalities receiving the same gross remuneration and having also in their respective countries equal amounts of other taxable income'. [11]

25. Taken together, Articles 13 and 14 govern that situation in such a way as to maintain the principle of equal treatment and in accordance with the division of powers under the Protocol.

26. Where there is equal Community pay, officials pay the same tax to the Communities.

27. In respect of their other income they are also liable to national tax, for which the different rates, depending on the respective Member State, in no way constitute discrimination but are the result of the sovereignty of the Member States in that field, in the absence of tax harmonization.

11 — P. 579 to 580.

28. If the domicile of a Community official for the purposes of taxation of income other than that referred to by Article 13 of the Protocol cannot depend on the *volition* of the person concerned, should account be taken when determining that domicile of *his intention* to reside in the State in which the institution is situated, prior to and irrespective of taking up the post?

29. This is the scope of the first question concerning the interpretation of the phrase 'solely by reason of the performance of their duties' in Article 14.

30. Two opposing interpretations are possible.

31. The first, which is restrictive, consists in disregarding the official's intentions and confining the examination to purely objective considerations, namely the official's obligation under the Staff Regulations to:

'reside either in the place where he is employed or at no greater distance therefrom than is compatible with the proper performance of his duties' [12]

and his change of residence at the same time as taking up the new post.

32. The second, which is broader and subjective in nature, entails examining the considerations which led the official to establish his residence in the State in which the institution is situated. If taking up the post was not the *only* intention ('solely'), or, at least, if the person concerned would have taken up residence in that State in the future, even if he had not obtained a Community post, Article 14 would not apply.

33. Let me say straightaway that I think the second interpretation must be ruled out because it is contrary to the underlying objective of the relevant provisions of the Protocol and would, by undermining the effectiveness of Article 14, lead to absurd situations.

34. This may be illustrated by a deliberately exaggerated example. Two brothers, Dutch nationals living in the Netherlands, entrust savings of the same amount to a banker there who makes identical investments with those savings. With a view to their future security, the brothers sit and pass a competition for lawyer-linguists with the Court of Justice. Therefore they leave their country to reside in the Grand Duchy of Luxembourg where they take up their duties.

35. However, there is one difference between the brothers. The first left his home for professional reasons only. The second was resolved to take up residence in the Grand Duchy even if he failed the competition, as he had decided to make his home there with his fiancée who already worked there.

36. Is it conceivable that, as regards their income in the Netherlands, one of the brothers is subject to Article 14, while the second

12 — Article 20 of the Staff Regulations of Officials of the European Communities.

finds that he is outside its ambit? And, pursuing this reasoning further, would it be enough, in order for the first also to avoid the retention of his last domicile for tax purposes, to prove that, in addition to intending to take up his post, he also had the intention of continuing to play in a chamber music ensemble located in the State in which the institution is situated?

37. Clearly, intention cannot be taken as a criterion for interpreting the rules in question.

38. Moreover, the wording of the Treaty itself reflects the underlying rationale: 'solely by reason of the performance of their duties in the service of the Communities' is a reminder that the sole fact of performing such duties, to the exclusion of any other consideration, is *sufficient* to confer power in taxation matters on the country of the last domicile; 'solely by reason of' means here 'merely by'.

39. As already mentioned, the Protocol, which is primary law, introduces, in the exclusive interest of the Communities, exceptional joint tax arrangements applicable only to the salary of Community officials, while maintaining their previous domicile for tax purposes, normally their national system, for their other income.

40. As the Protocol aims to maintain a balance and effect a compromise, it must not give rise to the conflicting interpretation by national courts which would inevitably occur if the many possible intentions on the part of officials could be taken into account, assuming that they could be proved.

41. Officials have an obligation of residence under the Staff Regulations. If the fulfilment of that obligation normally coincides with the establishment of residence in the State in which the institution is situated, which is a matter for assessment by the national court, Article 14 must apply.

42. I therefore propose the following reply:

(1) Article 14, paragraph 1, of the Protocol on the Privileges and Immunities of the European Communities applies to a Community official who establishes his residence, as he is obliged to do under the Staff Regulations, in the State in which the institution which he is to join is situated, at the same time as taking up his post. His intention or intentions at the time of his change of residence are irrelevant in this respect.

(2) The abovementioned provision does not give the Community official an option as to his domicile for tax purposes with regard to the income and other property to which it relates.