OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 17 December 2009 (1)

Case C?96/08

CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi Kft.

v

Adó- és Pénzügyi Ellen?rzési Hivatal Hatósági F?osztály Észak-magyarországi Kihelyezett Hatósági Osztály

(Reference for a preliminary ruling from the Pest Megyei Bíróság (Hungary))

(Taxation – Freedom of establishment – Calculation of the charge to tax based on the wage costs of employees including those who are employed in a branch in another Member State)

1. Two delicate issues are raised in this case. The first is the extent to which Member States' competence in matters of direct taxation is circumscribed by the EC Treaty. (2) The second is the Court's role in the elimination of double taxation. (3) The Pest Megyei Bíróság (Pest regional court) has asked whether Articles 43 EC and 48 EC preclude the Hungarian tax authorities from charging a 'vocational training levy' ('the levy') which is calculated on the basis of wage costs, taking into account the number of employees including those who work in a branch situated in another Member State where the company meets its tax and social security obligations with regard to those employees.

Legal framework

The EC Treaty

2. Article 43 EC prohibits restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. Article 48 EC provides that this prohibition also applies to companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or place of business within the Community, which are to be treated in the same way as natural persons who are nationals of the Member States. (4)

The Bilateral Convention

3. The Convention between the Republic of Hungary and the Czech Republic to prevent double taxation and tax avoidance in the field of income and capital taxes (5) ('the Bilateral Convention'), as its name implies, governs both tax collection and tax avoidance where persons or corporations are potentially subject to taxation in both States signatory.

4. Articles 1 and 2 of the Bilateral Convention (6) provide that it is to apply to persons established in Hungary, in the Czech Republic or in both States; and to income and capital taxes including taxes on the total amount of wages or salaries paid by undertakings.

Relevant Hungarian legislation

5. One of the objectives listed in Article 1 of Law LXXXVI of 2003 on the vocational training levy and support for the development of training is to enable persons to acquire qualifications recognised by the Hungarian authorities that are necessary to carry on an activity or a profession within the workforce.

6. Article 2 provides that companies established in Hungary are required to pay the levy. Legal persons established abroad are also required to pay the levy if they have a Hungarian branch.

7. Under Article 3, wage costs as defined in Hungarian legislation (Law C of 2000 on accounting) form the basis of assessment of the levy.

8. A company that chooses to pay the levy direct to the tax authorities is obliged to meet its liability in full. However, Article 4(1) and (2) of Law LXXXVI makes provision for a company to organise its affairs in a manner that reduces its gross liability ('the offset facility'). A company that wishes to make use of the offset facility can choose between four options: (i) entering into a cooperation agreement with a higher education institution which complies with the requirements of Law LXXXVI of 1993 on professional training, (ii) entering an 'apprenticeship' contract for practical training which includes a 'work placement' followed by a period of instruction at a technical training school, (iii) making a development grant to a professional training institution and (iv) concluding a contract with an approved body to train its own employees. (7)

The main proceedings and the question referred

9. CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi Kft. ('CIBA') is a company established in Hungary operating in the chemicals sector. It has a branch in the Czech Republic where part of its workforce is employed. CIBA meets its tax and social security obligations with regard to the workers employed in the Czech Republic in that State.

10. The Hungarian tax authority, the Adó- és Pénzügyi Ellen?rzési Hivatal ('APEH'), reviewed CIBA's tax affairs for the years 2003 and 2004. The APEH found that CIBA's tax declaration was insufficient for those years. That was because CIBA had failed to take into account both its full

wage costs in Hungary and those of its branch in the Czech Republic when calculating the amount of the levy it was obliged to pay.

11. CIBA appealed to the Pest Megyei Bíróság, arguing that it already paid a levy similar to the Hungarian levy for vocational training in the Czech Republic in respect of its Czech employees. (8)

12. The Pest Megyei Bíróság held that, under national law, CIBA was required to pay the levy in Hungary in respect of the employees in its branch in the Czech Republic as well as in respect of its employees in Hungary. Although the court found that CIBA had indeed paid social security contributions and the vocational training levy in the Czech Republic from 1 April 2000 to 22 August 2006, it considered that payment of the Hungarian levy did not fall within the scope of the Bilateral Convention.

13. However, the court stayed the proceedings and referred the following question for a preliminary ruling:

‘Can the principle of freedom of establishment under Articles 43 and 48 EC be interpreted as precluding a legal rule under which a company established in Hungary must pay a vocational training levy if it employs workers in a branch abroad and meets its tax and social security obligations with regard to such workers in the State where the branch is situated?’

14. Written observations were submitted on behalf of CIBA, the Hungarian Government and the Commission. All three parties, together with the United Kingdom, made oral submissions at the hearing.

Analysis

15. CIBA argues that following Hungary’s accession to the European Union on 1 May 2004, (9) the obligation to pay the vocational training levy is incompatible with the principle of freedom of establishment. That obligation penalises Hungarian undertakings exercising a fundamental Treaty freedom, since they must pay a comparable levy in respect of the same employees twice over: to the Hungarian tax authorities (because the parent company is established in Hungary) and to the Czech tax authorities (because the branch is established in the Czech Republic). (10) CIBA contends that this restricts the freedom of establishment guaranteed by Articles 43 EC and 48 EC.

What precisely is the levy?

16. The parties disagree as to whether the vocational training levy is a tax. How the levy is properly to be classified is clearly relevant to the question of whether it falls within the scope of Member States’ competence in direct tax matters, which in turn determines the extent to which CIBA can rely on Articles 43 EC and 48 EC to argue that the double charge that it finds itself paying is unlawful.

17. The Hungarian and the United Kingdom Governments argue that the vocational levy is a tax. Determining the basis of calculation therefore falls within the fiscal competence of the Member States. The fact that a double charge arises as a result of the obligation to pay both the vocational

training levy in Hungary and a comparable charge in the Czech Republic is simply a consequence of two Member States exercising their fiscal sovereignty in parallel. For that reason it cannot amount to a restriction under Articles 43 EC and 48 EC.

18. CIBA argues that the levy is not technically a tax and that the double charge is indeed a restriction for the purposes of Articles 43 EC and 48 EC.

19. The Commission contends that the levy is what it describes as a ‘special’ tax, which none the less constitutes a hindrance to freedom of establishment, because CIBA is obliged to pay a similar charge in the Czech Republic based on the salary costs of employees. At the hearing the Commission expanded on this submission, explaining that it considers the levy to be a ‘special’ tax because there is a direct link between the tax raised and the benefit provided by the State: the funds raised through the levy are applied by the Hungarian Government specifically for vocational training. The Commission argues that this differs from (for example) corporation tax, where it is not possible to establish any such direct link between the monies raised through the tax and the purposes to which they might be applied. Accordingly the Commission submits that the Court should apply by analogy, in the context of freedom of establishment, the principles already applicable under Article 49 EC (freedom to provide services), in order to eliminate the impediment to free movement.

20. It is evident that the levy does not have the characteristics of corporation or income tax in so far as it is not charged on a source of profits or income. (11) Rather, it is calculated by reference to wage costs – an expense. Moreover, it is raised for a specific purpose, namely, funding the vocational training scheme in Hungary.

21. That said, although the levy is raised for that purpose, CIBA has not demonstrated (nor has the national court found) that there is a direct link between liability to pay the levy and any individual service provided by the State to an individual employer to benefit its employees.

22. It therefore seems to me that the levy is a financial contribution from employers, collected to finance vocational training in general, but that there is no direct link between the levy paid and the benefit derived by that employer in respect of his own employees.

23. As regards the levy paid in the Czech Republic, there is no information before the Court enabling its nature to be assessed.

24. The national court has found that the Hungarian levy falls outside the scope of the Bilateral Convention. Consequently (and despite the proven payment of an equivalent levy in the Czech Republic) the double charge is not eliminated by the operation of that Convention in the way that certain other direct taxation is eliminated.

25. No uniform or harmonisation measure designed to eliminate double taxation has yet been adopted at Community level. (12) Thus, the obligation to pay the levy is not of itself a breach of Community law (13) and does not *per se* amount to a restriction on the exercise of the freedom of establishment. (14)

26. That said, the Court’s case?law recognises that cumulative burdens which result from the parallel exercise of Member State’s fiscal sovereignty ‘restrict’ cross-border activity. Here, I endorse Advocate General Geelhoed’s analysis in *ACT* (15) that there are, on closer analysis, two types of ‘restriction’ that can arise in such circumstances. The first (which he termed ‘quasi-restrictions’) are restrictions resulting inevitably from the co-existence of national tax systems. Indubitably they give rise to ‘distortions of economic activity resulting from the fact that different legal systems must exist side-by-side’ and – as Advocate General Geelhoed pointed out – the

result may be advantageous or disadvantageous to economic actors. (16) The second (which he termed ‘true restrictions’) are ‘restrictions that go beyond those flowing inevitably from the co-existence of national tax systems’. Advocate General Geelhoed suggested that ‘essentially all “truly” restrictive national direct tax measures will also, in practice, qualify as directly or indirectly discriminatory measures’. Later, he drew the distinction between ‘obstacles to freedom of establishment resulting from disparities or differences between the tax systems of two or more Member States’ – which he argued fall outside the scope of Article 43 EC, although not outside the scope of the Treaty – and ‘obstacles resulting from discrimination, which occurs as a result of the rules of just one tax jurisdiction’. (17)

27. There are two schools of thought as to whether the Court should rule that the first category of restrictions must be eliminated.

28. Thus, Advocate-General Geelhoed argued (referring to the Court’s judgment in *Schempp* (18)*)* that Article 43 EC is concerned with true restrictions, not quasi-restrictions: ‘… where a restriction on freedom of establishment results purely from the co-existence of national tax administrations, disparities between national tax systems, or the division of tax jurisdiction between two systems (a quasi-restriction), this should not fall within the scope of Article 43 EC. In contrast, “true” restrictions, that is to say, restrictions to free movement of establishment going beyond those resulting inevitably from the existence of national tax systems, fall under the Article 43 EC prohibition unless justified … [I]n order to fall under Article 43 EC, *disadvantageous tax treatment should follow from discrimination resulting from the rules of one jurisdiction*, not disparity or division of tax jurisdiction between (two or more) Member States’ tax systems’. (19)

29. The alternative view is that where cumulative burdens caused by double taxation amount to restrictions that hinder cross-border activity, the Court should apply by analogy its case?law on the fundamental freedoms to eliminate such obstacles. (20) Stripped to its bare essentials, the argument is that *any* hindrance to the exercise of a fundamental freedom is ‘a bad thing’. If a true single market is ultimately to be constructed, I can see the force of that argument. It seems to me important to point out, however, that no general Community rule presently exists governing which Member State takes priority for tax purposes in such circumstances. As the Court held in *Saint Gobain*, (21) in the absence of unifying or harmonising measures the Member States remain competent to determine the criteria for taxation of income and wealth with a view to eliminating double taxation by means, inter alia, of international agreements subject to the Community rules.

30. In my view the Hungarian levy here at issue is not a ‘quasi-restriction’ resulting from the coexistence of national tax systems. Self-evidently, the issue of how the Court deals with restrictions arising from the very existence of double taxation is both delicate and important. However, I do not think that the Court needs to enter into that debate to resolve this case.

31. It seems to me sufficient here to take as one’s starting point Advocate General Geelhoed’s description of what he termed ‘true restrictions’: ‘that is to say, restrictions that go beyond those flowing inevitably from the co-existence of national tax systems, which fall within the scope of Article 43 EC’. (22)

Identifying the restriction for the purposes of Articles 43 EC and 48 EC.

32. The Commission approaches the problem by asking whether the *obligation* to pay the levy in Hungary and an equivalent charge in the Czech Republic is sufficient to breach Community law.

It argues that that obligation discourages Hungarian companies from establishing foreign subsidiaries, since companies that do not exercise their freedom of establishment abroad are not subject to a double obligation to pay the levy or its equivalent. Whilst accepting that the mere existence of double taxation does not breach Article 43 EC, the Commission invites the Court to apply its decision in *Arblade and Others* (23) by analogy.

33. *Arblade and Others* concerned two companies established in France but engaged to carry out construction works in Belgium, which temporarily deployed members of their French workforce to Belgium. They were prosecuted by the Belgian authorities for failing to comply with Belgian social security legislation. (24) The Court held that: 'National rules which require an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to the fund of the Member State in which he is established, constitute a restriction on freedom to provide services. Such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services in the host Member State.' (25)

34. In the present case, the Commission argues that the obligation to pay the levy in Hungary and to pay a similar charge in the Czech Republic gives rise to additional administrative and economic burdens for undertakings like CIBA. At the hearing the Commission expanded upon this argument, explaining that where a contribution is intended to finance a specifically defined benefit there is a direct connection between the payment of the contribution and that benefit. Therefore, the Commission argued, Hungary cannot impose a contribution on a company which is aimed at activities carried out in the Czech Republic, the host Member State, because Hungary, the country of origin, is not responsible for providing those benefits in the Czech Republic.

35. I do not think that the Court should follow the Commission's invitation to apply *Arblade and Others* by analogy.

36. First, I do not accept that the nature of the employer's obligation in *Arblade and Others* to pay the 'timbres' is comparable to CIBA's obligation to pay the levy. In *Arblade and Others* a potential direct link existed between payment of the contribution (the 'timbres') and the (possible) provision of a social advantage by Belgium to those employees on behalf of whom that payment was made. (26) However, the employees in question were *temporarily* posted in Belgium by their French-based employers. Thus, they were already protected under the French social security scheme by the contributions made by their employers to the French authorities. Requiring their employers nevertheless also to pay social security contributions in Belgium was rightly held to be an additional expense and an economic burden, which placed their employers at a competitive disadvantage when seeking to provide services vis-á-vis Belgian employers (who had only to pay the Belgian contributions in respect of their employees). (27)

37. In the present case there is no such direct link between payment of the levy and the benefit received by an individual employee. (28) CIBA is not paying a social security contribution to the Hungarian authorities on behalf of its Czech employees (or, indeed, its Hungarian employees) in order to ensure that each employee may receive a particular benefit provided by the Hungarian State. On the contrary, CIBA is required to pay a tax in Hungary which is applied for the purposes of vocational training for the Hungarian workforce *in general*. The situation is thus different from *Arblade and Others*.

38. Secondly, I identify a different restriction 'resulting from the [tax] rules of one jurisdiction' to that identified by the Commission.

39. It is settled case?law that all measures which prohibit, impede or render less attractive the exercise of the freedom of establishment must be regarded as restrictions. (29) In *Hartlauer Handelsgesellschaft* (30) the Court confirmed that that principle applies in cases where there is no allegation of discrimination on grounds of nationality. Although the wording of Articles 43 EC and 48 EC suggest that they are directed at ensuring that foreign nationals and companies are treated in the host Member State in the same way as nationals of that State, those provisions also prohibit the Member State of origin from hindering the establishment of one of its nationals or of a company incorporated under its legislation in another Member State. (31)

40. The present case raises a novel point in as much as the Court is not being asked to consider a typical tax discrimination issue – for example, whether relief should be afforded in circumstances of economic double taxation due to the difference in tax treatment of income from a domestic as opposed to a foreign source. (32)

41. In my view, examination of the Hungarian legislation reveals a restriction arising from the operation of a single tax system that clearly operates to the disadvantage of a company seeking to exercise its right to freedom of establishment. I identify the disadvantage as arising from the fact that a company that seeks to establish abroad has to take into account that it must pay tax in its home Member State based in part on the salary cost of its workforce in the host Member State. The obligation to do so may be in addition (as in the present case) to the obligation to pay a similar charge in the Member State where the company sets up a branch. Finally, the company may not be able to use the offset facility (33) to reduce the cost of the payment of the levy in the home Member State (Hungary). This last point turns on the interpretation of the Hungarian legislation, which is of course ultimately a matter for the national court.

42. The Hungarian legislation requires a Hungarian parent company to pay the levy in respect of both its own workforce in Hungary and that of its Czech branch. It can make use of the offset facility in respect of its Hungary-based workforce like any other company based in Hungary. However, it seems that it cannot make equivalent offset arrangements within the Czech Republic in respect of its Czech-based workforce, since all offset arrangements must comply with Hungarian law. (34) Therefore, it must either pay the full levy in respect of its Czech-based workforce (thus losing the benefit of using the offset facility to fund training that is more relevant to its own specific business needs and reduce its overall tax liability) or, having made arrangements for them *in Hungary* under the offset facility, it must go to the additional trouble and expense of transporting the Czech-based employees from the Czech Republic to Hungary and accommodating them in Hungary so that they can benefit from the training that it has helped to fund.

43. Hungary argues that under its legislation all companies are treated in the same manner – including those that have foreign branches – and that there is therefore no discrimination. Hungary points out that CIBA (just like a company established solely in Hungary) is entitled to reduce its gross liability by using the offset facility.

44. Whilst undoubtedly true, that seems to me to miss the point.

45. A company that wishes to make use of the offset facility must comply with the specific provisions of the Hungarian legislation setting out the four offset options. Let us look briefly at each of those options in turn.

46. Option (i) is to enter into a cooperation agreement with a higher education institution which complies with the requirements of Law LXXXVI of 1993. That law appears to be framed in a way that means that only a Hungarian higher education institution will satisfy its requirements and will

therefore be an acceptable partner for such a cooperation agreement.

47. Option (ii) is to enter an ‘apprenticeship’ contract for practical training which includes a ‘work placement’ followed by period of instruction at a technical training school. It is not clear whether the initial work placement could take place at premises situated in the Czech Republic rather than in Hungary. In any event, it seems that at least the second part of the arrangement would need to take place with a technical training school that was approved by the Hungarian authorities. That would seem to rule out using a technical training school in the Czech Republic.

48. Option (iii) is to make a development grant to a professional training institution. From the material available to the Court, this option appears to be limited to institutions based in Hungary.

49. Finally, option (iv) involves the company concluding a contract with an approved body to train its own employees. Again, it appears from the material available to the Court that an ‘approved body’ means a body approved under Hungarian law. Even supposing that such a body were prepared to enter into a contract to train CIBA’s Czech-based employees in the Czech Republic and that that is permissible under Hungarian law, it seems plausible to assume that it would charge more to do so than it might well charge for equivalent training carried out in Hungary.

50. It therefore seems possible to take the view that the offset facility is, essentially, available only if a company uses a Hungarian institution as its training partner. That seems to me, in practical terms, to deprive a company that operates cross-border of the possibility of using the offset facility in respect of that part of its workforce that is based in another Member State.

51. Ultimately, however, it is for the national court (which has the advantage of fuller access to the relevant national legislation) to verify whether (a) Hungarian legislation would permit CIBA to make use of one of the four arrangements in the offset facility by using training partners in the Czech Republic rather than in Hungary; and whether (b) if so, the costs of such an arrangement would be comparable with the costs of using the offset facility with a training partner in Hungary.

52. If I am right, there are at least three (interrelated) disadvantages for such a company as compared with a company that operates exclusively in Hungary. First, it cannot choose to fund specific training for its employees in the Czech Republic that is directly relevant to its own business needs rather than incurring full liability for the levy, so that it enjoys less flexibility in its choice of strategy. Second, once it has paid the levy (which will then be applied in general terms to improving the skills level of the Hungarian workforce) it must still ask itself whether it needs *in addition* to fund training to improve the skills of its own employees. In that sense, it may end up paying not just the two training levies (under Hungarian and Czech law) but also a further sum in respect of job-specific training (which would not generally be the case for a company based exclusively in Hungary and able to make use of the offset facility). Third, if it does use the offset facility to set up training arrangements in Hungary for its Czech employees, it must then accept the additional costs and administrative burdens associated with transporting its Czech-based workforce to Hungary to take part in the training programme and providing them with accommodation and living expenses whilst they are there.

53. I therefore conclude that the manner in which the levy is imposed – which flows directly from the tax legislation of a single Member State, Hungary – results in a restriction, because it renders the exercise of the right to freedom of establishment less attractive. (35)

54. Such a restriction on freedom of establishment may be permissible if it is based on objective elements justified by overriding reasons in the public interest and its application is appropriate to ensuring the attainment of the objective in question and does not go beyond what is necessary to achieve that goal. (36)

55. The Hungarian Government did not seek to advance any grounds of justification in its written observations. When expressly asked during the course of the hearing whether it wished to make submissions on justification, it did not avail itself of the opportunity to do so.

56. Accordingly, I propose that the Court find that there is a restriction on freedom of establishment for which no justification has been advanced.

Conclusion

57. I am therefore of the view that the Court should answer the question referred by the Pest Megyei Bíróság as follows:

The calculation of the charge to tax of a vocational training levy based on the wage costs of a company's employees, including workers it employed in a branch established in another Member State (notwithstanding that the company also duly meets its tax and social security obligations with regard to such workers in the State where the branch is situated), is a restriction within the meaning of Articles 43 EC and 48 EC where it renders the exercise of the freedom of establishment less attractive.

1 – Original language: English.

2 – See Case C?446/03 *Marks and Spencer* [2005] ECR I?10837, paragraph 29 and the case?law cited there, and more recently Case C?298/05 *Columbus Container Services* [2007] ECR I?10451, paragraph 28 and the case?law cited there.

3 – Double taxation is defined in relation to taxes charged on income as either legal (juridical) double taxation (taxation of the same income twice in the hands of the same tax payer) or economic double taxation (taxation of the same income in the hands of two different tax payers – for example, the same profits taxed first as corporation tax paid by the company and then as income tax when distributed to the shareholder). See the Opinion of Advocate General Geelhoed in Case C?374/04 *Test Claimants in Class IV of the ACT Group Litigation* (*'ACT'*) [2006] ECR I?11673 at points 4 and 5, where he discusses these concepts.

4 – See, for example, Case C?303/07 *Aberdeen Property Fininvest Alpha* [2009] ECR I?0000, paragraph 37.

5 – Signed in Prague on 14 January 1993; it therefore antedates those Member States' accession to the European Union.

6 – Law XCIII of 1996 ratified the Bilateral Convention in Hungary.

7 – I have summarised the substance of Articles 1, 4(1) and 4(2) of Law LXXXVI of 2003 from the Annex to CIBA's written observations. Options (i) and (ii) are set out in Article 4(1) of Law LXXXVI of 2003. Options (iii) and (iv) are referred to in the observations of both parties to the main

proceedings.

8 – Pursuant to Law 589/1992 on social security contributions and the contribution to State employment policy in the Czech Republic.

9 – The national court is examining CIBA's tax liability for the years 2003 and 2004. However, it is clear that there can be no incompatibility with Community law before the date of Hungary's accession to the EU: see Case C?302/04 *Ynos kft* [2006] ECR I?371, paragraphs 35 and 36.

10 – In the main proceedings CIBA produced a certified report indicating payment of a similar levy in the Czech Republic, which is also based on the wage costs of employees. It appears from the Hungarian legislation that, if CIBA were a Czech company based in Prague which had established a branch in Budapest, it would likewise find itself required to pay the levy (see point 6 above).

11 – I have referred to corporation tax and income tax as obvious illustrations of direct taxes, since both taxes are common to all Member States.

12 – See *ColumbusContainer Services*, cited in footnote 2, paragraph 45, and Case C?513/04 *Kerckhaert and Morres* [2006] ECR I?10967, paragraph 22.

13 – The vocational training levy does not fall within the scope of the partial harmonisation measures thus far adopted, namely Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38).

14 – See for example Case C?157/07 *KrankenheimRuhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I?8061, paragraph 50.

15 – The following points draw generally (and gratefully) upon the analysis in section 2(a) ('Application of Article 43 to direct tax rules: introduction') at points 32 to 41 of Advocate General Geelhoed's Opinion in *ACT*, cited in footnote 3.

16 – Unsurprisingly, the former tend not to give rise to litigation before the national courts between an aggrieved taxpayer and the tax authorities leading to a reference for a preliminary ruling, as Advocate General Geelhoed noted at point 38.

17 – At point 46 of his Opinion; see also Case C?293/06 *Deutsche Shell* [2008] ECR I?1129, at points 40 to 44 of my Opinion and paragraphs 28 to 30 of the judgment.

18 – Case C?403/03 [2005] ECR I?6421, paragraph 45.

19 – At point 55, emphasis added.

20 – See, for example, F. Vanistendael, 'Does the ECJ have the power of interpretation to build a tax system compatible with the fundamental freedoms?', *EC Tax Review* 2008/2, p. 52.

21 – Case C?307/97 [1999] ECR I?6161, at paragraphs 56 and 57.

22 – *ACT*, cited in footnote 3, at point 40 of Advocate General Geelhoed's Opinion.

23 – Joined Cases C?369/96 and C-376/96 [1999] ECR I?8453.

24 – The Belgian legislation in question included obligations: to pay contributions to the ‘timbres-intempéries’ (bad weather stamps) and ‘timbres-fidélité’ (loyalty stamps) schemes, on which I understand the Commission to focus its observations in the present case.

25 – See *Arblade and Others*, cited in footnote 23, paragraph 50 (dealing specifically with the payment of the contribution to the ‘timbres?intempéries’ and ‘timbres?fidélité’).

26 – The judgment left it to the national court to determine whether the contributions payable in Belgium did give rise to any real social advantage there for the workers concerned: see paragraph 53 of the judgment.

27 – Part of the thinking seems to have been that the ‘posted’ employees did not need, and/or did not necessarily receive, additional benefits in Belgium: see paragraphs 51 to 54 of the judgment.

28 – See point 21 above.

29 – See *Columbus Container Services*, cited in footnote 2, paragraph 34 and the case?law cited there.

30 – Case C?169/07 [2009] ECR I?0000, paragraph 33.

31 – See Case C?414/06 *Lidl Belgium* [2008] ECR I?3601, paragraphs 18 and 19 and the case?law cited there; see also Case C?196/04 *Cadbury Schweppes* [2006] ECR I?7995, paragraphs 41 and 42.

32 – See Case C?315/02 *Lenz* [2004] ECR I?7063 where the Court held that the option for income tax treatment available for domestic dividends must be extended to foreign source dividends. See also Case C?170/05 *Denkavit International* [2006] ECR I?11949, where the Court held that Article 43 EC and Article 48 EC preclude national legislation which imposes a liability to tax on dividends paid to a non?resident parent company whilst allowing resident parent companies almost full exemption from such tax.

33 – See point 8 above.

34 – I examine this in more detail at points 45 to 49 below.

35 – On my analysis, no issue arises as to whether Hungary or the Czech Republic should have priority in charging the vocational training levy (as would be the case if one were comparing two tax regimes in two different Member States). The restriction arises purely from the way in which the Hungarian legislation is framed.

36 – See *Lidl Belgium*, cited in footnote 31, paragraph 27.