OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 28 April 2005 [1]

I — Introduction

1. In its reference the Unabhängiger Finanzsenat (Independent Tax Chamber) (Austria) submits two questions to the Court on the provisions relating to tax in the Protocol on the Privileges and Immunities of the European Communities. The issue underlying these questions is, however, whether the authorities of a Member State, for purposes of subjecting a person employed as local staff by a Community institution to national income tax, are entitled to determine whether that person has been graded correctly in view of the duties entrusted to him. As will become apparent, different views are held on this point within the Austrian judiciary.

1 — Original language: English

II — Relevant provisions

2. The preliminary questions concern Articles 13 and 16 of the Protocol on the Privileges and Immunities of the European Communities (hereinafter: 'the Protocol'). These provisions are drafted in the following terms:

Article 13

'Officials and other servants of the Communities shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities, in accordance with the conditions and procedure laid down by the Council, acting on a proposal from the Commission.

They shall be exempt from national taxes on salaries, wages and emoluments paid by the Communities.'

Article 16

'The Council shall, acting on a proposal from the Commission and after consulting the other institutions concerned, determine the categories of officials and other servants of the Communities to whom the provisions of Article 12, the second paragraph of Article 13, and Article 14 shall apply, in whole or in part.

The names, grades and addresses of officials and other servants included in such categories shall be communicated periodically to the Governments of the Member States.'

3. Pursuant to the first paragraph of Article 16 of the Protocol, Regulation No 549/69 was adopted in order to determine the categories of officials and other servants of the European Communities to whom inter alia the second paragraph of Article 13 of the Protocol applies. [2] Article 2(a) of this regulation provides:

'The provisions of the second paragraph of Article 13 of the Protocol on the Privileges and Immunities of the Communities shall apply to the following categories:

(a) persons coming under the Staff Regulations of Officials or the Conditions of Employment of Other Servants of the Communities, including those who receive the compensation provided for in the case of retirement in the interests of the service, with the exception of local staff;

...'

4. Articles 2 and 3 of Regulation (EEC, Euratom, ECSC) No 259/68 of the Council of 29 February 1968 laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Communities and instituting special measures temporarily applicable to officials of the Commission [3] determine respectively the Staff Regulations of Officials of the European Communities (hereinafter: 'the Staff Regulations') and the Conditions of Employment of Other Servants of the European Communities (hereinafter: 'the Conditions of Employment'). According to the first paragraph of Article 1 of the Staff Regulations:

'For the purposes of these Staff Regulations, official of the Communities means any person who has been appointed, as provided for in these Staff Regulations, to an established post on the staff of one of the institutions of the Communities by an instrument issued by the appointing authority of that institution.'

2 — Regulation (Euratom, ECSC, EEC) No 549/69 of the Council of 25 March 1969 determining the categories of officials and other servants of the European Communities to whom the provisions of Article 12, the second paragraph of Article 13 and Article 14 of the Protocol on the Privileges and Immunities of the Communities apply, OJ, English Special Edition 1969 (I), p. 119.

3 — OJ, English Special Edition 1968 (I), p. 30.

5. The Conditions of Employment apply, as laid down in Article 1, to all servants engaged under contract by the Communities. That provision distinguishes between temporary staff, auxiliary staff, local staff and special advisers. The first paragraph of Article 4 of the Conditions of Employment provides:

'For the purposes of these Conditions of Employment, local staff means staff engaged according to local practice for manual or service duties, assigned to a post not included in the list of posts appended to the section of the budget relating to each institution and paid from the total appropriations for the purpose under that section of the budget. By way of exception, staff engaged to perform executive duties at the Press and Information Offices of the Commission of the European Communities may also be regarded as local staff.'

6. As to disputes between Community institutions and their employees, Article 236 EC and Article 81(1) of the Conditions of Employment provide respectively:

Article 236 EC

'The Court of Justice shall have jurisdiction in any dispute between the Community and its servants within the limits and under the conditions laid down in the Staff Regulations or the Conditions of Employment.'

Article 81(1) of the Conditions of Employment

'Any dispute between the institution and a member of the local staff serving in a Member State shall be submitted to the competent court in accordance with the laws in force in the place where the servant performs his duties.'

III — Facts, procedure and preliminary questions

7. The appellant in the main proceedings has been employed by the Commission since 1982 as a member of its local staff. After having been posted at the Commission's Permanent Representative to the International Organisations in Geneva, he was transferred in 1987 to the delegation in Vienna. Since Austria's accession to the European Union in 1995 his place of employment has been the Representation of the European Commission in Austria. Under his contract of employment of 1 July 1994, which entered into force on 1 May 1994, he was engaged as a member of the local staff for an unlimited period for design, planning and monitoring duties in the position of press attaché at the delegation of the European Communities in Vienna and graded in Category I/Step 35.

8. Until the end of 1994 the appellant was not subject to taxation in Austria owing to

the fact that he was employed by a 'privileged institution' within the meaning of national tax law. The situation changed, however, on the accession of Austria to the European Union on 1 January 1995. Consequently, on 5 May 2000 the Finanzamt (Tax Office) for the 6th, 7th and 15th Districts issued income tax notices for the years 1995 to 1998 and a notice of advance payment of income tax for 2000. The appellant brought an appeal against those notices before the Unabhängiger Finanzsenat, alleging that Austria has no right to tax the income which he received as a member of the local staff on the ground that he has an inappropriate contract of employment.

9. More particularly, he argues that the type of duties which he performs may not, in the light of Articles 2 to 5 of the Conditions of Employment, be entrusted to local staff. According to the first paragraph of Article 4 of the Conditions of Employment, local staff may only be charged with duties commensurate with Categories III to VI, and not with Category I and II duties. He should, therefore, in his view, have been classified as auxiliary or other staff, in which case, under Article 13 of the Protocol, he would have been subject to Community taxation, not to national taxation. Although he was initially classified in Category I/Step 35, this was changed with his consent, by addendum of 4 July 1997 to his contract of employment, into Category III/Step 35. [4]

10. The appellant submits that, pursuant to Paragraph 116 of the Bundesabgabenordnung (Federal Tax Code), the Finanzamt was obliged to determine, as a preliminary issue, his status by reference to the actual duties performed and with due regard for the relevant legislation and to base its income tax notice on its findings. According to settled case-law of the Verwaltungsgerichtshof (Administrative Court), [5] this includes considering whether for the purposes of the application of Article 13 of the Protocol the person concerned has correctly or incorrectly been classified as a member of local staff. In line with this case-law, the Unabhängiger Finanzsenat examined the appellant's situation and concluded that from 1 January 1995 (Austria's accession) until 30 June 1997 (the amendment to the contract of employment) his contract of employment indeed infringed the first paragraph of Article 4 of the Conditions of Employment. However, the Unabhängiger Finanzsenat takes the view that it is not entitled, as required by the Verwaltungsgerichtshof, to determine which contract of employment the appellant should instead have had and what status should be allocated to him, retroactively, in compliance with Community law. It agrees with the Finanzamt that it is for the international institution in question, in this case the European Commission, to determine the status of its staff.

11. Accordingly, the Unabhängiger Finanzsenat, by Order of 28 June 2004, decided to

4 — The appellant contends, nevertheless, that the nature of his duties has remained unaltered. He has, therefore, challenged this amendment before the Arbeits- und Sozialgericht (Labour and Social Court) Wien.

5 — The referring court cites two Orders of the Verwaltungsgerichtshof: 2000/15/0162 of 18 December 2001 and 2000/14/0121 of 19 February 2002.

refer to the Court the following two questions for a preliminary ruling under Article 234 EC:

1. Does the first paragraph of Article 13 of the Protocol on the Privileges and Immunities of the European Communities preclude the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to their officials and other servants only if the European Communities exercise their right of taxation?

2. Does the second paragraph of Article 16 of the Protocol on the Privileges and Immunities of the European Communities preclude the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to their officials and other servants only if those officials or other servants are listed in a communication within the meaning of that article, and does a communication forwarded on the basis of that article automatically entitle the tax authorities of the Member State to exercise the national right of taxation in respect of officials and other servants not listed in that communication and thus in respect of those servants whom the European Communities regard as local staff?

12. Written submissions were presented by the Austrian, French and Portuguese Governments and by the Commission.

IV — Assessment

13. Given the Unabhängiger Finanzsenat's explanation of the background to the case in its order for reference, it is clear that the main issue to be decided is whether, for the purposes of applying Articles 13 and 16 of the Protocol, national administrative and judicial authorities are bound by the classification by a Community institution of its employees into the various categories of officials and other servants under the Staff Regulations or the Conditions of Employment. Alternatively, must it be accepted that national authorities are entitled to proceed to their own qualification of a Community employee where they consider that the decision engaging the person concerned contravenes the Staff Regulations or the Conditions of Employment? The questions referred by the Unabhängiger Finanzsenat address this issue only implicitly and in a rather circumvent manner, which is understandable in the light of the difference of opinion which exists on the matter with the Verwaltungsgerichtshof.

14. I agree, therefore, with the French Government and the Commission that in order to provide the Unabhängiger Finanzsenat with an answer which will be useful to

resolving the issue before it, the questions referred should be taken together and redrafted in the manner indicated above, i.e. is the decision of a Community institution concerning the employment of a person as an official or other servant and his classification into one of the categories under the Staff Regulations or the Conditions of Employment binding on national administrative and judicial authorities for the purposes of applying Articles 13 and 16 of the Protocol?

15. To my mind, it is clear that this question should be given an affirmative answer for the following reasons.

16. Articles 13 and 16 of the Protocol together constitute the basis for the taxation of persons employed by the Community institutions. Article 13 contains the basic rule which consists of two aspects. On the one hand, it provides that officials and other servants shall be liable to a tax for the benefit of the Communities on salaries, wages and emoluments paid to them by the Communities. On the other hand, as the logical corollary of that, it provides that these employees shall be exempt from national taxes on income paid to them by the Communities. Article 16, next, provides the basis for the scope *ratione personae* of this tax system by empowering the Council, acting on a proposal from the Commission and after consulting the other institutions concerned, to determine the categories of officials and other servants to whom it is to apply. The particulars of the persons subject to the Community tax and who are, therefore, exempt from national tax are communicated periodically to the Member States.

17. The purpose of Articles 13 and 16 of the Protocol is to guarantee the proper functioning of the Community institutions, ultimately with a view to facilitating the realisation of the objectives of the Communities. Firstly, as was pointed out by the Portuguese Government, Article 13 seeks to ensure that persons employed by the Community are treated equally from the point of view of the taxation of their income. By subjecting them to the Community system of taxation the net remuneration received by officials and other servants is calculated according to the same principles. Persons performing similar duties are therefore rewarded similarly. Secondly, in order to guarantee this equality of fiscal treatment, the second paragraph of Article 13 prevents these employees from being subject to double taxation. If Member States were permitted to tax income received by their nationals from Community institutions, either instead of or in addition to the Communities, this obviously would result in differences in treatment of Community employees depending on their country of origin. Unequal treatment of this type could have effects on the recruitment of personnel from the various Member States and thus adversely affect the functioning of the Community institutions. [6]

6 — Cf. on these points Case 6/60 *Humblet* [1960] ECR 559, at paragraph 4 of the judgment.

18. As is indicated in the preamble to Regulation No 549/69, the privileges, immunities and facilities provided for in the Protocol are granted solely in the interest of the Community. It follows from this that the decision as to the categories of employees who are to be subject to the Community tax system and are exempt from national income tax must be taken at Community level. Acting on this basis and pursuant to Article 16 of the Protocol, the Council determined in Article 2(a) of Regulation No 549/69 that the tax provisions laid down in Article 13 of the Protocol are to apply to all persons coming under the Staff Regulations or the Conditions of Employment, with the exception of local staff. The nature of the tasks carried out by the latter category of personnel is not, therefore, deemed to be sufficiently closely related to the achievement of the objectives of the Communities to justify the tax system of Article 13 of the Protocol being applicable to them.

19. Given the rationale of the tax system provided for in the Protocol and the resulting requirement that the scope *ratione personae* of that system is to be determined at Community level, it follows that decisions on the categorisation of Community employees in individual cases, the question which is at issue in the present case, also must come within the exclusive competence of the Community institutions involved. The relevant provisions in the Staff Regulations and the Conditions of Employment on the establishment of an employment relationship between a person and a Community institution are based on this premiss. According to Articles 1 and 2 of the Staff Regulations, 'officials' are 'appointed' to a post by a separate instrument of appointment taken by the Appointing Authority. 'Other servants', by contrast, are 'engaged under contract', pursuant to Article 1 of the Conditions of Employment, by the Communities to fill a certain post. Depending on the nature of the duties assigned to them, other servants are grouped into the categories temporary staff, auxiliary staff, local staff or special advisers by those who have been authorised to conclude employment contracts within the meaning of Article 6 of the Conditions of Employment. Decisions to 'appoint' a person as an official or to 'engage' a person to perform certain duties under a contract of employment are formal Community decisions taken by bodies empowered under Community law. These decisions determine the status of the person concerned vis-à-vis the institution for which he works as well as the employment regime which is applicable to him.

20. As the Commission rightly observed, the legal relationship between the Community institution and the person concerned is determined by these formal decisions and not by a certain number of conditions of a substantive nature being fulfilled. In other words the fact that a person's circumstances correspond to one or other of the situations referred to in Articles 2, 3 or 4 of the Conditions of Employment do not as such confer on him the status which attaches thereto. Such a status can only be conferred by the Appointing Authority or by those who have been authorised to conclude employment contracts.

21. This principle has also been recognised by the Court, albeit in negative terms. In

Porrini [7] it was asked whether the basis of the service relationship between the Community and its officials or servants must at all times and invariably reside in an instrument of appointment or whether this instrument may be substituted by a judicial decision finding that on the facts there exists a particular service relationship. The Court replied, quite briefly, 'that the basis of the service relationship between the Community and its officials or servants other than local staff cannot reside in a decision of a national court.' [8] The Court based this finding on the consideration that it has exclusive power under Article 152 EA, which is identical to Article 236 EC, not only to decide disputes concerning persons 'who have the status of officials or of servants other than local staff, but also to persons who lay claim to this status.' [9]

22. The Court confirmed this position in *Tordeur* [10] in which it held 'that it is not possible for a contract of employment with a Community institution, a fortiori a contract of employment of indeterminate duration, to come into being as a result not of a decision of the designated competent authority, but of the fact, even where it is supported by a decision of a national court, that certain statutory provisions of the Member State in which that institution is situated, which relate to temporary work, have not been complied with.' [11] Although recognising that temporary workers cannot be denied social protection, the Court emphasised that 'such protection cannot be provided by means which encroach upon the autonomy of the Community institutions in this area.' [12]

23. This principle of the autonomy of the Community institutions is an essential requirement for the proper functioning of the Community institutions. As I have observed before, these institutions operate, from the internal, organisational point of view, entirely independently of the Member States. Not only is this a consequence of their task to operate in the interest of the Union, it is also a fundamental condition for the performance of that task. [13]

24. It is clear that the tax system laid down in the Protocol is designed to ensure that the Community institutions function smoothly and to assist them in fulfilling their tasks. There is an evident functional relationship between this objective and the classification of individual members of Community personnel into certain categories resulting in the

7 — Case 65/74 *Porrini* [1975] ECR 319.

8 — At paragraphs 14 and 15 of the judgment.

9 — At paragraph 13 of the judgment.

10 — Case 232/84 *Tordeur* [1985] ECR 3223.

11 — At paragraph 28 of the judgment.

12 — At paragraph 27 of the judgment. By contrast in Case C-126/99 *Vitari* [2000] ECR I-9425, the Court did leave it up to the national court to determine whether the conditions were fulfilled to justify the conclusion of a fixed-term contract between the claimant and the European Training Foundation. In this case, it found that Community and national policies in the area were consistent with each other and that leaving it to the national court to decide the matter could not, in these circumstances, be regarded as an encroachment upon the sphere of autonomy of the Community institutions. Cf. paragraphs 24 to 27 of the judgment.

13 — See my Opinion in Case C-165/01 *Betriebsrat der Vertretung der Europäischen Kommission in Österreich* [2003] ECR I-7683 at paragraph 98.

grant of the various privileges, immunities and facilities indicated in the Protocol. This relationship is also referred to by the Council in the preamble to Regulation No 549/69 where it states 'that it is important to ensure that officials and other servants, in view of their duties and responsibilities and of their particular situation, benefit from such privileges, immunities and facilities as are necessary for the proper functioning of the Communities.' The designation of employees into categories and the concomitant conferral of immunity from national taxation on remuneration received from the Communities is, therefore, an internal matter for the Community institutions and belongs to the sphere of autonomy enjoyed by them.

25. In this context, national administrative and judicial authorities cannot have the power to call into question the legality of the employment relationship between a Community institution and its staff members, thereby determining whether or not the facilities granted under the Protocol do or do not apply to a given person. To recognise such a power would have a disruptive effect on the system established by the Protocol. If the Member States were able to define the status of Community employees for their own internal purposes and were not bound by the status conferred on that person by the Community institution concerned, this could result, in some situations, in a person either being subject to no taxation, as is possible in the case of the appellant, or being subject to double taxation, where the national authorities consider a person classified by the Community institution as for example temporary staff to be local staff. This clearly would be contrary to the objective of Article 13 of the Protocol as described in point 17 above. Member States cannot, therefore, unilaterally determine the status of Community employees.

26. On this point I would also refer to the Court's judgment in *Betriebsrat der Vertretung der Europäischen Kommission in Österreich* in which it observed that differing national interpretations of, in that case, Article 79 of the Conditions of Employment could entail the risk of jeopardising the proper functioning of the services of a Community institution. [14] Although the context of that case differed from the present one, the same principle expressed in that consideration applies here mutatis mutandis too.

27. Not only do national administrative and judicial authorities lack competence to find that a decision determining the status of a member of staff is illegal or invalid, they equally lack power to determine which status would be appropriate given the duties entrusted to the person concerned. This was also recognised explicitly by the referring court and pointed out by the French Government and the Commission. Any

14 — Cited in the previous footnote. See, in particular, paragraph 44 of the judgment.

national decision concerning the status of a member of Community staff could not bind the institution employing him or her, nor could a national court order the Community institution concerned to take a new decision on this matter.

28. Where a Community employee disagrees with the personnel category in which he has been classified by the employing Community institution in view of the duties performed by him, the relevant decision should be challenged directly under the appropriate Community procedures provided for in Articles 90 and 91 of the Staff Regulations in conjunction with Article 236 EC, not indirectly before the national courts.

29. It is true that Article 81 of the Conditions of Employment provides that disputes between members of local staff and the institution shall be submitted to the competent court in the Member State concerned. However, in the light of the judgment in *Porrini* referred to in point 21, this does not, in my view, apply to disputes relating to status. [15] On this point, I agree with the Commission that Article 81 of the Conditions of Employment applies to disputes relating to rights and obligations based on the employment relationship, but not to disputes concerning the nature of the employment relationship as such. At any rate, I do not consider it appropriate that the issue of the legality of the employment relationship with a Community institution be raised in the context of a dispute on the application of national tax law. In the context of such proceedings the employment status should be regarded as an established fact for the national court.

30. In the light of the foregoing observations, I am of the opinion that a decision taken by the competent body within a Community institution regarding the status of a person employed by it, is binding on national administrative and judicial authorities. The first paragraph of Article 13 of the Protocol precludes the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to the officials and other servants indicated in Article 2(a) of Regulation No 549/69, irrespective of whether the European Communities have exercised their right of taxation under that provision.

31. Article 13, second paragraph, of the Protocol read in conjunction with Article 16 of the Protocol precludes the taxation in the Member States of the salaries, wages and emoluments paid by the Communities to the officials and other servants listed in the communication indicated in Article 16 of the Protocol. The tax authorities of the Member State are therefore entitled to exercise their right of taxation in respect of Community employees not listed in that communication and thus in respect of those servants whom the European Communities regard as local staff.

15 — Cited in footnote 7. See paragraph 13 of the judgment.

V — Conclusion

32. I therefore conclude that the following answers should be given to the questions referred by the Unabhängiger Finanzsenat:

(1) A decision taken by the competent body within a Community institution regarding the status of a person employed by it, is binding on national administrative and judicial authorities. The first paragraph of Article 13 of the Protocol precludes the taxation in the Member States of the salaries, wages and emoluments which the Communities pay to the officials and other servants indicated in Article 2(a) of Regulation No 549/69, irrespective of whether the European Communities have exercised their right of taxation under that provision.

(2) Article 13, second paragraph, of the Protocol read in conjunction with Article 16 of the Protocol precludes the taxation in the Member States of the salaries, wages and emoluments paid by the Communities to the officials and other servants listed in the communication indicated in Article 16 of the Protocol. The tax authorities of the Member State are therefore entitled to exercise their right of taxation in respect of Community employees not listed in that communication and thus in respect of those servants whom the European Communities regard as local staff.