

OPINION OF ADVOCATE GENERAL

STIX-HACKL

delivered on 3 October 2006¹

1. By this action, brought under the second paragraph of Article 226 EC, the Commission of the European Communities alleges that the Kingdom of Belgium has failed to fulfil its obligations under Articles 18, 39, 43, 49 and 56 of the EC Treaty, Articles 28, 31, 36 and 40 of the EEA Agreement, and Articles 4 and 11(2) of Directive 92/96/EEC of 10 November 1992² — following revision, Articles 5(1) and 53(2) of Directive 2002/83/EC of 5 November 2002.³

— makes the deductibility of employers' supplementary pension and life assurance contributions subject to the condition, laid down by Article 59 of the CIR 92, that the contributions be paid to an insurance undertaking or welfare fund established in Belgium;

2. The alleged infringements of those provisions stem from the fact that the national legislation in question, that is, the Code des impôts sur les revenus de 1992 (Income Tax Code 1992; 'the CIR 92') and the Code des taxes assimilées au timbre (Code on taxes assimilated to stamp duty; 'the CTAT'):

— makes the tax reduction for long-term saving granted pursuant to Articles 145/1 and 145/3 of the CIR 92 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;

1 — Original language: French.

2 — 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).

3 — 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).

— provides in Article 364a of the CIR 92 that when capital, surrender values and savings referred to in Article 34 of the CIR 92 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, pursuant to the second paragraph of Article 364a, treats 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 92, 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 Belgium grant the right to tax such income to another Contracting State;

- requires, 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), foreign insurers who have no place of business in Belgium to obtain authorisation, before providing their services in Belgium, of 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 contracts relating to risks situated in Belgium.

I — Legal framework

A — Community law

- levies tax, pursuant to Article 364b of the CIR 92, on transfers of capital or of 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;

1. Primary law

3. Article 18 EC provides:

'1. Every citizen of the Union shall have the right to move and reside freely within the

territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

(b) to move freely within the territory of Member States for this purpose;

...

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

4. Article 39 EC provides:

'1. Freedom of movement for workers shall be secured within the Community.

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

...

5. Article 43 EC provides:

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

6. Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

The Council may, acting by a qualified majority on a proposal from the Commission, extend the provisions of the chapter to nationals of a third country who provide services and who are established within the Community.'

7. Article 56 EC provides:

'1. Within the framework of the provisions set out in this chapter, all restrictions on the

movement of capital between Member States and between Member States and third countries shall be prohibited.

2. Within the framework of the provisions set out in this chapter, all restrictions on payments between Member States and between Member States and third countries shall be prohibited.'

8. Article 28 of the Agreement on the European Economic Area ('the EEA Agreement') in essence repeats the provisions of Article 39 EC, Article 31 of the EEA Agreement those of Article 43 EC and Article 36 of the EEA Agreement those of Article 49 EC, while Article 40 of the EEA Agreement provides for the free movement of capital subject to certain limits.

2. Secondary legislation

9. Article 5 of Directive 2002/83, which concerns the scope of the authorisation needed in order to take up the business of life assurance, provides in paragraph 1:

'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.’

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

10. Article 53(2) of that directive provides:

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

‘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.’

12. Article 145/1 of the CIR 92, in the version which was applicable on 1 January 2004, provided:

‘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:

B — *Belgian law*

1. Direct taxation — the CIR 92

(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;

11. Article 59(1) of the CIR 92 provides:

(2) supplementary pension and life assurance contributions that the taxpayer has defini-

tively paid in Belgium for the creation of 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, in so far as that capital is not intended to pay off or guarantee a mortgage loan contracted for a dwelling referred to in Article 104(9).'

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.'

13. The first paragraph of Article 145/3 of the CIR 92 provides:

15. Article 364b of the CIR 92 provides:

'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 an 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.'

'When capital, or surrender values, built up by means of personal contributions referred to in Article 52a or Article 145/1(1), employer 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.

14. Article 364a of the CIR 92 provides as follows:

'When the capital, surrender values and savings referred to in Article 34 are paid or

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

2. Indirect taxation — the CTAT

charges, to be paid or borne during the tax year either by the insured persons or by the beneficiaries and their employers.’

16. Article 173 of the CTAT provides:

‘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.’

17. The first paragraph of Article 176/1 of the CTAT provides:

‘The tax liability is calculated on the total amount of premiums or contributions, plus

18. Article 177 of the CTAT provides:

‘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 benefits concerning social security, 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 as referred to in Article 178 in Belgium;

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

obligations under Articles 18, 39, 43, 49 and 56 EC, Articles 28, 31, 36 and 40 of the EEA Agreement and Articles 4 and 11(2) of Directive 92/96.

19. Article 224/2a of the General regulation on taxes assimilated to stamp duty provides:

‘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 above-mentioned contracts.’

II — Pre-litigation procedure

20. In its letter of formal notice of 6 February 2003, the Commission explained to the Kingdom of Belgium why it took the view that that State had failed to fulfil its

21. In their reply, sent on 9 May 2003, the Belgian authorities stated that the dissolution of the Chambers prior to the general election (held on 18 May 2003) meant that the Government did not have sufficient power to take legislative initiatives in order to amend Belgian law along the lines indicated in the Commission’s letter of formal notice.

22. However, they stated that the national provisions were introduced in order to combat tax avoidance (Article 364a of the CIR 92) and that the ability to appoint a representative responsible for the annual tax on insurance contracts was confirmed by a statement recorded in the Council minutes approving the third life assurance directive and was in accordance with the Commission’s interpretative communication on freedom to provide services and the general good in the insurance sector.⁴ Those obligations were imposed both on foreign companies which offered their services in Belgium by way of freedom to provide services and on foreign companies with an establishment in Belgium. The appointment of representatives was necessary and proportionate in order to ensure that the annual tax

4 — OJ 2000 C 43, p. 5.

on insurance contracts was collected (Article 177(3) of the CTAT and Article 224/2b(2) of the General regulation on taxes assimilated to stamp duty).

23. Noting that the Belgian authorities' reply covered only the two abovementioned measures and that when the Belgian Government presented a draft law on supplementary pensions on 13 January 2003 it recognised that national legislation was not entirely in compliance with Community law, the Commission sent the Kingdom of Belgium, on 19 December 2003, a reasoned opinion concerning infringements of the principles of freedom of movement for workers, freedom of establishment, freedom to provide services and free movement of capital, and of the life assurance directives, by tax provisions concerning income tax and the annual tax on insurance contracts.

24. As regards the appointment of a representative to ensure the collection of the annual tax on insurance contracts, the Commission took the view that that requirement constitutes a restriction on the freedom to provide services enjoyed by insurance companies and institutions established in other Member States. Payment of a tax could be ensured by less restrictive means, such as requests for information made to the foreign undertaking or body, requests for information made to and checks on insured persons resident in Belgium, and information exchange agreements with the other Mem-

ber States. Moreover, the Commission recalled that Article 1 of Directive 2001/44/EC of 15 June 2001⁵ amended Directive 76/308/EEC on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties and in respect of value added tax and certain excise duties. Mutual assistance concerning recovery was extended to taxes on insurance premiums and the Member States were obliged to ensure the conformity of their legislation with that directive by 30 June 2002. Given that the annual tax on insurance contracts is calculated on the total amount of premiums or contributions, plus charges, that tax falls within the scope of Directive 2001/44. The Commission added that, if the Kingdom of Belgium were to maintain its arguments, a directive, and all the more an interpretative communication, cannot be interpreted or applied in a manner that does not comply with the EC Treaty and the EEA Agreement.

25. In its reply of 24 February 2004, the Kingdom of Belgium confirmed its willingness to comply with the reasoned opinion, requesting 'a little patience and under-

5 — OJ 2001 L 175, p. 17.

standing with regard to the period which [would] be necessary for Belgian legislation to be in complete conformity with European legislation'. The time-limit laid down in the reasoned opinion having expired on 23 February 2004, the Commission brought the present action.

26. By letter of 5 May 2006, the Court asked the Belgian Government to state whether the Kingdom of Belgium still adhered to the observations made in reply to the letter of formal notice. It is apparent from the Belgian Government's reply, received at the Court on 2 June 2006, that the Kingdom of Belgium essentially maintained its position, while referring to forthcoming legislative amendments, concerning Articles 59, 145, 364a and 364b of the CIR 92, and legislative amendments already in force, concerning Article 224/2a of the General regulation on taxes assimilated to stamp duty.

28. As regards direct taxation, the Commission essentially criticises two sets of provisions: those limiting specific tax advantages — here the deductibility of employers' contributions (Article 59 of the CIR 92) and of personal contributions (Articles 145/1 and 145/3 of CIR 92) to occupational pension and life assurance schemes — to contributions paid to insurance undertakings or welfare funds established in Belgium; and those subjecting the payment or allocation of capital, surrender values or savings to a taxpayer who is no longer a resident for tax purposes (Article 364a of the CIR 92) and the transfer of capital or surrender values built up under occupational pension schemes to an insurance undertaking or pension fund established outside Belgium (Article 364b of the CIR 92) to a tax regime different from that applied to such operations lacking a cross-border element.

III — Analysis of the complaints

27. The alleged failure to fulfil obligations concerns Belgian legislation on both direct taxation (the provisions cited of the CIR 92) and indirect taxation (Article 177(3) of the CTAT and Article 224/2a of the General regulation on taxes assimilated to stamp duty).

29. As regards indirect taxation, the Commission criticises the obligation imposed on foreign insurers operating under the freedom to provide services, that is without a place of business in Belgium, to obtain prior authorisation of a resident tax representative who is personally responsible to the State for the payment of the annual tax on insurance contracts and interest and fines which may

be payable under contracts relating to risks situated in Belgium (Article 224/2a of the General regulation on taxes assimilated to stamp duty).

A — Restriction on the freedom to provide services and discrimination against foreign insurance companies

1. Conditions governing the deductibility of employers' and personal contributions to occupational pension schemes

30. In the light of the Court's case-law, in particular its judgment in *Danner*,⁶ the complaints formulated by the Commission against the provisions cited concerning direct taxation appear capable of establishing, *prima facie*, the alleged infringements of the fundamental freedoms guaranteed by the EC Treaty and the EEA Agreement and implemented in particular by Directive 92/96, or at least some of those infringements. In addition, the Belgian Government does not dispute the alleged failure to fulfil obligations, but minimises its extent by making reference in particular to agreements for the avoidance of double taxation entered into by Belgium. On the other hand, the complaint concerning the obligation to appoint — and have authorised — a tax representative is novel and for that reason should be given particular attention. Despite the subsequent amendment of the legislation in question,⁷ the Belgian Government has disputed this alleged failure to fulfil obligations.

(a) Main arguments of the parties

31. The *Commission* takes the view that the tax provisions under which employers' contributions (Article 59 of the CIR 92) and personal contributions (Articles 145/1 and 145/3 of the CIR 92) to occupational pension schemes are deductible only if they are paid to bodies established in Belgium, to the exclusion of contributions paid to bodies established outside Belgium, are contrary to the freedom to provide services (Article 49 EC, Articles 36 and 37 of the EEA Agreement, Article 4 of Directive 92/96 (now Article 5 of Directive 2002/83)).

32. The *Belgian Government* does not directly dispute the Commission's analysis, but mentions that the deduction of employers' contributions and the tax reduction for personal contributions paid to institutions

6 — Case C-136/00 [2002] ECR I-8147.

7 — In reply to a question by the Court, the Belgian Government indicated that the obligation to appoint a tax representative had been limited, from 1 January 2006, by the framework law of 27 December 2005, to insurance undertakings which are not established in Belgium and whose principal place of business is situated outside the EEA.

established abroad were sometimes available, in particular on the basis of certain bilateral agreements with Member States or third countries, or even on the basis of certain administrative circulars. Also, in its reply to the Court of 30 May 2006, the Belgian Government mentions a preliminary draft law amending Articles 59, 145, 364a and 364b of the CIR 92 in line with the Commission's wishes.

(b) Assessment

33. It is beyond doubt that a restriction on freedom to provide services results from the conditions, laid down in Articles 59 and 145 of the CIR 92, relating to the deductibility of employers' and personal contributions to occupational pension schemes.

34. As a preliminary point, it should be recalled that, although direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence consistently with Community law.⁸

35. The Court has held on numerous occasions that, '[i]n the perspective of a single market and in order to permit the attainment of the objectives thereof, Article 59 of the Treaty precludes the application of any national legislation which has the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State'.⁹

36. In *Danner* in particular, the Court recognised that 'in view of the important role played, at the time when a pension insurance contract is taken out, by the possibility of obtaining tax relief under that head, such legislation is liable to dissuade individuals from taking out voluntary pension insurance with institutions established in a Member State other than [the Member State in question] and to dissuade those institutions from offering their services on the [market in question]'.¹⁰

37. As Articles 59, 145/1 and 145/3 of the CIR 92 restrict the deductibility of employers' and personal supplementary life assurance and pension contributions to payments made to insurance undertakings or welfare funds established in Belgium, they constitute a restriction on freedom to provide services,

8 — Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16; Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 19; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651, paragraph 19; Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 32; and *Danner*, cited in footnote 6, paragraph 28.

9 — See, in particular, Case C-381/93 *Commission v France* [1994] ECR I-5145, paragraph 17, and *Danner*, cited in footnote 6, paragraph 29.

10 — Cited in footnote 6, paragraph 31, and Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 23.

inasmuch as they are liable to dissuade the persons concerned from concluding contracts with operators established in another Member State and to dissuade operators from offering such contracts in Belgium when they do not have a place of business there.

38. The Commission's complaint therefore appears well founded in this regard.

2. Taxation of the transfer of capital or surrender values

(a) Main arguments of the parties

39. The *Commission* considers that the rule in Article 364b of the CIR 92 is discriminatory. This rule provides that the transfer of capital or of surrender values built up by means of employers' contributions or personal supplementary pension contributions is taxable when the transfer is to a pension fund or insurance institution established abroad, whereas such transfers are not taxable transactions when the capital or surrender values are transferred to a pension fund or insurance institution established in Belgium.

40. The abovementioned national provisions are also contrary to Article 5 of Directive 2002/83 which provides that authorisation obtained in the Member State is valid for the entire Community and permits the undertaking to carry on business there, under either the right of establishment or freedom to provide services, and to Article 53(2) of that directive which provides that each Member State must authorise insurance undertakings whose head office is established in its territory to transfer all or part of their portfolios to a transferee established in the Community.

41. In its defence, the *Belgian Government* does not dispute the complaints formulated by the Commission. In its reply to the Court of 30 May 2006, it makes reference to its letter of 9 May 2003 and indicates that Article 364b of the CIR 92 has been redrafted in the abovementioned preliminary draft law¹¹ in line with the Commission's wishes.

(b) Assessment

42. It is apparent from the very wording of Article 364b of the CIR 92 that the transfer

¹¹ — See point 32.

between pension funds or insurance institutions of capital or of surrender values built up by means of employers' or personal supplementary pension contributions is not treated as a payment or allocation — which is taxable — unless the receiving pension fund or insurance institution is established abroad. It must therefore be stated that such a transfer is treated in a particular way for tax purposes where the transferee is established abroad.

43. Taxation is therefore being imposed because of the crossing of a border, which, as such, is liable to constitute an obstacle to the freedom to provide services enjoyed by insurance companies or institutions established in other Member States. Moreover, the rule in question is liable to dissuade insured persons from transferring capital, or surrender values, to a foreign operator. In that respect, the information provided by the Belgian Government, in its reply of 30 May 2006, relating to the practical significance of the provisions of the CIR 92 in question only concerns Article 364a of the CIR 92.

44. The Commission's complaint therefore also appears well founded in this regard.

3. Obligation to appoint a tax representative

(a) Main arguments of the parties

45. The general and absolute obligation imposed on foreign insurance undertakings to appoint a representative residing in Belgium, who must give a personal undertaking to pay the annual tax on insurance contracts, is to be regarded, according to the *Commission*, as not being proportionate and as undermining the freedom to provide services enjoyed by companies established in other Member States. Its aim, which is to ensure payment of the tax, could in fact be achieved using less restrictive methods.

46. The *Belgian Government* disputed the Commission's arguments in its letter of 9 May 2003, the terms of which are reproduced in the defence. The appointment of a tax representative remains necessary to ensure that the tax is collected correctly and has no bearing on the authorisation of the insurance undertaking or the transfer of its portfolio. In its letter of 30 May 2006, the Belgian Government's agent confirmed this position, while mentioning an amendment to the national legislation in question by the framework law of 27 December 2005:¹² under the new provisions, which entered

¹² — Article 140 et seq., *Moniteur belge* of 30 December 2005, p. 57315.

into force on 1 January 2006, only insurance undertakings whose principal place of business is outside the European Economic Area remain obliged to appoint a tax representative.

evasion. This is an objective of public interest.¹⁴

(b) Assessment

47. The permissibility, having regard to the fundamental freedoms established by the EC Treaty, of the requirement to appoint a tax representative in respect of insurance undertakings operating under the freedom to provide services has not been raised before and is a question, it would appear, of considerable significance, in so far as such a requirement is not unknown in other legal orders.¹³

48. The requirement to designate a tax representative who is responsible, as regards the provisions of Belgian law in question, for payment of the annual tax on insurance contracts has the objective of guaranteeing payment of that tax and combating tax

49. The requirement to appoint a tax representative is an obstacle to the freedom to provide services, in so far as an additional financial burden is imposed on insurance institutions which are not established in Belgium. That requirement is particularly burdensome for the institutions concerned, in that the decision to operate under the freedom to provide services may be due precisely to the absence of a company belonging to the same group in the host Member State; it is just in such circumstances that it may be difficult to find a tax representative willing to assume the personal responsibility incumbent on him pursuant to the legislation in question. In any event, there is little doubt that the remuneration of the tax representative is liable to amount to a significant sum, the burden of which will be borne by the insurance institution operating under the freedom to provide services.

50. The provisions of national law in question may be considered discriminatory in that the requirement to appoint a tax

13 — See for example Article 990 I(III) of the Code Général des Impôts (General Tax Code; 'CGI') in French law, concerning a tax levy of 20% on sums payable to beneficiaries of life assurance contracts following the death of the insured person: 'Insurance institutions and entities treated as such not established in France which are permitted to carry out business there under the freedom to provide services must appoint a representative residing in France who personally assumes responsibility for the payment of the levy referred to in paragraph 1.'

14 — Case C-275/92 *Schindler* [1994] ECR I-1039, paragraph 63. See in addition the Commission's interpretative communication 'Freedom to provide services and the general good in the insurance sector' (COM 2000/C 43/03, OJ 2000 C 43, p. 5), Section II(2)(b). See finally, concerning the free movement of capital, Article 58(1)(b) EC.

representative is restricted to insurance institutions which are not established in Belgium.¹⁵ It is nevertheless the case that a distinction between resident and non-resident taxpayers has been considered objectively justifiable in the area of direct taxation.¹⁶

the need to maintain the requirement to appoint a tax representative.²⁰

52. It follows from all the considerations set out above that the requirement to appoint a tax representative laid down in Article 224/2a of the General regulation on taxes assimilated to stamp duties constitutes an unjustifiable obstacle to freedom to provide services. It is therefore appropriate to uphold the Commission's application on this point too.

51. In any event, the Commission rightly observes that the collection of the annual tax on insurance contracts¹⁷ falls within the scope of Council Directive 77/799/EEC concerning mutual assistance of the authorities of the Member States in the field of direct taxation,¹⁸ as amended by Council Directive 2003/93/EC of 7 October 2003.¹⁹ The mutual assistance of the authorities of the Member States, as organised by those directives, accordingly constitutes a means of combating tax evasion, excluding therefore

B — Restrictions on the free movement of workers and on freedom of establishment

1. Main arguments of the parties

53. The *Commission* submits that the provisions which prohibit the deduction of employers' contributions or the tax reduction for personal contributions paid to institutions established in other Member

15 — See to that effect the interpretative communication cited in footnote 14, Section II(2)(c): 'Where the restriction in question is discriminatory, i.e. a Member State imposes on a Community insurance undertaking measures which it does not impose or imposes more advantageously on its own insurance undertakings, it can be justified only on the grounds set out in Article 46 of the Treaty (public policy, public security and public health).'

16 — See in particular Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 31 and 32, and Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 43.

17 — Unlike the levy referred to in Article 990 I of the CGI, cited in footnote 13.

18 — Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15).

19 — Council Directive 2003/93/EC of 7 October 2003 amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the Member States in the field of direct and indirect taxation (OJ 2003 L 264, p. 23).

20 — On the other hand, it is undeniable that there are harmonised areas where Community law allows the Member States to require the appointment of a tax representative, for example in the area of excise duty (Article 10(3) of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, OJ 1992 L 76, p. 1) and in the area of VAT (Council Directive 2000/65/EC of 17 October 2000 amending Directive 77/388/EEC as regards the determination of the person liable for payment of value added tax, OJ 2000 L 269, p. 44).

States are also contrary to the free movement of employed and self-employed persons, guaranteed by Articles 39 and 43 EC. Workers who have engaged in an occupational activity in a Member State and contributed to an occupational pension scheme in that State and then come to work in Belgium cannot benefit from tax advantages in respect of contributions paid in that other State. However, the income from such schemes is taxable in Belgium if the persons concerned are resident in Belgium when the income is received.

54. The provision according to which the transfer of capital or surrender values built up by means of employers' or personal supplementary pension contributions is taxable where the transfer is to a pension fund or insurance institution established abroad is also an obstacle to the free movement of workers and freedom of establishment. It places at a disadvantage employees and self-employed persons who wish to settle in another Member State and, at that time, to transfer the said capital or surrender values.

55. The Commission also submits that Article 364a of the CIR 92, which creates the fiction that the payment or allocation of capital, surrender values and savings referred to in Article 34 of the CIR 92 takes place on the day which precedes the transfer of residence or of the primary location of assets abroad, constitutes unjustified interference with the free movement of workers and freedom of establishment.

56. Finally, Articles 59, 145/1, 145/3, 364a and 364b of the CIR 92 prejudice the general right of free movement of persons, recognised by Article 18 EC.

57. In its defence, the *Belgian Government* did not explicitly contest the Commission's argument. As regards Article 364a of the CIR 92, it nevertheless explained in its reply of 30 May 2006, also making reference on this point to its reply of 9 May 2003, that Article 364a of the CIR 92 applies only in the event that Belgium has not signed an agreement for the avoidance of double taxation or where such an agreement gives Belgium the right to tax income, so that there is no double taxation. Moreover, the capital is taxed only from the time that it is actually paid or allocated, in the same way as for resident taxpayers. The Belgian Government indicates finally that Article 364a of the CIR 92 has been redrafted in the above-mentioned preliminary draft law²¹ in line with the Commission's wishes.

2. Assessment

58. As regards the restrictions concerning deductibility of employers' and personal

²¹ — See point 32.

contributions to occupational pension schemes where the insurance institution is established outside Belgium, there is no doubt that there must be a finding of infringement of Articles 39 and 43 EC and the corresponding provisions of the EEA Agreement. According to the case-law of the Court of Justice²² such restrictions hinder employed and self-employed persons established abroad from going to the Member State in question to pursue their occupation, while maintaining their occupational pension scheme in the Member State of origin.

59. Article 364a of the CIR 92 — which provides that, in the event of transfer of residence or of the primary location of assets abroad, the payment or allocation of capital, surrender values and savings is deemed to have taken place on the day preceding the transfer — also constitutes an obstacle to the free movement of employees and the freedom of establishment of self-employed persons. A legal fiction is involved which seeks to allow taxation by reason of the crossing of a border by the employee or self-employed person in question.

60. The clarifications made by the Belgian Government, in its reply of 30 May 2006, concerning the practical significance of that rule do not allow a different conclusion to be reached, as it may be seen from the information communicated that the applica-

tion of Article 364a of the CIR 92 is at the origin of proceedings before the national courts. Only an amendment to the wording of Article 364a of the CIR 92 appears, having regard to the principle of legal certainty, capable of safeguarding the rights conferred by Community law, in particular by Articles 39 and 43 EC, on all individuals.

61. Article 364b of the CIR 92 also prejudices the freedoms guaranteed by Articles 39 and 43 EC — and by Articles 28 and 31 of the EEA Agreement — in that it subjects transfers of capital or of surrender values which taxpayers may wish to make when exercising those freedoms to disadvantageous tax treatment.

62. In the case of Article 364a and Article 364b of the CIR 92, this reasoning may be applied, *mutatis mutandis*, to the context of Article 18 EC.

63. The complaints based on infringement of Articles 18, 39 and 43 EC, and Articles 28 and 31 of the EEA Agreement, therefore appear well founded.

²² — See my Opinion of 1 June 2006 in Case C-150/04 *Commission v Denmark*, pending before the Court, point 48, and the case-law cited.

C — *Free movement of capital*

2. Assessment

1. Main arguments of the parties

64. According to the *Commission*, the national provisions in question also constitute obstacles to the free movement of capital, contrary to Article 56 EC and Article 40 of the EEA Agreement.

65. Transfers in performance of insurance contracts are to be treated as capital movements in accordance with heading X of Annex I to Council Directive 88/361/EEC of 24 June 1988²³ and the limitation of the deductibility of employers' contributions, and of the tax reduction for personal contributions, to cases where contributions are made to bodies established in Belgium entails discriminatory restrictions on the free movement of capital.

66. Articles 364a and 364b of the CIR 92 also constitute discriminatory restrictions on the free movement of capital.

67. The *Belgian Government* has not disputed the Commission's arguments.

68. The Commission rightly refers to the nomenclature of Directive 88/361 although it is not directly applicable *ratione temporis* to the present case.

69. It is nevertheless the case that the alleged prejudice to the free movement of capital stems only indirectly from the above-mentioned restrictions to other fundamental freedoms, as the tax treatment of insurance contributions, of beneficiaries' rights or of operations for the transfer of capital or surrender values does not in itself prevent such operations. In accordance with the position adopted by the Court in *Safir*,²⁴ I confirm the position set out in my Opinion in *Commission v Denmark*:²⁵ the existence of an obstacle to the free movement of capital may be excluded when the alleged restriction results indirectly from restrictions to other fundamental freedoms.

70. In this context, there is therefore no infringement of the obligations stemming from Article 56 EC and Article 40 of the EEA Agreement.

23 — Directive for the implementation of Article 67 of the Treaty (OJ 1988 L 178, p. 5).

24 — Cited in footnote 10, paragraph 17.

25 — See in particular points 49 to 53.

IV — Costs

71. Examination of the pleas leads to ordering the defendant to pay the costs, in accordance with Article 69(2) of the Rules of Procedure, the Commission having applied for costs. The absence of infringe-

ment of Article 56 EC and Article 40 of the EEA Agreement does not alter that conclusion, to my mind, as all of the national legislation in question is at the origin of the infringements which I propose that the Court should find and, moreover, the Belgian Government has not challenged the applicability of Article 56 EC and/or Article 40 of the EEA Agreement.

V — Conclusion

72. Having regard to the above, I propose that the Court:

(1) declare that:

- by making the deductibility of employers' supplementary pension and life assurance contributions subject to the condition, laid down by Article 59 of the CIR 92, that the contributions be paid to an insurance undertaking or welfare fund established in Belgium;

- by making the tax reduction for long-term saving granted pursuant to Articles 145/1 and 145/3 of the CIR 92 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 92 that when capital, surrender values and savings referred to in Article 34 of the CIR 92 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, pursuant to the second paragraph of Article 364a, by treating 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 92, 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 Belgium grant the right to tax such income to another Contracting State;
- by levying tax, pursuant to Article 364b of the CIR 92, on transfers of capital or of 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;
- by requiring, on the basis of Article 224/2a of the General regulation on taxes assimilated to stamp duty, foreign insurers who have no place of

business in Belgium to obtain authorisation, before providing their services in Belgium, of 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 contracts relating to risks situated in Belgium;

the Kingdom of Belgium has failed to fulfil its obligations under Articles 18, 39, 43 and 49 EC, Articles 28, 31 and 36 of the EEA Agreement, and Articles 4 and 11(2) of Directive 92/96/EEC of 10 November 1992 — following revision, Articles 5(1) and 53(2) of Directive 2002/83/EC of 5 November 2002;

(2) order the Kingdom of Belgium to pay the costs.