Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

24 February 2022 *

(Reference for a preliminary ruling – Freedom to provide services – Article 56 TFEU – Restrictions – Tax legislation – Corporation tax – Obligation on purchasers of services to draw up and submit supporting documents to the tax authorities concerning amounts invoiced by service providers established in another Member State – No such obligation regarding purely domestic supplies of services – Justification – Effectiveness of fiscal supervision – Proportionality)

In Cases C-52/21 and C-53/21,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the cour d'appel de Liège (Court of Appeal, Liège, Belgium), made by decisions of 4 December 2020, received at the Court on 28 January 2021, in the proceedings

Pharmacie populaire – La Sauvegarde SCRL

v

État belge (C-52/21),

and

Pharma Santé – Réseau Solidaris SCRL

v

État belge (C-53/21),

THE COURT (Seventh Chamber),

composed of I. Ziemele, President of the Sixth Chamber, acting as President of the Seventh Chamber, P.G. Xuereb (Rapporteur) and A. Kumin, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: French.

after considering the observations submitted on behalf of:

– Pharmacie populaire – La Sauvegarde SCRL and Pharma Santé – Réseau Solidaris SCRL, by P. Destrée, avocat,

– the Belgian Government, by S. Baeyens, J.-C. Halleux and C. Pochet, acting as Agents,

– the European Commission, by W. Roels and V. Uher, acting as Agents,

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

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Article 56 TFEU.

2 The requests have been made in two disputes, between, on the one hand, Pharmacie populaire – La Sauvegarde SCRL ('Pharmacie populaire') (Case C-52/21) and Pharma Santé – Réseau Solidaris SCRL ('Pharma Santé') (Case C-53/21) and, on the other, the État belge (Belgian State), concerning the conditions laid down in the tax law of that Member State in order for expenses associated with purchases of services from providers established in a different Member State to be deductible from the taxable income of companies established in Belgium.

Belgian law

3 Article 57 of the Code des impôts sur les revenus (Income Tax Code) ('the CIR 1992'), in the version applicable to the dispute in the main proceedings, is worded as follows:

'The following expenses will only be regarded as professional costs if they are evidenced by the production of individual fee forms and a summary statement drawn up in the form and within the time limits determined by the King:

1. Commissions, brokerages, commercial or other rebates, ad hoc and other remuneration and fees, bonuses, reimbursements or benefits of any other kind that constitute for the recipients professional income whether or not taxable in Belgium, not including the remuneration referred to in Article 30(3);

…'

4 Article 219 of the CIR 1992, in the version applicable to the disputes in the main proceedings, provides:

'A separate levy is provided for in respect of the expenses referred to in Article 57 … which are not evidenced by the production of individual fee forms and a summary statement …

That levy is equal to 100[%] of those expenses, … unless it can be shown that the recipient of those expenses, … is a legal person …, in which case the rate is set at 50[%].

…

That levy is not applicable if the taxpayer shows that the amount of the expenses, referred to in Article 57, … is included in a tax return filed in accordance with Article 305 [of the CIR 1992] or in a similar tax return filed abroad by the recipient.

Where the amount of the expenses referred to in Article 57 … is not included in a tax return filed in accordance with Article 305 [of the CIR 1992] or in a similar tax return filed abroad by the recipient, the separate levy is not applicable to the taxpayer if the recipient has been clearly identified at the latest within 2 years and 6 months of 1 January in the tax year concerned.'

5 According to a practice known as 'administrative tolerance', referred to in particular in point 57/62 of the administrative commentary on the CIR 1992 and in Circular No Ci.RH.243/581.810 (AFER No 7/2009) of 19 February 2009, taxpayers are exempt from the requirement to produce those individual fee forms and summary statements where two conditions are satisfied. First, during the material period in the main proceedings, the recipients of the payments at issue must be persons subject to the 'Law of 17 July 1975 on business accounting'. That law having been repealed in 2014, that reference must now be understood as a reference to the business accounting obligations established in Book III, Title 3, Chapter 2, of the Code belge de droit économique (Belgian Code on Economic Law). Second, the payments at issue must be in remuneration of transactions that are not exempt from the obligation to issue invoices under the value added tax (VAT) legislation.

The disputes in the main proceedings and the question referred

6 The applicants in the main proceedings, Pharmacie populaire and Pharma Santé, both companies established in Belgium, market pharmaceutical products.

7 Both those companies have contractually entrusted LAD Sàrl, a Luxembourg company, with the task of carrying out transport schedules for medicinal products.

8 In 2010, 2011 and 2012, LAD invoiced Pharmacie populaire for scheduling costs of EUR 20 846.20, EUR 22 788.88 and EUR 16 723.44 respectively. The scheduling costs for which LAD invoiced Pharma Santé in 2008, 2009, 2010, 2011 and 2012 were EUR 32 516.23, EUR 22 653.95, EUR 25 468.33, EUR 27 197.78 and EUR 16 383.40 respectively.

9 Those facts gave rise to criminal proceedings against Pharmacie populaire and Pharma Santé, which were disposed of by judgments of the tribunal correctionnel de Liège (Criminal Court, Liège, Belgium) of 28 February 2019. According to those judgments, which have become *res judicata*, nothing in the case files established that the services were not actually provided to the applicants in the main proceedings or that the prices indicated by the applicants were not the prices actually paid. Nor did anything in the case files suggest that LAD did not genuinely exist.

10 Since the applicants in the main proceedings had not completed individual fee forms or summary statements relating to those expenses in accordance with Article 57 of the CIR 1992, the Belgian tax authorities sent them correction notices on 20 August and 4 November 2015 respectively, informing them that they intended to impose the separate levy under Article 219 of the CIR 1992 on the sums in question.

11 The applicants in the main proceedings contend that they made the payments at issue in good faith in consideration for services actually provided and that, since the recipient was a Luxembourg company subject to mandatory reporting, it was not necessary to complete individual fee forms.

12 By decisions sent to the applicants in the main proceedings on 23 November and 11 December 2015 respectively, the Belgian tax authorities maintained their position, stating inter alia that the applicants had not established that the payments at issue were included in a return filed by the recipient of those payments in accordance with Article 305 of the CIR 1992 or in a similar return filed abroad by that recipient. The amounts in question were therefore subject to the separate levy under Article 219 of the CIR 1992.

13 On 26 May 2016, the applicants in the main proceedings lodged complaints against those decisions. By decisions of 7 November 2016, the Belgian tax authorities dismissed those complaints.

14 By applications lodged on 27 January and 30 January 2017 respectively, the applicants in the main proceedings challenged those decisions before the tribunal de première instance de Liège (Court of First Instance, Liège, Belgium). Those actions were dismissed as unfounded by two judgments delivered on 25 October 2018.

15 The applicants lodged an appeal against those judgments to the referring court, the cour d'appel de Liège (Court of Appeal, Liège, Belgium).

16 The referring court notes that the administrative tolerance referred to in paragraph 5 of the present judgment does not apply to payments made in consideration for services provided by companies such as LAD whose registered office is in a different Member State and that do not have a permanent establishment in Belgium.

17 According to the referring court it appears that, by the combined effect of Article 219 of the CIR 1992 and that administrative tolerance, the obligation to complete individual fee forms and a summary statement in order to avoid application of the separate levy is imposed on the purchasers of services provided by non-resident companies and means that they are required to bear an additional administrative burden which is not required of purchasers of the same services provided by a resident supplier subject to the Belgian legislation on business accounting. As a result, such an obligation is liable to render cross-border services less attractive than services provided by resident service providers and therefore to deter those purchasers from having recourse to providers established in other Member States. That situation can therefore in its view be classified as a restriction on the freedom to provide services, in principle prohibited by Article 56 TFEU.

18 The referring court accordingly finds it necessary to seek guidance from the Court in order to determine whether the Belgian legislation at issue constitutes a restriction on the freedom to provide services and, if it does, whether such a restriction can be justified by an overriding reason in the public interest.

19 In those circumstances, the cour d'appel de Liège (Court of Appeal, Liège) stayed the proceedings and referred the following question to the Court of Justice for a preliminary ruling:

'Is Article 56 TFEU to be interpreted as precluding legislation, or a national practice, under which companies established in one Member State which use services of companies established in another Member State are required, in order to avoid a corporation tax levy of 100% or 50% of the sums invoiced by the latter, to complete and submit to the tax authorities individual fee forms and summary statements relating to those expenses whereas, if they use the services of resident companies, they are under no such obligation in order to avoid that levy?'

Consideration of the question referred

20 By its question, the referring court asks, in essence, whether Article 56 TFEU must be interpreted as precluding legislation of a Member State which requires any company established on the territory of that Member State to submit statements to the tax authorities concerning payments for services purchased from providers established in another Member State in which those providers are subject to both the legislation on the accounting system of undertakings and to an obligation to issue invoices in accordance with the VAT legislation, failing which a corporation tax levy of 50% or 100% of the value of those services will be imposed, whereas, in accordance with an administrative practice, the first Member State imposes no equivalent obligation where those services are provided by providers established on its territory.

21 As a preliminary consideration, since the legislation at issue in the main proceedings lays down an obligation to provide certain information to the tax authorities and a penalty in the form of a direct tax, where that obligation is not complied with, it is important to recall that, although direct taxation falls within the competence of the Member States, they must nonetheless exercise that competence consistently with EU law and, in particular, the fundamental freedoms guaranteed in the FEU Treaty (judgment of 11 June 2015, *Berlington Hungary and Others*, C-98/14, EU:C:2015:386, paragraph 34 and the case-law cited).

22 It should be borne in mind, first, that Article 56 TFEU precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within a Member State. Article 56 TFEU requires the abolition of any restriction on the freedom to provide services imposed on the ground that the person providing a service is established in a Member State other than that in which the service is provided (judgment of 3 March 2020, *Google Ireland*, C-482/18, EU:C:2020:141, paragraph 25 and the case-law cited).

23 National measures which prohibit, impede or render less attractive the exercise of the freedom to provide services are restrictions on that freedom. On the other hand, measures the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between the Member States and such provision within one Member State do not fall within the scope of the prohibition laid down in Article 56 TFEU (judgment of 3 March 2020, *Google Ireland*, C-482/18, EU:C:2020:141, paragraph 26 and the case-law cited).

24 Furthermore, according to the settled case-law of the Court, Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services (judgment of 30 January 2020, *Anton van Zantbeek*, C-725/18, EU:C:2020:54, paragraph 24 and the case-law cited).

25 In the light of that case-law, it must be observed that where legislation and an administrative practice impose a reporting obligation accompanied by penalty provisions which introduces a difference of treatment between service providers depending on whether or not they are established in Belgium, they must be found to be liable to render cross-border services less attractive for recipients of services established in Belgium than services provided by providers established in that Member State and to deter those recipients from having recourse to providers established in other Member States. Such legislation and such an administrative practice are therefore capable of constituting a restriction on the freedom to provide services, as the Belgian Government has moreover acknowledged in its observations.

26 That finding is not called into question by the line of argument advanced by the Belgian Government to the effect that, under Article 219 of the CIR 1992, the penalty for non-compliance with the reporting obligation established in Article 57 of that code does not apply where the payments at issue are included in a return that the recipient of those payments has filed with the Belgian tax authorities in accordance with Article 305 of that code or in a similar return filed abroad, or where that recipient has been clearly identified at the latest within two years and six months of 1 January in the tax year concerned.

27 As emerges in essence from that reasoning, in those situations, the reporting obligation under Article 57 of the CIR 1992 is simply replaced by a similar obligation, which appears not to affect in an equivalent way the provision of services purely within Belgium and is equally likely to impede or render less attractive the exercise of the freedom to provide services between the Member States.

28 Furthermore, as regards the Belgian Government's line of argument to the effect that the reporting obligations laid down by the legislation at issue in the main proceedings is limited to the information strictly necessary in order clearly to identify the payments concerned and the nature and amount of those payments, and that that information is in principle accessible in the accounts of the payer, who is not forced to carry out enquiries likely to give rise to substantial administrative costs, it is clear from the case-law that a restriction on a fundamental freedom is prohibited by the FEU Treaty even if it is of limited scope or minor importance (judgment of 18 October 2012, *X*, C-498/10, EU:C:2012:635, paragraph 30 and the case-law cited).

29 Second, it should be borne in mind that a difference of treatment amounting to a restriction on the freedom to provide services may nevertheless be warranted if it is justified by overriding reasons of public interest and, provided that that is the case, its application is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (judgment of 3 March 2020, *Google Ireland*, C-482/18, EU:C:2020:141, paragraph 45 and the case-law cited).

30 Although it has doubts as to whether any restriction may be justified by overriding reasons of public interest, the referring court has not provided any precise information in that respect.

31 The Belgian Government states in its observations that the legislation at issue in the main proceedings is justified by the need to ensure the effectiveness of fiscal supervision. In its view, the purpose of that legislation is to ensure that the amounts that a purchaser of services deducts from its taxable income correspond to the income declared by the supplier of those services. Admittedly, where the service provider is subject to Belgian accounting legislation and has to issue an invoice, the obligation on the purchaser to complete and submit individual fee forms and summary statements for those payments and the obligations on the supplier of the services in principle duplicate each other, since the data in the sales list filed by the supplier are in principle the same as those in the documents to be completed by the payer. According to the Belgian Government, that is why there is an administrative tolerance in those situations.

32 The Belgian Government nevertheless asserts that the reporting obligation on purchasers of services remains fully relevant where the service providers, although subject to the accounting legislation of their State of establishment and required to issue invoices, are not established in Belgium. In those situations, the payments made are not taxable in Belgium, as a result of the double taxation agreements relating to business profits. The Belgian tax authorities 'pass the baton' to the tax authorities of the Member State where the service provider is established, which alone is in a position to check whether that provider has in fact declared its income. All the Member States and a number of third countries participate in that spontaneous automatic exchange of information, since the information provided in that way is the information contained in the individual fee forms.

33 The Belgian Government submits that the individual fee forms and the summary statements referred to in Article 57 of the CIR 1992 remain necessary to enable the State of establishment of the service provider to carry out that check. Extending the administrative tolerance that applies to payments made by companies established in Belgium to service providers established in other Member States would entail foregoing that exchange of information and would jeopardise the supervision it enables.

34 In that regard, it can be seen from the case-law that the need to ensure the effectiveness of fiscal supervision may constitute an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services (judgments of 25 July 2018, *TTL*, C-553/16, EU:C:2018:604, paragraph 57, and of 3 March 2020, *Google Ireland*, C-482/18, EU:C:2020:141, paragraph 47 and the case-law cited).

35 As indicated in paragraph 29 of the present judgment, it is also necessary that the measures which restrict the freedom to provide services be appropriate for attaining their objective and do not go beyond what is necessary in order to attain that objective (judgment of 10 March 2021, *An Bord Pleanála*, C-739/19, EU:C:2021:185, paragraph 24).

36 In order to determine whether legislation such as that at issue in the main proceedings is appropriate, it must be borne in mind that, in order to ensure the effectiveness of fiscal supervision, which is intended to combat tax evasion, a Member State may apply measures which enable the amount of expenditure deductible in that State as business expenses to be ascertained clearly and precisely (judgment of 5 July 2012, *SIAT*, C-318/10, EU:C:2012:415, paragraph 44 and the case-law cited). There is no reason to find otherwise where the supervision enabled by those measures is supervision by another Member State.

37 As the Belgian Government noted, in essence, in its observations, the obligation on companies established in Belgium to report expenses associated with services purchased from providers established in other Member States is capable of assisting the tax authorities of those Member States to check whether the payments for those services are included in the taxable income of the payees.

38 The fact that the Belgian tax authorities provide the information in the individual fee forms referred to in Article 57 of the CIR 1992 relating to payments that are only taxable in another Member State to the tax authorities of that Member State can, in its view, enable those authorities to check the tax return of the service provider concerned.

39 As regards whether or not legislation such as that at issue in the main proceedings goes beyond what is necessary to attain the objective of ensuring the effectiveness of fiscal supervision, it should be borne in mind, first, that to explain the rationale of the administrative tolerance referred to in paragraph 5 of the present judgment, the Belgian Government states that, where the service provider is subject to Belgian accounting legislation and, under Belgian VAT legislation, is obliged to issue an invoice, the reporting obligation under Article 57 of the CIR 1992 is largely duplicated by the obligations on that provider under those two sets of legislation. As the European Commission noted in its observations, the administrative tolerance at issue is therefore based on the premiss that service providers which are subject to those accounting and VAT invoicing obligations under Belgian law do not pose the same level of risk of tax evasion as providers who are not subject to those obligations.

40 It must be observed in that respect that, since the rules governing the accounting systems of undertakings and VAT rules have been harmonised within the European Union, service providers established in other Member States are subject to obligations comparable to those on service providers established in Belgium. Moreover, it can be seen from the rules at issue in the main proceedings that the completion of individual fee forms and summary statements cannot be found to be necessary in order to enable the Belgian tax authorities to verify returns by service providers established in Belgium, since those providers are exempted from doing so where the conditions for applying the administrative tolerance referred to in paragraph 5 of the present judgment are satisfied. It cannot therefore be held that the information in the individual fee forms is necessary to enable the tax authorities of other Member States to verify the tax returns of service providers established in their territory.

41 Second, in respect of the Belgian Government's line of argument according to which the obligation on companies established in Belgium to report services supplied by service providers established in other Member States is necessary to enable a spontaneous automatic exchange of information among all the Member States and a number of third countries, it must be observed that that government has not provided any details of the legal basis for such an exchange.

42 Admittedly, both Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) and Council Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation and repealing Directive 77/799/EEC (OJ 2011 L 64, p. 1), which, in accordance with Article 28 thereof, repealed Directive 77/799 with effect from 1 January 2013, made it possible for the tax authorities of the Member States to request tax information from the tax authorities of other Member States and to exchange that information

with those authorities. Nevertheless, neither of those directives establishes an obligation on those authorities spontaneously and automatically to exchange information such as that at issue in the main proceedings.

43 Furthermore, Article 2, read together with Article 1, of Directive 77/799 allowed the tax authorities of one Member State, in a particular case, to request the tax authorities of another Member State to forward to them any information that could enable them to effect a correct assessment of taxes on income, including corporation tax, and obliged the latter authorities, if necessary, to conduct the enquiries necessary to obtain such information. Articles 1, 5 and 6 of Directive 2011/16 contain corresponding obligations. It follows that, even where there is no spontaneous automatic exchange of information, the tax authorities of the Member States are in a position, in the context of enquiries relating to a particular taxpayer, to obtain all the information they need to enable them to effect a correct assessment of the taxes in question.

44 Third, and in any event, it must be observed that the legislation at issue in the main proceedings contains a penalty, referred to as a 'separate levy', consisting of increasing the corporation tax by 50% or 100%, depending on the circumstances, of the amounts invoiced by the service providers established in other Member States.

45 According to the Belgian Government, that penalty is not intended to penalise failure to comply with the formal reporting requirements under Article 57 of the CIR 1992, but rather to deter non-compliance by neutralising the tax advantage that the purchaser and service provider could gain from it.

46 It is apparent from the information provided by the referring court and confirmed by the Belgian Government that the penalty in question is imposed wherever a Belgian company has failed to comply with its reporting obligation under the legislation at issue in the main proceedings and has not availed itself of the options, set out in paragraph 26 of the present judgment, that enable it to avoid that penalty. Even assuming that, as the Belgian Government asserts, the payer is exempt from that obligation where the payments do not exceed EUR 125, it is clear that, subject to that *de minimis* threshold, the penalty is enforceable even where the provider has in fact reported, in the Member State where it is established, income from Belgian sources received in remuneration for its services. The penalty is therefore incurred even where no tax on income has been avoided, either by the purchaser or the supplier of the services in question, as a result of non-compliance with the reporting obligation.

47 Although the Member States are free to penalise failure to comply with the administrative obligations they lay down, provided those penalties are proportionate to the objective pursued, a penalty consisting of increasing a tax by an amount that can represent 50% or even 100% of the value of the services concerned, even where no tax is avoided, goes beyond what is necessary to ensure the effectiveness of fiscal supervision. The penalty appears to be even more flagrantly disproportionate since, by virtue of the administrative tolerance referred to in paragraph 5 of the present judgment, a service provided purely within Belgium cannot give rise to a penalty, even where the service provider has not reported the payment received.

48 Accordingly, the restriction referred to in paragraph 25 of the present judgment likewise cannot be justified in the name of the fight against tax evasion, to which the applicants in the main proceeding and the Commission refer in their observations. That objective constitutes an overriding reason in the public interest capable of justifying a restriction on the exercise of the freedoms of movement guaranteed by the FEU Treaty (see, to that effect, judgment of

11 June 2009, *X and Passenheim-van Schoot*, C-155/08 and C-157/08, EU:C:2009:368, paragraph 45 and the case-law cited). In the present case, the legislation at issue can indeed help deter tax evasion, as a result of the penalty referred to in paragraph 44 of the present judgment. However, since that penalty can be applied even in the absence of any tax evasion, as noted in paragraph 46 of the present judgment, it goes beyond what is necessary in order to achieve that aim.

49 In the light of the foregoing, the answer to the question referred is that Article 56 TFEU must be interpreted as precluding legislation of a Member State which requires any company established on the territory of that first Member State to submit statements to the tax authorities concerning payments for services purchased from providers established in another Member State in which the latter are subject to both the legislation on the accounting system of undertakings, and to an obligation to issue invoices in accordance with VAT legislation, failing which a corporation tax levy of 50% or 100% of the value of those services will be imposed, whereas, in accordance with an administrative practice, the first Member State imposes no equivalent obligation where those services are provided by providers established on its territory.

Costs

50 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Seventh Chamber) hereby rules:

Article 56 TFEU must be interpreted as precluding legislation of a Member State which requires any company established on the territory of that first Member State to submit statements to the tax authorities concerning payments for services purchased from providers established in another Member State in which the latter are subject to both the legislation on the accounting system of undertakings, and to an obligation to issue invoices in accordance with legislation on value added tax, failing which a corporation tax levy of 50% or 100% of the value of those services will be imposed, whereas, in accordance with an administrative practice, the first Member State imposes no equivalent obligation where those services are provided by providers established on its territory.

[Signatures]