Case C-522/04

Commission of the European Communities

v

Kingdom of Belgium

(Failure of a Member State to fulfil obligations – Freedom of movement for persons – Freedom of movement for workers – Freedom to provide services – Freedom of establishment – Free movement of capital – Articles 28, 31, 36 and 40 of the Agreement on the European Economic Area – Directive 2002/83/EC – Tax legislation providing for less favourable treatment of contributions to occupational pension schemes paid to insurance undertakings established abroad – Taxation in Belgium of capital and surrender values paid to beneficiaries who have transferred their residence abroad – Tax convention preventing double taxation – Representative responsible)

Opinion of Advocate General Stix-Hackl delivered on 3 October 2006

Judgment of the Court (Second Chamber), 5 July 2007

Summary of the Judgment

1. *Member States – Obligations – Failure to fulfil obligations – Maintenance of a national provision incompatible with Community law*

2. *Freedom of movement for persons – Workers – Freedom of establishment – Freedom to provide services – Citizens of the European Union – Restrictions – Tax legislation*

(Arts 18 EC, 39 EC, 43 EC and 49 EC; EEA Agreement, Arts 28, 31 and 36; European Parliament and Council Directive 2002/83, Art. 5(1); Council Directive 92/96, Art. 4)

1. Even if, in practice, the authorities of a Member State do not apply a national provision which is at variance with Community law, the principle of legal certainty nevertheless requires that that provision be amended.

(see para. 70)

2. A Member State which:

– makes the tax-deductibility of employers' insurance contributions due under a supplementary pension and life assurance scheme subject to the condition that those contributions be paid to an insurance undertaking or welfare fund established in that Member State;

– makes tax reduction for long-term savings, granted for personal supplementary pension and life assurance contributions and premiums paid in the form of deductions made by the employer from the employee's remuneration, or in the form of deductions made by the undertaking from the remuneration of a director who is not under a contract of employment, subject to the condition that those contributions and premiums be paid to an insurance undertaking or welfare fund established in that Member State;

– provides that, when capital, surrender values and savings are paid or allocated to a taxpayer

who has previously transferred his residence or the primary location of his assets abroad, the payment or allocation is deemed to have taken place on the day preceding that transfer, and by treating in the same way as an allocation any transfer, so that every insurer is under an obligation to withhold amounts in respect of income tax from capital and surrender values paid to a non-resident who has been, at one time or another, resident for tax purposes in that Member State, in so far as those sums have been built up, entirely, or partially, during the period in which the person concerned was resident in that State for tax purposes, even though bilateral tax agreements concluded by that State grant the right to tax such income to another Contracting State;

– levies tax on transfers of capital or surrender values built up by means of employers' contributions or personal contributions for supplementary retirement benefits, where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another pension fund or insurance institution established outside that Member State, whereas such a transfer does not constitute a taxable transaction if the capital or surrender values are transferred to another pension fund or insurance institution established within that State;

– requires foreign insurers who have no place of business in that Member State to obtain authorisation, before providing their services in that State, for a representative residing there, who must personally assume, in writing, responsibility towards the State for paying the annual tax on insurance contracts, interest and fines which may be due in respect of contracts relating to risks situated in that State

thereby fails to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC, Articles 28, 31 and 36 of the European Economic Area Agreement and Article 4 of Directive 92/96 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267 and 90/619 (third life assurance Directive) – following revision, Article 5(1) of Directive 2002/83 concerning life assurance.

Since the provisions of the Treaty and of the EEA Agreement on freedom of movement for workers, freedom of establishment and freedom of movement for persons preclude such legislation, it is not necessary to consider that legislation separately in the light of Article 56 EC on free movement of capital.

(see paras 79-80, operative part)

JUDGMENT OF THE COURT (Second Chamber)

5 July 2007 (*)

(Failure of a Member State to fulfil obligations – Freedom of movement for persons – Freedom of movement for workers – Freedom to provide services – Freedom of establishment – Free movement of capital – Articles 28, 31, 36 and 40 of the Agreement on the European Economic Area – Directive 2002/83/EC – Tax legislation providing for less favourable treatment of contributions to occupational pension schemes paid to insurance undertakings established abroad – Taxation in Belgium of capital and surrender values paid to beneficiaries who have transferred

their residence abroad – Tax convention preventing double taxation – Representative responsible)

In Case C-522/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 December 2004,

Commission of the European Communities, represented by R. Lyal and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by E. Dominkovits and M. Wimmer, acting as Agents,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, P. K?ris (Rapporteur), J. Klu?ka, R. Silva de Lapuerta and L. Bay Larsen, Judges,

Advocate General: C. Stix-Hackl,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 3 October 2006,

gives the following

Judgment

1 By its application the Commission of the European Communities is requesting the Court to find that:

– by making the deductibility of employers' supplementary pension and life assurance contributions subject to the condition, laid down in Article 59 of the Code des impôts sur les revenus 1992 ('Income Tax Code 1992') consolidated by the Royal Decree of 10 April 1992 (Moniteur belge of 30 July 1992, p. 17120), as amended by the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages (Moniteur belge of 15 May 2003, p. 26407, and – rectification – Moniteur belge of 26 May 2003, p. 28892; 'the CIR 1992'), that those contributions be paid to an insurance undertaking or welfare fund established in Belgium;

– by making the tax reduction for long-term savings, granted pursuant to Articles 145/1 and 145/3 of the CIR 1992 for personal supplementary pension and life assurance contributions in the form of deductions made by the employer from the employee's remuneration, subject to the condition that the contributions be paid to an insurance undertaking or welfare fund established in Belgium;

– by providing, in Article 364a of the CIR 1992, that, when capital, surrender values and savings referred to in Article 34 of the CIR 1992 are paid or allocated to a taxpayer who has previously transferred his residence or the primary location of his assets abroad, the payment or

allocation is deemed to have taken place on the day preceding that transfer, and by treating, pursuant to the second paragraph of Article 364a, in the same way as an allocation any transfer referred to in Article 34(2)(3), so that every insurer is under an obligation to withhold amounts in respect of income tax, in accordance with Article 270 of the CIR 1992, from capital and surrender values paid to a non-resident who has been, at one time or another, resident for tax purposes in Belgium, in so far as those sums have been built up, entirely, or partially, during the period in which the person concerned was a Belgian resident for tax purposes, even though bilateral tax agreements concluded by the Kingdom of Belgium grant the right to tax such income to another Contracting State;

– by levying tax, pursuant to Article 364b of the CIR 1992, on transfers of capital or surrender values built up by means of employers' contributions or personal contributions for supplementary retirement benefits, where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another pension fund or insurance institution established outside Belgium, while such a transfer does not constitute a taxable transaction if the capital or surrender values are transferred to another pension fund or insurance institution established in Belgium; and

– by requiring, on the basis of Article 224/2a of the Règlement général sur les taxes assimilées au timbre (General Regulation on taxes assimilated to stamp duty) resulting from the Royal Decree of 3 March 1927 (Moniteur belge of 6 March 1927, p. 921), as amended by the Royal Decree of 30 July 1994 (Moniteur belge of 1 September 1994, p. 22260; 'the general regulation'), foreign insurers who have no place of business in Belgium to obtain authorisation, before providing their services in Belgium, for a representative residing in Belgium, who must personally assume, in writing, responsibility towards the State for paying the annual tax on insurance contracts, interest and fines which may be due in respect of contracts relating to risks situated in Belgium,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC, 49 EC and 56 EC and Articles 28, 31, 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement'), and Council Directive 92/96/EEC of 10 November 1992 on the coordination of laws, regulations and administrative provisions relating to direct life assurance and amending Directives 79/267/EEC and 90/619/EEC (third life assurance Directive) (OJ 1992 L 360, p. 1), – following revision, Articles 5(1) and 53(2) of Directive 2002/83/EC' of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ 2002 L 345, p. 1).

Legal context

The EEA Agreement

2 Articles 28, 31, 36 and 40 of the EEA Agreement correspond, respectively, to Article 39 EC, 43 EC, 49 EC and 56 EC.

Community rules

3 Article 1(1) of 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, certain excise duties and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2003/93/EC of 7 October 2003 (OJ 2003 L 264, p. 23; 'Directive 77/799'), states:

‘In accordance with this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and capital and any information relating to the assessment of the following indirect taxes:

– taxation of insurance premiums referred to in the sixth indent of Article 3 of Council Directive 76/308/EEC [of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17; ‘Directive 76/308’)],

…’

4 Under Article 2 of Directive 76/308:

‘This Directive shall apply to all claims relating to:

…

(h) taxes on insurance premiums;

…’

5 Article 3 of Directive 76/308 states:

‘In this Directive:

…

– “taxes on insurance premiums” means:

…

in Belgium: (i) Taxe annuelle sur les contrats d’assurance [annual tax on insurance contracts]

…’

6 Articles 4 et seq. of Directive 76/308 lay down the rules to be incorporated into the laws, regulations and administrative provisions of the Member States to ensure the recovery in each Member State of the claims referred to in Article 2 of the Directive which arise in another Member State.

7 Article 5(1) of Directive 2002/83 states:

‘Authorisation shall be valid for the entire Community. It shall permit an assurance undertaking to carry on business there, under either the right of establishment or freedom to provide services.’

8 Article 50 of Directive 2002/83, entitled ‘Taxes on premiums’, provides that:

‘(1) Without prejudice to any subsequent harmonisation, every assurance contract shall be subject exclusively to the indirect taxes and parafiscal charges on assurance premiums in the Member State of the commitment, …

…

(3) Pending future harmonisation, each Member State shall apply to those assurance

undertakings which cover commitments situated within its territory its own national provisions for measures to ensure the collection of indirect taxes and parafiscal charges due under paragraph 1.’

9 Article 53(2) of Directive 2002/83 states:

‘Under the conditions laid down by national law, each Member State shall authorise agencies and branches set up within its territory and covered by this Title to transfer all or part of their portfolios of contracts to an assurance undertaking with a head office in another Member State, if the competent authorities of that Member State certify that after taking the transfer into account the accepting office possesses the necessary solvency margin.’

10 According to point (k), entitled ‘arrangements introduced by the host Member State for charging indirect taxes on insurance premiums for policies concluded under the freedom to provide services: appointment of a tax representative of the insurer’, of subsection 3, concerning the application of the principles relating to the general good to the insurance sector, of Title II, entitled ‘The general good in the third insurance directives; applicability of rules promoting the general good’, of the Commission Interpretative Communication – Freedom to provide services and the general good in the insurance sector’ (OJ 2000 C 43, p. 5; ‘the interpretative communication’), the Member States may require the appointment of a tax representative of the insurer doing business under the freedom to provide services to guarantee the home Member State that its own legislation will be complied with and that the above taxes and charges will be charged, provided the practical arrangements whereby that Member State implements the measure comply with the criteria laid down by the Court of Justice of the European Communities, and in particular the requirements of necessity and proportionality.

National law

11 Article 34 of the CIR 1992 is worded as follows:

‘(1) Irrespective of the person liable, the beneficiary, the classification or the detailed rules for the determining and granting thereof, pensions, income and allowances in lieu, comprise:

…

(2) capital, surrender values of life assurance contracts, pensions, supplementary pensions and income, accruing in whole or in part from:

(a) personal supplementary pension and life assurance contributions made with a view to building up a pension or a capital sum payable either during the insured’s lifetime or on his death, or employer’s contributions …;

(b) contributions and premiums paid in order to build up a supplementary pension as referred to in the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages, including supplementary pensions allocated in implementation of a solidarity commitment (entered into, at the sectoral level, by a joint committee or sub?committee or, at the level of an individual undertaking, by the employer for the benefit of the workers and/or persons entitled through them) and the pensions accruing from contributions and premiums as referred to in the first, eighteenth and nineteenth subparagraphs of Article 38(1);

(c) contributions and premiums paid in order to build up a supplementary pension envisaged in the law referred to in point (b), where those contributions are paid in order to continue, on an individual basis, with a pension commitment as referred to in Article 33 of that law;

…

The term “supplementary pension” – referred to in the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages – shall be understood as meaning the retirement pension and/or survivors pension (in the case of death of the contributor before or after retirement), or the capital value corresponding thereto, which are granted, on the basis of compulsory transfers set out in pension rules or in a pension agreement, in addition to a pension laid down under a statutory social security scheme;

…

(2) Income from a savings pension includes:

(i) savings placed in a collective or individual savings account;

(ii) pensions, income, capital and surrender values of a savings insurance;

(iii) The following transfers:

– the partial transfer of sums in a savings account or of the savings insurance technical reserves;

– the full transfer of the assets of an individual or collective savings account to a savings insurance;

– the full transfer of saving insurance technical reserves to an individual or collective savings account.

…’

12 The contributions and premiums referred to in the first, eighteenth and nineteenth subparagraphs of Article 38(1) of the CIR 1992, to which the concluding words of subparagraph (2)(b) of Article 34(1) of that code refer, are, first, employers’ insurance contributions and premiums paid in respect of supplementary pension and life assurance with a view to the building up of a pension or capital sum payable either during the employee’s lifetime or in the event of his death for the benefit of employees and, second, company insurance contributions and premiums paid in respect of insurance of a similar nature for the benefit of company managers.

13 Article 52 of the CIR 1992 states:

‘Subject to Articles 53 to 66a, business expenses include, inter alia:

…

(3) remuneration of members of staff and the following related expenses:

…

(b) employers’ insurance contributions and premiums paid in respect of:

– supplementary pension and life assurance in order to build up a pension or a capital sum payable either during the employee’s lifetime or in the event of his death;

– a collective or individual commitment in respect of a supplementary retirement pension

and/or survivors pension in order to build up a pension or a capital sum payable either during the employee's lifetime or in the event of his death;

– a solidarity commitment as referred to in Articles 10 and 11 of the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages;

– a collective or individual commitment which must be regarded as an addition to statutory compensation in the event of death or incapacity for work following an accident at or outside work or an occupational disease or other illness;

…

(7) personal contributions due under social legislation or legal or regulatory rules excluding the persons concerned from the field of application of social legislation;

(7a) the contributions referred to in (7) above include, inter alia, [supplementary retirement or survivors pensions of self?employed persons];

…'

14 Article 59(1) of the CIR 1992 states:

'The employers' contributions and premiums referred to in Article 52(3)(b) shall be deductible as business expenses only under the following conditions and within the following limits:

(1) they must be definitively paid to an insurance undertaking or a welfare institution established in Belgium;

…'

15 Article 145/1 of the CIR 1992 states:

'Within the limits and under the conditions laid down by Articles 145/2 to 145/16, a tax reduction is granted on the following expenses which have been actually paid during the taxable period:

(1) personal contributions and premiums referred to in Article 34(1)(2)(a) to (c), in the form of deductions made by the employer from the employee's remuneration, or in the form of deductions made by the undertaking from the remuneration of a director who is not under a contract of employment;

(2) supplementary pension and life assurance contributions that the taxpayer has definitively paid in Belgium in order to build up a pension or capital sum payable during the insured's lifetime or on his death in performance of a life assurance contract concluded by him personally;

…'

16 Article 145/3 of the CIR 1992 is worded as follows:

‘The personal contributions and premiums referred to in Article 145/1(1) shall be taken into consideration for the reduction on the condition that they are definitively paid to an insurance undertaking or welfare institution established in Belgium and that the benefits payable on retirement, both statutory and non-statutory, expressed as annual income, do not exceed 80% of the last gross usual annual earnings and take into account a usual period of professional activity. Indexation of the income is allowed.’

17 Article 270 of the CIR 1992 states:

‘The following persons shall be liable to have income tax withheld at source:

(1) the taxpayers referred to in Articles 3, 179 or 220 who, in their capacity as a person liable, custodian, representative or intermediary, pay in or allocate to Belgium or another country, earnings referred to in Article 30(1) and (2), pensions, income and allowances, and the non?residents referred to in Article 227 in respect of whom the earnings referred to in Article 30(1) and (2), pensions, income and allowances which they pay in or allocate to Belgium or another country constitute business expenses for the purposes of Article 237;

…

(3) persons who, in their capacity as a person liable, custodian, representative or agent, pay or allocate income of performing artists or sportsmen referred to in Article 228(2)(8) or, if there are no such persons, the organiser of the performances or sports events;

(4) a person who is appointed by the members of a company or association as referred to in Article 229(3) to represent them on tax matters or, if there is no such person, each of the partners or members jointly and severally;

(5) persons who are required to register acts and declarations pursuant to Article 35 of the Code des droits d’enregistrement, d’hypothèque et de greffe (Code of registration, mortgage and registry charges) where the acts or declarations concerned attest to the transfer, for consideration, of immovable property situated in Belgium or real rights in respect of that property, by a taxable person as referred to in Article 227(1) or (2);

(6) persons who, as insolvency administrators, liquidators of judicial compositions, or company liquidators, or performing similar duties, are required to honour debts in the form of remuneration within the meaning of Article 30.’

18 Article 364a of the CIR 1992 states:

‘When the capital, surrender values and savings referred to in Article 34 are paid or allocated to a taxpayer who has previously transferred his residence or the primary location of his assets abroad, the payment or allocation is deemed to have taken place on the day preceding that transfer.

For the purposes of the first paragraph, any transfer referred to in Article 34(2)(3) shall be treated in the same way as an allocation.’

19 Article 364b of the CIR 1992 states:

‘When capital, or surrender values, built up by means of personal contributions referred to in Article 52(7)a or Article 145/1(1), employers’ contributions or company contributions are transferred, by the welfare institution or insurance undertaking with which they have been built up, in favour of the beneficiary or persons entitled through him, under a pension commitment or similar

pension agreement, that transaction is not regarded as a payment or an allocation, even if the transfer is carried out at the beneficiary's request, without prejudice to the right to levy tax at the time of subsequent payment or allocation by the institution or undertaking to the beneficiary.

The first paragraph does not apply to the transfer of capital or of surrender values to a welfare institution or insurance undertaking established abroad.'

20 The Article 173 of the Code des taxes assimilées au timbre (Code on taxes assimilated to stamp duty) ('the CTAT'), as in force on 1 January 2004, is worded as follows:

'Insurance contracts shall be subject to an annual tax if one of the three conditions below is met:

(1) the insurer carries on a professional insurance business, and has his principal place of business, an agency, a branch, a representative or some other place of business in Belgium;

(2) the insured person has his domicile or habitual residence in Belgium;

(3) the subject of the contract is movable or immovable property situated in Belgium.'

21 The first paragraph of Article 176/1 of the CTAT states:

'The tax liability is calculated on the total amount of premiums or contributions, plus charges, to be paid or borne during the tax year either by the insured persons or by the beneficiaries and their employers.'

22 Article 177 of the CTAT provides that the annual tax on insurance contracts shall be paid:

'(1) by the insurance associations, funds, companies or undertakings, pension agencies and legal persons responsible for implementing the obligation of solidarity in the context of the pension schemes referred to in the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages, and by all other insurers when they have their principal place of business, an agency, a branch, a representative or some other place of business in Belgium;

(2) by brokers and any other intermediaries resident in Belgium, for contracts concluded through them with foreign insurers who do not have a representative responsible as referred to in Article 178 in Belgium;

(3) by the insured person, in all other cases.'

23 Article 178 of the CTAT provides:

'…

Foreign insurers which have a branch, agency or some other place of business in Belgium shall also be required, before carrying on any operation in Belgium, to have authorised by the Minister for Finance a representative residing in Belgium, who must personally assume, in writing, responsibility towards the State for paying the annual tax on insurance contracts and any fines which may be payable.

In the case of the death of that representative, or of the withdrawal of his ministerial authorisation, or of any event leading to his incapacity, he shall be replaced immediately.

…'

24 Article 224/2(a) of the general regulation states:

‘In the cases referred to in Article 177(3) of the [CTAT], the foreign insurance undertaking shall pay the tax and, where relevant, interest and fines, on behalf of the insured person. To that end, any foreign insurance undertaking which has no agency, branch or other place of business in Belgium and which wishes to offer to underwrite contracts relating to risks situated in Belgium must, before carrying out such operations, have authorised by the Minister for Finance a representative residing in Belgium who personally assumes, in writing, responsibility towards the State for paying the annual tax on insurance contracts, interest and fines which may be due in respect of the abovementioned contracts.’

Pre?litigation procedure

25 After giving the Kingdom of Belgium formal notice to submit its observations on the compatibility of various provisions of Belgian legislation with Articles 18 EC, 39 EC, 43 EC, 49 EC and 56 EC, Articles 28, 31, 36, and 40 of the EEA Agreement and Articles 4 and 11(2) of Directive 92/96, the Commission issued a reasoned opinion on 19 December 2003 requesting that Member State to take the measures necessary to comply with that opinion within a period of two months of receiving it.

26 As it found the Kingdom of Belgium’s response to the reasoned opinion to be unsatisfactory, the Commission brought the present action.

The action

The obstacles to the freedom to provide services

Arguments of the parties

27 According to the Commission, Article 59 of the CIR 1992, in as much as it makes the deduction of employers’ contributions and premiums due in respect of supplementary pension and life assurance subject to the condition that they be paid to an insurance undertaking or welfare institution established in Belgium, and Article 145/3 of the CIR 1992, in as much as it makes the tax reduction for personal supplementary pension and life assurance contributions and premiums subject to the same condition, constitute a restriction on the freedom to provide services. Such legislation dissuades, first, interested persons from taking out supplementary retirement insurance from insurance undertakings or welfare institutions established in another Member State and, second, those undertakings and institutions from offering their services on the Belgian market. There is no objective reason enabling the Kingdom of Belgium to justify that legislation since, by reason of bilateral agreements or on the basis of administrative circulars, its competent authorities accept the deduction of contributions paid abroad.

28 The Commission submits that an obstacle to the freedom to provide services is also constituted by the discriminatory rule in Article 364b of the CIR 1992 which provides for the taxation of capital or surrender values built up by means of employers’ contributions or personal contributions in respect of supplementary retirement insurance which are transferred to a pension fund or insurance institution established abroad. Such a transfer is not taxable when made to a pension fund or insurance institution established in Belgium.

29 In addition, the Commission claims that Article 224/2a of the general regulation, which requires foreign insurance undertakings to appoint a representative residing in Belgium, who must give a personal undertaking to pay the annual tax on insurance contracts, combined with the joint

and several liability of the insured person, as laid down in Article 177(3) of the CTAT, is disproportionate to the need to guarantee payment of that tax. That result could be achieved by less restrictive means, such as information exchange agreements with the other Member States.

30 The Commission further points out that Directive 77/199 permits such assistance between Member States, which, in conjunction with the joint liability of insured residents, makes the appointment of a representative unnecessary.

31 Finally, the Commission adds that the national legislation compromises the rights of insurance institutions and bodies by introducing tax provisions which are contrary to the rules of the EC Treaty concerning the principles of freedom of movement and non?discrimination. First, those institutions and bodies which have obtained authorisation in a Member State, pursuant to Article 5 of Directive 2002/83, should be able to carry on their business under either the right of establishment or the freedom to provide services throughout the Community. Second, the same institutions and bodies established in a Member State should be authorised, in accordance with Article 53(2) of that directive, to transfer all or part of their portfolios to an accepting office established in the Community.

32 The Belgian Government points out that, as a result of the amendments made by the framework law of 27 December 2005 (Moniteur belge of 30 December 2005, p. 57315), the Royal Decree of 15 February 2006 amending [the general regulation] (Moniteur belge of 2 March 2006, p. 12463) and the Ministerial Decree of 8 March 2006 implementing Article 224(3) [of that regulation] (Moniteur belge of 21 March 2006, p. 16249), there is no longer an obligation to appoint a tax representative for insurance undertakings which are not established in Belgium but which have their principal place of business in the territory of the European Economic Area.

Findings of the Court

– Admissibility

33 It must be pointed out, at the outset, that, by its action, the Commission requests the Court to find, inter alia, that the Kingdom of Belgium has failed to fulfil its obligations under Article 11(2) of Directive 92/96, following revision, Article 53(2) of Directive 2002/83. However, having regard to Annex VI of Directive 2002/83, consisting of a correlation table, it must be found that Article 11(2) of Directive 92/96 corresponds not only to Article 53(2) of Directive 2002/83 but also to Article 14(1) of that directive. In those circumstances, it must be found that the Court is not in a position to be able to determine, with any certainty, the legal basis on which it is to give judgment on the assessment of the validity of that complaint.

34 It is therefore necessary to declare the claim, alleging failure to comply with Article 11(2) of Directive 92/96, now – following revision – Article 53(2) of Directive 2002/83, inadmissible.

– Substance

35 It should be noted that, although direct taxation falls within the competence of the Member States, they must none the less exercise that competence consistently with Community law (see, in particular, Case C?150/04 *Commission* v *Denmark* [2007] ECR I?0000, paragraph 34 and the case?law cited).

36 It should also be borne in mind that the provision of insurance constitutes a service within the meaning of Article 50 EC and that Article 49 EC precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see *Commission* v *Denmark*, paragraph 37, and the

case?law cited).

37 With reference to the single market and in order to permit the achievement of its objectives, Article 49 EC 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 one Member State (see *Safir*, paragraph 23, *Commission* v *Denmark*, paragraph 38, and the case?law cited).

38 In addition, according to the Court's case-law, Article 49 EC precludes, inter alia, any national legislation which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see, to that effect, Case C?118/96 *Safir* [1998] ECR I?1897, paragraph 22, and Joined Cases C?544/03 and C?545/03 *Mobistar and Belgacom Mobile* [2005] ECR I?7723, paragraph 29).

39 In the present case, it should be noted that, by making, pursuant to Article 59 of the CIR 1992, the deductibility of employers' insurance contributions and premiums due in respect of supplementary pension and life assurance subject to the condition that they be paid to an insurance undertaking or welfare fund established in Belgium and, pursuant to Articles 145/1 and 145/3 of the CIR 1992, the tax reduction for personal supplementary pension and life assurance contributions in the form of deductions made by the employer from the employee's remuneration, or in the form of deductions made by the undertaking from the remuneration of a director who is not under a contract of employment, subject to the condition that the contributions be paid to an insurance undertaking or welfare fund established in Belgium, the Belgian legislation has the effect of rendering the freedom to provide insurance services from other Member States more difficult than if it were purely within the Kingdom of Belgium. Those measures are liable to dissuade individuals from taking out insurance with foreign insurance companies. Consequently, those measures constitute obstacles to the freedom to provide services laid down in Article 49 EC.

40 That conclusion must also apply in respect of Article 364b of the CIR 1992, under which capital or surrender values which are transferred to a pension fund or insurance undertaking established abroad are taxed, while no such taxation is provided for where transfers are made to a pension fund or to an insurance undertaking established in Belgium. That measure is liable to further impede the activities of a provider of insurance services established in a Member State other than the Kingdom of Belgium where it lawfully provides such services.

41 Finally, as regards the obligation laid down in Article 224/2a of the general regulation for an insurance undertaking established in another Member State to appoint a representative in Belgium, it must be found that such an obligation, as a result of the costs and constraints which it entails, including for undertakings in possession of authorisation within the meaning of Article 5 of Directive 2002/83, is liable to dissuade those undertakings from offering their services in Belgium. Consequently, such legislation also constitutes an obstacle to the freedom to provide services.

42 The Commission also claims that the Kingdom of Belgium has failed to fulfil its obligations under Article 36 of the EEA Agreement relating to the freedom to provide services.

43 As stated in Article 6 of the EEA Agreement, in so far as they are identical in substance to the corresponding rules of the Treaty and to acts adopted in application of the Treaty, the provisions of the Agreement are, in their implementation and application, to be interpreted in conformity with the relevant rulings of the Court given prior to the date of signature of that Agreement.

44 Furthermore, both the Court of Justice and the Court of the European Free Trade Association (EFTA) have recognised the need to ensure that the rules of the EEA Agreement

which are identical in substance to those of the Treaty are interpreted uniformly (judgment of the Court of Justice in Case C?471/04 *Keller Holding* [2006] ECR I?2107, paragraph 48, and the case?law cited, and Case C?345/05 *Commission* v *Portugal* [2006] ECR I?0000, paragraph 40, and of the EFTA Court in Case E?1/03 *EFTA Surveillance Authority* v *Iceland* [2003] EFTA Court Report 143, paragraph 27).

45 It is to be noted that the rule prohibiting restrictions on the freedom to provide services laid down in Article 36 of the EEA Agreement is identical to that established in Article 49 EC.

46 In those circumstances, it must be concluded that the Belgian legislation at issue constitutes an obstacle to the freedom to provide services laid down in Article 49 EC and Article 36 of the EEA Agreement.

47 It follows, however, from well-established case?law that national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided they pursue a legitimate objective compatible with the Treaty, are justified by imperative requirements in the general interest, are suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it (see, to that effect, Case C?9/02 *De Lasteyrie du Saillant* [2004] ECR I?2409, paragraph 49; Case C?470/04 *N* [2006] ECR I?7409, paragraph 40; and *Commission* v *Denmark*, paragraph 46).

48 The Belgian Government, it must be noted, puts forward justification only in respect of the legislation requiring insurance undertakings established in another Member State to appoint a representative residing in Belgium. Consequently, that justification must be reviewed by the Court. As regards, however, the other measures covered by the Commission's complaint alleging the infringement of the rule relating to the freedom to provide services laid down in Articles 49 EC and 36 of the EEA Agreement, the Commission's action must already be considered to be founded since no justification has been put forward by the Belgian Government as regards those measures.

49 The Belgian Government submits that the obligation to appoint a representative residing in Belgium is necessary to meet the objective relating to the need to ensure payment of the annual tax on insurance contracts, interest and fines which may be due in respect of contracts relating to risks situated in Belgium, entered into with insurance undertakings established in another Member State. In addition, given that that requirement has no bearing on the authorisation of an insurance undertaking or on the transfer of its portfolio, it is not disproportionate to the objective pursued.

50 According to the Commission, the general and absolute obligation laid down in Article 224/2a of the general regulation, which requires foreign insurance undertakings to appoint a representative residing in Belgium, combined with the joint and several liability of the insured person, resulting from Article 177(3) CTAT is a disproportionate measure which constitutes an obstacle to the freedom of insurance companies and institutions established in other Member States to provide services. The payment of the annual tax on insurance contracts could be ensured by less restrictive means, such as the mutual assistance by the competent authorities of the Member States in the field of taxation of insurance premiums laid down by Directive 77/799.

51 In order to determine whether the obligation, laid down in Article 224/2a of the general regulation, to appoint a representative residing in Belgium is necessary to ensure payment of the annual tax on insurance contracts, interest and fines which may be due in respect of contracts concluded abroad for risks situated in Belgium, it must be determined whether that objective could be met by means of less restrictive measures.

52 First, as regards the establishment of that tax, it is clear that the first indent of Article 1(1) of Directive 77/799 provides for the exchange by the authorities of the Member States of any information that may enable them to effect a correct assessment of taxes on insurance premiums, in particular of the annual tax on insurance contracts laid down under Belgian law.

53 Second, as regards the payment of the annual tax on insurance contracts, it should be pointed out that, in accordance with Article 50(3) of Directive 2002/83, the Kingdom of Belgium may apply to those assurance undertakings which cover commitments situated within its territory its national provisions for measures to guarantee the collection of indirect taxes and parafiscal charges on insurance premiums in respect of contracts relating to risks situated in that Member State.

54 It is apparent from Article 177 of the CTAT that the insured person is personally liable for payment of the annual tax on insurance contracts where the contract concerned has been entered into with an insurer who is not established in Belgium and who does not have an agency, branch, representative or some other place of business or a representative responsible within the meaning of Article 178 of the CTAT, and the contract has not been entered into through a broker or other intermediary resident in Belgium.

55 It follows that Belgian law contains measures capable of fulfilling the objective of ensuring payment of that tax that are less prejudicial to the freedom to provide services than the obligation to appoint a representative responsible residing in Belgium.

56 Third, as regards recovery of the annual tax on insurance contracts, Directive 76/308 specifies that taxation of insurance premiums, including, as provided in the sixth indent of Article 3 of that directive, that annual tax, can be the subject of mutual assistance for its recovery.

57 It follows from the foregoing that, the Kingdom of Belgium has the means necessary to recover the annual tax on insurance contracts. It follows that the obligation, for insurance undertakings which are not established in that Member State, to appoint a representative responsible residing in Belgium goes beyond what is necessary to ensure payment of that tax and is therefore disproportionate to that objective.

58 Consequently, the arguments presented by the Belgian Government to justify the obligation laid down in Article 224a of the general regulation to appoint a representative responsible in Belgium cannot be upheld. It must therefore be concluded that, as regards that obligation, the Commission’s complaint alleging infringement of the rule relating to the freedom to provide services laid down in Articles 49 EC and 36 of the EEA Agreement must be considered to be founded.

59 Therefore, there must be a finding of infringement regarding the latter two provisions.

60 In the light of the above, it must be found that, in maintaining in force the legislation in dispute the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 36 of the EEA Agreement and Article 4 of Directive 92/96, following revision, Article 5(1) of Directive 2002/83.

The obstacle to the freedom of movement for persons

Arguments of the parties

61 According to the Commission, Article 59 of the CIR 1992, in so far as it makes the deduction of employers’ insurance contributions and premiums due in respect of supplementary pension and

life assurance subject to the condition that they be paid to an insurance undertaking or welfare institution established in Belgium, and Articles 145/1 and 145/3 of the CIR 1992, in so far as they make the reduction of tax for personal contributions and premiums for supplementary pension and life assurance subject to the same condition, run counter to freedom of movement for employed and self?employed persons. When such workers who have worked in a Member State other that the Kingdom of Belgium where they joined an occupational pension scheme come to work in that latter Member State, the contributions paid into the scheme cannot be deducted or give rise to a tax reduction. However, the income resulting from those schemes is taxable in Belgium when those workers are resident there.

62 Similarly, the Commission considers that the taxation of capital or surrender values when they are transferred to a pension fund or insurance institution established abroad resulting from Article 364b of the CIR 1992 constitutes an unjustified impairment of freedom of movement and freedom of establishment for employed and self?employed persons residing in Belgium who wish to go to another Member State in order to carry on an economic activity there and who, at that juncture, want to transfer that capital or surrender values. The emigration of a Belgian resident to another Member State does not constitute an ‘abuse’ but the exercise of a fundamental right recognised in Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement.

63 Finally, the Commission submits that Article 364a of the CIR 1992, which creates the fiction that the payment or allocation of capital, surrender values and savings takes place on the day preceding the transfer of the taxpayer’s residence or of the primary location of his assets abroad, constitutes an unjustified impairment of freedom of movement and freedom of establishment of employed and self?employed persons and of the general right of freedom of movement for persons under Article 18 EC.

64 In its letter of 30 May 2006 in response to a question posed by the Court, the Belgian Government stated that, following a judgment of the Belgian Cour de Cassation (Court of Cassation) of 5 December 2003, the Belgian authorities now apply the provisions of Article 364a of the CIR 1992 only where no agreement for the avoidance of double taxation has been concluded or where such an agreement gives the Kingdom of Belgium the right to tax income. In addition, capital is taxed only from the time that it is actually paid or allocated and at identical rates to those which apply to Belgian residents.

Findings of the Court

65 It should be pointed out, at the outset, that, according to the Court’s settled case?law, the provisions of the Treaty relating to freedom of movement for workers and those on freedom of establishment preclude, inter alia, the Member State of origin from obstructing the freedom of one of its nationals to accept and pursue employment in another Member State or the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see, to that effect, inter alia, *Portugal* v *Commission*, paragraphs 17 and 18, and the case?law cited).

66 In the present case, as regards, first, the refusal, (i) to grant a right to deduct employers’ insurance contributions and premiums due in respect of supplementary pension and life assurance where they are paid to an insurance undertaking or a welfare institution which is not established in Belgium, which results from Article 59 of the CIR 1992, and (ii) to grant, pursuant to Articles 145/1 and 145/3 of the CIR 1992, the tax reduction on personal supplementary pension and life assurance contributions and premiums paid to bodies established in other Member States, the national legislation has the effect of granting a tax advantage which varies depending on the place in which those contributions and premiums are collected and is accordingly likely to dissuade employed and self?employed persons from exercising their right to move freely in another Member

State.

67 It follows that Articles 59, 145/1 and 145/3 of the CIR 1992 impair the free movement of employed persons and the freedom of establishment of self?employed persons as guaranteed by Articles 39 EC and 43 EC.

68 Second, as pointed out by the Advocate General in paragraph 59 of her Opinion, the fiction created by Article 364a of the CIR 1992 seeks to allow taxation by reason of the crossing of a border by employed or self-employed persons.

69 In that regard, the declaration of the Belgian authorities that, where there is a tax agreement for the avoidance of double taxation which attributes the right to tax income to another contracting State, Article 364a of the CIR 1992 is no longer applied, even where that State does not make use of that right, does not constitute proper compliance with the obligations imposed on the Kingdom of Belgium under Community law.

70 Even if, in practice, the authorities of a Member State do not apply a national provision which is at variance with Community law, the principle of legal certainty nevertheless requires that that provision be amended (see, to that effect, Case C?358/98 *Commission* v *Italy* [2000] ECR I?1255, paragraphs 16 and 17, and Case C?160/99 *Commission* v *France* [2000] ECR I?6137, paragraph 22).

71 It is thus necessary to consider that Article 364a of the CIR 1992 also impairs the freedom of movement of employed persons and the freedom of establishment of self?employed persons guaranteed by Articles 39 EC and 43 EC.

72 Finally, as regards the complaint alleging infringement, by Article 364a, of the general right of freedom of movement for persons guaranteed by Article 18 EC with regard to persons who are not economically active, the same conclusion applies, for the same reasons (see, to that effect, Case C?406/04 *De Cuyper* [2006] ECR I?6947, paragraphs 39 and 40).

73 Third, by levying tax on transfers of capital or surrender values where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another insurance institution established outside Belgium, Article 364b of the CIR 1992 dissuades employed and self?employed persons from establishing themselves in another Member State by preventing them from forwarding their savings.

74 It must therefore be found that Article 364b of the CIR 1992 impairs the freedom of movement of employed persons and the freedom of establishment of self-employed persons guaranteed by Articles 39 EC and 43 EC.

75 The Commission also claims that, as a result of the existence of those provisions of domestic law, the Kingdom of Belgium has failed to fulfil its obligations under Articles 28 and 31 of the EEA Agreement, relating to freedom of movement for workers and freedom of establishment.

76 It is to be noted, in that regard, that the rules prohibiting restrictions on freedom of movement and freedom of establishment laid down in Articles 28 and 31 of the EEA Agreement are identical to those established in Articles 39 EC and 43 EC.

77 In those circumstances, the Commission's action must also be considered to be founded as regards the complaint alleging infringement of the rules on freedom of movement for persons and freedom of establishment laid down in the EEA Agreement.

78 It must therefore be held that, by maintaining in force legislation which denies, under Article 59 of the CIR 1992, a right to deduct employer's contributions or to grant, under Article 145/1 and 145/3 of the CIR 1992, a tax reduction on personal contributions paid to insurance bodies established in other Member States or which creates, under Article 364a of the CIR 1992, a legal fiction, or which taxes, under Article 364b of the CIR 1992, capital or surrender values which are transferred to a pension fund or insurance undertaking established outside Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Articles 18 EC, 39 EC and 43 EC and Articles 28 and 31 of the EEA Agreement.

79 Since the provisions of the Treaty and of the EEA Agreement on freedom of movement for workers, freedom of establishment and freedom movement for persons preclude the national provisions referred to in the preceding paragraph, it is not necessary to consider that legislation separately in the light of Article 56 EC on free movement of capital (see, to that effect, *Commission* v *Portugal*, paragraph 45, and *Commission* v *Denmark*, paragraph 76).

80 Consequently, it must be held that:

– by making the deductibility of employers' insurance contributions due in respect of supplementary pension and life assurance subject to the condition, laid down in Article 59 of the CIR 1992, that such contributions be paid to an insurance undertaking or welfare fund established in Belgium;

– by making the tax reduction for long-term savings, granted by virtue of Articles 145/1 and 145/3 of the CIR 1992 for personal supplementary pension and life assurance contributions paid in the form of deductions made by the employer from the employee's remuneration, or in the form of deductions made by the undertaking from the remuneration of a director who is not under a contract of employment, subject to the condition that those contributions be paid to an insurance undertaking or welfare fund established in Belgium;

– by providing, in Article 364a of the CIR 1992, that, when capital, surrender values and savings referred to in Article 34 of the CIR 1992 are paid or allocated to a taxpayer who has previously transferred his residence or the primary location of his assets abroad, the payment or allocation is deemed to have taken place on the day preceding that transfer, and by treating, pursuant to the second paragraph of Article 364a, in the same way as an allocation any transfer referred to in Article 34(2)(3), so that every insurer is under an obligation to withhold amounts in respect of income tax, in accordance with Article 270 of the CIR 1992, from capital and surrender values paid to a non-resident who has been, at one time or another, resident for tax purposes in Belgium, in so far as those sums have been built up, entirely, or partially, during the period in which the person concerned was a Belgian resident for tax purposes, even though bilateral tax agreements concluded by the Kingdom of Belgium grant the right to tax such income to another Contracting State;

– by levying tax, pursuant to Article 364b of the CIR 1992, on transfers of capital or surrender values built up by means of employers' contributions or personal contributions for supplementary retirement benefits, where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another pension fund or insurance institution established outside Belgium, while such a transfer does not constitute a taxable transaction if the capital or surrender values are

transferred to another pension fund or insurance institution established in Belgium; and

– by requiring, on the basis of Article 224/2a of the general regulation, foreign insurers who have no place of business in Belgium to obtain authorisation, before providing their services in Belgium, for a representative residing in Belgium, who must personally assume, in writing, responsibility towards the State for paying the annual tax on insurance contracts, interest and fines which may be due in respect of contracts relating to risks situated in Belgium,

the Kingdom of Belgium has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC, Articles 28, 31 and 36 of the EEA Agreement and, Article 4 of Directive 92/96, following revision, Article 5(1) of Directive 2002/83.

Costs

81 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Kingdom of Belgium has been unsuccessful in its submissions, the latter must be ordered to pay the costs.

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

1. **By making the deductibility of employers' insurance contributions supplementary pension and life assurance subject to the condition, laid down in Article 59 of the Income Tax Code 1992 consolidated by the Royal Decree of 10 April 1992, as amended by the Law of 28 April 2003 on supplementary pensions and the tax regime applying thereto and to certain additional social security advantages, that those contributions be paid to an insurance undertaking or welfare fund established in Belgium;**

– **by making the tax reduction for long-term savings, granted by virtue of Articles 145/1 and 145/3 of the Income Tax Code 1992, as amended by the Law of 28 April 2003, for personal supplementary pension and life assurance contributions and premiums paid in the form of deductions made by the employer from the employee's remuneration, or in the form of deductions made by the undertaking from the remuneration of a director who is not under a contract of employment, subject to the condition that those contributions and premiums be paid to an insurance undertaking or welfare fund established in Belgium;**

– **by providing, in Article 364a of the Income Tax Code 1992, as amended by the Law of 28 April 2003, that, when capital, surrender values and savings referred to in Article 34 of the Income Tax Code 1992 are paid or allocated to a taxpayer who has previously transferred his residence or the primary location of his assets abroad, the payment or allocation is deemed to have taken place on the day preceding that transfer, and by treating, pursuant to the second paragraph of Article 364a, in the same way as an allocation any transfer referred to in Article 34(2)(3), so that every insurer is under an obligation to withhold amounts in respect of income tax, in accordance with Article 270 of the Code, from capital and surrender values paid to a non-resident who has been, at one time or another, resident for tax purposes in Belgium, in so far as those sums have been built up, entirely, or partially, during the period in which the person concerned was a Belgian resident for tax purposes, even though bilateral tax agreements concluded by the Kingdom of Belgium grant the right to tax such income to another Contracting State;**

– **by providing in Article 364a of the Income Tax Code 1992, as amended by the Law of 28 April 2003, that, where the capital, surrender values and savings referred to in Article 34 of that code are paid or allocated to a taxpayer who has previously transferred his residence or the primary location of his assets abroad, the payment or allocation is deemed to have taken place on the day preceding that transfer, and by, under paragraph 2 of the**

same article, assimilating to an allocation all transfers referred to in Article 34(2)(3), so that every insurer is under an obligation to withhold amounts in respect of income tax, in accordance with Article 270 of the Code, as amended, from capital and redemption values paid to a non-resident who has been, at one time or another, a resident for tax purposes in Belgium, provided that those sums have, totally or partially, been constituted during the period in which the person concerned was a Belgian resident for tax purposes, even though bilateral tax agreements concluded by the Kingdom of Belgium grant the right to tax such income to another Contracting State;

– **by levying tax, pursuant to Article 364b of the Income Tax Code 1992, as amended by the Law of 28 April 2003, on transfers of capital or surrender values built up by means of employers' contributions or personal contributions for supplementary retirement benefits, where the transfer is made by the pension fund or insurance institution with which the capital or surrender values have been built up in favour of the beneficiary or persons entitled through him, to another pension fund or insurance institution established outside Belgium, while such a transfer does not constitute a taxable transaction if the capital or surrender values are transferred to another pension fund or insurance institution established in Belgium;**

the Kingdom of Belgium has failed to fulfil its obligations under Articles 18 EC, 39 EC, 43 EC and 49 EC, Articles 28, 31 and 36 of the Agreement establishing the European Economic Area of 2 May 1992 and Article 4 of Directive 92/96/EEC, following revision, Article 5(1) of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance.

2. The remainder of the action is dismissed.

3. The Kingdom of Belgium is ordered to pay the costs.

[Signatures]

* Language of the case: French.