# *Current & Quotable*

## From *Avoir Fiscal* to *Marks & Spencer*

*Edited by Tom O'Shea*

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A special tax seminar took place at the School of Tax Law, Centre for Commercial Law Studies, Queen Mary, University of London to mark the 20th anniversary of the *Avoir Fiscal* judgment and to discuss the *Marks & Spencer* case on January 30, 2006. Given the increasing significance of EC Tax Law on the tax systems of the member states, and the importance of the *Marks & Spencer* decision for U.K. and European multinationals operating in an intra-EU environment, the transcript of the seminar has been made available and is reproduced below with limited editing.

**Prof. David Southern:**[1] Thank you very much for coming this afternoon. This is one of our irregular series of tax seminars on current topics. In order to run them, we are very dependent on a panel being prepared to turn up at short notice. It is very kind of our panel to turn up at such short notice. Our panel are:

**Tom O'Shea** who is a lecturer here and runs a lot of courses.

**Timothy Lyons QC** who is at 15 Old Square Lincoln's Inn. He is a great authority on all manners European and above all he has written a monumental book on EC customs duties, which despite its formidable title is really a delight to read.

**John Avery Jones** is so well known that he needs no introduction, but nevertheless I will give myself the pleasure of introducing him. Formerly a senior partner at Speechly Bircham, hugely active as a Special Commissioner and chairman of VAT Tribunals, really most of the major articles on international tax in the last twenty years have stemmed from his pen. He has also been very active in assisting in teaching.

**Philip Baker QC**[2] is codirector of the School of Tax Law here. [He is] author of the well-known handbook on double tax treaties extensively quoted by the High Court in a recent case.

**Eric Tomsett** has embodied international tax at Deloitte's for many years and really is an unrivalled authority in this area, unless you come to **Jonathan Schwarz**[3] next door who is alleged to have written

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[1]David Southern, barrister, 3 Temple Gardens Tax Chambers, and codirector along with Philip Baker QC of the School of Tax Law, Centre for Commercial Law Studies, Queen Mary, University of London.

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the only readable book on international tax, I am reliably informed. He has practiced in the U.K. as a solicitor and a barrister, in South Africa and Canada, and does a lot of U.S. work.

We have a very distinguished and experienced panel. This is meant to be an informal event — people drift in and drift out as the whim takes them as in Catholic Church services. One reason for having this non-seating plan is that people will feel sufficiently psychologically secure to contribute at will and interrupt speakers as we go along, because it is meant to be a seminar. I shall be going at 5:30 p.m. along with some of you because we have a corporate tax finance seminar at 6:00 p.m. and we have to go off to Freshfields for it. The only housekeeping point is that this does score for CPD points for the Bar, the Law Society, and the Institute of Chartered Accountants. We don't charge for these events. Many of you will say that there is a very good reason for that. A further reason is that you do, or will, contribute through your taxes to the cost of these events. We are holding our annual tax conference on Thursday, 30 March 2006. The publicity will go out for it soon. We do make a modest charge for this because it includes lunch. It would be very nice if we could see some of you there. We are focusing today on the *Marks & Spencer*'s loss relief judgment and it was Tom's suggestion to link it with the *Avoir Fiscal* case, which took place 20 years ago.

In March 1989, East Germans were starting to go from East Germany to Czechoslovakia to Hungary, and they then camped on the border with Austria in the hope of being allowed to go through Austria to get to West Germany via a circuitous route. As the numbers constantly grew on the Hungary-Austria border, the communist Hungarian government had an increasingly acute dilemma. On 10 September 1989, the Hungarian foreign minister, Gyula Horn, decided to open the border with Austria to allow the exodus of East Germans into Austria and so into West Germany. From that single act on 10 September 1989 stemmed directly the removal of the Berlin Wall, the reunification of East and West Germany, the collapse of communism in Eastern Europe and the demise of the old Soviet Union. Now when Gyula Horn announced his decision to the Hungarian cabinet, the minister of the interior said why are you choosing capitalist West Germany in preference to communist East Germany? Gyula Horn replied I am not choosing between West Germany and East Germany; I am choosing Europe.

In its tax jurisdiction, the European Court of Justice (ECJ) came to the same parting of the ways in 1986 with the *Avoir Fiscal* judgment. And since then it has pursued a conscious political agenda of seeking to promote greater European integration. This is very much the basis on which cases have been decided or seem to have been decided, to the consternation of lawyers and tax authorities alike. Because of the state of Community legislation, this has been a somewhat one-sided process. In the sphere of VAT, we do have Community law; and the courts developed a balanced jurisprudence, which takes account both of the rights and of the obligations of taxpayers. In the direct tax sphere though, in the face of a substantial vacuum of Community legislation, the courts applied the four freedoms set out in the EC Treaty and the general principles of Community administrative law. The result has been a wholly one-sided jurisprudence in which the taxpayer alone holds the European trump card.

So for the taxpayer, the process has become rather like a game of snakes and ladders with no snakes. (Now I have used this metaphor on many occasions, but it has proved completely untranslatable.) Another difficulty in developing a coherent jurisprudence in this field has been that contentious litigation is not the ideal way of addressing major public policy issues. Litigation is a form of warfare and in the words of Admiral Lord John Arbuthnot Fisher (1841-1920) [often referred to as the greatest Royal Navy Admiral since Nelson] there are only four rules of war: "Give no quarter, take no prisoners, sink everything, no time for mercy."

Nevertheless, the achievements have been substantial and for [Professor Southern] the high point was the *Hoechst & Metallgesellschaft* cases, C-397/98 and C-410/98; and I recall the Chief Executive of Hoechst U.K. saying the company wasn't pursuing these claims for commercial reasons, although there was an important commercial point, but simply because they thought the existing U.K. system was wrong. In the *M&S* (VAT) case C-62/00, clearly the courts also took the view that the way in which the U.K. capping rules were introduced was less than ideal. In the *M&S* (loss-relief) case C-446/03, there is clearly an argument that if you are going to have a single market, companies must be able to relieve losses in one member state against profits in another member state; although this begs a lot of questions.

Now Prof. John Avery Jones has very kindly drawn my attention to a perceptive comment by Kees van Raad[4] in the *British Tax Review* 1981 where he writes:

> The court thereby apparently read the words nationals as meaning "those fluent in the national tongue." Other decisions by the court as well as the writings of some leading experts on EC Law seem to support an interpretation in which Article 7 covers not just nationals, but

[4](b. 1946) Professor of International Tax Law at the University of Leiden.

more generally, persons who have strong personal ties with the country concerned, like persons resident in such a country. If in this widened interpretation, Article 7 is applicable in the field of direct taxation, it would result in a substantial expansion of the legal arsenal available to residents of one EC member state who derive income, etc. from another EC state and who are taxed by this latter state differently from the way that this state taxes its own residents.

So really in this couple of sentences you have the whole development of the EC tax jurisprudence foreshadowed. Timothy Lyons QC is very kindly going to give a brief introduction to the subject of today's seminar.

## *Avoir Fiscal*

**Timothy Lyons QC:** Ladies and gentlemen — good afternoon. It's a great pleasure to be with you. I am particularly pleased that you are, as I understand from Prof. Southern's introduction, psychologically attuned to this afternoon's seminar by virtue of the very interesting seating arrangement that has been adopted. I am also fascinated that so many tax lawyers should be so fascinated in cases which are not tax cases. I do find that really quite encouraging.

*Avoir Fiscal* — is it a tax case? Well, if you want to look under tax harmonization in the European Court Reports, you won't find *Avoir Fiscal*. You will find it however under free movement of persons. And it seems to me that this is a fundamental starting point. What we are here to discuss is the rule of a single market as it happens to impact upon tax systems. And when we are sometimes told that the impact of the single market on national legislation is really a political project of the court, it seems to me that that is to deprive the rules requiring the establishment of a single market in the treaty of legal meaning. In truth, the [European Court of Justice] has not been pursuing a political agenda; it has been pursuing a legal agenda. It has a legal obligation to strike down obstacles in the single market.

The member states, unsurprisingly in many ways, have not made the fulfilment of that agenda very easy by the simple expedient that they pass no rules in relation to it, thereby leaving the court with a completely open field, and a few very simple legal, but not political, obligations. And those problems arose at the outset, and were foreseen in *Avoir Fiscal*, a case which continues to be immensely powerful. If you want to look at the judgment of the ECJ in case C-265/04 *Bouanich,* 19 January 2006, para. 46, you will see the Commission founding propositions upon the case there; it is a case that has stood the test of time.

But before we begin to look at it in any great detail or as much detail as 10 minutes will permit, let us just remind ourselves, as I think Tom O'Shea has also reminded us in his opinion, that *Avoir Fiscal* was not the first time by any means that member states had to face the conflict between European treaties and their direct tax systems. I don't know if you have my paltry offering of four sides in your pack, but if you do, you will see that on page one, I have referred you to a couple of cases (I think there are more, but the haste with which this seminar was put together precluded much more extensive research), but you will see the case of case 6/60 *Humblet v. Belgian State* [1960] ECR 559 (which concerned the taxation of an ECSC official on his spouse's income — there was clearly a conflict between the Belgian direct tax system and the European Coal and Steel Community), and the reference in the case 208/80 *Lord Bruce of Donnington v. Aspden* [1981] ECR 2205 (a reference by the Special Commissioners to the ECJ on an income tax matter on 5 November 1979). What an interesting case this was.

The court decided that the obligation of Community solidarity imposed restraints on the U.K.'s taxation of members of the European Parliament. Now it occurred to me as I was reading this that that would be a marvellous principle to set. If any of us think that the principle of discrimination might possibly run out of steam, then may I invite you to consider what you can do with the principle of solidarity in relation to member states' tax systems. Well, there it was in 1979; and, *Avoir Fiscal* itself, of course. The judgment comes out in 1986. Note that the proceedings by the Commission started in 1981. So *Avoir Fiscal* is itself important, but the notion in 1986 that somehow there was a flash of lightning and everyone was told for the first time in a way that no one had ever appreciated before, that EC rules impacted on direct taxation is, perhaps, not entirely accurate.

Now one of the reasons for this seminar is to work out what precisely the judgment in *Marks & Spencer* might mean. If you think that that is an unusual position to be put in, then think again, because in *Avoir Fiscal* itself, even as the case was going along, there was some confusion as to what exactly was at stake. As you know, objection had been taken to the provision of tax credits for residents, but not for nonresidents. The case arose in the context of insurance companies and their subsidiaries (branches). So, was this a case about the taxation of insurance companies or was this a case just about tax credits and about the whole tax system in general? The French government unsurprisingly thought that it was simply about insurance companies. But it warned the court that if it went down the route of allowing the litigant/taxpayer to win, then it could have an impact outside the insurance sector, so that this was an additional reason for denying it success in its litigation. Well, the court was having none of it, and highlighted to everybody in the judgment,[5] that actually it was about the tax system as a whole and not just about the taxation of insurance companies. And they rather regretted that the Commission had formulated the action only in terms of one aspect of the French system. The Advocate General accused the Commission of making a mountain out of a molehill. Well, I am not quite sure which was the mountain and which was the molehill, but perhaps he simply thought that the taxation of insurance companies was the molehill and the tax system was the mountain.

***The difficulty in determining the scope of the general principles was inherent right at the very beginning in Avoir Fiscal.***

But the important point to stress is that the difficulty in determining the scope of the general principles was inherent right at the very beginning in *Avoir Fiscal*. Now I have highlighted that there may have been some debate about how widely *Avoir Fiscal* should be interpreted in the context of tax. But the truth is, as I rather indicated in my introduction, it isn't really about the tax element at all. What it is about is the scope of freedom of establishment, one of the fundamental freedoms of the single market. And paragraphs 13 and 18 of the judgment in *Avoir Fiscal* have been repeatedly relied on by the court in a display of consistency, which dismays opponents of the single market. (It is rather interesting that the people who on a whole wish to preserve national jurisdictions find themselves in the uncomfortable position, I should have thought, in contending that the court should be really rather creative in responding to these cases so as to limit the scope of the general principles and preserve national jurisdictions. However, that is an aside.)

What I was saying to you was that in fact *Avoir Fiscal* was about the single market and that finds an echo in *M&S*. Because one of the important, and less dramatic, things about *M&S* is that it reaffirms the *Avoir Fiscal* interpretation of the fundamental freedoms, in words which were actually used in *Avoir Fiscal*; because the court noted that member states were contending that really you could not start to tax people in the same way when they were resident and nonresident. To which the response was that that submission of the U.K. threatened to deprive article 43 of all meaning — a direct link from *Avoir Fiscal*. Just as the single market was at stake in *Avoir Fiscal*, so it is at stake in *M&S*. I have nearly used all my time, so can I just give you a few elements of my notes, which I think will show you the continuing influence of *Avoir Fiscal*. We have seen that:

- [*Avoir Fiscal*] has been relied upon to support the notion that member states cannot rely on the existence of countervailing advantages to defend discrimination.
- The fact that a taxpayer can in some way avoid the discrimination is not a defense. Indeed that was reiterated in a case involving Luxembourg, who said that if the taxpayer had filled out the right forms (in three incomprehensible languages!) they would have avoided all this discrimination in any event. No, going back to *Avoir Fiscal*, you cannot say that it would be possible to avoid the discrimination.
- Lack of harmonization cannot be relied upon as a defense. Again, that finds an echo in *M&S*.
- Again, there are various comments about tax avoidance in *Avoir Fiscal*, the contemporary relevance of which we perhaps have yet to determine.

There are, I highlight, two difficulties that *Avoir Fiscal* has given us. One of them, it said, because this is about the single market and freedom of establishment, you really cannot influence traders in the single market as to the form in which they exercise their freedom of establishment. So, branches, subsidiaries, agencies, [in] all of these things you have a perfect right to choose as you will. Now when that came to *M&S*, it comes before the Advocate General, and he says, well surely you can't mean that we have to tax all of these entities in the same way. Surely the point is that if your legislation makes no distinction between them then you can't introduce one on the grounds of nationality. So, perhaps there were things in *Avoir Fiscal* which have had to be adapted.

Another example, perhaps, is the relationship between discriminatory legislation and double tax treaties. In *Avoir Fiscal* we see the court saying freedom of establishment, etc., are fundamental rights and cannot be negotiated away or made subject to double tax treaties. It seems to me that this is a perfectly inevitable proposition. If these are to be rights at all which Art. 43 gives us, then surely member states cannot run off and negotiate them away, whether it be in a double tax treaty or a

[5]" . . . 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 . . . " Para. 8, Case 270/83 *Commission v. French Republic* [1986] ECR 273 ("Avoir Fiscal": Judgment delivered 28 January 1986).

national insurance treaty or a landing rights treaty or whatever it may be. If you have a right, then you have a right. It is not to be negotiated away. Well, in *Bouanich*, without necessarily being explicit about it, the court seems to me to be changing its approach slightly, in a way which I suggest might be rather dangerous when applied to situations outside tax certainly. At any rate, I have overrun my time, and probably overstayed my welcome. What I can say in conclusion is that *Avoir Fiscal* is still relevant after 20 years. And that says something for the consistency of the jurisprudence of the ECJ.

**Southern:** Thank you very much, Timothy. [Applause] We hope that you have not outstayed your welcome as we hope that you will contribute later. One point is that I grandly started by saying that the court has been pursuing a political agenda, whilst you correctly said that it is pursuing a legal agenda. Is it a question as to whether you are looking, as it were, from the bottom upwards or the top downwards, as to whether you classify something as a legal policy or a political policy?

**Lyons:** Now that I am sitting down, I am perhaps being more conciliatory! Perhaps, we are both right, because in fact the requirement that one adopts the single market is a legal obligation, but it is in a way a political objective, is it not? But in a way the whole treaty is. But this might be one of the fundamental problems about the whole project, if you want to look at it in a more abstract way. Those political objectives have become legal obligations and the court has been given the legal obligation, which makes it very easy to be accused of political activity.

**Southern:** Yes, it's part of the fascination of European constitutional law. Were there any other points for Timothy at this stage? [Pause] Well, in that case, let's go straight on to Tom who is going to give us "*un très grand tour d'horizon*" of the jurisprudence leading up to *M&S*.

## Setting the Stage

**Tom O'Shea:** *Merci*! David! Today, I am going to talk about freedom of establishment, because *M&S* is about freedom of establishment and *Avoir Fiscal* is about freedom of establishment. Today, we are celebrating the 20th anniversary of the *Avoir Fiscal* judgment delivered on 28 January 1986, and as today was the closest day we could actually get, Philip Baker being Philip Baker said, let's go ahead and do this, so here we are.

We are looking at a particular aspect of the treaty, which involves rules, which were put in place by the member states at a time when the Treaty of Rome was signed. So, these rules have been in place for quite a number of years, but we are still working out what exactly they mean for our tax systems. This was very evident from the *M&S* case, because [in that case], the ECJ refers back to *Avoir Fiscal* and cites a particular paragraph from *Avoir Fiscal* that has never been looked at before in this context. The court, in my opinion, for the first time, sees this particular paragraph from the point of view of an origin member state. Until now we have been looking at this particular quote from the *Avoir Fiscal* judgment from the point of view of host member states.

So, first of all, I think I need to define what I am talking about when I say an "origin member state" and a "host member state." You can think about it perhaps from this particular slide. In *Avoir Fiscal*, insurance companies from a variety of member states were setting up insurance branches in France and being denied tax credits. One of my students asked me two nights ago, what does *Avoir Fiscal* mean? She was looking it up in an English dictionary and could not find what an *Avoir Fiscal* was. I think she thought that I was crazy! So I said no, it is actually the French for tax credit. We have tended to use *Avoir Fiscal* because it tends to get used in text books and it's become common parlance for this particular case.

> ***As far back as 1960, the court is interfering in member states' direct tax affairs.***

France is the host country, because insurance companies are establishing themselves in France. So from the point of view of the *Avoir Fiscal* judgment we are looking at things from a host perspective. When we come to *M&S* later on, we see things from both a host and an origin state perspective. M&S were setting up subsidiaries in France, Germany, and Belgium. So they are the host states. But, as we will see later, it is a U.K. rule, an origin state rule, which is impacting upon the decision of *M&S*, the parent company, to establish.

The focus of this afternoon's talk is going to be to try to show you the jurisprudence of the court from the point of view of the host member state, but more importantly, and equally now from the point of view of the origin member state and to draw some of it together. Now in your packs, I have done a quick paper on this topic to save myself going through everything, but I have put a nice slide show together for you as well.

I want to go back to *Humblet v. Belgian State*, case 6/60, because *Humblet* is the forgotten case and it goes back to 1960. For the member states to say that the court did nothing in relation to member states' direct tax systems until *Avoir Fiscal* is clearly incorrect as Timothy Lyons has already pointed out.

As far back as 1960, the court is interfering in member states' direct tax affairs because the member states actually gave away some of their direct tax competence when they signed up for the European Community. And they gave away the area of taxation relating to the taxation of salaries of Community officials.

In *Humblet*, there is a Community official who gets an exempt salary, but whose salary is taken into account indirectly when Belgium wants to tax his wife and it applies an exemption with progression of the kind that we see in double tax treaties nowadays. But in the *Humblet* case, it was a purely domestic rule. The court said that there was a clear delineation between the competence of the member state and the competence of the Community to tax in relation to direct tax matters relating to Community officials. Thus, as far back as 1960, the court is saying there are certain areas that you cannot go into. Now where the lawyers failed to make the link at the time was that freedom of establishment was another rule, free movement of capital, even though at that time was a lesser rule, was another rule. Freedom to provide services was another rule and free movement of workers was another rule. These rules were all put in place by the treaty and the member states have to abide by those rules. They are the only rules which organize the market. This is why we are now seeing this jurisprudence happening in the tax area, because people have come to realize that tax obstacles are no different to any other type of obstacle.

In *Avoir Fiscal*, we have foreign insurance companies setting up branches in France, the host member state, and being denied tax credits by France because France says that we are limited tax credits to French companies. If you want, you can set up a subsidiary, which is a French company. We will also give the benefit of the tax credit if it is agreed in a tax treaty, which they did with the U.K., Luxembourg and a couple of other countries — I think four countries in total.

Now the reason that I gave some information about the Advocate General's opinion and the Commission's arguments here is because these are the same arguments that we continue to see nearly 20 years later in every case. So you are either going to see a discrimination argument or you are going to see a restriction argument. And, we saw both of these in *M&S*. And, lo and behold, the same defenses are regurgitated again, and again, and again by the member states, similar to the ones France put forward in *Avoir Fiscal*. So we have learnt very little in the past 20 years because *Avoir Fiscal* actually dealt with a lot of these defenses and put them to bed. So:

- Lack of harmonization in the tax field. France was arguing that because we haven't got [harmonized] Community rules in the tax field; France should not have to change its rules. But what France was forgetting about was that it had agreed the treaty rules, which were supposed to be supreme, superior to their own rules.
- These matters can only be resolved by double tax treaties. They can only be done on a reciprocal basis.
- Danger of large scale tax avoidance if the tax credits are extended to branches and agencies of foreign insurance companies. Danger of tax avoidance — why? Because they would not be able to tax the profits of a foreign insurance company. The profits of the branch would be transferred up to the parent, the foreign company, and there would be no dividend distribution tax.
- Amply compensated for by other tax and financial advantages. This gets trotted out all the time in the cases.
- Resident/nonresident distinction. Because the foreign insurance company has only got a branch, the person that is in their country is a nonresident; and a nonresident (i.e., a foreign company) can always be taxed differently to a resident (i.e., a French company). The different treatment was based on the resident/nonresident distinction accepted internationally by international tax law; they could be taxed differently.
- Freedom to choose between a branch and a subsidiary. What this means is that the freedom of establishment includes the right to establish as subsidiaries, branches, or agencies. So, it goes much further than just enabling them to set up a subsidiary. By forcing them to set up a subsidiary, you are forcing them to become a tax resident. You are forcing them to set up something much more structured than a branch, which can be a very simple form of establishment in another country.

The Commission makes the discrimination argument and demonstrates that a company incorporated under French law was treated differently from a taxation point of view from a company with a branch in France. This different treatment fell within the scope of article 43 of the treaty. (Note that I have changed the old treaty article number references to the new numbers — it used to be article 52 in those days.) Because the different treatment was based on nationality and made the management of the branch much more difficult (because a branch holding similar shares to a French company would not receive the same tax credit as the French company upon receipt of dividends). So it made it less advantageous to set up the branch in France.

On the restriction issue, the Commission argues that the French tax credit (i.e., *Avoir Fiscal*) rules cause foreign insurance companies to establish subsidiaries rather than branches. You need to draw the parallel between that thinking and *M&S*, which was the other way around. In *M&S,* the U.K.'s group relief rules forced *M&S* in reality to select a branch instead of a subsidiary if they were to obtain group relief [for losses]. Here, in *Avoir Fiscal*, we are seeing things from the other way around; we are seeing things from the perspective of a host state rule, whereas in *M&S* it was from the perspective of an origin state rule. So these are the background arguments to the case.

The Advocate General dismissed all the arguments, almost immediately, bar one. I've put his key points on the slide. [Now] I intend to delve more into the judgment of the court, but just to let you know that the Advocate General is more or less followed 100 percent by the court. He rejects the arguments of the French government.

In respect of what the court says, freedom of establishment means that nationals of member states who establish themselves in another member state even if that establishment is only secondary, for the purpose of pursuing activities as self-employed persons, receive the same treatment as nationals of that state. And it prohibits, as a restriction on the freedom of establishment, any discrimination of the grounds of nationality resulting from the legislation of that member state. This is called the "national treatment" principle. Here, we are setting up a branch in the host member state, France, and under the treaty we are entitled to the same benefits as France gives its own nationals — if what we are setting up is in the same situation as those nationals. In this particular case, a branch and a French company would not normally be in the same situation, but if they are comparable they must be treated in the same way.

The court finds that here they are comparable from the point of view of taxation.

> Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital. (Art. 43.)

When foreign insurance companies set up their branches in France, unless they benefit from a tax treaty, they would not receive a tax credit [on foreign dividends]. But although denied a tax credit, in all other respects, branches were taxed in an identical manner to a French company. The only difference was the tax credit. When the tax credit is denied to the foreign branch, foreign investment is made less advantageous, and the tendency to establish through branches is decreased. So, this is a restriction of the freedom of establishment. The court examines article 43, which prohibits:

> Restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. (Art. 43.)

It is the establisher's choice as to whether to set up an agency, branch, or subsidiary:

> 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. (*Avoir Fiscal*, para. 18.)

Within the context of *Avoir Fiscal*, the court is talking about a host member state. But when it comes to citing para. 18 in *M&S*, it takes the words "Member State of establishment" from the second to last line and it refers to member state in general, not just in the state of establishment. It is important to see that the court has jumped from host member states to both host and origin member state. And it applies that thinking from *Avoir Fiscal* (in relation to a host member state) to an origin member state in *M&S,* as we will see later on.

So the impact of *Avoir Fiscal* continues. It is still a very important judgment of which we need to understand the ramifications. This is why the different treatment caused a problem, because French tax law did not distinguish, for the purpose of determining income liable to corporation tax, between companies having their registered office in France and branches and agencies situated in France whose registered office was abroad. If you have two types of entities who are both taxed in the same way you must give them both the same tax advantages.

If they are comparable, they must be treated in the same way. So the question is, are branches and companies comparable? They are the same in this perspective, from the point of view of the host member state. As we will see later on, it is very difficult to see whether they are comparable from the point of view of an origin member state, which covers some fifty paragraphs of the Special Commissioner's decision in the *M&S* case. The lawyers argued that setting up a branch and a subsidiary in France was the same. But what I think they were mistaking was that *Avoir Fiscal* was all about the host member state. Yes, from the point of view of the host member state, there are going to be situations when a branch and a subsidiary must be treated the same because they are treated the same from a tax perspective.

Discrimination under the treaty is different treatment of two comparables. Here we are looking at discrimination, not on direct grounds of nationality, but on indirect grounds of residency, the location of the company's registered office. From the point of view of the court, discrimination on the grounds of residence, where a resident and nonresident are comparable, is similar to discrimination on grounds of nationality. The taxing of branches and subsidiaries in the same way by France was an implicit admission that they were comparable and ought to be given equal treatment.

- The usual argument [for the justification of the different treatment of branches and subsidiaries] is that a branch is not taxed in the same way as a subsidiary. It may have particular advantages; e.g., a subsidiary might distribute its profits by way of a dividend and be subject to a dividend withholding tax, yet a branch would not have to pay dividend withholding tax (as there is no dividend as between itself and its parent). But the court is saying here that even if these types of advantages exist, there is no way that you could start to quantify them. There has to be an objective way of looking at things. The conclusion is that the argument is insufficient to justify discrimination (or a restriction on the freedom of establishment). In the *Avoir Fiscal*, the court simply says that there is no need to assess the advantages and disadvantages, and so it takes away a lot of member states' arguments relating to justifying the restriction of the freedoms.
- In regard to the quantification of restrictions — a restriction can be very small.
- In respect of the argument that the establisher can set up as a subsidiary if he chooses, the court rejects that argument on the basis of the wording of article 43:

> Such prohibition shall also apply 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.

One might consider that this is irrelevant to the *M&S* litigation, but this issue was still being litigated before Christmas. On the same day as the *M&S* judgment came out (13 December 2005), the ECJ gave its judgment in *SEVIC* case C-411/03. It ruled that nonregistration of cross-border mergers in Germany is contrary to the freedom of establishment. Germany had rules, which effectively prevented cross-border mergers from happening, which demanded that the original company be dissolved and a new company be set up. So, the ability to set up a subsidiary was no answer to the action for infringement of the treaty in respect of freedom of establishment. *M&S* was the reverse. It set up a subsidiary, yet if it had set up a branch it would have obtained group relief. But it is also the reverse of *Avoir Fiscal* in that *Avoir Fiscal* was argued from a host state perspective and *M&S* from an origin state perspective. We are now seeing more and more cases relating to origin perspectives.

- The earlier argument about differences in tax systems between states was raised by France as a defense. The court said that article 43 prevents a member state from imposing conditions on persons exercising their rights of establishment, different from those applying to its own nationals. The court merely said that if those wishing to establish were in a comparable position to one's own nationals, then they must get the same treatment.
- The tax avoidance/evasion argument, which was raised in *M&S* as well — the court simply dismisses the argument and says article 43 has no derogations for tax avoidance. There are other ways of using the tax avoidance argument and we will see later some of the other ways in which it may be used. But in terms of justifying discrimination, the court says that it is not a valid argument.
- The double tax treaty argument — the court merely says that you cannot subjugate the freedom of establishment provisions in the treaty to reciprocity in the form of double tax treaties. The court notes at para. 5 of its judgment:

> The rights conferred by Article 52 of the Treaty are unconditional and a Member State cannot make respect for them subject to the contents of a double-taxation 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.

The French argument that everyone could deal with the problem through double tax treaties is not accepted by the court.

*Avoir Fiscal* concerns the principle of national treatment, which is sometimes referred to as the principle of equal treatment. So, whatever French nationals are entitled to, comparable nonresidents are also entitled to the same treatment. Since there was no objective difference between how branches and French companies were taxed in France, both should receive the *Avoir Fiscal* in the same way.

*Avoir Fiscal* kicks off the modern direct tax jurisprudence as we know it. It is a fundamental case that has impacted upon us immensely in the last 20 years and led to a massive amount of litigation which has affected the U.K. in particular, but also Germany and the other member states. I thought that I would mention an early case involving the branch of a German bank, *Commerzbank*, case C-330/91, 13 July 1993. The branch in the U.K. was taxed as though it were a U.K. company. National law provided for payment by the tax authorities of interest on overpaid tax for the period during which the authorities were holding the money prior to its repayment to the taxpayer. However, *Commerzbank*, being not fiscally resident in the U.K., was denied the payment of interest accrued. From a U.K. perspective, this is a very early example of treating the branch in the U.K. in the same way as a U.K. company. The same arguments as were used in *Avoir Fiscal* were repeated in *Commerzbank.* The court said in paragraph 15:

> Although it applies independently of a company's seat, the use of the criterion of fiscal residence within national territory for the purpose of granting repayment supplement on overpaid tax is liable to work more particularly to the disadvantage of companies having their seat in other member-states. Indeed, it is most often those companies which are resident for tax purposes outside the territory of the Member-State in question.

In between *Avoir Fiscal* and *Commerzbank*, there was the case of *Biehl,* case C-175/88, 8 May 1990.[6] Biehl had argued that even though he had left Luxembourg, he was still entitled to be treated the same as a Luxemburg national for the time he worked in Luxembourg. The last line of *Commerzbank:*

> The fact that the latter would not have been exempt from tax if they had been resident in that State is of no relevance in that regard. (Para. 20.)

is very similar to the findings in *Biehl* in that the criterion of residence is dismissed as a justificatory reason for different treatment.

> 14 Even though the criterion of permanent residence in the national territory referred to in connection with obtaining any repayment of an over deduction of tax applies irrespective of the nationality of the taxpayer concerned, there is a risk that it will work in particular against taxpayers who are nationals of other Member States.

*Commerzbank* is thus, to a certain extent, a company version of *Biehl.* The U.K. rules mainly affect foreign companies. *Commerzbank* is an early indication that our tax systems would be affected by *Avoir Fiscal.*

***Avoir Fiscal kicks off the modern direct tax jurisprudence as we know it.***

*Halliburton*, case C-1/93, 12 April 1994, is interesting because if you look at my *M&S* article, you will see that I make some links between it and *M&S*. I thought that the reasoning in this case should have given a lot more warning to the people bringing the *M&S* litigation and the people hearing the *M&S* litigation as to the reasoning that the court might take. Again, this is from the point of view of a host member state. So the Special Commissioners and the Advocate General in *M&S* were basically seeing the court's answers from the point of view of a host member state without necessarily having a similar case to look at from an origin member state. *Halliburton* involved Dutch rules about reorganizations.[7]

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[6]"3 Mr Biehl is a German national who was resident in the Grand Duchy of Luxembourg from 15 November 1973 to 31 October 1983. During that period, he pursued an activity as an employed person in Luxembourg. On 1 November 1983, he moved to the Federal Republic of Germany where he now works.

"4 For the period from 1 January to 31 October 1983 Mr Biehl's Luxembourg employer deducted sums by way of income tax from Mr Biehl's salary. It emerged from Mr Biehl's final tax assessment for the year of assessment 1983 that the amount deducted by his Luxembourg employer exceeded the total amount of his liability to tax.

"5 Mr Biehl asked the administration des contributions du grand-duche de Luxembourg to repay the overdeduction of income tax. The bureau d'imposition de Luxembourg (Tax Office, Luxembourg) refused that request on the basis of Article 154(6) of the loi sur l'impot sur le revenu (Income Tax Law) (Memorial A No 79, of 6 December 1967). Mr Biehl lodged a complaint against the decision of the bureau d'imposition, which was rejected on the same basis by the directeur des contributions (Director of Taxation)."

[7]"3 Halliburton is an international group in which the parent company, Halliburton Inc., is established in the United States of America. It holds all the shares in its German subsidiary (Halliburton Co. Germany GmbH) and Netherlands subsidiary (Halliburton Services BV). The latter is constituted as a private ('closed') company with limited liability ('besloten vennootschap met beperkte aansprakelijkheid') under Netherlands law.

"4 As part of a reorganization of the activities of the Halliburton Group in Europe, the German subsidiary, by a document certified by a notary of 22 December 1986, transferred and sold to the Netherlands subsidiary its permanent

**(Footnote continued on next page.)**

The German company was the Community national. From the point of view of establishment, it was a German company, which had established a branch in the Netherlands, which was discriminated against when it decided to close its branch down. *M&S* has a similar problem when it closed its subsidiaries down, but here we are looking at it from the point of view of a German company closing its branch down and selling it to a Dutch company. If the transaction had been between two Dutch companies, the tax exemption on the transfer of immoveable property would have been upheld. But:

> 7 Taking the view that the transfer of immovable property carried out by the German and Netherlands companies could not come within the aforementioned exemption, the Netherlands tax administration claimed payment of the tax on legal transactions from Halliburton Services BV.

So, here the Dutch rule impacts on the freedom of establishment and affects the choice of the German company to set up a branch or a subsidiary (which would have obtained the benefit of the tax exemption). The parallel with *M&S* lies in the fact that both cases deal with companies closing down their foreign establishments. But *Halliburton* involved a host state member rule, whilst *M&S* involved an origin state rule. The court held in *Halliburton:*

> 18 The Netherlands Government considers that such legislation involves no discrimination because the person liable to pay the tax is not the German company but the Netherlands company. Since the situation is purely internal to the Netherlands legal system, it is not a matter for Community law.
>
> 19 In that regard, it should be noted that payment of a tax on the sale of immovable property constitutes a burden which renders the conditions of sale of the property more onerous and thus has repercussions on the position of the transferor. In a case such as this, the vendor is in a distinctly less favourable position than if it had chosen the form of a public or private limited company instead of that of a permanent establishment for its business in the Netherlands.

In this case, the vendor is in a distinctly less favorable position than if it had chosen the form of a private or public limited company, instead of that of a branch. If you exchange branch for subsidiary, in *M&S*, and you see similar reasoning. So the reasoning in this case could by analogy have been utilized more in *M&S*.

> 20 Although the difference in treatment has only an indirect effect on the position of companies constituted under the law of other member states, it constitutes discrimination on grounds of nationality which is prohibited by Article 52 of the Treaty.

Thus, even though this case happened only when the branch was being closed down, it still impacted on the original decision of the German company to establish a branch. The Advocate General is well worth a read in this case, as he gives us a clue as to how businesses think when they are planning to set up a business abroad. Most advisers [in M&S's situation] will say that if you are going to have losses, you should set up a branch. But, the Advocate General notes that "every business which intends to set up a branch must also consider the costs and risks of the disposal of assets which comprise the whole of, or part of, that branch." There is no time limit. The Advocate General further considers:

> 18. Every business which intends to set up a branch must also consider the costs and risks associated with the disposal of assets which comprise the whole or part of that branch. That normally includes the real property of a business, for it is part of its "permanent presence," which distinguishes activities connected with

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establishment in the Netherlands, which included immovable property situated at Emmen and valued at HFL 3 178 926.

"5 In the Netherlands the transfer of immovable property is subject to the tax on legal transactions. However, the first paragraph of Article 15(h) of the Law provides for exemption of transactions which are carried out 'as part of an internal reorganization of public limited companies and private limited companies'.

"6 Under Article 5 of the implementing order, the said exemption is confined to transfers between public limited companies and private limited companies belonging to a group in which the parent company is also constituted in either of those two legal forms. It is clear from the documents before the court, however, that the Hoge Raad has already decided that, under the principle of non-discrimination as laid down in the bilateral treaty concerning taxation between the Netherlands and the United States of America, Halliburton Services may not be deprived of the benefit of exemption on the ground that the parent company of the Halliburton Group is constituted under United States law.

"7 Taking the view that the transfer of immovable property carried out by the German and Netherlands companies could not come within the aforementioned exemption, the Netherlands tax administration claimed payment of the tax on legal transactions from Halliburton Services BV.

"8 By decision of 11 December 1990 the Gerechtshof, The Hague, dismissed the action brought by that company on the ground that the transferor, Halliburton Co. Germany GmbH, was not a company incorporated under Netherlands law as defined in Article 5(4) of the implementing order and that accordingly the transaction in question did not qualify for exemption.

"9 The plaintiff company appealed to the Hoge Raad, claiming in particular that the aforesaid conditions for exemption involved discrimination on grounds of nationality contrary to the provisions of the Treaty."

an establishment from those related to the provision of services. (4) A business of that kind must consider the need to dispose of such property if there is a change in economic circumstances in relation to the time when the establishment was set up. Burdens which arise in that connection therefore affect, if only indirectly, the "taking up" of activities as self-employed persons within the meaning of Article 52 and thus, so far as concerns companies from other Member States, their previously defined freedom to set up branches.

19. In that connection reference must also be made [*8] to the possibility of a company giving up an existing branch in a Member State other than that of its seat in order to set up a similar establishment in a third Member State. That situation is to be equated with the case covered by Article 52, in which an undertaking leaves the State in which it was originally established in order to set up an establishment in another Member State, (5) and thus also comes within that provision.

20. In so far as only a partial surrender of the assets of the establishment is involved, the "pursuit" of activities within the meaning of Article 52 is also affected. It may be important for the economic development of an establishment to dispose of assets it no longer needs. Any obstacles to such a sale therefore fall within the scope of Article 52.

The actual decision of the people who decide to exercise freedom of establishment is impacted upon by a tax rule, which may not have an effect until many years later. The decision must still be looked at irrespective of how far in the future the tax rule will apply. There is no time limit placed on the rule. This is the decision of the German company to establish a branch being impacted upon at the time when they are closing it down. So it is a very important decision, which needs to be looked at again. But notice it was from a host state point of view. The rule was in the state where the branch was established, not as in *M&S* where the rule was in the state which affected the decision maker, the origin member state which we will come to in a minute.

In *Halliburton*, the Advocate General sees the dis-establishment of the branch as a "negative act of establishment." This particular concept has not been explored. It has not been explored in the case law. Nonresident companies must receive the same treatment as resident companies in circumstances where they have exercised the right of establishment unless the host member state can demonstrate some objective reason acceptable to the court to justify the different treatment. Applying that to *M&S*, we observe that the U.K. showed a variety of justifications for its particular rules, which covered the vast majority of scenarios. But there were going to be situations when the U.K. in *M&S* were not going to be able to show that the different treatment could be justified. In *M&S*, as we shall see, there were three particular instances of justification that were acceptable to the court; but M&S still won on a critical point, which we will discuss later.

> ***Saint Gobain was interesting because rules of international tax law which have been in place for 50 or more years appear to be set by the wayside as a result of this case.***

Another interesting case is *Saint Gobain*, case C-307/97, 21 September 1999, which has been picked because it has a tax treaty element in it. We don't quite know how tax treaties will interact with EC law from time to time. This particular case was extremely interesting because rules of international tax law which have been in place for 50 or more years appear to be set by the wayside as a result of this case. But you could equally argue that the member states have agreed to put freedom of establishment, and all these other rules agreed by the treaty, are already in place so that what we are really doing is ensuring that the rules that we have agreed as a club operate irrespective of what other arrangements have been put in place internationally.

The other interesting thing about this case is that there is a third country element. We saw a little bit of a third country element in *Halliburton* with an American parent. The American parent did not actually get involved in the proceedings. Here we have dividends coming from Switzerland and the U.S.A. to a branch of a French company located in Germany. The question was whether the benefits of the tax treaties between Germany and the U.S.A., and Germany and Switzerland, which were negotiated primarily for the benefit of German residents, could be extended to branches of French companies, which had established themselves in Germany.[8] The

[8]"Saint-Gobain ZN is challenging before the *Finanzgericht* the refusal of the *Finanzamt* to grant it three tax concessions designed to prevent dividends which are received in Germany by companies with shareholdings in foreign companies and which have already been taxed abroad from being taxed again in Germany. (Para. 15 *Saint Gobain*) First, the *Finanzamt* refused to grant an exemption from German corporation tax for the dividends received by Saint-Gobain ZN from the United States of America and Switzerland on the ground that

**(Footnote continued on next page.)**

court says yes, the branch in Germany was entitled to the same treatment in Germany as German companies because the branches were in a comparable situation to Germany companies. Again, the court is repeating articles 43 and 48, freedom of establishment in paragraph 34 of its judgment.[9]

In a rehash of *Avoir Fiscal*, Germany refused the tax reliefs [to branches of foreign companies] on the grounds that they were limited to companies resident in Germany under the tax treaties. The question therefore was that if you have these tax treaties, are you thereby impacting upon the freedom of establishment if you don't extend the same benefits to branches of all member state companies that are established in your county. So, in other words, it made it less attractive for those foreign companies to hold shares via German branches and it restricted their freedom to choose the most appropriate legal form to pursue their freedom of establishment under article 43, which was expressly granted to economic operators.

Thus, if the branch holds the shares and it is taxed in the same way as a German subsidiary, the question is how can you justify not giving it the same treatment. So, *Saint Gobain* is interesting from that point of view. The German justifications were:

- Need to prevent a reduction in tax revenue. Germany could not tax the French company and the foreign dividends paid to that company.
- Resident and nonresident distinction, because German companies and French companies were different, because the German company was a resident and a French company was a nonresident.
- Branches enjoy advantages compared to companies.
- The double tax treaty justification deserves a slide on its own because there are two aspects to it:
  - First, there is the argument that tax treaties with third countries had nothing to do with the European Community. The court had to deal with this new issue.
  - The balance inherent in the tax treaty would be disturbed if the benefit was extended to companies established in member states who were not a party to the tax treaty. Balance in the tax system has been accepted by the court from time to time. But in *M&S* we have a new justification, balance in the allocation of taxing rights between member states. We are seeing the court thinking about these things. But in *Saint Gobain*, the court does not give much credence to it. It dismisses the tax treaty argument here and it explains why, which I shall come to in another slide.

So a German branch of a French company and a German company were objectively comparable because the receipt of dividends in Germany was liable to tax there by both resident and nonresident companies who operated a branch in Germany, and also because the shareholdings held in foreign subsidiaries were liable to tax there irrespective of whether they were held by German resident companies or by branches of nonresident companies. Comparability was the first factor that the court had to find and it did. By failing to grant to nonresident companies with a German branch the tax advantages meant that the tax liability of the branch included those dividends from the U.S.A. and Switzerland. Normally, when you tax a branch, you are taxing a branch on sources within your country. Here, if they had allowed the German rules to operate in the way

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the treaties for the avoidance of double taxation concluded between the Federal Republic of Germany and each of those two nonmember countries, which provide for such exemption, restrict it to, respectively, German companies and companies subject in Germany to unlimited tax liability. The concession concerned is a form of international group relief from corporation tax in respect of profits distributed between parent company and subsidiary (*internationales Schachtelprivileg*)." (Para. 16 *Saint Gobain*)

"Second, although the *Finanzamt* allowed Saint-Gobain SA the direct credit provided for in paragraph 26(1) of the KStG and therefore credited against the German corporation tax payable by Saint-Gobain SA on dividends received through Saint-Gobain ZN, the foreign tax which it had already paid and which had been withheld at source in the various countries in which the distributing companies are established, it refused a credit for the foreign corporation tax levied on the profits distributed by the foreign subsidiaries and sub-subsidiaries of Saint-Gobain SA in the countries in which they are established (indirect credit, also called "indirect tax credit," which is provided for in paragraph 26(2) of the KStG) because the law restricts that concession to companies subject in Germany to unlimited tax liability." (Para. 19 *Saint Gobain*)

[9]"The freedom of establishment conferred by Article 52 of the Treaty on nationals of Member States of the Community, which entails for them access to, and pursuit of, activities as employed persons and the forming and management of undertakings on the same conditions as those laid down for its own nationals by the laws of the Member State where establishment is effected, includes, pursuant to Article 58 of the Treaty, the right of companies or firms formed in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community to pursue their activities in the Member State concerned through a branch or an agency (see Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 20, and the case-law cited there). Those two provisions guarantee nationals of Member States of the Community who have exercised their freedom of establishment and companies or firms which are assimilated to them the same treatment in the host Member State as that accorded to nationals of that Member State." (Para. 34 *Saint Gobain*)

they operated, the branch of the French company in Germany would also have been taxed on dividends received from other member states. So this would have breached the limited tax liability of the branch. So the court is also finding problems with the German rules from that aspect.

On the tax treaty argument, when member states enter into double tax treaties with third countries, the court says it doesn't matter if you enter into these tax treaties with third countries — you still have to extend the benefits of the tax treaty to a branch of another member state company because it is not affecting the [third state with whom the treaty has been concluded]. From the point of view of entering into the tax treaties with third countries, the national treatment principle requires that a member state, which is a party to the tax treaty, must grant to permanent establishments [which are not subsidiaries] the advantages provided by that tax treaty on the same conditions as those which apply to its own nationals. Here, we have seen the national treatment principle encroaching upon the double tax treaty area. We also see it in *SEVIC* (case C-411/03, December 13, 2005).

*SEVIC* involved a German company merging with a Luxembourg company and German rules, which precluded the registration of that merger in Germany, and thereby the recognition of the merger. The court said this was a restriction which breached the freedom of establishment. From the point of view of the host member state, I think [this talk] gives you a summary of the way the court has been thinking — that you are entitled to the same treatment if you are in a comparable situation as the host member states' own nationals.

To wrap up, [may I] draw your attention to this other aspect of Community law which has developed over a number of years. It has been there for some time in terms of the thinking, but the cases have not really arrived at the court yet from the point of view of the origin member state. There was an English case involving the Daily Mail who wanted to move their registered office to the Netherlands from the U.K., *Regina v. H.M. Treasury and Commissioners of Inland Revenue ex parte. Daily Mail and General Trust Plc*, case 81/87, 27 September 1988. This reasoning of the court goes back to a little over one year after *Avoir Fiscal*. It has been there for quite a while. The court says that the freedom of establishment also impacts upon origin member state rules. So an origin member state cannot hinder the establishment in another member state of one of its own nationals or a company incorporated under its own law. In *M&S*, this is what happened. We are dealing with a group relief rule impacting upon M&S's decision to establish in another member state via its subsidiary. Therefore, we need to see the Community's freedoms from two different aspects:

- The aspect of the host member state, in which you establish yourself, or provide services, or go to work, or make an investment.
- The aspect of the origin member state, which puts restrictive rules in place that hinders you from exercising your fundamental freedom rights.

So from these four aspects, origin state rules need to be looked at as well.

*F.W.L. de Groot v. Staatssecretaris van Financiën*; C-385/00, 12 December 2002, was interesting. *De Groot* returned to the Netherlands after working in another member state to find himself denied a tax-free allowance. The court says that even though he was a Dutch national and the rule was a Dutch rule, the Dutch rule violated his freedom of establishment. The last case that I want to mention is *Baars v. Inspecteur der Belastingdienst Particulieren/Ondernemingen*; case C-251/98, 13 April 2000, where a Dutch national was denied a tax advantage because the company in which he invested was not established in the Netherlands.[10] This was a case of origin state discrimination. If you have a 100 percent holding, you are definitely within the freedom of establishment. Paras. 21 and 22 of the judgment in *Baars* state:

> 21 However, the situation from which the main proceedings have arisen concerns a national of a Member State who resides in that Member State and who holds all the shares in a company established in another Member State. A

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[10]"9 Mr Baars is resident in the Netherlands. He owns all the shares in Ballyard Foods Limited (hereinafter 'Ballyard'), a limited company incorporated under Irish law established in Dublin, Ireland.

"10 It is apparent from the order for reference that those shares represent a "substantial holding" in a company in terms of Dutch law.

"11 For the purposes of the 1994 wealth tax assessment, Mr Baars declared assets amounting, at 1 January 1994, to NLG 2,650,600, which included the value of his shares in Ballyard, which on that date amounted to NLG 749,800.

"12 Arguing that his shares in Ballyard represented a substantial holding in terms of Dutch law, Mr Baars claimed the undertaking exemption provided for in Article 7(3) of the Wealth Tax Law, as amended, in the form of an allowance of NLG 442,400 against his taxable assets.

"13 The Inspector in the Belastingdienst Particulieren/Ondernemingen (Tax Office responsible for private individuals/undertakings), Gorinchem (hereinafter "the Inspector") did not dispute that Mr Baars' holding in Ballyard was a substantial holding in terms of Dutch law. However, he refused to allow the exemption on the ground that Ballyard did not satisfy the requirement that it be established in the Netherlands, as provided in Article 7(3)(c) of the Wealth Tax Law, as amended." (*Baars* Judgment)

100 per cent holding in the capital of a company having its seat in another Member State undoubtedly brings such a taxpayer within the scope of application of the Treaty provisions on the right of establishment.

22 It is clear from the second paragraph of Article 52 of the Treaty that freedom of establishment includes the right to set up and manage undertakings, in particular companies or firms, in a Member State by a national of another Member State. *So, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him definite influence over the company's decisions and allows him to determine its activities is exercising his right of establishment.* [Emphasis added.]

So, this is a very important cross-over case, which gives us the relationship between free movement of capital and freedom of establishment, first from an origin member state, but also leads us into which treaty freedom we are dealing with when we are dealing with ownership of companies and control of companies. We will be talking about *M&S* later on so I'll leave it there. Thank you very much.

**Southern:** Thank you very much Tom. This shows my ignorance. You seem to be describing a situation in which subsidiaries have got to have the advantages of permanent establishments, but not the disadvantages, and permanent establishments have got to have the advantages of subsidiaries but not the disadvantages. And for me this just conflicts with basic truth that values necessarily conflict. The idea that you can have your cake and eat it is simply a short route to the most odious forms of totalitarianism. But in the mean time, it's tea time. [Break for afternoon tea]

## *Marks & Spencer*

**Southern:** Now, Tom having so ably set the general scene in the story leading up to *M&S*, Timothy Lyons is going to give a brief introduction to the subject of *M&S*. Members of the panel will indicate where they think that we have got to with Community law and national tax. And then Tom will go into detail on the Advocate General's opinion and the judgment on *M&S*. Then we will go on to the panel discussion, from which I shall absent myself at 17.30 and Jonathan Schwarz will take over.

**Lyons:** Welcome back after tea. This is *M&S* in five minutes if you really have been asleep up to now and don't want to be awake much longer. We knew from C-254/96 *ICI v. Colmer* that rules about domestic losses had to avoid discrimination or a difference in treatment. *ICI* told us that. Now *M&S* takes things one step further. We have losses in a foreign subsidiary. Oh great shock and horror, the world will fall in! I thought, in my naïve way, the single market is without internal borders as art. 14 tells us. So why on earth should we start drawing distinctions between national losses, which *ICI* has told us cannot be the subject of discriminatory rules and foreign losses? Can they really be the subject of discriminatory rules? Well, *M&S* was about the deductibility of foreign losses within the single market. And the ECJ decided, as you know, that so long as certain criteria were met, legislation which denies the deductibility of foreign losses is incompatible with the freedom of establishment provisions of the treaty. Is that the end of the *M&S* litigation? Hardly. It has to come back to the Special Commissioners, or at least to the High Court, back to the U.K., at any rate, and we will eventually find out what results from this judgment in relation to this case at least, but when, presumably, Andrew Park tells us. So although *M&S* has established certain principles in its favor, quite how they will affect its tax liability ultimately we must wait and see. The marvellous thing about litigation is that once it has started, it is very hard to stop. But there are perhaps one or two interesting things that I might perhaps flag in the three minutes remaining to me.

***The marvellous thing about litigation is that once it has started, it is very hard to stop.***

One is this business of discrimination, which I was talking about just a moment ago. We saw with the *Avoir Fiscal* slides, that the court was concerned to strike against discrimination. What is discrimination? What are the comparables? I remember writing articles myself, which looked at exactly what comparables should be. What then — the court moves in the course of time to refer not so much to discrimination, but to difference of treatment. And when we get to *M&S* itself, neither discrimination nor difference of treatment become material. The shortest point disposed of in *M&S* is that there is an infringement of the freedom of establishment. It's done on the basis that the U.K. rules are a restriction on the freedom. So those of you who like pulling holes in analyses rooted to comparability have your game rudely cut short because all the court is concerned about is whether there is a restriction on the freedom or not. Answer — yes.

Well now, the other interesting area of *M&S* is, once you have established a restriction, is it justified? And interestingly, the court manages to have a discussion on the justifications of the infringement of the treaty without referring to *Hanns-Martin Bachmann v. Belgian State,* C-204/90, 28 January 1992, a case I must confess I begin to find immensely tedious. And the court also, I think, also finds it unattractive. The Advocate General, you might remember, had encouraged the court to enlarge the criteria for the applicability of *Bachmann*, *i.e.,* fiscal cohesion. The court wisely decided that creating almost a piece of legislation about the applicability of *Bachmann* was not really what it was going to do. And it directed attention back to the notion of mandatory restrictions. What is a justifiable restriction? It does not say that *Bachmann* is not a justifiable restriction, but it simply presented the member states with others that they could look at. Indeed in the *SEVIC* case, C-411/03, 13 December 2005, which Tom has already referred to, *Bachmann* is referred to. But do not think that *Bachmann* just because it does not appear in *M&S*, it has disappeared from view permanently. It is there, but it is by no means the only bullet in the member states' arsenal.

***The same criteria can destroy your health system and save your tax system.***

Now, perhaps one other thing that I should say about the justifications concerns this notion of tax avoidance. The court seems to have accepted very happily that a restriction imposed by U.K. legislation on the deductibility of foreign losses was there to prevent tax avoidance. I must say that I found that rather surprising. In a case called *X and Y v. Riksskatteverket*, C-436/00, 21 November 2002, the court said, well, there is a restriction in the case of nonresident's availability of tax advantages, but that restriction is not at all specific. And it seemed to me that one might lift those words and apply them to the group relief provisions as well. Yes, that is a restriction, but is it really that specific? One thing we do know is that the draftsman of the legislation did not sit there and draft the restriction on group relief out of due regard for the rules of the single market, because the one thing that we surely know about the U.K. tax system is that it is designed with complete disregard for the rules of the single market. So I do find that conclusion of the court just a little surprising. And then I suppose we can't leave *M&S* without saying something about this business about only being able to deduct foreign losses if you have exhausted the possibilities abroad, derived as you know from some cases on free movement within health systems to which the Advocate General drew attention. Quite remarkably, the possibility of going to another European Community country to get your hip replacement carried out, in very limited circumstances, was regarded as completely destructive of member states' national health systems. They, then, apply those limiting criteria in the context of taxation and there is universal rejoicing that member states' tax systems have been saved. So, the same criteria can destroy your health system and save your tax system. It just shows you how interesting *M&S* is. It is so interesting that I could take a great deal longer, but I have already taken more time than I have been allotted so with those few opening remarks. I shall invite whoever is going to follow me to follow me!

**Southern:** Thank you very much, Timothy. In that great classic of German jurisprudence by Oskar Bülow, *Gesetz und Richteramt* (1885) "The Law and Judicial Office," the learned author says in the courts the law speaks its last word. Now John Avery Jones, wearing his Special Commissioner's hat, spoke the first word in *M&S*. He may yet speak the last. That makes him a great authority on the subject and restricts what he can actually say. But John, if you say where you think we have got to on Community law and national law.

**John Avery Jones:** I think I am one of the few people who is old enough to say, "I think I haven't the slightest idea." I do, I am afraid, want to be a bit reticent about *M&S* because I suspect there is about another five days to be heard about this. I would not have thought that Mr. Justice Park would be that keen on hearing it, so it is almost certainly going to end up on my plate. There are some substantial points to be argued about the interaction of the two systems. There will be expert witnesses from three countries and this won't be another short case. So I don't want to say anything that might prejudice that. But how it is striking me as we move from an era about cases concerning one country's tax system, which are really pretty straightforward (I mean they seem so obvious now), as we move from that into the two country system. Now we have had one or two already, but we are only just scratching the surface of the two country problem. I like to think that I thought of this some years ago. When Tom asked me to come along, he said you used to write about these cases ten years ago. I got out something I wrote about *Finanzamt Köln-Altstadt v. Roland Schumacker,* C-279/93, 14 February 1995, when that was pretty new; if you can't get your personal allowances in the residence state, then you must get them in the source state. Now, of course, that was in the context of an exemption system. But supposing that had been the U.K. in the context of a tax credit system where you have got two countries to look at together; how do you get to the answer? And I still don't know. And I still don't think that it will be any clearer after *M&S* because there are all sorts of half bits of getting allowances. If you look at *Schumacker* in the residence state, you can, in theory, get the allowance, but the whole benefit might be swept away by the lack of double tax relief and that sort of thing. So any two country problem is going to be incredibly difficult. We are just moving into the era of two country problems. Where are we going? We are going into really difficult territory, I think here.

**Southern:** Thank you very much, John. May I just introduce Dr. David Williams, who has very kindly joined us. David used to be the Price Waterhouse Professor of International Taxation at Queen Mary. He then left to become a Social Security Commissioner, but besides adjudicating Social Security Commission cases and advising the government on social security law, and being the only person in the U.K. who understands the system of tax credits, not the tax credits that John has been talking about, but the tax credits that families get, he is also still very active in international tax. So, thank you very much for coming here today, David. Philip, have you anything to say on where we have got to now.

**Philip Baker QC:** Not a great deal, really, except to say that I think we have reached a watermark, probably a low watermark with direct tax cases. That might be a reflection of my mood at the present moment. We possibly have a high watermark with cases like *Lankhorst-Hohorst GmbH,* C-324/00, 12 December 2002, and *Bosal Holding BV v. Staatssecretaris van Financien*, C-200/98, 18 September 2003, where there was a feeling that virtually no rules of national tax systems could be defended against the advancing waters of Community law. *M&S* seemed to swing the other way. And in a sense, in all but the final result, it is a victory for the U.K. government. It is a victory in the sense that you now see very clearly the development of new justifications that did not exist a couple of months ago, and an emphasis on proportionality. I entirely agree with John Avery Jones' comment that it is really quite amazing looking back over 20 years that the French even bothered to defend *Avoir Fiscal*. But there is one very big difference between *Avoir Fiscal* and *M&S*. In *M&S*, the court seemed to try to understand what was the purpose of the national tax rules concerned. They said that these are concerned with ensuring that you do get relief for losses. What is the best way that we can ensure that loss relief is granted where the losses arise in the subsidiary and there is no other way of using those losses? In *Avoir Fiscal*, it occurs to me that the court never tried to understand *Avoir Fiscal*, why the French rule was what it was. And the French rule was what it was, I suppose, for two reasons. One of them is because that is what international tax law had always accepted it to be. A permanent establishment is not a resident of the state in which it is hosted, and so why should it be treated like a resident? Why should it get the benefit of the tax credit? And it is only in the past 20 years that I have seen this tension growing between established principles of international tax law, on the one hand, which is where all the member states started, and Community law that is coming in and saying, we know we are a bit of a new upstart, but we don't really have a lot of respect for international tax law. The fact that it has been there for 80 or 90 years does not mean that it is going to be there for the next eight or nine years. And so we have seen gradually rules that I regarded as taken for granted, unquestioningly rules, things like the rules of cricket that could not possibly be changed. And suddenly they no longer apply, which is why Tom and I have such interesting discussions, to use a fairly mild term, about the impact on tax treaties on Community law.

That is one of the reasons that the French had the rule that they had, because it had always been the case. But also because France looked at *Avoir Fiscal* and said the reason why we give a tax credit is because we tax in the case of a French resident shareholder, we tax the company and the shareholder on the whole of the dividend received, and that is going to give double taxation. So the *Avoir Fiscal* system tries to mitigate double taxation. But we don't have that problem to as great an extent where the shareholder is nonresident. But where the shareholder is nonresident and has a PE and the PE is taxed in France, then actually the situation is objectively comparable, which is what the court starts from there. So in one sense, looking back over 20 years [one is entitled to ask] why did France defend the situation? But on the other hand, 20 years ago they could not have anticipated the result. Just as on the morning on 13 December 2005, none of us could have been absolutely certain of the outcome in *M&S*.

Equally, I am not certain that any of us can say for certain where we are going to be in 20 years time, except that I come back to my first comment. I think we have a low watermark in that we have new judges. More than half the judges have been on the court for less than three years. Ten of them are from accession states. Many of them are from accession states, which have just escaped from states that have been under a large empire. Having been dictated to from Moscow, they do not want to be dictated to from Brussels. And as I have said in conferences, the view from Riga (Latvia) or Tallinn (Estonia) is not the same view as the view from Brussels or Luxembourg. That will change. If you look at the Community, particularly at the legislative side, the Community on direct tax goes through phases. There is a phase when member states join, and there is a phase of absorbing, or those states becoming more comfortable with the idea of the single market. During that time, you are unlikely to see any major new direct tax directives. It is very much a process of acclimatizing those new member states. And I think we are in that stage at the moment, but we will not remain in it for very long. The judges will start to become Europeanized and federal in their approach. So, we may see a return to cases like *Lankhorst or Bosal* in the future. So come back in 20 years' time.

**Southern:** I said that John Avery Jones had effectively spoken the first word in *M&S* loss relief; but that is not quite true because we have now been joined by Peter Cussons, who is a Pricewaterhouse-Coopers International Tax partner who really launched the *M&S* case, who has seen it through from its origins, when people said, stop wasting time, to its triumphant conclusion. The Dorsey and Whitney lawyer [Simon Whitehead] who has been responsible for organizing the group loss relief group litigation order and various other group litigation officers, you may have seen last week in the *Times*, he did one of these interviews, and he was asked who had most influenced him and he said it was Peter Cussons from PricewaterhouseCoopers. Thank you very much for being here. Eric, do you have anything to say at this point?

**Eric Tomsett:** My comment would be, on viewing the cases where we have got to so far in today's discussion, is that there is a danger of trying to draw principles from the case. Whenever a decision comes up, there is always an assumption that we can determine from that decision how a lot of other [cases] are going to be determined. I think that what we have experienced more and more that that is not necessarily the case and we are not getting such a broad principle coming out of the cases as maybe people were thinking at one time.

We can look particularly at *M&S*. I don't think it is necessarily establishing a clear principle on cross border loss relief as some people might seem to assume. If you look at the European tax systems' group relief, there is quite a narrow concept of the U.K. and Ireland. Other countries either have different loss relief systems where they allow losses, or indeed a number of countries do not relieve company losses at all. So I think that that is an important point in the *M&S* case that group relief is something over and above the national territoriality of the tax system, which was the original focus of the Special Commissioners in terms of their decision. And it was that which has been regarded as a restriction on freedom of establishment by the court. As Philip indicated, now as well as the challenge that has been put on the basic restriction, we are back to looking at the justifications. And exactly where the court is going to come down on this in future cases is I think pretty unclear. So when we see some of these key areas to be dealt with in the future, controlled foreign companies [and] free movement of foreign dividends are probably the two most important from a practical point of view in the U.K., in terms of the impact on the tax system. And there is great concern as to how the government would react in terms of those cases. I don't think probably in this seminar, although it will be interesting to see where we get to by [the end of this seminar], I am not sure that we will be any closer, and maybe are further away than we were a few months ago in really knowing where the final outcome of those cases will be, and even more so in terms of the overall impact on European tax systems.

So that would be my message here — beware of trying to use too many principles from these cases that will clearly be used determine the position [or outcome] of subsequent cases. The court will come down where it decides that it wants to in particular cases, and even in the parallel with domestic courts. They are not always decided on entirely consistent principles. It tends to be the view of the judges at the end of the day [and] the merits of the case can be as important as the ultimate legal principles. So I think that that is where we are and there is still a great deal of uncertainty going forward. It may be many years yet before all these issues are fully resolved, because all these cases come back to the national courts, and may be going right through to the House of Lords, as the *ACT* case has already, before we finally get a resolution.

**Southern:** Thank you very much, Eric. Jonathan, if you would just like to finish up this part of the session.

**Jonathan Schwarz:** Thank you, David, and I shall start where you started and thank you for saying that you found my book readable, which is quite extraordinary for something that deals with the U.K. treatment of tax treaties and is written in South African English. Looking perhaps from the outside into the European entity, one of the things which is really quite striking is that if one does view the court as a constitutional court, what you would hope over time is that principles would become more certain and would become more predictable. And it does seem that you would hope that issues would be put to bed and that you would not have to revisit them in the same way as they are being revisited right now. There was a time there was a feeling that was actually happening; there was a particular direction that the court was taking. The court itself expressed that certainty in the *Metalgesellschaft Ltd and Others v. Commissioners of Inland Revenue*, case C-397/98, 8 March 2001 decision, where it said that it was appropriate to award damages [by way of] restitution for breach of Community law. And the court contrasted the position to what had happened in *Metalgesellschaft* to an earlier case *Denkavit*, cases C-283/94, C-291/94 and C-292/94, 17 October 1996, where there was a request for a similar remedy in relation to a breach of the parent subsidiary directive. What the court said in *Denkavit* was that the law had not been sufficiently developed at that point in time so that there was no clear guidance as to what was right or wrong. Several member states had made the same mistake, and therefore although the rules in question were in breach of the directive, it was inappropriate to order damages for breach of Community law. By the time it got around to *Metalgesellschaft*, the court said there is a lot of guidance, the jurisprudence of the court is absolutely clear, member states ought to know right from wrong. I just wonder whether a couple of years later, in the light of *Marks & Spencer*, whether judges would feel that same confidence, that they would award damages in the same way that they did in the *Metalgesellschaft* case.

**Southern:** Thank you very much, Jonathan. Now this panel seems to gain quite staggering weight and authority with everyone who comes in, because we have now been joined by Professor Takis Tridimas, LL.B. (Athens), LL.M, Ph.D. (Cantab), Sir John Lubbock, Professor of Banking Law and Head of International Financial Law Unit, and is author of the classic book on EC Law, *General Principles of EC Law*, which Lord Nicholls in the House of Lords has been quoting. Now its time for Tom O'Shea to take us through the *M&S* judgment in five minutes! Thank you, Tom! [Southern departs. Schwarz takes over as Chair.]

## *Marks & Spencer* Judgment

**O'Shea:** This is *M&S* in seven minutes. M&S, a U.K. PLC, had a choice of setting up a subsidiary abroad or a branch abroad. It chose to set up subsidiaries and these subsidiaries incurred losses. If M&S had set up a subsidiary in the U.K., it would have got group relief. If M&S had set up a subsidiary in France, which had a branch in the U.K., it would have got a certain amount of group relief. But because it set up foreign subsidiaries, it did not qualify for any group relief. Now, group relief is simply a tax advantage, so it allows companies to move losses from a company within the group to another company within the group which has profits. It represents a tax advantage overall for the group. The structure of the group is a little bit different from what we read about in the cases. The formal structure of the group is found in the decision of the Special Commissioners in the Annex. I think that slide shows the structure of the group as referred to in the Special Commissioners' decision. For the purposes of the case, it has no relevance. But it might be relevant in respect of future cases in this area particularly involving non-U.K. parents established either in the EU or in third countries. The actual structure of the group might need to be looked at, but for our purposes we are looking at a U.K. company establishing in France via a subsidiary or a branch.

Interestingly, M&S were not a poor company; they were actually making a considerable amount of money around this time. However, in France, Belgium, and Germany, they made losses over three years during which time they made profits in the U.K. Obviously, they took a decision to close their foreign operations down, even though as a group overall they were making money. From the *Halliburton,* C-1/93, point of view, which I referred to earlier, you had a negative act of establishment.

Now, you would think that if the U.K. rules were put in place to assist company groups to form and have an intra-group flow of losses, you would think that group rules operating in a single market should take the single market into account, because it is quite nationalistic to look at things purely from the U.K. perspective. By looking at things purely from the U.K. perspective, we [tend to] forget that we are operating in a single market with freedom of establishment, etc. From a U.K. perspective, it can be understood why the U.K. had group relief rules, which benefited residents, people operating in the U.K., because the U.K. were taxing U.K. residents and the U.K. government wanted the tax relief rules to assist U.K. residents. But you have to change that mindset in a Community environment.

There are two basic arguments in the case. There is whether, if M&S had set up a branch, they would have got group relief. And as I have said, 49 paragraphs of the Special Commissioner's decision related more or less to equal treatment of branches. As we saw earlier today that branches in *Avoir Fiscal* were more or less treated in the same way as companies from a tax point of view. Therefore, in a host state situation, a branch could be comparable to a company in the *Avoir Fiscal* situation. But, I would argue that from an origin state point of view, that was never a possibility even though the lawyers did put these arguments rather forcefully. The reason I think it was never a possibility is that from an origin state perspective, you are looking at a different comparator; you must compare like with like. You are looking at the migrant person and comparing with the nonmigrant. You are looking at it from the point of view of the company who moves cross-border and the company who stays at home. And if you are looking at it from the point of view of an origin member state, you are looking at it from the point of view of M&S setting up a subsidiary in another member state (not setting up a branch). So, therefore, if you were to compare like with like, you would look at it from the point of view of a U.K. company setting up a U.K. subsidiary, with a U.K. company setting up a French subsidiary. You would not compare it with a U.K. company setting up a French branch. That is the argument that I would make, and I think indirectly the court must have accepted this argument because the Advocate General more or less made the same argument and the court did not talk about the branch situation or the branch arguments at all. The court completely ignores this argument about setting up a branch and the branch being entitled to equal treatment [with a subsidiary]. I think from an origin state perspective that is never going to be a runner if you look at the comparables. So if you give U.K. group relief to a U.K. subsidiary, you have to give it in a cross border situation. If you don't give it cross border, is that a restriction on the freedom of establishment? Once you determine that there is a restriction on the freedom of establishment, you need to look at the justifications. And the court does just that.

The court looks at the U.K.-U.K. and U.K.-France subsidiary situation only. It ignores the branch completely. The comparability of the branch does not get mentioned in the judgment. We see the same quotations from *R v. HM Treasury and CIR, ex parte Daily Mail and General Trust plc*, case 81/87, which we saw earlier today in relation to origin states, going from *Daily Mail* direct into the court's judgment in *M&S*. The court explains that it is a tax advantage and it speeds up the relief for losses. How is it that the subsidiary does not get the benefits? The subsidiary gets benefits in a group relief situation as well because the subsidiary may get paid for its losses, so if the subsidiary does not qualify for group relief either, there is a good argument that the subsidiary is also quite capable of bringing this type of case, as well as its parent.

In *M&S*, the court finds that there is a restriction. It looks at its earlier decisions in the nontax environment, *e.g.*, *Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuration di Milano,* case C-55/94, 30 November 1995. *Gebhard* basically gives us four conditions. [First,] you must look at the restriction to see if it is discriminatory or not. If it is discriminatory, it does not fit within the *Gebhard* formula. Otherwise, if it is nondiscriminatory, you apply each of the remaining *Gebhard* conditions in turn.

The interesting happening in *M&S* is that the court looks at the imperative reasons in the public interest and finds three particular justifications, which do satisfy the U.K.'s public interest. Those three justifications are accepted by the court in this case. M&S wins on the last two sentences of the *Gebhard* formula of that particular slide. It wins on proportionality grounds. In other words, the justifications are found to be necessary and in the public interest, but they go beyond what is necessary to achieve what the group relief rules want to achieve.

The court applies *Gebhard* in a new sort of way because it takes this quotation that I talked about earlier completely out of context from the *Avoir Fiscal* point of view, because as you can see there, it is written in the *Avoir Fiscal* judgment, and we know that is a host state case, and even cites the case as a "member state in which a company seeks to establish itself." So in *M&S* the court is not talking about a host state rule/situation. It must be talking about the U.K. rules from an origin state point of view. And it looks at a member state in which a company seeks to establish itself and converts it into a member states in general. It is covered in other cases from an origin state point of view, but this is the court putting it into an origin state situation for the first time, in such a black and white way.

The court says that you need to look at the consequences, which would flow if an advantage such as that at issue were to be extended unconditionally. Now this is the "two country" tax treatment that Prof. Avery Jones talked about. So we can no longer look at things in a cross border environment from a one country point of view. This thinking has actually gone into the four freedoms:

- free movement of workers in *De Groot,* case C-385/00;
- freedom to provide services in *Eurowings,* case C-294/97;
- free movement of capital in *Manninen*, case C-319/02;
- freedom of establishment in *Marks & Spencer*, case C-446/03.

So, the court is looking at what happens if the U.K. group relief rules are extended cross border. The U.K. justifications for not extending it are three.

The first one, which is very important, is "it is not Bachmann." This is a new defense, which sits alongside *Bachmann* and can operate independently of *Bachmann*. Most of what the Advocate General was arguing was *Bachmann*, but he also talked about what Timothy Lyons was referring to, *i.e.*, health systems, and there is case law on health systems allowing you to jump across the border to get your hip replacement. Now that would create a number of difficulties for member states if it was allowed.

So in such circumstances, the court has allowed certain restrictions on the freedoms and has imposed restrictions on member state nationals from doing that. This is a direct translation of that thinking into a new possible justification in this area, which says if member states have a tax system and we agree that [foreign] subsidiaries should not be taxed in our tax system, then the member state of establishment should be responsible for the profits and losses. Normally *M&S* would not happen; *M&S* is clearly an exception. You would not normally have to deal with a loss situation.

*M&S* is an interesting case because for the first time, we get to view an establishment situation from an origin state rule perspective, which says that you must look at the tax treatment in the host member state as well as the tax treatment in origin member state before you make a decision on whether or not the restrictive rules can be allowed under the treaty. So the first justification which was accepted, which, as I have said, is the important one, is the balanced allocation of the power to tax.

The second one was pretty expected — avoidance of double dipping, *i.e.*, a loss which is used in two or more jurisdictions — the court allows the U.K. to deal with this without difficulty.

***M&S is an interesting case because for the first time, we get to view an establishment situation from an origin state rule perspective.***

The third one is the moving of losses within a cross border environment into situations where the most relief can be obtained — the court also allows the U.K. to deal with this.

So, from the court's point of view, those are three justifications, which we have not seen in the case law before, but the last two are not really new. The "balanced allocation of taxing power" justification is interesting, because we don't know where this is going to go. The court brings this into effect and forgets entirely about tax treaties in the same way that it forgot about tax treaties in relation to *Bachmann*. The *Bachmann* decision was made by the court, but the academic writers queried the coherence of the tax system from the point of view of tax treaties. The same arguments could be made here, that tax treaties may have affected this balanced allocation of taxing power rights. We have had no discussion about this at all yet. This is something that is new and it will be very interesting to see where it goes. One point to note is that this is a new justification and is not *Bachmann* "coherence" under another name.

The last couple of points, as Dr. Julian Ghosh made in a class here last week, we have the U.K. being found to be justified in taking this action, but losing on the proportionality grounds. The U.K. is said to be justified by the court in having territorial based group relief rules, but not in certain circumstances. Whenever they fail the proportionality test, which says that it unfair for you to have a company which earns £1,250 million and had £48-50 million of losses, which it cannot use ever again. You cannot have a group like that, which can never use its own losses, if you are giving the benefits to your own residents. If you are going to give these benefits to your own resident companies, you have to, under the freedom of establishment rules, insist that they are given also in the limited *M&S* situation of foreign losses, which cannot receive relief in the state of establishment.

Basically the court says the U.K. is in breach, but it is only a partial breach. So if M&S can find some way of utilizing the losses of its foreign subsidiaries in France, Germany, or Belgium, then the U.K. rules stand firm. There should be no reason why the U.K. should have to pay for the losses. Remember, you are not establishing in another state with U.K. rules. When you establish in another member state you do not take your loss relief rules with you. You establish the subsidiary under the foreign rules.

I have two slides on whether M&S win or not. I think they do win. I think the U.K. rules are in breach of Community law if M&S cannot get their loss relief in France, Germany, or Belgium or by selling their French subsidiary, which they did.

There are a number of questions that I want to leave you with; and perhaps these are the type of questions that we can explore in the next hour with the panel.

We are looking at the difference between a restriction and a breach. This is Julian Ghosh's point that we are in contingent breach situation; there is a breach only if M&S cannot get its loss relief in the other member states. Must the loss-making subsidiary be sold to a third party? There seems to be intimation or nuance in the judgment that if you are in a position to sell your loss-making subsidiary to a third party, you may be obliged to do it (but I am not sure whether this is correct or not).

If there are time restrictions placed on the use of losses in the host member state, does that have an impact? I would think that the U.K. would not have to give relief in those circumstances; if you have the opportunity to use the loss relief, then you have to use it.

Is there a test of reasonableness for closing down the loss-making subsidiary? I do not believe that there is, because this equates to imposing a reasonableness test on the freedom of establishment and I don't believe that you have to demonstrate reasonableness whether you are establishing a subsidiary or disestablishing a subsidiary.

How far can losses be traced once they go to a third party? I think *M&S* says that that is it — end of story. That's a debateable issue.

What happens if the parent of the subsidiary is an EU or a non-EU based parent? An EU parent or a non-EU parent triggers other issues, not just in the establishment area, but particularly in the free movement of capital area. These are going to be the hot live issues following *M&S*.

The last issue, which I believe is the key one, is where does this leave the argument "we don't tax the foreign subsidiary so we should not have to relieve losses?" (after the court has said there are some situations where "We must give relief for the losses.") I would be very interested to hear the views of the audience and the views of our great panel here this evening. Thank you very much.

## Discussion

**Schwarz:** Thank you, Tom. David has relieved me of all the hard work of chairing this session, so let's get onto the subject matter. I know that the panel are all itching to give their views, but what I would like to do is actually open the discussion up completely. Any thoughts or questions for the panel? The only thing I would say is just given the brevity of time, it is a bit like appearing before the European Court itself. You need to be very to the point. So any initial questions?

**Gavin McKay (Ernst and Young):** I do a bit of this on the side. I had a client who phoned me up last week and they said, M&S has won and we are in their group litigation order and there has been a very robust opinion from Graham Aaronson. Without wishing to comment on the facts and circumstances of my client, if M&S has won throughout, how much tax might they get back and when they might they see it?

**Schwarz:** That is all credit to the judges because they have managed to make all sides believe that they have won. Peter . . .

**Peter Cussons:** Subject to the constraints of time and confidentiality, if I share with you, as I understand it, the only reason ironically why M&S did not liquidate the Belgian and German subsidiaries was because they did not want to prejudice the outcome of the ECJ case. I think that it is more or less known that either back at the High Court or in discussion with HMRC, the Belgium and German claims should prove good because if HMRC insists that they liquidate their companies then they will do that. As a slight aside on the continent, contrary to the U.K. and may be Irish systems, whereby if the trade ceases, but the company carries on, then the losses of D1 losses are lost. It is not so on most of the continent; you have actually got to liquidate the company. The position as regards the *Galeries Lafayette* losses is much more cloudy. John will recall and others will recall, having either been in the High Court that that issue caused some difficulties between the parties. But again in the public domain, and I think in the Special Commissioner's judgment, it is known that M&S France SA was acquired by Galeries Lafayette SA, I think it was towards the end of 2001. And then under French law sometime in the spring a fusion was done, a merger with retrospective effect to 1 January 2002. Again, this was the focus of debate in the High Court — there was an application, it's in the public domain, with the French Revenue, to get the *imprimatur* that, the old M&S France SA losses to go across to Galeries Lafayette SA because in the circumstances, that is not automatic. You will see from the referral questions to the European Court that that implied that the French Finance Ministry were helpful to Galeries Lafayette SA. If you look at the judgment and take a strict view of M&S France SA's losses re. the Galeries Lafayette SA purchase, what had happened there to M&S France SA, losses, at a minute to midnight at the end of 2003, French law changed such that tax losses which were not then evergreen. They just have a five-year time bar apart from start up losses and depreciation. They automatically overnight became evergreen losses. So I think M&S have a job at Galeries Lafayette SA to find out what had happened to their losses because the crystal ball was a little bit cloudy back in 2001. I don't know that they had in their sale agreement the right to that information, and they may not get that information. And, for myself, one of my comments on the ECJ's judgment is that there used to be something called principle of equivalence under EU law whereby, for the domestic group relief mechanism, you just decide or not when a subsidiary surrenders. But a cross border situation is much more difficult because in circumstances where you have no right to the information, you have to go on bended knee to Galeries Lafayette SA and say, please tell me what you are doing with our tax losses? They may just not respond or ask for a large sum of money to give you the information that you ask for.

**Schwarz:** Any other views on that? The fact that the burden is on the taxpayer to demonstrate what has happened to the losses.

**Tomsett:** Could it be a question for an exchange of information for the tax authorities under the tax treaty or EC law?

**Baker:** It is something that seems to come from the judgement in para. 56:

> Where, in one member state, the resident parent company demonstrates to the tax authorities that those conditions are fulfilled, it is contrary to Articles 43 EC and 48 EC to preclude the possibility for the parent company to deduct from its taxable profits in that member state the losses incurred by its nonresident subsidiary.

The court seems to be mindful of the fact that someone has actually got to prove this. Not the answer that you wanted here, but in answer to the question about your client, [I have] no idea of the facts. But subject to the particular circumstances, I think that you can probably tell your client they are unlikely to get their tax back and they may never see it at all if they have got to demonstrate [that those conditions are fulfilled].

Backtracking for a moment, the U.K. lost the case on the grounds of proportionality. What would the U.K. have to have done in order for the legislation not to have been disproportionate? One answer to that is that if they had put in a provision which said that if you cannot use the losses anywhere else now or in the future, then come back to us and we will smile at you. It seems to me that if the U.K. [had held itself out as] the loss reliever of last resort, if nobody else would have done so. It seems to me that in the judgment this would have been sufficient to avoid falling down on the point of proportionality. If you then apply that in practice, then unless the taxpayer can prove that there is absolutely no possibility of using the losses anywhere else, why should the U.K. step in and give relief? We are not generally inclined to step in and relieve losses in other countries suffered by subsidiaries. Why should we do so unless we are absolutely required to do?

On the question of M&S now liquidating the two subsidiaries that have not been sold — isn't there a danger of an argument that you are doing that for tax avoidance? Interestingly enough we now have two concepts of tax avoidance in *M&S*. We have the old ICI concept of artificial transactions designed to circumvent the tax system. We also have this new concept of tax avoidance, which is shifting the losses around to where they have the greatest value, which to my mind does not look like tax avoidance but sensible tax planning. But in fact it really is tax avoidance. Liquidating your subsidiaries to prove that you cannot use the losses somewhere else looks exactly like the circumstances where HMRC will be entitled to deny you the use of those losses.

**Cussons:** But that would prejudice the outcome of the litigation. In a sense it's ironic. It's certainly not a wholly artificial arrangement in the *Emsland Starke* [case C-110/99] category, I accept you are doing something to crystallize your claim. What the court seems to have done is rule that this is a latent U.K. tax loss. I am sure HMRC will however make the point in the course of these discussions.

**Member of the Audience:** On what basis do you compute the losses? Do you compute them on the basis of the relieving state or the [inaudible] state?

**Cussons:** The relieving state.

**Tomsett:** There is no guidance, but the best assumption is that under the U.K. rules it is the U.K. group relief system. That would be more logical. The court has carefully avoided any comment.

**Baker:** Following on from Jane's point, what happens if you have a loss in one country and a profit in another? Suppose because of large initial depreciation, you show a loss in one country but no loss in another. Do you have to relieve losses in both countries?

**Schwarz:** Does anyone think that you have to keep the subsidiary alive forever to demonstrate that you are not doing tax avoidance?

**Tomsett:** I expect the Revenue, when they do draft legislation to deal with this, will [doubtless] bring in the usual anti-avoidance legislation wording to enable them to challenge any situation.

**Schwarz:** The case operates at two levels. One is the consequences for groups of losses. What about the broader issues. Do we have any thoughts about where the case is leading us, other than to just say, we are in the wilderness?

**Takis Tridimas:** Two points. First of all, I am not a tax lawyer. My first point is this — if I can come back to an issue made earlier. It seems to me that the default position in the judgment that the restriction in group relief to domestic subsidiaries is that the burden lies firmly on the corporate group to show that the losses cannot be taken into account elsewhere. I think there is a difference between the judgment and the Advocate General, because the Advocate General talks a lot more about collaboration between the national tax authorities. He goes back to the classification of proportionality under the free movement of goods. There is a restrictive substance of this in the judgment.

In many ways there is a conservative judgment, a nation state friendly judgment, if I can put it this way. This lies in two things. First of all, what the court talks about is fiscal neutrality of free movement; the corporate group inter-state presence should not be worse off than a corporate group whose constituent parts are based in one member state. This is really all that the court demands. This places national tax restrictions in a noncontentious position *vis-à-vis* other national restrictions. In other areas of corporate company law, reverse discrimination is a result which the court accepts. A company which exercises the right of free movement may be better off than a company which does not exercise the right of free movement. This kind of reverse discrimination is accepted by the court in many cases as an inevitable or welcome consequence of the treaty. But this is not what the court asks for in *M&S*. All that the court asks for is tax neutrality between a corporate group which has all its parts within the U.K. and a corporate group which does not. So, in that sense, it is a more conservative judgment.

Another interesting point is the way that the court treats proportionality. Indeed we have here a so-called contingent breach situation. I think that is not best case. In many references, the court simply provides guidance to the national court and leaves it up to the national court to sort things out, and this is what happens here. The distinct picture in this case is that the proportionality of a restriction imposed by British law depends on the law of the other member states. What the court says is what is missing is part of the law of the host state; and on that basis you can decide whether British law is proportional or not. Answer — whether in the case [inaudible] I think it would be difficult to generalize here. But I think that *M&S* is giving us a specific fact situation rather than articulating general theories and this is by no means the end of it. One has to wait and see how many of the questions will be answered?

**Member of the Audience:** What are your views of Maastricht Treaty and the concept of territoriality?

**Schwarz:** How does the court view territoriality? Tim, is that one for you?

**Lyons:** It rather depends upon what one means by territoriality, really. I think as you will know in a number of cases, member states have tried to use what they have called territoriality to defend discriminatory tax provisions from *Futura* onwards to cases like *Bosal*. I am afraid that I have a rather jaundiced view of the notion of territoriality in the jurisprudence of the European Court of Justice. It seems to me to be simply a fancy way of talking about maintaining your insecure tax borders. And to the extent that the U.K. managed to do that in *M&S*, then perhaps the notion of territoriality within the tax system of the EC is given some encouragement. But of course fundamentally, one talks about the restriction here as being inconsistent with the treaty. We are concentrating on proportionality now and the existence of legitimate reasons for certain rules; but one starts off with question in this judgment with the rules being inconsistent with the single market. So one has to bear that in mind.

**Schwarz:** There is this interesting notion in the first justification and that is that it relates to the necessity to maintain a balance of allocation of power of raising taxes between states. I wondered whether anyone has any views as to what that means. And also whether this is not some sort of concession going the other way. That an allocation is required, that there is not an unlimited authority, as the previous formulations have said, [in saying] that you are entitled to exercise your taxing jurisdiction but consistently with Community law. What does this defense that has been invented actually mean "balanced allocation of power to impose taxes"? [Does it mean] a divided allocation between member states? Does anyone have any suggestions? This is as much for the audience as anyone else.

**Tridimas:** I don't know what it means, but perhaps it can be defined easily negatively in paragraphs 45 and 46 of the judgment. I think it means two things. First of all, the corporate group does not have the choice of where the losses will be taxed/ relieved. This is a right which does not exist under English law. Secondly, that the law of only one member state may need to be applied. [inaudible] passage from the judgment, but I think these points are quite interesting. This is all we know about this idea of balanced allocation of fiscal competences. It is an interesting question because that does not exist in British case law. It is a new principle which shows that the judgment. . . . I find the *M&S* judgment interesting because the court articulates more than in previous cases the way free movement applies in direct taxation. I think these two ideas, the balanced allocation of fiscal competences and the fiscal neutrality of free movement, do not come true in the English cases. Both these cases are in favor of the taxing authority, in favor of the member states. The emphasis lies with the sovereignty of officials rather than the [inaudible].

> ***I find the M&S judgment interesting because the court articulates more than in previous cases the way free movement applies in direct taxation.***

**Cussons:** I think that there is another tangential point that can be made in relation to the possible impact of paragraphs 45 and 46 on the *Cadbury* judgment. Because the obverse of this if you don't look at para. 45 as the court doffing its hat to the U.K.:

> 45 None the less, as the United Kingdom rightly observes, the preservation of the allocation of the power to impose taxes between member states might make it necessary to apply to the economic activities of companies established in one of those States only the tax rules of that State in respect of both profits and losses.
>
> 46 In effect, to give companies the option to have their losses taken into account in the member state in which they are established or in another member state would significantly jeopardise a balanced allocation of the power to impose taxes between member states, as the taxable basis would be increased in the first State and reduced in the second to the extent of the losses transferred.

Then you can substitute the profits for losses in paragraph 46 "the option to have their losses taken into account in the member state in which they are established or in another member state." Those paragraphs seem bad news for the U.K. government in relation to the *Cadbury* case. So there is the flip side of the coin in relation to paragraphs 45 and 46.

**Baker:** In *Cadbury Schweppes*, there is also para. 49, which I think the Danish government advocate picked up in the hearings on the loss relief group litigation order which was heard the same day as *Marks & Spencer*.

> 49 As regards, last, the third justification, relating to the risk of tax avoidance, it must be accepted that the possibility of transferring the

losses incurred by a non-resident company to a resident company entails the risk that within a group of companies losses will be transferred to companies established in the member states which apply the highest rates of taxation and in which the tax value of the losses is therefore the highest.

While Tom was talking, I realized that in fact *M&S* gives the answer to CFC and to *Cadbury Schweppes* because if occasionally the U.K. must give relief for losses on overseas subsidiaries, then occasionally the U.K. should be able to tax the profits of overseas subsidiaries. The question is one of allocation. [Laughter.]

**Tomsett:** Within a domestic group, there is a very wide degree of choice with what you do with domestic losses each year. So some conflict there with the freedom which they are not extending in the same way to cross border losses as that which is prevalent within a domestic group. . . .

**Baker:** Can I ask a question of the panel? Does anyone think we are gradually edging to a single general justification in respect of which coherence, balanced allocation, combating tax avoidance may all be examples. The general application being that if the member state concerned can explain the rationale behind the tax rule in question, show that rationale is not inconsistent with the single market, show that there is no less restrictive measure that could have been adopted regarding proportionality, then the member state will be allowed to have that rule. Are we moving in that direction? Is that possibly where we will be moving over the next 10-15 years?

**Lyons:** Implicitly rather than explicitly, but yes . . . Can I answer that question with a question? Aren't we there already? Isn't that notion the law as it exists? If you can satisfy a mandatory requirement, your justification is acceptable.

**Baker:** I don't think that is where we were a year ago. A year ago we were looking at various specific justifications, such as, could you bring this within coherence as phrased by *Bachmann*, and the very narrow concept of tax avoidance as elaborated in ICI. Now the court might be saying, we don't want to have a list of accepted justifications, each with their own name, coherence, anti-avoidance, etc. What we want to have is a general approach which says: explain to us why you need this measure; explain why it is needed to preserve your territoriality, your fiscal jurisdiction; show to us that it is not inconsistent with the single market; and convince us of proportionality. If you can do all that, then the state has won. Conversely, if the taxpayer can show there is a less restrictive measure that could have been adopted, which is what Marks & Spencer did, then the taxpayer will win.

**Lyons:** But isn't that the law as it has always been? Surely the only reason that *Bachmann* is allowable is that it describes one of the mandatory requirements? It's not a free standing, invented, doctrine. You can justify discrimination if you satisfy certain mandatory requirements. *Bachmann* describes the situation in which you do.

**Schwarz:** Well, that is an interesting observation because although the court is trying to move away from discrimination language, the fact is if you look at para. 45 [it shows] this is discrimination. It's a question of comparability. Maybe really the place to go back to is were there correct comparators? And they are saying that in some cases, it is possible to have rules which apply to both profits and losses within a single member state. In other words, that the comparison between the U.K. resident subsidiary and the nonresident subsidiary in an inappropriate one. They just don't want to use discrimination language.

**O'Shea:** I made the point that this is picked up from the Special Commissioners' decision — profits and losses are two sides of the same coin. And the Special Commissioners harp on about this in great detail in their decision, and the court picks up on this and builds this particular defense based on that thinking. I think it ties in a little with territoriality as well. Territoriality, which we saw in *Futura*, case C-250/95, is that a state is entitled to tax within its jurisdiction. And it is also entitled to have loss rules. But what gets forgotten about is that the court starts off by saying that, although direct taxation is a matter for the member states, it must still comply with Community law. The explanation for territoriality is best given by the Advocate General in *Futura*, case C-250/95, who makes it very clear that a state can have its own loss rules but they must not discriminate and they must not restrict unless justified.

**Tridimas:** I think the way that Philip put is quite attractive. My view of the case law in the internal market in general is that the court is looking towards a more flexible understanding of exceptions. That does not fit in, here, to justify a restriction. I don't think the court thinks as much as it used to in terms of ticking boxes. [ . . . ] Nor does it argue in terms of discrimination. I think that is a good thing. All these tests, discrimination, and proportionality — I think all of them facilitate the inquiry; they structure the judicial inquiry. Discrimination is not [a simple] concept. Discriminatory restrictions which may well be justified and non-discriminatory restrictions which are more conditioned to free movement. I don't think that discrimination is necessarily a reliable criterion. It is my interpretation that the court is moving, perhaps, towards a more flexible application of justification.

**Schwarz:** Can I, maybe, reformulate Philip's question in a slightly different way? Are there specific justifications in the tax area which are not of universal application or is this a wider general principle of the court? Is there something special about tax?

***All these tests, discrimination, and proportionality — I think all of them facilitate the inquiry; they structure the judicial inquiry.***

**Monica Chowdry:** . . . The court has taken into account what is the purpose of what we are doing, what is the purpose of the tax rule? If we ask, what options does the court have if the court wants to protect the corporate taxpayer? I am not sure that I see what other options the court really has. The court has to give some sort of concession to allow corporate tax losses to continue. If this is right, then is this the first case for saying there is this separate tax justification? And we allow this special tax justification because we recognize that European law has for sometime been encroaching on domestic taxpayers; and at some point the line has to be drawn. Is it not the case that the European Court is saying, the line has to be drawn?

**O'Shea:** I don't think it is correct, because the U.K. has these loss relief rules. The U.K. could have solved its problem overnight by not having these loss relief rules. It's not a problem from the court's point of view. It's from the point of view of Marks & Spencer as a parent company, a U.K. company, which decides to operate cross-border instead of operating purely within the U.K. So the U.K. is entitled to have a rule and the U.K. can justify these types of rules. But Marks & Spencer has all its income in its parent company, and it cannot get these losses relieved — I don't see the problem as being the court; I see the problem as being with the design of our U.K. tax system.

**Chowdry:** I agree that the problem is the design of our tax system. But there are reasons for tax systems being designed in a certain way. Is it really compatible to have a single market and separately enacted tax systems? The point is I think it is not. And at some point we have to compromise and they are creating a specific tax exception, which they have never done before to my knowledge. I can't see any other case which says tax is different. But here we have a case of a special tax exception and I think that is shown that the court is moving to realizing that these are not two compatible concepts; a single market and different tax bases are just not compatible.

**O'Shea:** The court has marked out tax as a special area. The court does realize that there may be difficulties. For example, in *Avoir Fiscal* it said that tax law may require these differences. It has also accepted that international tax practice may cause different situations to cause residents and nonresidents to be taxed differently. And it has also picked out the effectiveness of fiscal supervision as being a particular method of justifying some of our different rules, which cause problems in the market. But I come back to the earlier point that I made today, which is that we signed the deal for the European market and freedom of establishment, free movement of capital, and the other freedom rights are above our understanding of everything. All our other national rules must comply with them first, before we have any other rules, whether it is a tax treaty, or a tax treaty with the U.S.A., or whether it is a domestic rule.

**Chowdry:** Did not we think we were opting out of any infringement in direct tax consequences when we [signed the treaty]?

**Lyons:** Well, we didn't read the treaty.

**David Williams:** The treaty in those areas is a regional application of what was the GATT and is now the World Trade Organization. The fudge is still there in the law of treaty rules. You have it in much sharper form.

**Baker:** We did sign the treaty before *Avoir Fiscal*. The case is a landmark case; and I take your point about *Humbret*. *Avoir Fiscal* really was a bit of a shock to direct tax lawyers who thought the Community was all about VAT and customs; and surely it was nothing to do with direct tax. We signed the treaty in 1971, before even *Avoir Fiscal* was started by the Commission.

**Williams:** It took seven years for *Avoir Fiscal* to be mentioned in a British law report. . . .

I have to say, this dates me terribly, that I actually taught European Community law before we joined the European Community. But a couple of points of reflection if I might — the cases which were being argued over in 1984 and 1985, there is hardly anything in Simons Tax Cases about European law. And I can distinctly remember in, I think it was 1986, about being told off in a conference of university law teachers that tax lawyers knew nothing about Community law. Indeed I had a proposal for a book not long after this and got told that I wasn't competent to write it because I wasn't a European Community lawyer. Shortly after that we put forward, and Philip again knows this, a proposal for European Community tax law as an option then, going back to that time, and that was again vetoed because there was nothing to talk about.

**Schwarz:** It's rather like a German lawyer at an ABA seminar on *Lankhorst*, who said, it is very interesting, but this has nothing to do with German law.

## Closing Comments

**Baker:** There are three things I want to say:

You will nearly all have received short notice of this seminar and the reason for that is that it was only three or four weeks ago that Tom and I were chatting and Tom said: "Have you noticed that it is 20 years since *Avoir Fiscal* — why don't we have a 20 year conference?" [And it was discovered to be 28 January] so Tom and I thought about it and came up with a programme. That we are here today is very much due to Tom's effort in putting it all together and in preparing the papers and the slides. So can I ask you all to thank Tom. [Applause]

About halfway through the afternoon, I turned to David Southern, who was then in the chair, and said, "This is just the most amazing panel. It is amazing that at such short notice we could put on a panel of the weight and strength that we have." We are really only missing two people, and we [would] have the complete royal flush. We are missing Paul Farmer and Malcolm Gammie, the other Special Commission. Malcolm Gammie has gone to Australia to escape participation in this panel. Paul was asked to take part but he said he was so fed up with hearing about *Marks & Spencer*. . . . We have a most astonishing panel, and it is testimony to the great strength of EC tax law in London at the moment that we can put on a panel of this intellectual strength and breadth. Can I ask you all please thank the members of the panel? [Applause]

The third point is, a number of people have asked, "Where are we going to now?" Well, I know where we are going — to the local hostelry and all are welcome to join us there for a drink. ◆