# JUDGMENT OF THE COURT
28 January 1992 *

In Case C-300/90,

**Commission of the European Communities**, represented by Jean-Claude Séché, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

**Kingdom of Belgium**, represented by Jean Devadder, Adviser at the Ministry of Foreign Affairs, Foreign Trade and Development Aid, acting as Agent, assisted by Ignace Maselis, of the Brussels Bar, with an address for service in Luxembourg at the Belgian Embassy, 4 Rue des Girondins,

defendant,

APPLICATION for a declaration that, by making the deductibility from taxable income of supplementary pension or life assurance contributions conditional on those contributions being paid to an undertaking established in Belgium or to the Belgian establishment of a foreign insurance undertaking, the Kingdom of Belgium

* Language of the case: French.

has failed to fulfil its obligations under Articles 48 and 59 of the EEC Treaty and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community,

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,

having regard to the Report for the Hearing,

after hearing oral argument from the parties 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 application lodged at the Court Registry on 1 October 1990, the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by making the deductibility from taxable income of supplementary pension or life assurance contributions conditional on those contributions being paid to an undertaking established in Belgium or to the Belgian establishment of a foreign insurance undertaking, the Kingdom of Belgium has failed to fulfil its obligations under Articles 48 and 59 of the EEC Treaty and Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal 1968 L 257, p. 2).

2 Article 54(2) of the Code des Impôts sur les Revenus (*Moniteur belge* of 10 April 1964, p. 3809, hereinafter referred to as the 'CIR') provides that there are to be deducted from a taxpayer's total occupational income supplementary pension and life assurance contributions definitively paid by him in Belgium, otherwise than pursuant to a legal obligation, with a view to the creation of a pension or a capital sum payable either during his lifetime or in the event of his death.

3 The implementing legislation, Royal Decree of 4 March 1965 (*Moniteur belge* of 30 April 1965, p. 4722), provides that 'single or periodic premiums paid by the taxpayer pursuant to life assurance contracts personally concluded by him shall be . . . deducted from the insured's total occupational income only where: (1) the contracts are concluded with Belgian undertakings, or with the Belgian establishments of foreign undertakings, which enter into obligations the performance of which is dependent on the duration of a human life, including public or private provident institutions governed by special legislation . . . ' (Article 45, subsequently Article 44 pursuant to the Royal Decree of 7 January 1989, *Moniteur belge* of 10 January 1989, p. 999). As regards supplementary insurance contributions paid by employers by way of deductions at source from remuneration, Article 33e of the said Royal Decree provides that deductions from taxable income are to be conditional *inter alia* on the contributions being 'paid to a life assurance company or pension fund having its registered office, principal establishment or managerial or administrative headquarters in Belgium or to an establishment maintained in Belgium by such a company or fund having its registered office or principal establishment abroad . . . '.

4 Following the repeal of Article 54 of the CIR by Article 35(1)(6) of the Law of 7 December 1988 (*Moniteur belge* of 16 December 1988, p. 17312), the relevant rules are now to be found in Articles 12(2)(1) and 13(1)(1) of that Law, the wording of which is as follows:

'The following shall be regarded as occupational expenses:

(1) supplementary pension and life assurance contributions definitively paid by the taxpayer in Belgium, otherwise than pursuant to a legal obligation, with a view to the creation of a pension or capital sum payable during the insured's

lifetime or on his death, by way of deduction at source from his remuneration through the intermediary of his employer' (Article 12(2];

'There shall be deducted from the taxpayer's total occupational income . . . :

(1) supplementary pension and life assurance contributions definitively paid by the taxpayer in Belgium, otherwise than pursuant to a legal obligation, with a view to 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' (Article 13(1].

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

**Infringement of Article 48 of the Treaty and of Article 7(2) of Regulation No 1612/68**

6 The Belgian Government asserts that the provisions at issue apply irrespective of nationality to Belgian workers and to workers from other Member States who choose to retain the benefit of contracts previously entered into abroad, and that there is no foundation whatever for the Commission's statement that the operation of those provisions is particularly disadvantageous to taxpayers who are nationals of other Member States.

7 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 life assurance 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.

8 The Belgian Government further observes that, whilst nationals of other Member States who are employed in Belgium and who are the beneficiaries of life assurance contracts previously concluded in another Member State are unable to deduct their contributions from their total taxable income, nevertheless the pensions, annuities, capital sums or surrender values paid to them by the insurers under those contracts do not constitute taxable income, as is apparent from Article 32a, incorporated into the CIR by the Law of 5 January 1976 (*Moniteur belge* of 5 February 1976, p. 81). If they are obliged, on returning to their country of origin, to pay tax on such sums, that obligation results not from 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.

9 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.

10 The Belgian Government asserts that the provisions at issue are in any event justified in the public interest. First, it is difficult, if not impossible, to monitor the payment of contributions in the other Member States, and, secondly, such provisions are necessary to ensure the cohesion of the tax system at issue.

11 As regards the effectiveness of fiscal control, it is to 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, as in this case, it is necessary, in order correctly to assess the income tax, to take account of those payments (Article 1(1].

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

13 It should be noted in that regard that under Article 8(1) of the Directive there is 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 the 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 Belgian tax authorities from requiring the person concerned to provide such proof as they may consider necessary and, where appropriate, from refusing to allow deduction where such proof is not forthcoming.

14 As regards the need to preserve the cohesion of the tax system at issue, it should be noted that there exists a connection under the Belgian rules between the deductibility of contributions and the liability to tax of sums payable by insurers pursuant to pension or life assurance contracts. According to Article 32a of the CIR, cited above, pensions, annuities, capital sums or surrender values payable under life assurance contracts are exempt from tax where there has been no deduction of contributions under Article 54.

15 It follows that, under the Belgian tax system at issue, the loss of revenue resulting from the deduction of life assurance contributions from total taxable income 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.

16 The cohesion of such a tax system, the formulation of which is a matter for the Belgian State, presupposes, therefore, that in the event of that 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.

17 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.

18 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.

19 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.

20 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 provided for by the rules in question, and that the consequences of any other measure ensuring the recovery by the Belgian State 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.

21 In view of the foregoing, it must be accepted that the contested provisions of Belgian law are justified by the need to safeguard the cohesion of the tax system at

issue and, consequently, that they do not infringe Article 48 of the Treaty. This is also the case as regards Article 7 of Regulation No 1612/68.

**Infringement of Article 59 of the Treaty**

22 It is to be noted that the provisions in question 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.

23 However, as the Court has previously held (see, *inter alia*, the judgment in Case 205/84 *Commission* v *Germany* [1986] ECR 3755, 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. As is apparent from the considerations set out above, that is the situation in the present case.

24 It follows that the contested provisions are not contrary to Article 59 of the Treaty and, consequently, that the application must be dismissed in its entirety.

**Costs**

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

**1. Dismisses the application;**

**2. Orders the Commission to pay the costs.**

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