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Case C-281/06

Hans-Dieter Jundt and Hedwig Jundt

v

Finanzamt Offenburg

(Reference for a preliminary ruling from the Bundesfinanzhof)

(Freedom to provide services – Secondary teaching activity – Concept of ‘remuneration’ – Allowances for professional expenses – Legislation concerning tax exemption – Conditions – Remuneration paid by a national university)

Opinion of Advocate General Poiares Maduro delivered on 10 October 2007

Judgment of the Court (Third Chamber), 18 December 2007

Summary of the Judgment

1. *Freedom to provide services – Provisions of the Treaty – Scope*

(Arts 45, first para., EC, 49 EC and 50 EC)

2. *Freedom to provide services – Restrictions – Tax legislation*

(Art. 49 EC)

1. A teaching activity carried out by a taxpayer of one Member State for a legal person established under public law, such as a university, situated in another Member State comes within the scope of Article 49 EC, even if it is carried out on a secondary basis and in a quasi-honorary capacity.

The decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character, that is to say, the activity must not be provided for nothing. By contrast, there is no need in that regard for the person providing the services to be seeking to make a profit. Moreover, the fact that a remunerated teaching activity is carried out on behalf of a university, a legal person established under public law, does not have the effect of removing the service provided from the scope of Article 49 EC, since university teaching activities, being activities of civil society, do not fall within the scope of the derogation provided for in the first paragraph of Article 45 EC, in conjunction with Article 50 EC, that derogation being restricted to activities which in themselves are directly and specifically connected with the exercise of official authority.

(see paras 32-33, 35, 37-39, operative part 1)

2. The restriction on the freedom to provide services constituted by the fact that national legislation confines the application of an exemption from income tax to remuneration paid by universities, that is to say, public-law legal persons, established on national territory, in return for teaching activities carried out on a secondary basis, and refuses to apply that exemption where that remuneration is paid by a university established in another Member State, is not justified by

overriding reasons relating to the public interest.

Such legislation, which applies in the same way to nationals and to foreign nationals who carry out activities for national legal persons established under public law, results in less favourable treatment of the services provided to beneficiaries in other Member States in comparison with the treatment reserved for services provided on national territory. That restriction on the freedom to provide services cannot be justified by the promotion of teaching, research and development, since it infringes the freedom of teachers exercising their activity on a secondary basis to choose where within the European Community to provide their services, without it having been established that, in order to achieve the supposed objective of promoting education, it is necessary to limit the enjoyment of the tax exemption at issue to those taxpayers working on a secondary basis as teachers in universities situated on national territory. Nor can that restriction be justified by the need to safeguard the coherence of the tax system, since there is no direct link, from the point of view of the tax system, between the exemption from tax of expense allowances paid by national universities and an offsetting of that concession by a particular tax levy.

Moreover, the fact that the Member States are themselves competent to organise their respective education systems is not such as to render compatible with Community law that legislation which confines the benefit of a tax exemption to taxpayers carrying out activities for or on behalf of national public universities. That legislation is not a measure which concerns the content of teaching or the organisation of the education system, but a fiscal measure of a general nature which grants a tax concession where an individual engages in activities of benefit to the general public. Even if such legislation were a measure linked to the organisation of the education system, the fact remains that it is incompatible with the Treaty in so far as it influences the choice of persons teaching on a secondary basis with regard to the place in which they provide their services.

(see paras 54, 56-57, 61, 69, 71, 73, 83-85, 88-89, operative part 2-3)

JUDGMENT OF THE COURT (Third Chamber)

18 December 2007 (*)

(Freedom to provide services – Secondary teaching activity – Concept of ‘remuneration’ – Allowances for professional expenses – Legislation concerning tax exemption – Conditions – Remuneration paid by a national university)

In Case C?281/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Bundesfinanzhof (Germany), made by decision of 1 March 2006, received at the Court on 28 June 2006, in the proceedings

Hans-Dieter Jundt,

Hedwig Jundt

v

Finanzamt Offenburg,

THE COURT (Third Chamber),

composed of A. Rosas (Rapporteur), President of the Chamber, J.N. Cunha Rodrigues, J. Klu?ka, P. Lindh and A. Arabadjiev, Judges,

Advocate General: M. Poiares Maduro,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Mr and Mrs Jundt, by H.-D. Jundt, Rechtsanwalt,

– the German Government, by M. Lumma, acting as Agent,

– the Commission of the European Communities, by E. Traversa and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 10 October 2007,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 59 of the EEC Treaty (which became Article 59 of the EC Treaty and is now, following amendment, Article 49 EC) and Article 128 of the EEC Treaty (which became, after amendment, Article 126 of the EC Treaty and is now Article 149 EC).

2 The request has been made in proceedings between Mr and Mrs Jundt, who are resident in Germany, and the Finanzamt (Tax Office) Offenburg with regard to the latter's refusal to take into account, as revenue exempt from income tax for the tax assessment year 1991, expense allowances received in respect of teaching carried out on a spare-time basis at a university established in another Member State, on the ground that the national income tax legislation reserved the application of the exemption in question to remuneration emanating from German public-law bodies.

National legal framework

3 The first sentence of Paragraph 1(1) of the Law on Income Tax (Einkommensteuergesetz; EStG'), in the version applicable at the time of the facts in the main proceedings, provides that natural persons who are permanently or normally resident in Germany are subject to unlimited taxation on their income.

4 Under Paragraph 2(2) of the EStG, income is constituted either by profit or by the surplus of revenue over professional expenses.

5 Paragraph 3(26) of the EStG, which appears in the section of that Law dealing with 'exempt

revenue', states as follows:

'The following are exempt from tax:

...

26. expense allowances for secondary activities as training supervisor, instructor or educator or for comparable secondary activities, for secondary artistic activities or for second jobs caring for the elderly, ill or handicapped persons for or on behalf of a national public-law legal person or a body falling within Paragraph 5(1)(9) of the Law on Corporation Tax (Körperschaftssteuergesetz; 'KStG') and which is for the promotion of the public good or of charitable or ecclesiastical purposes (Paragraphs 52 to 54 of the Tax Code (Abgabenordnung)). Revenue not exceeding a total of DM 2 400 per annum received in respect of the activities referred to in the first sentence shall be treated as expense allowances …'

The main proceedings and the questions referred for a preliminary ruling

6 Mr and Mrs Jundt are subject to joint assessment for income tax purposes in Germany. Working principally as a lawyer in Germany, where he resides, in 1991 Mr Jundt taught a 16-hour course at the University of Strasbourg for which he received the sum of FRF 5 760 (gross) (corresponding to DEM 1 612).

7 The Finanzamt Offenburg charged income tax on that gross amount in its tax assessment notice for 1991.

8 Mr and Mrs Jundt have submitted that that amount should be exempted from income tax under Paragraph 3(26) of the EStG. They are of the view that it is contrary to Community law to restrict the application of that exemption to remuneration paid by German bodies established under public law.

9 Their objection against the decision of the Finanzamt Offenburg and their appeal to the Finanzgericht having failed, Mr and Mrs Jundt appealed on a point of law ('Revision') to the Bundesfinanzhof.

10 The Bundesfinanzhof points out that Mr Jundt could have benefited from the exemption provided for under Paragraph 3(26) of the EStG if he had carried out his activity in a German university, a legal person established under public law, and not in a university of another Member State. In order to determine whether or not such legislation is compatible with the provisions of Community law on the freedom to provide services, it considers it necessary to refer three questions for a preliminary ruling.

11 First, it raises the question whether a secondary activity as a teacher for a university falls within the scope of the provisions on the freedom to provide services inasmuch as it is not certain that the sums eligible for exemption under Paragraph 3(26) of the EStG constitute actual remuneration. According to that provision, the exempted revenue has the character of an 'expense allowance', which seems to imply a simple reimbursement of the expenses connected with the performance of the activity in question.

12 Second, the Bundesfinanzhof raises the question whether, if that is the case, the restriction on the freedom to provide services resulting from Paragraph 3(26) of the EStG can be justified. It is of the opinion that there may be a legitimate interest in confining the tax concession to activities carried out for or on behalf of German legal persons established under public law.

13 According to the Bundesfinanzhof, it is possible that such justification is to be found in the

cohesion of the tax system, as acknowledged by the Court in Case C?204/90 *Bachmann* [1992] ECR I-249 and Case C?300/90 *Commission* v *Belgium* [1992] ECR I-305. It takes the view that, in the main proceedings, there is a direct link between the teaching activity on behalf of a German legal person established under public law and the exemption from income tax. That tax concession is granted only by reason of the fact that the taxpayer provides, on a quasi-honorary basis, a specific service for the community which levies the tax and thus relieves it of certain tasks. If the taxpayer did not provide that service, the tax authorities would in theory have to increase the tax in order to finance the higher teaching costs which would result. According to the Bundesfinanzhof, Paragraph 3(26) of the EStG is based on a reciprocal relationship between the waiver of tax and the provision of a service in return.

14 Finally, as regards the teaching activities, the Bundesfinanzhof raises the question whether legislation such as that in issue in the main proceedings is not an element of the freedom explicitly left to the Member States by the EC Treaty to assume responsibility for the organisation of their education systems. According to it, that freedom comprises not only the duty to provide for the financing of the national education system, but also the possibility to confine the fiscal measures designed to promote education to 'national' activities, and it therefore inclines to the view that the freedom to provide services has not been infringed. Its third question concerns the effect of Article 126 of the EC Treaty on a finding that the restriction on the freedom to provide services was unjustified.

15 In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 59 of the EC Treaty … to be interpreted as including within its scope also part-time teaching activity for or on behalf of a public-law legal person (a university) where only an expense allowance is paid for that activity, as being an activity in a quasi-honorary capacity?

(2) If the first question is answered in the affirmative, is the restriction on freedom to provide services whereby allowances are taxed favourably only if they are paid by national public-law legal persons (here, Paragraph 3(26) of the EStG) justified by the fact that the State tax concession applies only where the activity is for the benefit of a national public-law legal person?

(3) If the second question is answered in the negative, is Article 126 of the EC Treaty … to be interpreted as meaning that a provision of tax law designed to help supplement the organisation of the education system (such as, here, Paragraph 3(26) of the EstG) is lawful in the light of the fact that the Member States continue to have responsibility in that regard?'

The questions referred for a preliminary ruling

16 It should be noted at the outset that, as the facts which gave rise to the dispute in the main proceedings occurred before 1 November 1993, and thus before the entry into force of the Treaty on European Union signed in Maastricht on 7 February 1992, the interpretation asked for by the national court in fact concerns Articles 59 and 128 of the EEC Treaty and not Articles 59 and 126 of the EC Treaty.

17 As the Commission of the European Communities correctly stated in its written observations, that fact is not decisive for the answer to be given to the national court.

18 First, the content of the principle of the freedom to provide services has not been changed, in substance, by the Treaties of Maastricht or Amsterdam.

19 Second, Article 128 of the EEC Treaty concerns vocational training, which includes university

education (see Case 24/86 *Blaizot and Others* [1988] ECR 379, paragraphs 15 to 20; Case 242/87 *Commission* v *Council* [1989] ECR 1425, paragraph 25; Case C-147/03 *Commission* v *Austria* [2005] ECR I-5969, paragraph 33; and C-40/05 *Lyyski* [2007] ECR I?99, paragraph 29). To the extent that Article 126 of the EC Treaty was relied upon essentially because of the competence of the Member States for the content of teaching and the organisation of education systems and with reference to the objectives of Community policy within the education sector, it must be pointed out that, at the time of the facts in the main proceedings, the Member States were competent for educational organisation and policy, as is evident from the judgment in Case 293/83 *Gravier* [1985] ECR 593, paragraph 19, and that Community policy in the education sector already sought to facilitate the mobility of teachers.

20 Following this clarification, reference shall be made to the version of the relevant provisions of the Treaty in force after 1 May 1999.

The first question

21 By its first question, the national court asks essentially whether a teaching activity carried out by a taxpayer of one Member State for a legal person established under public law in another Member State, in this case a university, comes within the scope of Article 49 EC even if it is carried out on a secondary basis and in a quasi-honorary capacity.

Observations submitted to the Court

22 Mr and Mrs Jundt, the German Government and the Commission take the view that secondary activities as a teacher at a university constitute a provision of services for the purposes of Article 50 EC, that is to say, an economic activity normally performed for remuneration.

23 Mr and Mrs Jundt point out that Paragraph 3(26) of the EStG itself defines ‘expense allowances’ as ‘revenue’ and that, in the current version of that provision, the reference is no longer to ‘expense allowances’, but to ‘revenue for secondary professional activities’.

24 According to the German Government, the scope of Article 49 EC also covers activities carried out on a secondary and quasi-honorary basis as a teacher for or on behalf of a legal person established under public law such as a university, in return for an expense allowance. Those economic activities, it argues, have the particular feature of being intended not to make profits but merely to offset expenditure incurred.

25 The Commission notes that the doubts entertained by the Bundesfinanzhof as to the existence of remuneration are based on the use by the provision of national law in question of the expression ‘expense allowance’, which suggests a payment not exceeding the amount of expenses incurred and the absence of profit. According to the Commission, a payment does not lose its character as ‘remuneration’ for the sole reason that it does not allow a profit to be made. For there to be an economic activity, the terms of Article 50 EC require only the payment of remuneration and not the existence of a profit.

26 The Commission submits that, in any event, the main proceedings and the legislation at issue in those proceedings do not concern remuneration which is limited to covering actual expenses incurred. Had the payment made by the University of Strasbourg been limited to covering the expenses borne by Mr Jundt for the purpose of performing his teaching activities successfully, he would not have relied on Paragraph 3(26) of the EStG to apply for exemption of the sums received since the application of the ordinary rules of the EStG would already have resulted in his activity not being taxed.

27 According to the Commission, Paragraph 3(26) of the EStG grants a tax concession to the taxpayer precisely in the case where revenue exceeds expenses and the taxpayer is therefore left with net revenue, that is to say, a ‘profit’.

Reply of the Court

28 In order to determine whether an activity such as that at issue in the main proceedings comes within the scope of Article 49 EC, it should be recalled, first, that according to the first paragraph of Article 50 EC the concept of ‘services’ means ‘services ... normally provided for remuneration’ (Case C-355/00 *Freskot* [2003] ECR I-5263, paragraph 54).

29 In that regard, it has already been held that, for the purposes of that latter provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (see, inter alia, Case 263/86 *Humbel* [1988] ECR 5365, paragraph 17; Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 23; Case C-76/05 *Schwarz and Gootjes-Schwarz* [2007] ECR I-0000, paragraph 38; and Case C-318/05 *Commission* v *Germany* [2007] ECR I-0000, paragraph 67).

30 Second, the Court has excluded from the concept of ‘services’ within the meaning of Article 50 EC courses provided by certain establishments forming part of a system of public education and financed, entirely or mainly, by public funds (see, to that effect, *Humbel*, paragraph 18, and Case C-109/92 *Wirth* [1993] ECR I-6447, paragraphs 15 and 16). The Court has thus stated that, by establishing and maintaining such a system of public education, normally financed from the public purse and not by pupils or their parents, the State does not intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational fields (see *Schwarz and Gootjes-Schwarz*, paragraph 39).

31 The main proceedings in the present case, however, do not relate to the teaching activity of the universities themselves, financed by public funds. On the contrary, the present case and the national legislation in question concern services provided on a secondary basis by natural persons called upon by universities to help them fulfil their mission. Payment for those services may constitute remuneration on the part of the university concerned.

32 As the Advocate General noted in point 12 of his Opinion, the decisive factor which brings an activity within the ambit of the Treaty provisions on the freedom to provide services is its economic character, that is to say, the activity must not be provided for nothing.

33 By contrast, contrary to the view which the national court appears to take, there is no need in that regard for the person providing the service to be seeking to make a profit (see, inter alia, C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraphs 50 and 52).

34 Consequently, the main proceedings, in the same way as Paragraph 3(26) of the EStG, concern services provided for ‘remuneration’. The sum received by Mr Jundt from the university for his teaching activity constitutes remuneration for the purposes of Article 50 EC, that is to say, consideration for the service provided by him, even if it is assumed that that activity was carried out on a quasi-honorary basis.

35 Finally, the fact that the teaching activity is carried out on behalf of a university, a legal person established under public law, does not have the effect of removing the service provided from the scope of Article 49 EC.

36 The national court expresses some doubts in that regard, questioning whether the services

carried out for or on behalf of an institution established under public law and capable of coming within the scope of Article 45 EC – which must also be taken into consideration in the framework of the free provision of services – can constitute a provision of services. According to the national court, those services are to be considered as ‘semi-public’ and fall within the sphere of State activity under public law.

37 While, under the first paragraph of Article 45 EC, in conjunction with Article 50 EC, the freedom to provide services does not extend to activities connected in a Member State, even occasionally, with the exercise of official authority, that derogation must, however, be restricted to activities which in themselves are directly and specifically connected with the exercise of official authority (Case 2/74 *Reyners* [1974] ECR 631, paragraph 45; Case C-283/99 *Commission* v *Italy* [2001] ECR I-4363, paragraph 20; and Case C-451/03 *Servizi Ausiliari Dottori Commercialisti* [2006] ECR I-2941, paragraph 46).

38 It follows from the Court’s case-law concerning Article 39(4) EC that university teaching activities, being activities of civil society, do not fall within the scope of that derogation (see, to that effect, Case 33/88 *Allué and Coonan* [1989] ECR 1591, paragraph 7, and Case C-290/94 *Commission* v *Greece* [1996] ECR I-3285, paragraph 34).

39 The answer to the first question referred must therefore be that a teaching activity carried out by a taxpayer of one Member State for a legal person established under public law, in the present case a university, situated in another Member State comes within the scope of Article 49 EC, even if it is carried out on a secondary basis and in a quasi-honorary capacity.

The second question

40 By its second question, the national court asks essentially whether the restriction on the freedom to provide services constituted by the fact that national legislation confines the application of an exemption from income tax to remuneration paid by universities, that is to say, public-law legal persons, that are established on national territory, in return for teaching activities carried out on a secondary basis, and refuses it where that remuneration is paid by universities established in another Member State, is justified by overriding reasons in the public interest. The national court particularly points in this regard to the fact that the tax concession applies only where the activity is carried out for the benefit of a national legal person established under public law.

Observations submitted to the Court

41 According to Mr and Mrs Jundt and the Commission, the fact that the remuneration in question is exempted only if paid by public universities situated on national territory and does not benefit from that exemption if paid by public universities established in other Member States amounts to a restriction on the freedom to provide services which is not justified by any legitimate public interest.

42 First, the restriction brought about by the legislation at issue in the main proceedings cannot be justified on the ground of its objective, which is to ensure that persons are available to teach on a secondary basis and thereby to support the training and education sector.

43 Mr and Mrs Jundt consider the judgment in Case C-39/04 *Laboratoires Fournier* [2005] ECR I-2057 to be relevant in that respect. In paragraph 23 of that judgment, the Court held that the promotion of research and development cannot justify a national measure which refuses to confer a tax concession on any research not carried out in the Member State concerned. Such a measure is directly contrary to the objective of Community policy on research and technological development, as defined by Article 163(2) EC.

44 Similarly, it would be contrary to the objectives of the European Community in the field of education to deny, to a teacher carrying out his activity on a secondary basis, tax concessions which could promote his availability. According to Article 149 EC, cooperation between Member States in the field of education and the mobility of students and teachers is to be encouraged. The refusal to grant the tax exemption in question in the main proceedings would indirectly encourage a person teaching on a secondary basis to teach only in national universities.

45 Second, contrary to the view apparently held by the national court, legislation such as that at issue in the main proceedings cannot be justified, in terms of the cohesion of the German tax system, by the fact that the tax concession in question impacts positively on the educational options at national universities.

46 In their view, the case-law of the Court confirms that the justification based on the need to maintain the cohesion of the national tax system which was accepted in *Bachmann* and in *Commission* v *Belgium* must be interpreted strictly. The conditions laid down by the case-law resulting from *Bachmann* are not satisfied in the present case, because the tax concession at issue in the main proceedings, that is to say, the exemption of the ‘expense allowance’, is not counterbalanced by a specific tax levy. The fact that the exemption of expense allowances can indirectly confer advantages on the German State does not make it possible to establish the cohesion of the national tax system and cannot therefore justify legislation such at that at issue in the main proceedings.

47 According to the German Government, a restriction on the free provision of services may, admittedly, arise from the fact that a teacher who carries out his activity on a secondary basis at a university established in another Member State in return for payment of his expense allowances does not enjoy the tax concession at issue in the main proceedings. That restriction, however, is justified by overriding reasons in the public interest linked to the promotion of teaching, research and development.

48 The German Government points out in that regard that Paragraph 3(26) of the EStG encourages teachers carrying out their activity on a secondary basis to offer their services in a quasi-honorary capacity to the institutions mentioned in that provision in return for a modest remuneration taking the form of an expense allowance.

49 That provision therefore has the objective of supporting, by means of tax exemptions for citizens carrying out activities additional to their main profession, the legal persons established under public law which it mentions, in the present case universities. The objective and effect of that provision are to make teachers available to universities at favourable rates. It is justified by an overriding reason in the public interest, namely the promotion of education, research and development. It is appropriate and necessary for attaining the objective pursued.

50 In any event, the German Government takes the view that there is no obligation on the Federal Republic of Germany to support the universities of other Member States. Since both the organisation of teaching and direct taxation remain within the competence of the Member States, each Member State should be able, in those fields, to retain a degree of latitude with regard to the

content of its national rules.

51 Article 149(1) EC expresses clearly the fact that the Community is to carry out its activities in the field of education ‘while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems’. The German Government deduces from this that the Member States may organise their education systems, and therefore also the teaching activities in their universities, in an autonomous manner on their territory. Since the Federal Republic of Germany has little influence on the organisation of the educational institutions of the other Member States, it cannot be required to subsidise their operation by waiving the money of taxpayers to which it is entitled.

Reply of the Court

52 According to settled case-law, Article 49 EC precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33; *Smits and Peerbooms*, paragraph 61; Case C?136/00 *Danner* [2002] ECR I-8147, paragraph 29; and Joined Cases C?544/03 and C-545/03 *Mobistar and Belgacom Mobile* [2005] ECR I?7723, paragraph 30).

53 In that regard, it was not disputed before the Court that, if a teaching activity performed on a secondary basis, such as that at issue in the main proceedings, comes within the scope of the Treaty provisions on the freedom to provide services, national legislation such as Paragraph 3(26) of the EStG restricts the freedom of Mr Jundt, as guaranteed by Article 49 EC, to provide his services in another Member State in so far as it deprives him of a tax concession from which he would benefit if he offered those same services in his own Member State.

54 The national court itself explains in addition that the national legislation at issue in the main proceedings, which applies in the same way to German and foreign nationals who carry out activities for national legal persons established under public law, results in less favourable treatment of the services provided to beneficiaries in other Member States in comparison with the treatment reserved for services provided on national territory and constitutes a restriction on the freedom to provide services.

55 It is necessary to examine whether such a restriction on the freedom to provide services can be objectively justified.

56 In that context, it is necessary, first, to enquire whether, as submitted by the German Government, the restriction provided for in the national legislation is justified by the promotion of teaching, research and development as an overriding reason in the public interest.

57 Such an argument cannot be accepted.

58 Even if one were to assume that the objective of promoting teaching, research and development is an overriding reason relating to the public interest, the fact remains that, in order to be justified, a restrictive measure must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it (Case C?478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 41, and Case C?334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 28).

59 In paragraph 23 of *Laboratoires Fournier*, the Court admittedly held that it could not be ruled out that the promotion of research and development may be an overriding reason relating to the

public interest. However, it rejected the argument that a Member State cannot be required to promote research carried out in another Member State and held that national legislation which restricts the benefit of a tax credit only to research carried out in the Member State concerned amounts to a restriction of the freedom to provide services. The Court ruled that such legislation is directly contrary to the objective of Community policy on research and technological development which, according to Article 163(2) EC, seeks in particular to remove fiscal obstacles to cooperation in the field of research.

60 It should be recalled, in the context of the main proceedings, that Article 149(1) EC provides that '[t]he Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action', while Article 149(2) EC states that 'Community action shall be aimed at … encouraging mobility of students and teachers'.

61 Legislation of a Member State such as that at issue in the main proceedings is contrary to those objectives to the extent to which it discourages persons teaching on a secondary basis from exercising their fundamental freedoms in order to offer their services in another Member State by denying them a tax concession which they would have enjoyed had they provided the same services on national territory.

62 The Court has already stressed the importance of those objectives in the context of Article 18 EC. After having pointed out that the opportunities offered by the Treaty in relation to freedom of movement for citizens of the Union cannot be fully effective if a national of a Member State may be deterred from availing himself of them by obstacles placed in the way of his stay in another Member State by legislation of his State of origin penalising the mere fact that he has used those opportunities, the Court ruled that that consideration is particularly important in the field of education, in view of the aims pursued by Article 3(1)(q) EC and the second indent of Article 149(2) EC, namely, inter alia, encouraging mobility of students and teachers (see Joined Cases C-11/06 and C?12/06 *Morgan and Bucher* [2007] ECR I-0000, paragraphs 26 and 27 and case-law cited).

63 By exercising an influence similar to that of the national legislation at issue in the proceedings which led to the judgment in *Laboratoires Fournier*, legislation such as that at issue in the main proceedings infringes the freedom of teachers exercising their activity on a secondary basis to choose where within the European Community to provide their services, without it having been established that, in order to achieve the supposed objective of promoting education, it is necessary to limit the enjoyment of the tax exemption at issue in the main proceedings to those taxpayers working on a secondary basis as teachers in universities situated on national territory.

64 The German Government has failed to provide any argument capable of demonstrating that the objective mentioned in the preceding paragraph cannot be achieved without the contested legislation or by other means which would not affect the choice, by persons working as teachers on a secondary basis, of the place where they might offer their services.

65 Second, it is necessary to examine whether the restriction at issue in the main proceedings can be justified by the need to safeguard the cohesion of the German tax system, as envisaged by the national court.

66 According to the national court, the objective of Paragraph 3(26) of the EStG is to relieve the German State of certain responsibilities incumbent on it by means of a tax measure: on the one hand, persons working as teachers on a secondary basis are granted a tax exemption if they teach at national public universities; on the other hand, the German State enjoys a corresponding benefit because it can cover the teaching and research needs of those universities at a lower cost. Thus,

the national court raises the question whether there is not, in the main proceedings, a direct link between the tax exemption granted to a taxpayer in respect of his secondary teaching activity and the fact that that teaching activity is carried out for the benefit of a national legal person established under public law. That point of view is based on the assumption that the service provided by the taxpayer, rewarded with the tax concession, serves the public interest, and that the 'advantage' enjoyed by the public offsets the disadvantage represented by the waiver of tax.

67 In that respect, it should be pointed out that, in paragraphs 28 and 21, respectively, of the judgments in *Bachmann* and *Commission* v *Belgium*, the Court admittedly recognised that the need to safeguard the cohesion of a tax system may justify a restriction on the exercise of the fundamental freedoms guaranteed by the Treaty.

68 However, according to settled case-law, for an argument based on such a justification to succeed, a direct link must be established between the tax concession concerned and the offsetting of that concession by a particular tax levy (see, to that effect, Case C-471/04 *Keller Holding* [2006] ECR I-2107, paragraph 40; Case C-347/04 *Rewe Zentralfinanz* [2007] ECR I?2647, paragraph 62; and Case C-443/06 *Hollmann* [2007] ECR I-0000, paragraph 56).

69 There is no direct link, from the point of view of the tax system, between the exemption from tax of expense allowances paid by German universities and an offsetting of that concession by a particular tax levy.

70 As the Advocate General stated in point 23 of his Opinion, in the present case it is suggested only that the exemption from income tax is offset by the benefit derived by the German State from the teaching and research activity of spare-time tutors. The existence of such a general and indirect link between the tax concession for the taxpayer and the benefit ostensibly accruing to the State is not sufficient for the purpose of the requirements of the case-law resulting from *Bachmann* .

71 The argument which seeks to justify the restriction on the principle of the freedom to provide services by reference to the need to safeguard the cohesion of the German tax system cannot therefore be accepted.

72 In the light of the foregoing, the fact that a national tax concession applies only where the activity in question is for the benefit of a national legal person established under public law cannot justify the restriction on the freedom to provide services.

73 The answer to the second question must therefore be that the restriction on the freedom to provide services constituted by the fact that national legislation confines the application of an exemption from income tax to remuneration paid by universities, that is to say, public-law legal persons, established on national territory, in return for teaching activities carried out on a secondary basis, and refuses to apply that exemption where that remuneration is paid by a university established in another Member State, is not justified by overriding reasons relating to the public interest.

The third question

Observations submitted to the Court

74 Given that the third question was posed by the national court on the hypothesis of a negative answer to the second question and given that the national court considers that the second question should be answered in the affirmative, the German Government takes the view that there is no need to reply to the third question.

75 According to Mr and Mrs Jundt, it cannot be argued that an unjustified restriction on the freedom to provide services is nevertheless compatible with Community law on the ground that the Member States retain responsibility for the organisation of their respective education systems under Article 149 EC. The German State, they argue, is obliged to promote cooperation between the Member States and not to prevent it by adopting rules for its own benefit.

76 In the Commission's view, Paragraph 3(26) of the EStG does not fall outside the scope of the freedom to provide services on the ground that the Member States have retained the competence to organise their respective education systems. Article 149 EC does not exclude such a tax regime, applied to university teaching activities, from the scope of the freedom to provide services.

77 The Commission also takes the view that Paragraph 3(26) of the EStG does not relate either to the organisation of education or to education policy. It simply establishes a tax derogation intended to support, in a general manner, secondary professional activity in the public interest, without having any specific link to the education system.

78 In the Commission's view, Article 128 of the EEC Treaty and the provisions of secondary law adopted on that basis indirectly refute the Bundesfinanzhof's opinion that the main proceedings involve a derogation from the rules governing the freedom to provide services which is justified by the 'education policy' factor. Those provisions show that artificial obstacles to the mobility of teachers are contrary to the objectives of Community policy in the area of vocational education and that that was already the case at the time of the dispute in the main proceedings. Moreover, 'encouraging mobility of students and teachers' is now one of the express objectives of the Community anchored in the Treaty as a result of Article 149 EC.

Reply of the Court

79 By its third question, the national court asks essentially whether the fact that the Member States are themselves competent to organise their respective education systems is such as to render compatible with Community law national legislation which confines the benefit of a tax exemption to taxpayers carrying out activities for or on behalf of national public universities.

80 According to the national court, Paragraph 3(26) of the EStG can be understood as expressing the competence of the Member States themselves to decide how their education systems should be organised and that power entails the freedom to confine the benefit of a tax concession to taxpayers carrying out activities for or on behalf of a national public university.

81 In that regard, it should be pointed out that, admittedly, it follows from Article 149(1) EC that '[t]he Community shall contribute to the development of quality education by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.'

82 While the areas of competence and responsibilities of the Member States in those fields are not mentioned in Article 128 of the EEC Treaty, which was the relevant provision at the time of the facts in the main proceedings, it follows from paragraph 19 of *Gravier* that, at the material time of the main proceedings, educational organisation and policy were not as such included in the

spheres which the EEC Treaty had entrusted to the Community institutions.

83 That being so, as the Commission correctly submits, legislation such as Paragraph 3(26) of the EStG is not a measure which concerns the content of teaching or the organisation of the education system. It is a fiscal measure of a general nature which grants a tax concession where an individual engages in activities of benefit to the general public.

84 It is not only expense allowances for teaching activities paid by public educational and research institutions which come within the scope of the legislation at issue in the main proceedings, but also those which are paid for other activities and by other institutions. Such legislation does not therefore as such constitute the expression of a Member State's power to organise its education system.

85 In any event, irrespective of its real or supposed links with the fields of areas of competence reserved to the Member States, national legislation such as that at issue in the main proceedings does not escape from the application of the principle of freedom to provide services.

86 The Member States are in fact bound, when exercising the areas of competence reserved to them, to comply with Community law, in particular the provisions on the freedom to provide services. The Court has ruled thus in several fields, including direct taxation and education (see, inter alia, *Schwarz and Gootjes-Schwarz*, paragraphs 69 and 70, and *Commission* v *Germany*, paragraphs 85 and 86).

87 Consequently, the competence and the responsibility of the Member States for the organisation of their respective education systems cannot have the effect of removing tax legislation such as that at issue in the main proceedings from the scope of the Treaty provisions on the freedom to provide services or of rendering compatible with Community law the refusal to grant the tax concessions in question to teachers offering their services in the universities of other Member States.

88 As follows from paragraphs 61 to 63 of the present judgment concerning the lack of justification for legislation such as that in the main proceedings on the ground of an overriding reason relating to the public interest, even if such legislation were a measure linked to the organisation of the education system, the fact remains that it is incompatible with the Treaty in so far as it influences the choice of persons teaching on a secondary basis with regard to the place in which they provide their services.

89 The answer to the third question referred must therefore be that the fact that the Member States are themselves competent to organise their respective education systems is not such as to render compatible with Community law national legislation which confines the benefit of a tax exemption to taxpayers carrying out activities for or on behalf of national public universities.

Costs

90 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

1. **A teaching activity carried out by a taxpayer of one Member State for a legal person established under public law, in the present case a university, situated in another Member State comes within the scope of Article 49 EC, even if it is carried out on a secondary basis and in a quasi-honorary capacity.**

2. **The restriction on the freedom to provide services constituted by the fact that national legislation confines the application of an exemption from income tax to remuneration paid by universities, that is to say, public-law legal persons, established on national territory, in return for teaching activities carried out on a secondary basis, and refuses to apply that exemption where that remuneration is paid by a university established in another Member State, is not justified by overriding reasons relating to the public interest.**

3. **The fact that the Member States are themselves competent to organise their respective education systems is not such as to render compatible with Community law national legislation which confines the benefit of a tax exemption to taxpayers carrying out activities for or on behalf of national public universities.**

[Signatures]

* Language of the case: German.