

JUDGMENT OF THE COURT
28 January 1986

In Case 270/83

Commission of the European [Union], represented by Georges Kremlis, a member of its Legal Department, acting as Agent, assisted by Gerard Druesne, professor at the University of Nancy II, Dean of the Faculty of Law and Economic Science of Nancy, with an address for service in Luxembourg at the office of Georges Kremlis, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

applicant,

v

French Republic, represented by Francois Renouard, acting as Agent, and Alain Sortais, acting as Deputy Agent, with an address for service in Luxembourg at the French Embassy,

defendant,

APPLICATION for a declaration that, by not granting the benefit of shareholders' tax credits to the branches and agencies in France of insurance companies established in another Member State, the French Republic has failed to fulfil its obligations under the [FEU] Treaty, in particular [Article 49] thereof,

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet, (Presidents of Chambers), T. Koopmans, O. Due, Y. Galmot, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini
Registrar: D. Louterman, Administrator

after hearing the Opinion of the Advocate General delivered at the sitting on 16 October 1985,

gives the following

Decision

- 1 By an application lodged at the Court Registry on 12 December 1983, the Commission of the European [Union] has brought an action under [Article 258 TFEU] for a declaration that by not granting the benefit of shareholders' tax credits to the branches and agencies in France of insurance companies established in another Member State on the same terms as those enjoyed by French companies, the French Republic has failed to fulfil its obligations under the [FEU] Treaty, in particular [Article 49] thereof.

The national legislation at issue

- 2 French tax legislation provides for the charge of corporation tax at a rate of 50% on all profits made by companies and other taxable legal persons; that tax is the equivalent of the income tax to which natural persons are liable. In principle, companies are liable to corporation tax irrespective of where their registered office is situated. However, by virtue of Article 209 of the code general des impôts, account is taken only of profits made in undertakings operating in France or in those liable to taxation in France by virtue of a double-taxation agreement.
- 3 In order to reduce the effects of the cumulative taxation of profits distributed by companies caused by the fact that such profits are liable first to corporation tax in the hands of the company distributing the dividends and then to income tax or corporation tax in the hands of the recipient of those dividends, Article 158 bis of the code general des impôts provides for a tax credit called 'avoir fiscal' which is granted to the recipients of dividends distributed by French companies and is equal to half the amount actually paid by those companies. The tax credit may be set off against the tax payable by the recipient of the dividends. It constitutes income of that person and may be used only in so far as it forms part of that person's taxable income.

- 4 The second paragraph of Article 158 ter of the code general des impôts provides that the benefit of the shareholders' tax credit 'is granted only to persons who have their habitual residence or registered office in France'. Furthermore, according to Article 242 quater of the code general des impôts that benefit may be granted to persons resident in the territory of States which have concluded double-taxation agreements with France.
- 5 According to the information which the parties supplied to the Court, the agreements concluded between France and four other Member States, namely the Federal Republic of Germany, Luxembourg, the Netherlands and the United Kingdom, provide that a company whose registered office is in one of those Member States and which holds shares in French companies among the assets of its principal establishment may benefit from the shareholders' tax credit. On the other hand, there is no case in which benefit of the tax credit is granted in respect of shares forming part of the assets of secondary establishments, branches or agencies of companies whose registered office is not in France.
- 6 It is clear from the aforementioned provisions, and also from Article 15 of the loi des finances [Finance Law] for 1978 (Law No 77-1467 of 30 December 1977, Journal Officiel de la Republique Francaise 1977, p. 6316), that insurance companies whose registered office is in France, including subsidiaries set up in France by foreign insurance companies, benefit from the shareholders' tax credit in respect of their shares in French companies. However, that benefit is not granted to secondary establishments set up in France in the form of branches or agencies by insurance companies whose registered office is in another Member State.

The purpose of the proceedings

- 7 In this action under [Article 258 TFEU], the Commission is seeking to establish that the rules governing shareholders' tax credits discriminate against branches and agencies of insurance companies whose registered office is situated in another Member State and constitute an indirect restriction on the freedom to set up secondary establishment. The Commission has added that although it has restricted its action to the insurance sector because it has received complaints only in regard to that sector, all the Member States, and in particular France, must nonetheless draw all the appropriate conclusions from

the Court's judgment, even in regard to other sectors.

- 8 The French Government has expressed its opposition to the Commission's enlarging the scope of the action to all companies whatever their sector of activity.
- 9 It must be observed in that regard that even though the effects of the national legislation at issue are particularly noticeable in a sector such as insurance, in which branches of foreign insurance companies are required to establish technical reserves consisting of assets localized in the country where business is carried on, the same rules do apply to other sectors as well. It may therefore be regretted that, by reason of the fact that it is restricted to insurance companies, this action raises the problems in terms which cover only part of the scope of the French legislative provisions in question. That does not however affect the admissibility of the action.
- 10 Since some uncertainty as to the precise subject matter of this action has become visible during the proceedings, it must once again be pointed out that the action is concerned with disparity in the treatment in regard to the shareholders' tax credit of, on the one hand, insurance companies whose registered office is in France, including subsidiaries set up in France by foreign companies, and, on the other, of branches and agencies established in France by insurance companies whose registered office is in another Member State. The action does not therefore deal generally with every difference in treatment between, on the one hand, companies as independent legal entities and, on the other, branches and agencies without separate legal personality. Finally, it must be particularly emphasized that the action does not concern differences which may exist in the rules regarding taxation applicable to branches and agencies, on the one hand, and, on the other hand, subsidiaries of companies whose registered office is in another Member State where those branches and agencies or those subsidiaries transfer to the company which owns them profits made in the undertakings carried on by them in France.

The application of [Article 49 TFEU]

- 11 The Commission puts forward two submissions intended to show that the said rules governing shareholders' tax credits are contrary to the second paragraph of [Article 49 TFEU]. In the first place, those rules discriminate

against branches and agencies in France of insurance companies whose registered office is in another Member State by comparison with companies whose registered office is in France. The tax system prevents such branches and agencies from holding French shares and thus places them at a disadvantage in the pursuit of their activities in France. The discrimination is made all the more clear by the fact that, for the purpose of determining taxable income, French tax law applies the same rules to French companies as it does to secondary establishments of foreign companies. Secondly, the fact that the tax rules in question are unfavourable to the branches and agencies of foreign insurance companies indirectly restricts the freedom which insurance companies based in other Member States must have to establish themselves in France either through a subsidiary or through a branch or agency. It constitutes an inducement to choose to set up a subsidiary so as to avoid the disadvantage resulting from the refusal to grant the benefit of the shareholders' tax credit.

- 12 In the view of the French Government, such different treatment does not constitute discrimination and is therefore not contrary to the Member States' obligation under the second paragraph of [Article 49 TFEU] to apply to a company whose registered office is in another Member State the conditions laid down for its own nationals in its own law. The French Government puts forward two series of arguments designed to show essentially that different treatment is justified in this case because the situations involved are objectively different and that that difference in treatment is due to the particularities of the tax systems, which vary from one Member State to another, and to the double-taxation agreements.
- 13 It must be stated firstly that [Article 49 TFEU] embodies one of the fundamental principles of the [Union] and has been directly applicable in the Member States since the end of the transitional period. By virtue of that provision, freedom of establishment for nationals of one Member State on the territory of another includes the right to take up and pursue activities as self-employed persons and 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. The abolition of restrictions on freedom of establishment also applies to restrictions on the setting up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
- 14 [Article 49 TFEU] is thus intended to ensure that all nationals of Member States who establish themselves in another Member State, even if that

establishment is only secondary, for the purpose of pursuing activities there as a self-employed persons receive the same treatment as nationals of that State and it prohibits, as a restriction on freedom of establishment, any discrimination on grounds of nationality resulting from the legislation of the Member State.

- 15 It thus appears that the two submissions put forward by the Commission, namely that concerning discrimination in French law against branches and agencies of insurance companies established in other Member States vis-a-vis companies established in France and that concerning the restriction of the freedom of foreign insurance companies to establish branches and agencies, are closely linked. They must therefore be considered together.
- 16 It is common ground that in French law, in particular, under Article 158 ter of the code general des impôts, insurance companies whose registered office is in France benefit from shareholders' tax credits in respect of dividends on shares which they hold in French companies whereas that benefit is denied to branches and agencies of insurance companies whose registered office is in another Member State. In that respect, insurance companies whose registered office is in another Member State and who pursue their activities in France through branches or agencies are thus not treated in the same way as insurance companies whose registered office is in France.
- 17 In its first line of argument the French Government seeks to demonstrate that the above-mentioned difference of treatment is justified by objective differences between the position of an insurance company whose registered office is in France and that of a branch or agency of an insurance company whose registered office is situated in another Member State. The difference in question is based on the distinction between 'residents' and 'non-residents', which is to be found in all legal systems and is internationally accepted. It is an essential distinction in tax law. It is thus also applicable in the context of [Article 49 TFEU]. Furthermore, branches and agencies of companies whose registered office is abroad enjoy various advantages over French companies which balance out any disadvantages in regard to shareholders' tax credits. Finally, those disadvantages are in any event insignificant and may be easily avoided by setting up a subsidiary in France.
- 18 It must first be emphasized in that regard that freedom of establishment, which [Article 49 TFEU] grants to nationals of another Member State and

which entails their right to take up and pursue activities as self-employed persons under the conditions laid down for its own nationals by the law of the country where such establishment is effected, includes, pursuant to [Article 54 TFEU], the right of companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the [Union] to pursue their activities in the Member State concerned through a branch or agency. With regard to companies, it should be noted in this context that it is their registered office in the above-mentioned sense that serves as the connecting factor with the legal system of a particular State, like nationality in the case of natural persons. Acceptance of the proposition that the Member State in which a company seeks to establish itself may freely apply to it a different treatment solely by reason of the fact that its registered office is situated in another Member State would thus deprive that provision of all meaning.

- 19 Even if the possibility cannot altogether be excluded that a distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law, it must be observed in this case that French tax law does not distinguish, for the purpose of determining the income liable to corporation tax, between companies having their registered office in France and branches and agencies situated in France of companies whose registered office is abroad. By virtue of Article 209 of the code general des impôts, both are liable to taxation on profits made in undertakings carried on in France, to the exclusion of profits which are made abroad or which France is entitled to tax under the terms of a double-taxation agreement.
- 20 Since the rules at issue place companies whose registered office is in France and branches and agencies situated in France of companies whose registered office is abroad on the same footing for the purposes of taxing their profits, those rules, cannot, without giving rise to discrimination, treat them differently in regard to the grant of an advantage related to taxation, such as shareholders' tax credits. By treating the two forms of establishment in the same way for the purposes of taxing their profits, the French legislature has in fact admitted that there is no objective difference between their positions in regard to the detailed rules and conditions relating to that taxation which could justify different treatment.
- 21 Notwithstanding the French Government's argument to the contrary, the difference in treatment also cannot be justified by any advantages which

branches and agencies may enjoy *vis-a-vis* companies and which, according to the French Government, balance out the disadvantages resulting from the failure to grant the benefit of shareholders' tax credits. Even if such advantages actually exist, they cannot justify a breach of the obligation laid down in [Article 49 TFEU] to accord foreign companies the same treatment in regard to shareholders' tax credits as is accorded to French companies. It is also not necessary in this context to assess the extent of the disadvantages which branches and agencies of foreign insurance companies suffer as a result of the failure to grant them the benefit of shareholders' tax credits and to consider whether those disadvantages could have any effect on their tariffs, since [Article 49 TFEU] prohibits all discrimination, even if only of a limited nature.

- 22 Furthermore, the fact that insurance companies whose registered office is situated in another Member State are at liberty to establish themselves by setting up a subsidiary in order to have the benefit of the tax credit cannot justify different treatment. The second sentence of the first paragraph of [Article 49 TFEU] expressly leaves traders free to choose the appropriate legal form in which to pursue their activities in another Member State and that freedom of choice must not be limited by discriminatory tax provisions.
- 23 In a second line of argument, the French Government seeks to demonstrate that the difference in treatment is in fact due to the particular characteristics of and the differences between the tax systems applying in the various Member States and to the double-taxation agreements. It argues that since the legislation at issue has not been harmonized, different measures are necessary in each case in order to take account of the differences between the taxation systems; those different measures are therefore justified under [Article 49 TFEU]. Thus, the rules which are being contested in this case are necessary, in particular, in order to prevent tax evasion. The application of tax legislation to natural persons and companies pursuing their activities in different Member States is governed by double-taxation agreements whose existence is expressly recognized in Article 220 of the [EEC] Treaty [repealed]. The French Government concludes that the difference in treatment provided for by the rules at issue is not contrary to [Article 49 TFEU].
- 24 It must first be noted that the fact that the laws of the Member States on corporation tax have not been harmonized cannot justify the difference of

treatment in this case. Although it is true that in the absence of such harmonization, a company's tax position depends on the national law applied to it, [Article 49 TFEU] prohibits the Member States from laying down in their laws conditions for the pursuit of activities by persons exercising their right of establishment which differ from those laid down for its own nationals.

- 25 Furthermore, the risk of tax avoidance cannot be relied upon in this context. [Article 49 TFEU] does not permit any derogation from the fundamental principle of freedom of establishment on such a ground. Moreover, the Court is not convinced by the calculations submitted by the French Government for the purpose of showing that if the benefit of shareholders' tax credits was granted to branches and agencies of companies whose registered offices are in other Member States, those companies would be prompted to include the shares they hold in French companies among the assets of their branches and agencies in France. Those calculations are based on the hypothesis, which finds no support in Article 158 bis of the code general des impôts, that the transfer to the place at which the company has its registered office of profits made by branches or agencies would in its turn benefit from the shareholders' tax credit; nor has the Commission sought in these proceedings to have the benefit of that tax credit extended to such cases.
- 26 Finally, the French Government is wrong to contend that the difference of treatment in question is due to the double-taxation agreements. Those agreements do not deal with the cases here at issue as defined above. Moreover, the rights conferred by [Article 49 TFEU] are unconditional and a Member State cannot make respect for them subject to the contents of an agreement concluded with another Member State. In particular, that article does not permit those rights to be made subject to a condition of reciprocity imposed for the purpose of obtaining corresponding advantages in other Member States.
- 27 Consequently, by failing to grant to the branches and agencies in France of insurance companies whose registered office is in another Member State the benefit of shareholders' tax credits in respect of dividends paid by French companies to such branches or agencies, Article 158 ter of the code general des impôts does not apply to those companies the conditions laid down by French law for insurance companies whose registered office is in France. That discrimination constitutes a restriction on the right of establishment of

insurance companies whose registered office is in another Member State, which is contrary to the first and second paragraphs of [Article 49 TFEU].

28 It must therefore be held that by not granting to the branches and agencies in France of insurance companies whose registered office is in another Member State on the same terms as apply to insurance companies whose registered office is in France the benefit of shareholders' tax credits in respect of dividends paid to such branches or agencies by French companies, the French Republic has failed to fulfil its obligations under [Article 49 TFEU].

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the French Republic has been unsuccessful in its submissions, it must be ordered to pay the costs.

On those grounds,

The Court

hereby:

(1) Declares that by not granting to the branches and agencies in France of insurance companies whose registered office is in another Member State on the same terms as apply to insurance companies whose registered office is in France the benefit of shareholders' tax credits in respect of dividends paid to such branches or agencies by French companies, the French Republic has failed to fulfil its obligations under [Article 49 TFEU];

(2) Orders the French Republic to pay the costs.

Mackenzie Stuart

Everling

Bahlmann

Joliet Koopmans

Due

Galmot

Kakouris

O'Higgins

Delivered in open court in Luxembourg on 28 January 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President

Robert Schütze European Union Law Lisbonised Cases