OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 16 October 2003 [1]

1. Under French personal income tax legislation, returns on certain investments are exempt from tax if the taxable person opts for a deduction at source, provided that the debtor of the income is resident or established in France.

2. The Commission of the European Communities seeks a declaration from the Court of Justice, pursuant to the second paragraph of Article 226 EC, that, by maintaining the abovementioned provision in force, the French Republic has failed to fulfil its obligations under Articles 49 and 56 EC.

I — Direct taxation, freedom to provide services and free movement of capital

3. Direct taxation falls within the competence of the Member States, but they must exercise that competence consistently with Community law provisions, [2] particularly the ones which lay down the principles of freedom to provide services and free movement of capital.

4. Freedom to provide services, which is enshrined in Article 49 EC (formerly Article 59 of the EC Treaty), requires the removal of all discrimination against providers of services on the grounds of their nationality or by reason of the fact that they are established in a State other than the one in which they provide the services. [3] Consequently, any tax measure which discourages economic operators who are established in other Member States, or which deters a Member State's own

1 — Original language: Spanish.

2 — See Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 21; Case C-264/96 ICI [1998] ECR I-4695, paragraph 19; Case C-307/97 *Saint-Gobain* [1999] ECR I-6161, paragraph 58; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 37.

3 — Case 33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 25; Joined Cases 110/78 and 111/78 *Van Wesemael and Others* [1979] ECR 35, paragraph 27; Case 279/80 *Webb* [1981] ECR 3305, paragraph 14; and Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 25.

nationals from purchasing the services provided by such operators, is, in principle, contrary to that freedom. [4]

5. Free movement of capital, which is laid down in Article 56 EC (formerly Article 73b of the EC Treaty), precludes Member States from adopting measures which dissuade their residents from making investments in the territory of other Member States [5] and, therefore, prohibits taxation provisions which produce such an effect. [6]

4 — In Case C-204/90 *Bachmann* [1992] ECR I-249, the Court declared that 'Provisions requiring an insurer to be established in a Member State as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to deter those seeking insurance from approaching insurers established in another Member State, and thus constitute a restriction of the latter's freedom to provide services' (paragraph 31). In Case C-118/96 *Safir* [1998] ECR I-1897, the Court declared that legislation (in that case Swedish) establishing different tax regimes for capital life assurance policies depending on the place of establishment of the insurance company is liable to dissuade individuals resident in Sweden from taking out policies with companies located abroad and liable to dissuade such companies from offering their services on the Swedish market (paragraphs 24 and 30).

5 — See Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 18, and the cases cited therein.

6 — In *Verkooijen*, the Court pointed out that limitation of an exemption from personal income tax to dividends distributed by companies established on national territory constitutes a restriction on capital movements, because (1) it dissuades residents of the State concerned from investing in companies which have their seat abroad, and (2) it constitutes an obstacle to the raising of capital in that Member State by such companies, since the dividends they distribute receive less favourable tax treatment than dividends distributed by bodies established in the territory of that Member State, with the result that their shares are less attractive (paragraphs 34 to 36). Advocate General Tizzano reached the same conclusion in the Opinion he delivered in Case C-516/99 *Schmid* [2002] ECR I-4573, which concerned legislation under which only recipients of domestic revenue from capital assets are entitled to choose between a special final tax and ordinary income tax at a rate which is reduced by 50%, whereas all other persons are compulsorily subject to income tax without any reduction of the rate (paragraph 39 et seq.).

II — The disputed tax provisions

6. Paragraph I of Article 125 A of the Code général des impôts (General Tax Code) provides that:

'... natural persons who receive interest, accumulated interest and any kind of proceeds from Government securities, bonds, equities, bills and other debt instruments, deposits, indemnity bonds and current accounts, *where the debtor is resident or established in France*, may elect for them to be subject to a fixed levy of income tax on the income concerned.

In the event that deduction at source is applied to such income, it will be imputed to the levy in discharge (fixed levy).

The latter is applied by the debtor or by the person who effects payment of the income.'

7. Paragraph IIIa of Article 125 A stipulates the rate of the levy, which ranges from 15% to 60% depending on the type of financial product to which it is applied, the duration of the contract, the date of issue of the instruments, and the interest payment period.

8. Paragraph II of Article 125-0 A lays down the same rule for income arising from bills or investment contracts and other similar investments. In those cases, the rate varies between 7.5% and 60%.

III — The administrative procedure

9. On 30 October 2000, the Commission informed the French authorities by letter that, by restricting the right to choose to taxpayers who collect income from debtors which are established or resident in France, the French Republic had failed to fulfil the obligations laid down in Articles 49 and 56 EC. The Commission granted the French authorities a period of two months in which to submit observations on the matter.

10. The French Government replied on 28 December 2000. The Commission was unconvinced by the French Government's arguments and, on 18 July 2001, issued a reasoned opinion which reiterated its earlier complaint.

IV — The claims of the parties and the proceedings before the Court of Justice

11. On 10 December 2002, the Commission brought this action, in which it seeks a declaration from the Court that the tax regime in question constitutes a restriction on freedom to provide services and free movement of capital, contrary to Articles 49 and 56 EC, in that the rate of the fixed levy, which is generally more favourable, is not applicable to income collected by French residents from a debtor which is not resident or established in France.

12. The French Government contends that the system was designed to function in the case of debtors (usually financial institutions) established in French territory, which, during the first fifteen days of each month, are required to deposit with the Treasury the sums they have deducted by way of a fixed levy in the course of the previous month. The French Government also claims that the different tax treatment of which the Commission complains must be viewed in context, because, occasionally, the rate of the fixed levy is higher than the rate of tax and because, in terms of liquidity, it is more advantageous to be subject to income tax than to the reduced rate deducted at source by the debtor. The French Government concludes by stating that, in any event, the restriction of the right to choose is justified by the need to guarantee payment and to safeguard the effectiveness of fiscal controls.

V — The breach

A — *The difference in treatment*

13. Taxable persons subject to personal income tax, whose residence for tax purposes is in France, [7] and who receive any of the types of income referred to in Articles 125 A and 125-0 A of the Code général des impôts, may pay income tax or, alternatively, may fulfil the obligation to do so by means of a fixed levy, which must be applied by the debtor and deposited into Treasury funds. That right to choose only arises if the debtor is resident or established in France, or, in the event that he is not, if the instruments which give rise to the income were issued in that Member State. [8]

14. The difference in tax treatment is real, a fact which is common ground between the parties. The right to choose only arises where the taxpayer and the debtor are resident or established in France. [9] However, the defendant Government minimises the importance of the inequality, arguing that, from the point of view of the taxpayer, the rate of tax is sometimes more attractive than the rate of the fixed levy and that the time at which each is paid makes it more advantageous to opt to pay income tax.

1. The rate of the fixed levy and the rate of tax

15. The French Government [10] and the Commission [11] have exchanged argument as to whether the rate of income tax imposed is more advantageous than the rate applied in respect of the fixed levy. Neither has adopted a comprehensive approach and, naturally, they have failed to reach agreement. The parameters to be taken into consideration are so many and so varied [12] that it is impossible to give a single, all-encompassing reply. What is certain, as the defendant Member State acknowledges, [13] is that there are always

7 — Taxable persons resident outside France do not have the right to choose and the income they collect is subject to the proportional rate of taxation. The same rule applies to that income whether it is paid outside French territory or is collected by legal persons whose seat is abroad (Paragraph III of Article 125 A of the Code général des impôts).

8 — Article 41k H of Annex III to the Code général des impôts.

9 — Where a taxpayer is resident for tax purposes abroad, the fixed levy is automatically applied; alternatively, where the debtor undertaking is established outside France, payment of income tax is compulsory.

10 — Paragraphs 22 and 23 of the defence and paragraphs 10 to 14 of the rejoinder.

11 — Paragraphs 3 to 7 of the reply.

12 — To determine the applicable rate of the fixed levy: the type of financial product, the duration of the contract, the date of issue of the instruments and the interest payment period (Paragraph IIIa of Article 125 A and Paragraph II of Article 125-0 A of the Code général des impôts). To determine the rate of income tax: *inter alia*, the basis of assessment and the family situation of the taxpayer (single, married, widowed, divorced, with or without dependent children, etc.) (Article 193 et seq. of the Code général des impôts).

13 — In the defence (paragraphs 22 and 23), the defendant states that 90% of taxpayers are subject to a rate of tax lower than or equal to 15% and that the average marginal rate is 25%. According to the defendant, income from investment contracts of less than eight years' duration are subject to a fixed levy of 15% of 35%, which is close to the aforementioned marginal rate. That argument advanced by the French Government demonstrates that there are instances in which the fixed levy is more attractive than income tax, and the French Government admits as much in paragraph 24 of the defence, where it states that the position of individuals who are subject to the fixed levy 'may prove to be more favourable from the point of view of the rate imposed'.

situations in which the rate of the fixed levy is more favourable than the rate of income tax. Furthermore, tax analysts take the view that 'the fixed levy generally benefits the taxpayer, in that, in the absence of choice, his taxable income (or part of it) is liable ... to be subject to income tax at a rate which is effectively higher than the rate of the fixed levy'. [14]

16. Accordingly, as regards the portion of income which, one way or another, will go into public funds, Articles 125 A and 125-0 A of the Code général des impôts constitute an obstacle to the two fundamental freedoms in question, because in certain situations it is more attractive for taxpayers to purchase products which give rise to that income from companies resident or established in France than from companies resident or established in other Member States. As the Commission recalls, [15] for that to be the case, the situation described need only occur in a limited number of the cases referred to in the legislation, because any restriction, however minor, of a fundamental freedom is prohibited. [16]

14 — *Mémento pratique Francis Lefebvre, Fiscal 1998*, paragraph 2158.

15 — See paragraph 2 of the reply.

16 — In Case C-34/98 *Commission* v *France* [2000] ECR I-995, paragraph 49, and Case C-169/98 *Commission* v *France* [2000] ECR I-1049, paragraph 46, the Court made a similar observation in relation to the argument advanced by the French Government in each case to the effect that the social debt repayment contribution, the application of which was claimed to contravene Community law, affected only a limited number of workers, and that the rate of the contested levy was minimal. In Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 8, the Court adopted the same approach.

2. The time of payment and the effect on public funds

17. The fact that the fixed levy is deducted by the person or undertaking which pays the income on the taxpayer's investments at the time such payment is effected, whereas payment of income tax occurs in September of the year following the tax year in which the income was collected, with the result that liquid assets are available in the latter case which are not available in the former, is not in itself a tax advantage which it is possible to measure in objective terms.

18. The choice between paying a specified percentage of the income immediately (in the form of a fixed levy) and paying a higher amount by way of income tax in a few months' time is a subjective decision which is influenced by factors that are so personal in nature that it is generally impossible to determine which is the most attractive option.

19. In any event, even if the defendant were correct in its view and it were possible to assert that, in terms of liquidity, it is more advantageous for an individual to be subject to income tax than to pay the fixed levy, there would still be a restriction of free movement of capital and freedom to

provide services because, as the Commission points out,[17] and the French Government itself admits,[18] the Court has held that tax treatment contrary to a fundamental freedom cannot be justified by the existence of tax advantages.[19]

20. In order to escape the application of that case-law, the defendant Member State argues that the liquidity advantage arising from the interval which elapses prior to payment of income tax is an integral part of the fixed levy scheme, which forms a cohesive whole, from which it follows that it does not fall within the scope of the said case-law. By that approach, the defendant implies that the fact that payment of income tax occurs at a later date than the application of the fixed levy was intended to compensate for the disadvantage suffered by persons who, because they have no right to choose, are compulsorily subject to income tax.

21. To my mind, that argument is manifestly without foundation. The dispute in these proceedings does not concern whether some individuals are subject to the fixed levy and some to payment of tax, with the result that the former are in a more advantageous position than the latter. The question which has arisen is very different: some individuals are entitled to choose and some are not, so that taxpayers who collect income from undertakings established in France have the right to choose between the immediate application of a fixed levy and paying tax in several months' time, an option which is not available to persons who take out investments with companies resident in other Member States. In that sense, the temporary liquidity advantage enjoyed by an individual who is subject (either voluntarily or compulsorily) to income tax is unrelated to the fixed levy scheme and is not designed to compensate for the difference in treatment.

22. In any event, even if it were an advantage, it would not remove the restriction which the disputed French measures place on the freedoms invoked by the Commission in the application.

23. There appears to be no doubt that the decision of the French legislature to assess and collect tax in September of the year following the tax year in which the taxable income concerned is received is unconnected to the right to opt for the fixed levy under Articles 125 A and 125-0 A of the Code général des impôts. Moreover, the stipulation that the levy must be applied at source by the body paying the income is not intended to place persons who choose that system at a disadvantage vis-à-vis persons for whom payment of income tax is compulsory and unavoidable. Indeed, the defendant government states that the aim of that stipulation is to control financial savings instruments and to ensure that it is

17 — Paragraph 21 of the reply.

18 — Paragraph 16 of the rejoinder.

19 — See *Verkooijen*, paragraph 61, and the cases referred to therein.

possible for the Treasury to collect that form of public revenue, an aim which academic writers have also stated includes 'encouraging savers to invest their wealth in French securities rather than foreign ones'. [20]

24. It is therefore my view that the system of choice laid down in the disputed articles of the Code général des impôts constitutes a restriction on freedom to provide services and free movement of capital, because it deters taxpayers resident in France from investing their savings in financial products offered by foreign undertakings and constitutes an obstacle to such undertakings offering those products on French territory, because the income they pay generally receives less favourable treatment for tax purposes than income distributed by competitors which are established or resident in France.

B — *General interest considerations which would justify the difference in treatment: the need to safeguard the effectiveness of fiscal supervision*

25. The French Republic claims that the system complained of by the Commission is justified by the need to ensure payment of tax and to safeguard fiscal controls. It argues that, where the debtor has its seat outside French territory, the tax authorities do not have the means to guarantee the conditions for the application of the fixed levy, especially if the undertaking concerned is established in a Member State which practises banking secrecy or whose legislation restricts the scope of procedures for the exchange of information.

26. In that regard, it is not appropriate to take into consideration the judgment in *Bachmann*. In those proceedings, the Court observed that the tax regime in issue was justified by the need for cohesion in the tax system, but, nonetheless, dismissed the claim that it was justified by the need to guarantee effective fiscal controls. [21] Community case-law certainly permits restrictions of the fundamental freedoms which are aimed at ensuring effective fiscal administration, [22] in particular where the aim is to combat tax evasion, in which case Article 58(1)(b) EC (formerly Article 73d(1)(b) of the EC Treaty) may be relied upon to justify restrictions of the free movement of capital. [23]

27. That general interest objective does not, however, give Member States carte

20 — Grosclaude, J., and Marchessou, P., *Droit fiscal général*, Dalloz, second edition, 1999, p. 167, paragraph 230 *in fine*.

21 — Paragraphs 18 to 20.

22 — See Case 120/78 *Rewe* [1979] ECR 649, paragraph 8; Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31; Case C-254/97 *Baxter and Others* [1999] ECR I-4809, paragraph 18; and *Commission* v *Belgium*, paragraph 39.

23 — See the judgment in *Commission* v *Belgium*, paragraphs 38 and 39, which cites the findings of the Court in Joined Cases C-358/93 and C-416/93 *Bordessa and Others* [1995] ECR I-361, paragraphs 21 and 22, and Joined Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraph 22.

blanche to curtail the fundamental freedoms, and is instead, like any exception to a cardinal principle of the Community, to be interpreted restrictively and applied in compliance with the requirements of the principle of proportionality. [24] Accordingly, difficulties inherent in the tasks of tax administration and tax inspection are not sufficient to render lawful measures which impose an outright restriction on fundamental freedoms and which disregard other means of achieving the same outcome that are not only less expeditious but also less onerous. [25] A restriction may only be justified under Community law if it is essential in order to ensure effective fiscal supervision.

28. In accordance with the case-law of the Court, an absolute prohibition to the effect that individuals who are resident in France and who collect income from undertakings resident or established outside France are not entitled to opt for the fixed levy scheme is not justified by the need to guarantee the effectiveness of fiscal controls, and, in particular, by the difficulties inherent in ascertaining whether all the conditions necessary for the application of a specified rate of levy have been met (nature of the product, duration of the contract, date of issue, interest payment period). As the Court held in *Baxter*, [26] the taxpayer should not be excluded a priori from proving, by producing the relevant documents, that all the conditions have been met entitling him to the application of a specified rate by way of a fixed levy instead of being subject to income tax. Thus, fiscal supervision, which is essential, is transferred from the debtor establishment to the investor/taxpayer.

24 — See paragraph 41 of the judgment in *Commission* v *Belgium*.

25 — So, for example, the Court did not accept that freedom of movement for workers and freedom to provided services may be restricted by Belgian income tax legislation which, on the basis that it is difficult to check certificates attesting to payments made in other Member States, provides that only insurance contributions paid in Belgium are deductible, because there is nothing to prevent the national authorities concerned from demanding from the person involved such proof as they consider necessary (judgment in *Bachmann*, paragraph 20). Also in relation to income tax (in this case the legislation was Danish), the Court has stated that, for the purposes of deducting, as operating costs, expenditure incurred in taking part in training courses, the need to guarantee effective fiscal supervision does not justify the introduction of a general presumption that expenditure relating to courses held in ordinary tourist resorts located in other Member States is not to be treated as such when the same presumption does not exist in relation to training courses undertaken in ordinary tourist resorts located in Denmark, because there is nothing to prevent the tax authorities from requiring from the taxpayer the proof necessary to assess whether or not the deduction should be applied (judgment in Case C-55/98 *Vestergaard* [1999] ECR I-7641, paragraphs 25 and 26). A similar criticism was levelled at a special French tax imposed on undertakings exploiting one or more proprietary medicinal products, under which it was only possible to deduct from the amount payable expenditure on research carried out in France, since the provision concerned, which, it was claimed, was justified by the need to safeguard fiscal supervision, excluded the taxpayer a priori from proving that the expenditure relating to research carried out in other Member States had actually been incurred (judgment in *Baxter and Others*, paragraphs 19 and 20). The Court has criticised Luxembourg income tax legislation, which was also applicable to collective bodies and which made the carrying forward of the losses of taxpayers which were not resident in the Grand Duchy but had a branch there subject to the condition that they must have kept and held in that Member State accounts relating to their activities carried on there which complied with its relevant national rules. The Court took the view that that was a disproportionate requirement, since it would merely be necessary to ask the taxpayer to demonstrate clearly and precisely that the amount of the losses he claims to have incurred corresponds to the amount of the losses incurred in Luxembourg (judgment in *Futura Participations and Singer*, paragraph 32 et seq.).

26 — Paragraph 20.

1. Difficulties in tax administration

29. As the French Government rightly observes, the above approach involves changing the rules governing payment of the levy and shifting the obligation to make the payment concerned into Treasury funds from the financial institution which pays the income to the person liable for tax, in other words the investor who collects the income.[27] As I have already pointed out, the method and time of payment are not the foundation or the basis of the system of choice laid down in Articles 125 A and 125-0 A of the Code général des impôts. As Advocate General Tizzano observed in a similar case, the fixed levy does not necessarily entail a deduction at source, although there is nothing to preclude methods of collection, such as self-assessment, which allow its application to income paid by foreign undertakings.[28]

30. A restriction on freedom to provide services and the free movement of capital of the type laid down in the disputed French legislation cannot be justified on the ground that the replacement of a simple system, based on prior, overall supervision and entailing no risk of fraud, by a system of subsequent, unsystematic supervision would give rise to difficulties in the administration of taxes. Once it has been established that the objective pursued can be fulfilled by other means, the principle of proportionality precludes mere administrative difficulties from being cited as absolute grounds justifying discriminatory treatment which, because it is contrary to the fundamental freedoms, must be based on strong reasons in order to be lawful.

31. The defendant Government acknowledges that it would be possible to counter such practical problems in relation to the fixed levy by allowing self-assessment of income collected from undertakings established in other Member States, which would take place annually at the same time as income tax returns are filed. However, it

27 — Citing the judgment in *Safir*, the defendant Government states that that shift of obligation is incompatible with the freedom to provide services because the sums levied from the taxpayer are liable to dissuade him from purchasing financial products from undertakings established abroad. It is paradoxical of the French Government to advance such an argument in view of its defence of a wider restriction on that freedom, which does not simply impose certain obligations on the taxpayer, aimed at confirming whether he fulfils the conditions entitling him to make the choice provided for in the legislation, but actually denies him any right of choice at all, and consequently has an even stronger deterrent effect. The conditions at issue in *Safir* were wholly unconnected to the duty of taxpayers to provide certain information to the tax authorities in order to be entitled to a tax benefit; holders of life assurance policies taken out with companies not established in Sweden had to fulfil much more stringent conditions (*inter alia*, registration with and declaration of premium payments to a central body; the fact that surrender of policies after a short period was more costly; duty to provide information concerning the tax to which the insurance company was subject in order for the policyholder to be entitled to an exemption from or reduction of tax on the premiums). In short, regard must always be had to the principle of proportionality: in *Safir*, the measures set out in the Swedish legislation were not compatible with that principle, but the obligation imposed on taxpayers to provide the authorities with the information required for eligibility for a tax advantage does not exceed the limits inherent therein.

28 — Opinion in *Schmid*, paragraphs 47 and 48.

goes on to claim that such a process would upset the balance of the scheme and, as regards liquidity, that it would discriminate against individuals who have invested in financial products offered by national undertakings, since such persons would have the fixed levy deducted at source. [29] However, that argument is unfounded because, as the system of choice currently stands, the interval between the deduction of the fixed levy and the assessment and payment of income tax is not an essential attribute of the scheme but a consequence of the way it is administered. In other words, the fact that persons who are excluded from the right to choose fulfil their obligation later is not determined by the need to compensate them for paying a higher rate because they are compulsorily subject to income tax; instead, it is a means of circumventing the difficulties involved in supervising payments made abroad, [30] which, as I have already stated, do not justify a restriction of the free movement of capital and the freedom to provide services of the kind I described above.

32. I am unable to understand what point the defendant Member State is making when it asserts [31] that, if a self-assessment system were introduced, the rate charged would be the same for everyone, that is for those who choose the fixed levy and for those who are subject to income tax, meaning that the system of choice would lose its *raison d'être* because everyone would pay the same rate at the same time. That assertion is based on two consequences which, to my mind, are not inevitable, because self-assessment, for the purposes of the fixed levy, does not necessarily have to take place at the same time as the filing of income tax returns, and, even if the two procedures were simultaneous, it would not automatically mean that the rate imposed would be the same in both cases.

33. In fact, it follows from a careful reading of Articles 125 A and 125-0 A of the Code général des impôts, bearing in mind the views of academic writers, that, irrespective of the ultimate objective of the provisions and the reasons for not according individuals who invest in other countries the right to choose, the outcome is that it is more attractive for French taxpayers to invest their savings in financial products offered by companies established in France.

2. Mutual assistance by the authorities and the possibilities available under Directive 77/799/EEC [32]

34. The Court has repeatedly pointed out the options available under Directive 77/799, [33] which may be relied on by

29 — See paragraphs 24 to 26 of the rejoinder.

30 — See Grosclaude, J. and Marchessou, P., op. cit., p. 167, paragraph 230.

31 — Paragraphs 27 and 28 of the rejoinder.

32 — 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).

33 — Most recently in Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 49 et seq., and Case C-422/01 *Skandia and Ramstedt* [2003] ECR I-6817, paragraph 42 et seq.

the authorities of a Member State in order to obtain from another Member State all the information necessary to ascertain and calculate the amount of income tax payable by a taxpayer in accordance with the legislation which they have to apply. [34]

35. However, the French Government cites three obstacles to the application of that case-law. First of all, it claims that Directive 77/799/EEC, and Community legislation on mutual assistance in general, [35] is of limited use when it comes to obtaining proof that the conditions for the application of the fixed levy have been fulfilled, because punctual recourse to *ex post* assistance cannot replace the current scheme which involves systematic *ex ante* supervision. I refer to paragraph 29 et seq. above, in which I have already addressed that claim.

36. The second difficulty, that mutual assistance is ineffective vis-à-vis Member States which practise banking secrecy, is immaterial to the aims pursued by the defendant Member State for two reasons. The first is that Community legislation already provides that certain information does not have to be disclosed, [36] and, notwithstanding that, the Court has acknowledged the usefulness of mutual assistance as a tool enabling effective fiscal supervision. [37] The second reason is that a blanket exclusion from the system of choice established by the French legislature of individuals who collect income from companies established in other Member States is not justified by the fact that, in some situations, it is not possible to cross-check information. As I have already observed, that effect is out of proportion to the aim of the measure, particularly in view of the fact that there is nothing to preclude the French tax authorities from seeking from taxpayers who choose the fixed levy such proof as may be necessary in order to determine

34 — *Vestergaard*, paragraphs 26 and 28.

35 — For example, Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18), which, following amendment by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), changed its title to 'Council Directive ... on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures' and applies, *inter alia*, to taxes on income and capital (Article 1 (1) and (2)(g)).

36 — See Article 8(1) and (2) of Directive 77/799 and Article 4(3) (a) and (b) of Directive 76/308.

37 — In particular, in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, the Court noted that the impossibility of obtaining collaboration from another Member State, whose laws or administrative practices prevent the competent authorities from carrying out enquiries or from collecting or using the information for its own purposes, cannot justify a failure to apply a tax benefit to income obtained in that Member State (paragraph 13).

whether the conditions for application of the levy have been met. [38]

37. The third and final difficulty invoked by the French Republic is that, as concerns income arising from life assurance, in order to determine whether the fixed levy may be applied and, where appropriate, the rate, it is necessary to take into account not only the amount payable but also the conditions for taking out the policy, which are not always available to the authorities of all the Member States. That claim is the same as the general claim set out above, for this specific class of financial product. The fact that there may be difficulties in collecting the necessary information, and any shortcomings which may arise in collaboration between Member States, are not capable of rendering lawful measures restricting fundamental freedoms which have been proclaimed absolute and binding. At this juncture, I should like to recall the wise words of Advocate General Jacobs in the Opinion he delivered in *Danner*, in which he referred to the need for cooperation between the Member State of taxation and insurance undertakings established abroad, which, it must be assumed, will act in good faith because they are 'undertakings of some standing and permanence closely supervised by their State of establishment'. [39] A presumption or risk of fraud cannot justify a measure which prohibits the exercise of a fundamental freedom guaranteed by the Treaty. [40]

38. In short, I consider that the arguments advanced by the defendant Government do not justify the French legislation complained of by the Commission.

39. Accordingly, in my opinion, by imposing an absolute prohibition to the effect that individuals who collect income on the financial products referred to in Articles 125 A and 125-0 A of the Code général des impôts are not entitled to choose between payment of income tax and the application of a fixed levy, where the debtor of such income is not resident or established in France, the French Republic has failed to fulfil its obligations under Articles 49 and 56 EC.

VI — Costs

40. In accordance with Article 69(2) of the Rules of Procedure, the costs must be borne by the defendant Member State.

38 — See *Bachmann*, paragraph 20; Case C-300/90 *Commission* v *Belgium*, paragraph 13; *Danner*, paragraph 50; and *Skandia and Ramstedt*, paragraph 43.

39 — Paragraph 74.

40 — Case C-478/98 *Commission* v *Belgium*, paragraph 45.

VII — Conclusion

41. In the light of the foregoing considerations, I propose that the Court of Justice should allow the Commission's application and:

(1) Declare that, by imposing an absolute prohibition to the effect that individuals who collect income on the financial products referred to in Articles 125 A and 125-0 A of the Code général des impôts from persons or undertakings established in other Member States are not entitled to choose between payment of income tax and the application of a fixed levy, the French Republic has failed to fulfil its obligations under Articles 49 and 56 EC.

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