JUDGMENT OF THE COURT
28 January 1992 *

In Case C-204/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Belgian Cour de Cassation for a preliminary ruling in the proceedings pending before that court between

Hanns-Martin Bachmann

and

Belgian State

on the interpretation of Articles 48, 59, 67 and 106 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler and F. Grévisse, (Presidents of Chambers), C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: J. A. Pompe, Deputy Registrar,

after considering the written observations submitted on behalf of:

the plaintiff in the main proceedings, by Jean-Pierre Nemery de Bellevaux, of the Brussels Bar,

* Language of the case: French.

the defendant in the main proceedings, by Ignace Maselis, of the Brussels Bar,

the Federal Republic of Germany, by Ernst Röder, acting as Agent,

the Commission of the European Communities, by Jean-Claude Séché, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing oral argument presented by the parties in the main proceedings, by the Danish Government, represented by Jørgen Molde, acting as Agent, by the German Government, by the Netherlands Government, represented by T. Heukels, acting as Agent, and by the Commission at the hearing on 3 July 1991,

after hearing the Opinion of the Advocate General at the sitting on 17 September 1991,

gives the following

Judgment

1 By a judgment of 28 June 1990, which was received at the Court on 5 July 1990, the Belgian Cour de Cassation referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question concerning the interpretation of Articles 48, 59, 67 and 106 of the EEC Treaty.

2 That question was raised in proceedings between Mr Bachmann, a German national employed in Belgium, and the Belgian State concerning the refusal by the Directeur des Contributions Directes (Director of Direct Taxation) for the Brussels-I area to allow the deduction from his total occupational income for 1973 to 1976 of contributions paid in Germany pursuant to sickness and invalidity insurance contracts and a life assurance contract concluded prior to his arrival in Belgium.

3 That refusal is based upon Article 54 of the Code des Impôts sur les Revenus (Income Tax Code, hereinafter referred to as the 'CIR'), which applies to the main proceedings in this case and which provides that only voluntary sickness and invalidity insurance contributions paid to a mutual insurance company recognized by Belgium and pension and life insurance contributions paid in Belgium may be deducted from occupational income.

4 Mr Bachmann brought an action against the said decision in the Brussels Cour d'Appel. Upon the dismissal of that action, he appealed to the Cour de Cassation, which has decided to reserve judgment until the Court of Justice has given a preliminary ruling on the following question:

'Are the provisions of Belgian revenue law relating to income tax pursuant to which the deductibility of sickness and invalidity insurance contributions or pension and life assurance contributions is made conditional upon the contributions being paid "in Belgium" compatible with Articles 48, 59 (in particular the first paragraph thereof), 67 and 106 of the Treaty of Rome?'

5 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

6 It should be stated at the outset that it is not for the Court, in proceedings pursuant to Article 177 of the EEC Treaty, to make any declaration as to the compatibility of rules of national law with Community law, but it may provide the national court with all relevant guidance as to the interpretation of Community law, with a view to enabling that court to assess the compatibility of those rules with the provisions of Community law mentioned.

7 The Court is consequently of the opinion that the national court, in referring the above question for a preliminary ruling, is seeking in essence to know whether Articles 48, 59, 67 and 106 of the Treaty are to be interpreted as precluding the legislation of a Member State from restricting the deductibility of sickness and invalidity insurance contributions and pension and life assurance contributions to contributions paid in that State.

Article 48 of the Treaty

8 The Belgian Government observes that the provisions in question are applied without distinction as to nationality to workers, whether they are Belgian workers or workers who are nationals of other Member States, who choose to retain the benefit of contracts previously entered into abroad, and that the Commission's assertion that those provisions operate to the particular detriment of taxpayers who are nationals of other Member States is unfounded.

9 However, it should be noted that workers who have carried on an occupation in one Member State and who are subsequently employed, or seek employment, in another Member State will normally have concluded their pension and life assurance contracts or invalidity and sickness insurance contracts with insurers established in the first State. It follows that there is a risk that the provisions in question may operate to the particular detriment of those workers who are, as a general rule, nationals of other Member States.

10 As regards pension and life assurance contracts, the Belgian Government points out that, whilst nationals of other Member States who are employed in Belgium and who are beneficiaries of such contracts previously concluded in another Member State are unable to deduct their contributions from their total taxable income in Belgium, nevertheless by Article 32a, which was added to the CIR by the Law of 5 January 1976 (*Moniteur belge* of 6 February 1976, p. 81), pensions, annuities, capital sums or surrender values paid to them by the insurers under those contracts do not constitute taxable income. If they are obliged, on returning to their country of origin, to pay tax on such sums, that obligation arises not by reason of any restriction on freedom of movement for workers imposed by Belgian

law but from the absence of harmonization of the fiscal laws of the Member States.

11 That argument cannot be accepted. It is normally nationals of other Member States who, after working in Belgium, return to their State of origin, where the sums payable by the insurers are liable to tax, and who are therefore prevented from deducting their contributions for income tax purposes without receiving the corresponding benefit of exemption from tax on the sums payable by the insurers. Whilst this situation results from the absence of harmonization of the fiscal laws of the Member States, such harmonization cannot constitute a condition precedent to the application of Article 48 of the Treaty.

12 As regards invalidity and sickness insurance, the Belgian Government contends that the provisions at issue do not constitute a restriction on freedom of movement for workers, inasmuch as a Community national wishing to accept a job in Belgium can easily bring his contract to an end and conclude a new contract with a mutual insurance company recognized by Belgium, with a view to gaining the benefit of deductibility. Furthermore, this is what he would normally do, given that cover under such insurance falls within the compulsory insurance system, which varies from one Member State to another.

13 The Court is likewise unable to accept this argument. To be obliged to terminate a contract concluded with an insurer based in one Member State, in order to be eligible for a tax deduction provided for in another Member State, in circumstances where the person concerned considers the continuation of such a contract to be in his interests, constitutes, by reason of the arrangements and expense involved, a restriction on his freedom of movement.

14 The Belgian, German, Netherlands and Danish governments consider that provisions such as those referred to by the national court are in any event justified in the public interest.

15 The German Government observes in that regard that as far as pensions and life assurance are concerned, as well as sickness and invalidity insurance, the case-law of the Court indicates that Member States may make the conclusion of insurance contracts with an insurer based in another Member State conditional on a system of authorization, in order to protect consumers in their capacity as policy-holders and insured persons (see the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, paragraph 49). If Member States are not obliged to allow the conclusion of insurance contracts which do not fulfil that condition, neither are they obliged to grant any tax advantages in relation to such contracts.

16 The Court is unable to accept that argument. Whilst in the absence of Community harmonization measures Member States are able, with a view to ensuring the protection, as consumers, of insured persons and policy-holders, to make the conclusion of certain insurance contracts conditional upon the insurer being officially approved, no such public interest may be invoked as a ground for refusing to recognize the existence of insurance contracts concluded with insurers established in another Member State at the time when the policy-holder was resident there.

17 The Belgian, Netherlands and Danish governments consider that provisions such as those contained in Article 54 of the CIR are necessary, given, first, the difficulty, if not impossibility, of checking certificates relating to the payment of contributions in other Member States and, secondly, the need to ensure the cohesion of the tax system in relation to pensions and life assurance.

18 As regards the effectiveness of fiscal controls, it should be observed that 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 (Official Journal 1977 L 336, p. 15, hereinafter referred to as 'the Directive') may be invoked by a Member State in order to check whether payments have been made in another Member State where it is necessary, as in the main proceedings in this case, for those payments to be taken into account in order correctly to assess the income tax payable (Article 1(1)).

19 However, the Belgian Government points out that certain Member States have no legal basis for requiring insurers to provide the information needed to monitor payments made within their territory.

20 It should be noted in that regard that Article 8(1) of the Directive imposes no obligation on the tax authorities of Member States to collaborate where their laws or administrative practices prevent the competent authorities from carrying out enquiries or from collecting or using information for those States' own purposes. However, the inability to request such collaboration cannot justify the non-deductibility of insurance contributions. There is nothing to prevent the tax authorities concerned from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction where such proof is not forthcoming.

21 As regards the need to preserve the cohesion of the tax system, the Court held, in its judgment delivered today in Case C-300/90 *Commission* v *Belgium*, that there exists under the Belgian rules a connection between the deductibility of contributions and the liability to tax of sums payable by the insurers under pension and life assurance contracts. According to Article 32a of the CIR, cited above, pensions, annuities, capital sums or surrender values under life assurance contracts are exempt from tax where there has been no deduction of contributions under Article 54.

22 It follows that in such a tax system the loss of revenue resulting from the deduction of life assurance contributions from total taxable income — which includes pensions and insurance payable in the event of death — is offset by the taxation of pensions, annuities or capital sums payable by the insurers. Where such contributions have not been deducted, those sums are exempt from tax.

23 The cohesion of such a tax system, the formulation of which is a matter for each Member State, therefore presupposes that, in the event of a State being obliged to allow the deduction of life assurance contributions paid in another Member State, it should be able to tax sums payable by insurers.

24 An undertaking by an insurer to pay such tax cannot constitute an adequate safeguard. If the undertaking were not honoured, it would be necessary to enforce it in the Member State in which the insurer is established, and quite apart from the problems encountered by a State in discovering the existence and amount of the payments made by insurers established in another State, there remains the possibility that the recovery of the tax might then be prevented on the grounds of public policy.

25 It would certainly be possible in principle for such an undertaking to be accompanied by the deposit by the insurer of a guarantee, but this would involve the insurer in additional expense which would have to be passed on in the insurance premiums, with the result that the insured, who may moreover be subjected to double taxation on the sums payable under the contracts, would cease to have any interest in maintaining them.

26 It is true that bilateral conventions exist between certain Member States, allowing the deduction for tax purposes of contributions paid in a contracting State other than that in which the advantage is granted, and recognizing the power of a single State to tax sums payable by insurers under the contracts concluded with them. However, such a solution is possible only by means of such conventions or by the adoption by the Council of the necessary coordination or harmonization measures.

27 It follows that, as Community law stands at present, it is not possible to ensure the cohesion of such a tax system by means of measures which are less restrictive than those at issue in the main proceedings, and that the consequences of any other measure ensuring the recovery by the State concerned of the tax due under its legislation on sums payable by insurers pursuant to the contracts concluded with them would ultimately be similar to those resulting from the non-deductibility of contributions.

28 In the light of the foregoing, it must be recognized that, in the field of pensions and life assurance, provisions such as those contained in the Belgian legislation at

issue are justified by the need to ensure the cohesion of the tax system of which they form part, and that such provisions are not, therefore, contrary to Article 48 of the Treaty.

29 It should be noted, however, that Article 32a of the CIR applies only with effect from 1975 and that it consequently covers only a part of the period in question. It must be left to the national court to assess, on the basis of the foregoing analysis, whether, as regards the remainder of that period, the provisions referred to by it were necessary in order to achieve the objective, referred to above, of protecting the public interest.

30 It is likewise for the national court to assess whether, as regards sickness and invalidity insurance, the said provisions were also necessary in order to achieve that objective.

Article 59 of the Treaty

31 It is to be noted that provisions such as those contained in the Belgian legislation at issue constitute a restriction on freedom to provide services. Provisions requiring an insurer to be established in a Member State as a condition of the eligibility of insured persons to benefit from certain tax deductions in that State operate to deter those seeking insurance from approaching insurers established in another Member State, and thus constitute a restriction of the latter's freedom to provide services.

32 However, as the Court has previously held (see the judgment in *Commission* v *Germany*, referred to above, paragraph 52), the requirement of an establishment is compatible with Article 59 of the Treaty where it constitutes a condition which is indispensable to the achievement of the public-interest objective pursued.

33 As is apparent from the foregoing analysis, this is the case as far as pensions and life assurance are concerned for the period after 1975. As regards the preceding years, and as far as sickness and invalidity insurance are concerned, it must be left to the national court to assess whether the provisions to which it refers were also necessary in order to ensure the cohesion of the tax system of which they form part.

Articles 67(1) and 106 of the Treaty

34 Provisions such as those contained in Article 54 of the CIR are not incompatible with Articles 67 and 106 of the Treaty. It need merely be observed in that regard, first, that Article 67 does not prohibit restrictions which do not relate to the movement of capital but which result indirectly from restrictions on other fundamental freedoms, and, secondly, that provisions such as those at issue before the national court preclude neither the payment of insurance contributions to insurers established in another Member State nor their payment in the currency of the Member State in which the insurer is established.

35 Consequently, the answer to the question submitted by the national court is that legislation of a Member State which makes the deductibility of sickness and invalidity insurance contributions and pensions and life assurance contributions conditional on those contributions being paid in that State is contrary to Articles 48 and 59 of the Treaty. However, that condition may be justified by the need to preserve the cohesion of the applicable tax system. Such legislation is not contrary to Articles 67 and 106 of the EEC Treaty.

Costs

36 The costs incurred by the German, Danish and Netherlands Governments and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Belgian Cour de Cassation by judgment of 28 June 1990, hereby rules:

Legislation of a Member State which makes the deductibility of sickness and invalidity insurance contributions and pensions and life assurance contributions conditional on those contributions being paid in that State is contrary to Articles 48 and 59 of the EEC Treaty. However, that condition may be justified by the need to preserve the cohesion of the applicable tax system. Such legislation is not contrary to Articles 67 and 106 of the EEC Treaty.

Due Joliet Schockweiler Grévisse

Kakouris Moitinho de Almeida Rodríguez Iglesias Díez de Velasco Zuleeg

Delivered in open court in Luxembourg on 28 January 1992.

J.-G. Giraud
Registrar

O. Due
President