Arrêt de la Cour
Case C-422/01

Försäkringsaktiebolaget Skandia (publ)
and
Ola Ramstedt

v
Riksskatteverket

(Reference for a preliminary ruling from the Regeringsrätten (Sweden))

«(Occupational endowment pension insurance – Policy taken out with a company in another Member State – Difference in tax treatment – Compatibility with Article 49 EC)»

Opinion of Advocate General Léger delivered on 3 April 2003 I - 0000 Judgment of the Court (Fifth Chamber), 26 June 2003 I - 0000
Summary of the Judgment
*Freedom to provide services – Restrictions – Tax legislation – Difference in treatment for occupational pension insurance taken out in another Member State – Not permissible (Art. 49 EC)*Article 49 EC precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation, with income tax effects which, depending on the circumstances in the individual case, may be less favourable.see para. 62, operative part

JUDGMENT OF THE COURT (Fifth Chamber)
26 June 2003 (1)

((Occupational endowment pension insurance – Policy taken out with a company in another Member State – Difference in tax treatment – Compatibility with Article 49 EC))

In Case C-422/01,
REFERENCE to the Court under Article 234 EC by the Regeringsrätten (Sweden) for a preliminary ruling in the proceedings pending before that court between
Försäkringsaktiebolaget Skandia (publ), Ola Ramstedt
and

Riksskatteverket,
on the interpretation of the EC Treaty and Article 49 EC in particular,

THE COURT (Fifth Chamber),,

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, A. La Pergola, P. Jann and A. Rosas, Judges,
Advocate General: P. Léger,
Registrar: R. Grass,
after considering the written observations submitted on behalf of:

?Försäkringsaktiebolaget Skandia (publ) and Mr Ramstedt, by J.-M. Bexhed, chefsjurist,
?the Swedish Government, by A. Kruse, acting as Agent,
?the Danish Government, by J. Molde, acting as Agent,
?the Italian Government, by I.M. Braguglia, acting as Agent, and G. Fiengo, avvocato dello Stato,
?Commission of the European Communities, by C. Tufvesson and R. Lyal, acting as Agents,
?the EFTA Surveillance Authority, by E. Wright and P.A. Bjørgan, acting as Agents,
having regard to the Report for the Hearing,

after hearing the oral observations of Försäkringsaktiebolaget Skandia (publ) and Mr Ramstedt, represented by J.-M. Bexhed, of the Riksskatteverket, represented by G. Bäck, acting as Agent, of the Swedish Government, represented by A. Kruse and K. Wistrand, acting as Agents, of the Commission, represented by C. Tufvesson and R. Lyal, and of the EFTA Surveillance Authority, represented by E. Wright and by P.A. Bjørgan, at the hearing on 30 January 2003,

after hearing the Opinion of the Advocate General at the sitting on 3 April 2003,

gives the following

Judgment

1 By order of 23 October 2001, received by the Court on 25 October 2001, the Regeringsrätten (Supreme Administrative Court) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of the EC Treaty and, in particular, Article 49 EC.
2 That question was raised in proceedings brought by Försäkringsaktiebolaget Skandia (publ) (Skandia) and Mr Ramstedt against the Riksskatteverket (National Tax Board) concerning the tax treatment of an occupational pension insurance policy taken out by Skandia for the benefit of Mr Ramstedt with companies established in other Member States.
National legal background
The legislation at issue
3 The rules on the taxation of insurance are to be found *inter alia* in the kommunalskattelagen (1928:370) (Municipal Tax Act) and, from the 2002 tax year onwards (income of 2001), in the inkomstskattelagen (1999:1229) (Income Tax Act, IL) which contains rules equivalent to those of the kommunalskattelagen.
4 In the matter *inter alia* of occupational pension insurance policies which are taken out by an employer who pays the premiums on behalf of one of his employees, the legislation makes a distinction between pension insurance and endowment insurance.
5 To be considered as pension insurance, a policy must, as a rule, be taken out with an insurer established in Sweden.
6 Article 5 of Chapter 58 of the IL provides, however, that an insurance policy not taken out with an insurance company operating in Sweden none the less constitutes pension insurance if
(a)the insurance chiefly relates to an old-age, invalidity or survivor's pension and the taxable person was resident abroad when the contract was entered into, in a country whose tax system allows a right to deduct, a tax reduction or other tax relief, or

(b)the employer paid premiums for such insurance during the insured's period of residence or gainful employment abroad without that payment being deemed income of the insured for the purposes of taxation in that country, or

(c)the tax authorities, in the light of the particular circumstances of the case, have given authorisation for the insurance policy to be considered to be pension insurance.

7 Article 2(2) of Chapter 58 of the IL provides that life assurance which does not fulfil the conditions applicable to pension insurance constitutes endowment insurance.

8 In terms of direct taxation the two types of insurance are subject to different rules on deduction.

9 Premiums paid by the employer under an occupational insurance policy which can be deemed pension insurance under the legislation are immediately deductible in calculating his taxable income. Retirement benefits paid out subsequently are subject to income tax in their entirety in the hands of the retired employee who is the beneficiary of the policy.

10 On the other hand, premiums paid by an employer under occupational pension insurance which is deemed under the Swedish legislation to be endowment insurance are not deductible in calculating taxable income. It is clear from the order for reference that the employer none the less has a right to deduct the amounts he has undertaken contractually to pay to the employee. Consequently, that deduction can only be made as and when the retirement benefits are actually paid. In the hands of the employee the sums received constitute taxable earned income.

The main proceedings and the question referred

11 Mr Ramstedt, a Swedish citizen resident in Sweden, is employed by the Swedish company Skandia. Mr Ramstedt and Skandia agreed that part of Mr Ramstedt's pension was to be provided by Skandia's taking out an occupational pension insurance policy with the Danish life assurance company Skandia Link Livforsikring A/S, the German life assurance company Skandia Lebensversicherung AG or the English life assurance company Skandia Life Assurance Ltd (the foreign insurance companies).

12 Mr Ramstedt and Skandia applied for an advance ruling from the Skatterättsnämnden (Council for Advance Tax Rulings) in order to establish (1) whether Skandia was entitled to deduct from taxable income the premiums for an insurance policy taken out with one of the above foreign insurance companies and, if so, (2) whether the answer to that question would be different if those foreign insurance companies undertook to provide income statements to the Swedish tax authorities for the payments made to Mr Ramstedt under the insurance policy in question, and (3) whether Mr Ramstedt should declare the payments received from the insurance as earned income and, if so, when.

13 In its advance ruling of 1 February 2000 the Skatterättsnämnden found that Skandia was not entitled to deduct premiums paid but that a right to deduct arose in respect of the pension benefits when they were paid out. It also found that Mr Ramstedt should be taxed on the benefits paid under the contract.

14 In its ruling the Skatterättsnämnden stated that the Swedish rules did not entail any discrimination prohibited under EC law. It cited Case C-204/90 *Bachmann* [1992] ECR I-249 in support of its view that it was not contrary to Community law for a Member State to have two sets of rules for life assurance.

15 Mr Ramstedt and Skandia appealed against this advance ruling to the Regeringsrätten.

16 In its order for reference, the Regeringsrätten states that the implication of the contested decision is that Skandia's right to deduct premium payments arises at a later date than when the premiums are paid, in that the deduction does not relate to premiums paid, but to sums actually paid out as pension benefits.

17 It considers that, as regards tax on company profits alone, the position adopted by the Skatterättsnämnden does not imply that the insurance policies at issue will always be at a disadvantage compared with occupational pension insurance policies deemed to be pension insurance policies.

18 In that regard, the Regeringsrätten envisaged two possibilities. If it is only long after the premiums have been paid in that benefits are paid under the insurance policy and the corresponding right to deduct arises, and the insurance benefits payable are not significantly higher than the amount of the premiums paid, an insurance policy taken out with a company abroad may entail less favourable consequences in terms of income tax than a policy taken out with an insurance company in Sweden. On the other hand, if benefits are paid under the insurance policy and the right to deduct can be invoked after only a short period of time, and the insurance benefits are significantly higher than the amount of premiums paid, the result can be the opposite.

19 Despite those uncertainties, the national court accepted that the tax regime for endowment insurance was certainly less favourable in some cases than that applying to occupational pension insurance.

20 In the light of those considerations, the national court raises the question whether the obligation to take out an insurance policy with an insurer in Sweden in order to benefit from the tax regime for pension insurance constitutes a restriction on the free movement of services, persons and capital and, in particular, Article 49 EC.

21 It is against that background that the Regeringsrätten decided to stay proceedings and refer the following question to the Court of Justice for a preliminary ruling: Are the provisions of Community law on freedom of movement for persons, services and capital, in particular Article 49 EC, in conjunction with Article 12 EC, to be interpreted as meaning that they preclude application of national tax rules under which an insurance policy issued by an insurance company in the UK, Germany or Denmark which meets the conditions laid down in Sweden for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in Sweden, is treated as an endowment insurance policy with income tax effects which, depending on the circumstances in the individual case, may be less favourable than the tax effects of an occupational pension policy?

Applicability of Treaty provisions relating to freedom to provide services

22 At the outset, it should be stated that the Treaty provisions relating to freedom to provide services apply to a situation such as that in the main proceedings.

23 Article 50 EC provides that services are to be considered to be services within the meaning of the Treaty where they are normally provided for remuneration. It has already been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (see Case 263/86 *Belgian State* v *Humbel* [1988] ECR 5365, paragraph 17).

24 In fact, the premiums which Skandia pays are the consideration for the pension which will be paid to Mr Ramstedt when he retires. It is irrelevant that Mr Ramstedt does not pay the premiums himself, as Article 50 does not require that the service be paid for by those for whom it is performed (see, to that effect, Case 352/85 *Bond van Adverteerders and Others* [1988] ECR 2085, paragraph 16). Moreover, the premiums unquestionably represent remuneration for the insurance companies which receive them (see, to that effect, Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 58).

Restriction on freedom to provide services

25 At the outset it should be recalled that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19, Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19, and Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32).

26 In the perspective of a single market and in order to permit the attainment of the objectives thereof, Article 49 EC precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see, *inter alia* , Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraph 17, and *Smits and Peerbooms* , cited above, paragraph 61).

27 In that regard, it was not disputed before the Court that national legislation such as that at issue in the main proceedings restricts freedom to provide services.

28 In fact, in view of the disadvantage to the employer in financial terms in the postponement of the right to deduction until the time the pension benefits are paid to the employee, national rules such as those at issue in the main proceedings are liable both to dissuade Swedish employers from taking out occupational pension insurance with institutions established in a Member State other than the Kingdom of Sweden and to dissuade those institutions from offering their services on the Swedish market (see, to that effect, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 30, and Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 31).

Justification relied on

29 The need to ensure the cohesion of the national tax system and effective fiscal controls, the need to protect the basis of tax revenue of the Member State concerned and competitive neutrality have been put forward as grounds justifying the legislation at issue.

Fiscal cohesion

30 The Swedish and Danish Governments point to the similarities between the factual background in *Bachmann* and that in the present case. In particular, they take the view that the direct correlation between deduction and taxation, required by that judgment, exists in the national legislation at issue.

31 The argue in that connection that, although, strictly speaking, the deductions are not made by the same taxpayer who is liable to taxation, the tax advantages and disadvantages of the pension policy in practice affect only the employee who is the beneficiary of the policy. The pension insurance premium paid by the employer in fact constitutes part of the employee's remuneration. If the employer did not pay the premium, the net remuneration received by the employee would be greater, which would enable him to pay the premium himself. The fact that the contribution to the pension policy is paid by the employer and not by the employee is merely a technicality.

32 That line of argument cannot be upheld.

33 In that regard, it should be noted that the judgments in *Bachmann* and Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 14, were based on the finding that, in Belgian law, there was a direct connection between the deductibility of contributions and the liability to tax on sums payable by insurers. Under the Belgian tax system, the loss of revenue resulting from the deduction of insurance contributions was offset by the taxation of pensions, annuities or capital sums payable by insurers. By contrast, where such contributions had not been deducted, those sums were exempted from tax (see *Danner* , cited above, paragraph 36).

34 In the case in the main proceedings, however, there is no such connection.

35 In the Swedish system, an employer who has taken out an insurance policy with an insurer established in another Member State has to wait until pension benefits are paid to his employee to enjoy the right to deduct. There is no compensatory measure to offset the disadvantage he suffers compared with an employer who takes out comparable insurance with a company established in Sweden.

36 However, in both situations, the employee who is the beneficiary is liable to tax at the same time and in the same way.

37 Moreover, the argument of the Swedish and Danish Governments that the insurance premium is, essentially, a part of the employee's remuneration does not explain why it can be deducted immediately the employer takes out the occupational insurance with an insurer established in Sweden while deduction is deferred where it is taken out with an insurer established in another Member State.

The effectiveness of fiscal controls

38 According to the Swedish and Danish Governments, the requirement of establishment in Sweden is justified by the need to have in place an effective system of fiscal controls. In that respect, and, in particular, for the purposes of obtaining the information necessary for controls of this kind, the Community instruments which provide for such controls, in

particular, Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), are inadequate.

39 The Danish Government argues *inter alia* that, as long as Community law does not expressly provide for the right of Member States to require foreign insurance companies to provide information on payments made, such controls cannot be effectively implemented.

40 It would likewise not be possible to ensure effective fiscal controls relying only on voluntary cooperation. It is true that the tax authorities of the Member States can, to a great extent, safeguard themselves against unjustified deductions of premium payments by laying down very strict conditions as regards evidence of the fact and the amount of payments. A system based on information provided voluntarily does not, however, solve the subsequent question of liability to tax. Taxpayers do not have the same interest in providing the national tax authorities with full and correct information on payments received, which are subject to tax, as on payments made or payments which can be deducted.

41 That argument cannot be upheld.

42 It should first be recalled that Directive 77/799 may be relied on by a Member State in order to obtain from the competent authorities of another Member State all the information enabling it to ascertain the correct amount of income tax (see Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraph 26), or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (see *Wielockx* , cited above, paragraph 26, and *Danner* , paragraph 49).

43 A Member State is therefore in a position to check whether contributions have actually been paid by one of its taxpayers to an insurance company established in another Member State. In addition, there is nothing to prevent the tax authorities concerned from requiring the taxpayer to provide such proof as they may consider necessary in order to determine whether the conditions for deducting contributions provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested (see, to that effect, *Bachmann* , paragraphs 18 and 20, *Commission* v *Belgium* , paragraphs 11 and 13, and *Danner* , paragraph 50).

44 As regards the effectiveness of the supervision of the taxation of pensions paid to Swedish residents, it may be ensured by measures which restrict freedom to provide services to a lesser degree than a national measure such as that at issue in the main proceedings (*Danner* , paragraph 51).

45 Apart from the possibilities afforded by Directive 77/799, it should be pointed out that, before receiving a pension from a foreign insurance company, the taxpayer will normally have applied for deduction of the contributions relating thereto. The application for deduction and the documentary evidence provided by the employer at the time such applications are made will constitute a valuable source of information about the pensions which will be paid to the employees who are the beneficiaries at a later stage (see, to that effect, *Danner* , paragraph 52).

The need to preserve the tax base

46 According to the Swedish Government, the requirement of establishment in Sweden is justified by the risk that the taxable property may disappear. The Kingdom of Sweden would not be able to tax pension benefits if there were no requirement that the insurance company be established in Sweden and, if it were not so established, the pension would not originate in that Member State.

47 The Danish Government submits, for its part, that in *Safir* the Court held that the protection of the tax base was a public interest requirement which could justify even indirectly discriminatory tax rules.

48 If the right to deduct premiums paid for foreign pension policies could not be limited, that would allow taxpayers residing in Member States where taxation is high, such as the Kingdom of Sweden and the Kingdom of Denmark, to make an unacceptable profit from the differences between the tax systems of the Member States. Pension policies would be

taken out in Member States where tax on pension premiums is lower and where tax is deducted at source on such premiums under a bilateral taxation convention concluded with the beneficiary's State of residence.

49 The result in the long term would be that Member States would be forced to bring down their level of taxation in line with others. That could destroy the basis of the economy of welfare States such as the Kingdom of Sweden and the Kingdom of Denmark.

50 Those arguments cannot be upheld.

51 In that regard, as it pointed out in *Danner* in paragraph 55, the Court held in paragraph 34 of its judgment in *Safir* that, in that case, the need to fill the fiscal vacuum arising from the non-taxation of savings in the form of capital life assurance policies taken out with companies established in a Member State other than the one where the saver is resident was not such as to justify the national measure at issue, which restricted freedom to provide services.

52 The Court has also held, in general terms, that any tax advantage resulting for providers of services from the low taxation to which they are subject in the Member State in which they are established cannot be used by another Member State to justify less favourable treatment in tax matters given to recipients of services established in the latter State. Such compensatory tax arrangements prejudice the very foundations of the single market (see Case C-294/97 *Eurowings Luftverkehrs* [1999] ECR I-7447, paragraphs 44 and 45).

53 Finally, the Court has held that the need to prevent the reduction of tax revenue is not one of the grounds listed in Article 56 of the EC Treaty (now, after amendment, Article 46 EC) or a matter of overriding general interest (see *Danner* , paragraph 56) which would justify a restriction on the freedom to provide services.

Competitive neutrality

54 The Swedish Government explains that, in Sweden, an employer may deduct the costs of guaranteeing retirement pensions paid for by him before actual payment of the pension due to an employee in three circumstances: where a reserve is created in the balance sheet in conjunction with an insurance credit or with a municipal or State or equivalent guarantee, in the event of the transfer of funds to a retirement foundation or in the event of payment of pension insurance premiums.

55 The right to deduct in respect of the guarantee of undertakings on pensions by creating a reserve or making a transfer to a retirement foundation entails those deductions being made by companies established in Sweden and the sums whose deduction is allowed returning to those companies.

56 If there were no requirement that the insurance company should be established in Sweden in order for pension insurance premiums to be deductible, the conditions of competition between the different ways of guaranteeing undertakings on pensions would no longer be neutral. In terms of fiscal control, *inter alia* , foreign branches of Swedish insurance companies and foreign insurance companies would enjoy unwarranted competitive advantages compared with other forms of management of pension capital and compared with pension insurance companies in Sweden.

57 That line of argument, which is difficult to follow, as the Advocate General observed in point 50 of his Opinion, cannot, in any event, be upheld.

58 Even if they were valid, considerations of equality of competition between different national forms of guaranteeing undertakings on occupational pensions could not be upheld at the cost of restricting the free movement of services.

59 Moreover, in so far as the justification based on competitive neutrality also relies on considerations relating to the effectiveness of fiscal controls, it calls for the same criticisms as those already raised in that regard (see above, paragraphs 42 to 45).

Free movement of persons and capital

60 In the light of the foregoing observations, there is no need to assess whether the provisions of the Treaty on the free movement of persons and capital preclude national legislation such as that at issue in the main proceedings.

Article 12 EC

61 As Article 12 EC applies independently only to situations governed by Community law in regard to which the Treaty lays down no specific rules prohibiting discrimination (see *inter alia* Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 18), there is no need, in the light of the foregoing observations, to consider the question raised in the light of that provision.

62 In the light of the foregoing observations, the answer to the question referred must be that Article 49 EC precludes an insurance policy issued by an insurance company established in another Member State which meets the conditions laid down in national law for occupational pension insurance, apart from the condition that the policy must be issued by an insurance company operating in the national territory, from being treated differently in terms of taxation, with income tax effects which, depending on the circumstances in the individual case, may be less favourable.

Costs

63 The costs incurred by the Swedish, Danish and Italian Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Regeringsrätten (Sweden) by order of 23 October 2001, hereby rules:

Wathelet

Timmermans

La Pergola

Jann

Rosas

Delivered in open court in Luxembourg on 26 June 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1 – Language of the case: Swedish.