Reports of Cases

JUDGMENT OF THE COURT (Tenth Chamber)

23 January 2014*

(Failure of a Member State to fulfil obligations — Freedom to provide services — Free movement of capital — Income tax — Contributions paid to a savings pension — Tax reduction solely in respect of payments to institutions or funds established in that Member State — Coherence of the tax system — Efficacy of fiscal supervision)

In Case C-296/12,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 14 June 2012,

European Commission, represented by R. Lyal and W. Roels, acting as Agents,

applicant,

v

Kingdom of Belgium, represented by J.-C. Halleux and M. Jacobs, acting as Agents,

defendant,

THE COURT (Tenth Chamber),

composed of E. Juhász, President of the Chamber, D. Šváby and C. Vajda (Rapporteur), Judges,

Advocate General: N. Wahl,

Registrar: A. Calot Escobar,

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its application, the European Commission seeks a declaration from the Court that, by introducing and maintaining a tax reduction in respect of contributions paid to a savings pension in so far as that reduction is applicable only to payments to institutions or funds established in Belgium, the Kingdom of Belgium failed to fulfil its obligations under Articles 56 TFEU and 63 TFEU.

* Language of the case: Dutch.

Belgian law

2 Under Article 34(1) to 34(3) of the code des impôts sur les revenus 1992 (the 1992 Income Tax Code: 'the CIR 1992'):

'(1) Irrespective of the party liable, the beneficiary, the classification or the detailed rules for the determining and granting thereof, pensions, annuities and equivalent allowances shall comprise:

...

3° Income from a savings pension established in accordance with Article 145/8.

(2) Income from a savings pension includes:

1° savings placed in a collective or individual savings account;

2° pensions, annuities, capital sums and surrender values of savings insurance;

...

(3) The taxable amount of the savings referred to in (2), 1°, shall equal the amount corresponding to the capitalisation, at the rate of 4.75% per annum, of the total amount of the net sums paid to the saving account which are to be taken into consideration for the reduction of tax.

...'

3 Article 39(2), 3°, of the CIR 1992 states that pensions, complementary pensions, annuities, capital sums, savings and surrender values are exempt where they derive from a savings account or a savings insurance contract in respect of which the tax reduction provided for in Article 145/1, 5°, of that code was not granted.

4 Article 145/1 of the CIR 1992 provides:

'Within the limits and under the conditions laid down by Articles 145/2 to 145/16, a tax reduction shall be granted on the following expenses ...:

...

5° payments in respect of a savings pension;

...'

5 The first paragraph of Article 145/8 of the CIR 1992 is worded as follows:

'The amounts to be taken into consideration for the reduction in respect of a savings pension in accordance with Article 145/1, 5°, shall be those which are definitively paid in Belgium:

1° either for the establishment of a collective savings account;

2° or for the establishment of an individual savings account;

3° or as premiums in respect of savings insurance.'

6 Article 145/11 of the CIR 1992 provides that the company approved as manager of a savings pension fund in accordance with Article 145/16 of that code is obliged to invest the assets in that fund and the income from those assets, under deduction of charges, exclusively in investments specified in Article 145/11 and within the limits there laid down.

7 Under Articles 145/12 and 145/13 of that code, the provisions of Article 145/11 are also applicable to individual savings accounts and to savings insurance.

8 Article 145/15 of the CIR 1992 provides:

'Collective or individual savings accounts may be opened solely by the establishments specified in Article 56(1). The King may, by decree deliberated in the Council of Ministers, on such conditions as he may determine, grant the same authorisation to publicly listed companies incorporated under Belgian law.

Only those insurance undertakings which conduct 'life' business in accordance with the law of 9 July 1975 on the supervision of insurance undertakings may enter into savings insurance contracts.'

9 In Article 145/16, 1°, of the CIR 1992 a collective savings account is defined as those parts of a savings pension fund approved by the Minister for Finance on the conditions determined by the King, intended to constitute savings available either during life or on death.

10 Article 63/5(1) of the Royal Decree of 27 August 1993 implementing the code des impôts sur les revenus 1992 ('the AR/CIR 1992') provides that, in the two months following each calendar year in which contributions have been paid to a savings pension, the institutions and the undertakings referred to in Article 145/15 of the CIR 1992 are to supply to the authorities responsible for direct taxation a copy of the certificate which they have sent to each savings account holder or party to a savings insurance contract.

11 Article 63/6(1) of the AR/CIR 1992 specifies which documents must be produced by a management company in support of an application for the approval of a Belgian investment fund as a savings pension fund. Paragraph 2 of the same article obliges such a management company to inform the Minister for Finance of changes which are to be made to those documents and to submit the annual accounts.

12 In accordance with Article 63/7 of the AR/CIR 1992, compliance with the conditions laid down in Article 145/11 of the CIR 1992 is determined on the basis of the management company's submission to the Minister for Finance, no later than one month after the end of each full quarter following approval of the fund, of documents setting out the detailed position of the fund established at the end of the last banking day of each month within that quarter.

13 Article 63/8 of the AR/CIR 1992 specifies the circumstances in which the approval of a savings pension fund can be withdrawn.

The pre-litigation procedure

14 By letter of 18 October 2006 the Commission gave the Kingdom of Belgium formal notice that it should submit its observations on the compatibility with the EC Treaty and the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) of certain provisions of the Belgian legislation concerning a reduction of tax in respect of payments paid to savings pensions. On 8 February 2007 the Kingdom of Belgium replied to that letter.

15 On 22 March 2010 the Commission sent to the Kingdom of Belgium a reasoned opinion where it expressed the view that that Member State was failing to fulfil its obligations under Articles 56 TFEU and 63 TFEU and Articles 31 and 40 of the Agreement on the European Economic Area and asked it to adopt the measures necessary to comply with that opinion within a period of two months following receipt.

16 As it was not satisfied with the Kingdom of Belgium's reply of 13 July 2010 to that opinion, the Commission brought this action.

The action

Arguments of the parties

17 The Commission states, first, that management of savings pension funds constitutes a service within the meaning of Article 56 TFEU. It considers that the fact that contributions to such funds confer a right to a tax reduction solely where they are paid to financial institutions established in Belgium restricts the freedom to provide services both of the persons to whom that service is supplied and of suppliers who are not established in Belgium.

18 Secondly, both the deposits of sums in an individual or collective account and the payment of life insurance premiums fall within the scope of movements of capital within the meaning of Article 63 TFEU. The granting of a tax reduction solely where those deposits and payments are made to institutions established in Belgium constitutes a restriction on the free movement of capital since Belgian depositors and insurance policy holders will be deterred from transferring sums in connection with savings pensions to institutions which are not established in Belgium.

19 According to the Commission, those restrictions cannot be justified by the need to safeguard the coherence of the Belgian tax system. In that regard, the argument that the national rules are symmetrical, in that they exclude the taxation of benefits paid if the deposits and payments of premiums relating thereto did not qualify for a tax reduction, has been previously rejected by the Court in Case C-150/04 *Commission* v *Denmark* [2007] ECR I-1163.

20 Further, the Commission considers that the Kingdom of Belgium has failed to satisfy the requirement of fiscal coherence within double taxation agreements entered into with other Member States, since a good number of them allocate the power to tax pensions and other comparable income to the State where the recipient is resident. In the case of agreements where that power is allocated to the State of origin of such income, the requirement of fiscal coherence cannot justify the restrictions in question since that State could tax the benefits which the person liable to tax receives even if that person established himself in the other State which is party to the agreement.

21 As regards a justification based on the protection of citizens investing in savings pensions, the Commission considers that the security of the funds invested can be guaranteed without it being necessary to require that contributions and premiums should be paid solely to institutions or funds established in Belgium, since the obligations imposed by the Belgian legislation in relation to investment, approval and reporting can also be met by financial institutions established in other Member States. Supervision of compliance with the reporting requirement is also possible provided that the submission of such reports constitutes a condition for obtaining and retaining the approval granted to the institution or fund. Further, the Kingdom of Belgium could rely on Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 1977 L 336, p. 15), as amended by Council Directive 92/12/EEC of 25 February 1992 (OJ 1992 L 76, p. 1, 'Directive 77/799'), in order to obtain information on the person liable to tax and to supervise the foreign financial institution.

22 The Kingdom of Belgium accepts that the Belgian savings pension rules at issue constitute a restriction on freedom to provide services and free movement of capital. It states, however, that such a restriction can be justified by overriding reasons in the public interest.

23 In that regard, it relies, firstly, on the internal coherence of the tax system and argues that the Belgian savings pension rules are compatible with the judgments in Case C-204/90 *Bachmann* [1992] ECR I-249 and in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, where the Court inter alia insisted upon there being a direct link between a tax advantage and an actual disadvantage. While the pension benefits are, in principle, taxable under Article 34(1), 3°, of the CIR 1992, they are however exempted under Article 39(2), 3°, of that code if the tax reduction provided for in Article 145/1, 5°, of that code was not granted in respect of payments to savings pension accounts or savings insurance premiums, as would be the case where those accounts and that savings insurance are managed by institutions not established in Belgium.

24 The Kingdom of Belgium states, further, that it has endeavoured to ensure tax coherence at the level of double taxation agreements by conferring on the State of origin the power to tax pensions and other comparable payments, but accepts that that it has not succeeded in doing so in agreements entered into with some Member States.

25 Secondly, the Kingdom of Belgium argues that effective fiscal supervision is necessary. In the first place, it states that the Belgian tax authority is able to monitor the granting of the tax reduction in respect of payments made to a savings pensions and to ensure collection of the tax payable on the amount allowed under, inter alia, Article 63/5 of the AR/CIR 1992, which imposes obligations on the financial institutions and the savings pension funds as regards information to be supplied to the tax authority in relation to certificates issued to persons liable to tax.

26 In the second place, the Kingdom of Belgium relies on the protection of the interests of savers in order to ensure that the pension to which they will be entitled will be paid to them. That protection is ensured by Articles 145/11 of the CIR 1992 and Articles 63/6 to 63/8 of the AR/CIR 1992, which provide, inter alia, for a procedure of approving savings pension funds, for the possibility of such approval being withdrawn and obligations relating to investment and reporting. The Kingdom of Belgium considers that the procedures set out in provisions of European Union law relating to Member States exchanging information are complex and slow and do not therefore ensure that institutions and funds established in other Member States will comply with those obligations.

Findings of the Court

27 It has been consistently held that, whilst direct taxation falls within their competence, the Member States must none the less exercise that competence consistently with European Union law (see Case C-387/11 *Commission* v *Belgium* [2012] ECR, paragraph 36 and case-law cited).

The failure to fulfil obligations deriving from Article 56 TFEU

28 First, it must be observed that services provided in relation to savings pensions by financial institutions and insurance undertakings, including companies which are approved savings pension fund managers, are services within the meaning of Article 57 TFEU. Such services are services normally provided for remuneration, the essential characteristic of which lies in the fact that it constitutes consideration for the services in question (see Case C-136/00 *Danner* [2002] ECR I-8147, paragraph 26).

29 It must also be stated that, from the perspective of the single market, and in order to permit the achievement of its objectives, Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services, within the meaning of Article 57 TFEU, between

Member States more difficult than the provision of services purely within one Member State (see *Commission* v *Denmark*, paragraph 38, and Case C-383/10 *Commission* v *Belgium* [2013] ECR, paragraph 42).

30 In this case, the Kingdom of Belgium does not dispute that the provisions at issue in the CIR 1992 constitute a restriction on the freedom to provide services.

31 The fact that contributions paid to a savings pension confer a right to the tax reduction provided for in Article 145/1, 5°, of the CIR 1992 solely if they are paid to financial institutions established in Belgium has the effect of rendering the freedom to provide savings pension services from other Member States more difficult than if it were purely within the Kingdom of Belgium. Those savings pension rules are liable to dissuade both Belgians liable to tax from subscribing to an individual or collective savings account or taking out savings insurance with financial institutions established in a Member State other than the Kingdom of Belgium and those institutions from offering their services on the Belgian market (see, to that effect, *Danner*, paragraph 31, and Case C-522/04 *Commission* v *Belgium* [2007] ECR I-5701, paragraph 39).

32 It is clear, however, from well-established case-law, that national measures capable of hindering the exercise of fundamental freedoms guaranteed by the FEU Treaty or of making it less attractive may none the less be allowed if they pursue an objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, inter alia, Case C-383/10 *Commission* v *Belgium*, paragraph 49 and case-law cited).

33 Again, according to settled case-law, it is for the national authorities, where they adopt a measure derogating from a principle enshrined in European Union law, to show in each individual case that that condition is satisfied. The reasons which may be invoked by a Member State by way of justification must thus be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see Case C-542/09 *Commission* v *Netherlands* [2012] ECR, paragraph 81 and case-law cited).

34 The Kingdom of Belgium pleads, first, that it is necessary to preserve the coherence of the Belgian tax system, drawing attention to the symmetry of the rules at issue, which provide that savings pension income is taxed where the payments made to the savings pension have given rise to a tax reduction, but is exempted when there has been no such reduction.

35 In that regard, the Court has previously accepted that the need to preserve the coherence of a tax system may justify a restriction on the exercise of the freedoms of movement guaranteed by the FEU Treaty but that that necessity requires the existence of a direct link between a tax advantage and a corresponding disadvantage (see, to that effect, *Commission* v *Denmark*, paragraph 70, and Case C-350/11 *Argenta Spaarbank* [2013] ECR, paragraphs 41 and 42).

36 In this case, there is admittedly a link between the tax reduction for which contributions paid to a savings pension are eligible and the taxation of the savings pension income. Under Article 39/2, 3°, of the CIR 1992, pensions, complementary pensions, annuities, capital sums, savings and surrender values are exempt if they are derived from a savings account or a savings insurance contract in respect of which the tax reduction provided for in Article 145/1, 5°, of that Code has not been granted (see, to that effect, *Bachmann*, paragraph 21, and Case C-300/90 *Commission* v *Belgium*, paragraph 14).

37 However, as the Court has stated in paragraph 71 of *Commission* v *Denmark*, with regard to a scheme providing for a similar link between the deductibility of contributions to a pension and the taxation of the corresponding benefits, the factor liable adversely to affect the coherence of the Belgian rules at issue is to be found in the fact that the transfer of residence of the person liable to tax occurs

between the time of payment of contributions to the savings pension and the receipt of savings pension income, and less in the fact that the financial institution managing the savings pension is located in another Member State.

38 Where a person liable to tax, having contracted for a savings pension with a financial institution established in Belgium, qualifies for a reduction of tax on the contributions to that savings pension, subsequently, before the time when payment of the savings pension income falls due, transfers his residence to another Member State, the Kingdom of Belgium loses the power to tax that income, at least where it has agreed, with the Member State to which residence of the person liable to tax is transferred, a double taxation agreement which provides that pensions and other comparable payments are taxable only in the Member State where the recipient of that income is resident (see, to that effect, *Commission* v *Denmark*, paragraph 72).

39 Conversely, the fact that a savings pension is acquired from a financial institution established in a Member State other than the Kingdom of Belgium is not liable, as such, adversely to affect the coherence of the rules at issue. There is nothing to prevent the Kingdom of Belgium from exercising its power of taxation over the income derived from the savings pension paid by a financial institution established in another Member State to a person liable to tax who is still resident in Belgium when that income is paid, as a counterbalance to the payments of contributions in respect of which a tax reduction was granted (see, to that effect, *Commission* v *Denmark*, paragraph 73).

40 Consequently, the rules at issue, which constitute a general refusal to grant a tax reduction in respect of contributions paid to a savings pension managed by a financial institution established in a Member State other than the Kingdom of Belgium, cannot be justified by the need to preserve the coherence of the tax system.

41 Secondly, the Kingdom of Belgium seeks to justify the rules at issue by referring to the need for effective fiscal supervision.

42 In that regard, in accordance with settled case-law, the need to guarantee the effectiveness of fiscal supervision may justify a restriction on the fundamental freedoms (Case C-383/10 *Commission* v *Belgium*, paragraph 51).

43 It must be recalled that Directive 77/799 may be invoked by a Member State in order to obtain from the competent authorities of another Member State all the information necessary to enable it correctly to assess the amount of the taxes covered by that directive (see Case C-540/07 *Commission* v *Italy* [2009] ECR I-10983, paragraph 60).

44 Further, there is no reason why the Belgian tax authorities should not request from the person liable to tax the evidence that they consider they need to effect a correct assessment of the taxes concerned and, where appropriate, refuse the tax reduction applied for if that evidence is not supplied (see, to that effect, Case C-451/05 *ELISA* [2007] ECR I-8251, paragraph 95, and Case C-383/10 *Commission* v *Belgium*, paragraph 54).

45 In those circumstances, justification of the rules at issue by the need for effective fiscal supervision cannot be accepted.

46 Furthermore, the Kingdom of Belgium cannot validly claim that protection of the interests of savers, so that the pension to which they will be entitled will be paid to them, is related to the objective of ensuring the effectiveness of fiscal supervision, which is intended to combat tax evasion (see, by analogy, the judgment of 13 March 2008 in Case C-248/06 *Commission* v *Spain*, paragraph 34, and Case C-318/10 *SIAT* [2012] ECR, paragraph 44), and not to protect persons liable to tax.

47 To the extent that it may be considered that such protection falls within the scope of the overriding reason in the public interest consisting in the protection of consumers, it is clear that the Kingdom of Belgium has not demonstrated that the provisions at issue do not go beyond what is necessary in order to ensure the attainment of the objective relied upon.

48 In that regard, in its statement of defence, the Kingdom of Belgium does not demonstrate that there do not exist other means of protecting consumers apart from the general rule that any payment to institutions established in or funds managed in other Member States cannot qualify for the tax reduction in respect of a savings pension.

49 In those circumstances, a justification based on the protection of persons liable to tax cannot be accepted.

50 It follows from the foregoing that the restriction on the freedom to provide services entailed by the rules at issue cannot be justified by the objectives relied on by the Kingdom of Belgium.

The failure to fulfil obligations deriving from Article 63 TFEU

51 Since the provisions of the FEU Treaty relating to the freedom to provide services preclude the rules at issue, there is no need to examine them separately in the light of Article 63 TFEU concerning free movement of capital (see, to that effect, *Commission* v *Denmark*, paragraph 76, and Case C-383/10 *Commission* v *Belgium*, paragraph 74).

52 Consequently, it must be held that, by adopting and maintaining the tax reduction in respect of contributions paid to a savings pension in so far as that reduction is applicable only in respect of payments to institutions and funds established in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU.

Costs

53 Under Article 138(1) of the Rules of Procedure of the Court of Justice, the unsuccessful party must be ordered to pay the costs if they have been applied for in the other party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Tenth Chamber) hereby:

1. **Declares that, by adopting and maintaining the tax reduction in respect of contributions paid to a savings pension in so far as that reduction is applicable only in respect of payments to institutions and funds established in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Article 56 TFEU;**

2. **Orders the Kingdom of Belgium to pay the costs.**

[Signatures]