JUDGMENT OF THE COURT (Fifth Chamber)

29 November 2001 *

In Case C-17/00,

REFERENCE to the Court under Article 234 EC by the Collège juridictionnel de la Région de Bruxelles-Capitale (Belgium) for a preliminary ruling in the proceedings pending before that body between

François De Coster

and

Collège des bourgmestre et échevins de Watermael-Boitsfort,

on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC),

* Language of the case: French.

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the Chamber, S. von Bahr, D.A.O. Edward, A. La Pergola (Rapporteur) and M. Wathelet, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Commission of the European Communities, by K. Banks and M. Wolfcarius, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 28 June 2001,

gives the following

Judgment

1 By order of 9 December 1999, received at the Court on 19 January 2000, the Collège juridictionnel de la Région de Bruxelles-Capitale (Judicial Board of the

Brussels-Capital region) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC).

2 The question was raised in proceedings between Mr De Coster and the Collège des bourgmestre et échevins de la commune de Watermael-Boitsfort (Belgium) concerning the municipal tax on satellite dishes which he was charged for the year 1998.

National regulations

3 Articles 1 to 3 of the tax regulation on satellite dishes adopted by the municipal council of Watermael-Boitsfort on 24 June 1997 ('the tax regulation') read as follows:

'1. An annual municipal tax on satellite dishes is hereby introduced for the 1997 to 2001 financial years inclusive.

2. The rate of the tax is set at 5000 francs per satellite dish, whatever its size. The tax is due for the whole calendar year regardless of the date of installation of the dish during the tax year.

3. The tax is payable by the owner of the satellite dish on 1 January of the tax year....'

4 The tax regulation was repealed with effect from 1 January 1999 by a decision of the municipal Council of Watermael-Boitsfort meeting on 21 September 1999, prompted by the fact that in the course of infringement proceedings against the Kingdom of Belgium the Commission had sent the latter a reasoned opinion questioning the compliance of measures such as the tax regulation with Community law.

Main proceedings and the question submitted for a preliminary ruling

5 On 10 December 1998 Mr De Coster lodged at the Collège juridictionnel de la Région de Bruxelles-Capitale a complaint against the satellite dish tax charged him by the municipality of Watermael-Boitsfort for the 1998 financial year.

6 Mr De Coster considers that such a tax results in a restriction on the freedom to receive television programmes coming from other Member States which is contrary to Community law and especially to Article 59 of the Treaty.

7 By letter of 27 April 1999 addressed to the Collège juridictionnel de la Région de Bruxelles-Capitale, the municipality of Watermael-Boitsfort stated that the tax on

satellite dishes was introduced in an attempt to prevent their uncontrolled proliferation in the municipality and thereby preserve the quality of the environment.

8 Since the Collège noted *inter alia* that the tax could result in inequality between cable broadcasting companies and those broadcasting by satellite, it decided to stay the proceedings and submit the following question to the Court of Justice for a preliminary ruling:

'Are Articles 1 to 3 of the tax regulation on satellite dishes adopted by vote of the municipal council of Watermael-Boitsfort sitting in public on 24 June 1997 introducing a tax on satellite dishes compatible with Articles 59 to 66 of the Treaty establishing the European Community of 25 March 1957?'

Admissibility

9 First of all, the question of whether the Collège juridictionnel de la Région de Bruxelles-Capitale should be considered to be a national court or tribunal for the purposes of Article 234 EC must be examined.

10 It is settled case-law that in order to determine whether a body making a reference is a court or tribunal for the purposes of Article 234 EC, which is a question governed by Community law alone, the Court takes account of a number of factors, such as whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter*

partes, whether it applies rules of law and whether it is independent (see, in particular, Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, paragraph 23 and the case.law cited therein, and Joined Cases C-110/98 to C-147/98 *Gabalfrisa and Others* [2000] ECR I-1577, paragraph 33).

11 In the case of the Collège juridictionnel de la Région de Bruxelles-Capitale, Article 83d(2) of the Law of 12 January 1989 concerning the Brussels institutions (*Moniteur belge* of 14 January 1989, p. 667), states:

'The judicial functions which in the provinces are exercised by the permanent deputation are exercised in respect of the territory referred to in Article 2(1) by a board of 9 members appointed by the Council of the Brussels-Capital Region on the proposal of its government. At least three members must come from the smallest linguistic group.

The members of this board are subject to the same rules on ineligibility as those which apply to the members of the permanent deputations in the provinces.

In proceedings before the board, the same rules must be respected as those which apply when the permanent deputation exercises a judicial function in the provinces.'

12 It is thus established that the Collège juridictionnel de la Région de Bruxelles-Capitale is a permanent body, established by law, that it gives legal rulings and that the jurisdiction thereby invested in it concerning local tax proceedings is compulsory.

13 However, the Commission maintains that no assurance can be gained from examination of Article 83d of the Law of 12 January 1989 that the procedure followed before the Collège juridictionnel is *inter partes*, or that the latter exercises its functions completely independently and impartially in applications by taxpayers challenging taxes charged them by the municipal councils. In particular, the Commission raises the question of whether the Collège juridictionnel is independent of the executive.

14 Regarding the requirement that the procedure be *inter partes*, it must first be noted that that is not an absolute criterion (*Dorsch Consult*, paragraph 31, and *Gabalfrisa*, paragraph 37, both cited above).

15 Secondly, it must be noted that in the present case Article 104a of the Provincial Law of 30 April 1836, a provision inserted by the Law of 6 July 1987 (*Moniteur belge* of 18 August 1987, p. 12309), and the Royal Decree of 17 September 1987 concerning the procedure before the permanent deputation when it exercises a judicial function (*Moniteur belge* of 29 September 1987, p. 14073), both of which are applicable to the Collège juridictionnel de la Région de Bruxelles-Capitale by virtue of Article 83d(2) of the Law of 12 January 1989, indicate that the procedure followed before the latter is indeed *inter partes*.

16 Article 104a of the abovementioned Provincial Law and Article 5 of the Royal Decree of 17 September 1987 indicate that a copy of the application is sent to the defendant, who has 30 days in which to submit a reply (which is then sent to the applicant), that the preparatory inquiries are adversarial, that the file may be consulted by the parties and that they may present their oral observations at a public hearing.

17 As to the criteria of independence and impartiality, it must be noted that there is no reason to consider that the Collège juridictionnel does not satisfy such requirements.

18 First, as is clear from Article 83d(2) of the Law of 12 January 1989, it is the Conseil de la Région de Bruxelles-Capitale that appoints the members of the Collège juridictionnel and not the municipal authorities whose tax decisions the Collège juridictionnel is, as in the main proceedings, required to examine.

19 Secondly, it is apparent *inter alia* from the Belgian Government's answers to the questions put to it by the Court that members of the Collège juridictionnel may not be members of a municipal council or of the staff of a municipal authority.

20 Thirdly, Articles 22 to 25 of the Royal Decree of 17 September 1987 establish procedure for challenging appointment which is applicable to the members of the Collège juridictionnel by virtue of Article 83d(2) of the Law of 12 January 1989, and which is to be based on reasons essentially identical to those which apply in the case of members of the judiciary.

21 Finally, it appears from the explanations provided by the Belgian Government at the request of the Court that appointments of members of the Collège juridictionnel are for an unlimited period of time and cannot be revoked.

22 It is clear from the above that the Collège juridictionnel de la Région de Bruxelles-Capitale must be considered to be a court or tribunal for the purposes of Article 234 EC; accordingly, the reference for a preliminary ruling is admissible.

Substance

23 When addressing that question, it must be borne in mind that in proceedings brought under Article 234 EC the Court does not have jurisdiction to rule on the compatibility of a national measure with Community law. However, it does have jurisdiction to supply the national court with a ruling on the interpretation of Community law so as to enable that court to determine whether such compatibility exists in order to decide the case before it (see especially Joined Cases C-37/96 and C-38/96 *Sodiprem and Others* [1998] ECR I-2039, paragraph 22).

24 The question submitted for a preliminary ruling must therefore be understood as asking in substance whether Articles 59, 60 and 66 of the Treaty must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation.

25 In order to reply to the question as thus reformulated, it must be observed that although, as Community law stands at present, direct taxation does not as such fall within the purview of the Community, the powers retained by the Member States must nevertheless be exercised consistently with Community law (see, in particular, Case C-118/96 *Safir* [1998] ECR I-1897, paragraph 21).

26 In the context of freedom to provide services the Court has also recognised that a national tax measure restricting that freedom may constitute a prohibited measure (see, in particular, Case C-49/89 *Corsica Ferries France* [1989] ECR 4441, paragraph 9, and Case C-381/93 *Commission* v *France* [1994] ECR I-5145, paragraphs 20 to 22).

27 Since the duty to abide by the rules relating to the freedom to provide services applies to the actions of public authorities (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraph 17), it is, in that respect, irrelevant that the tax measure in question was adopted, as in the main proceedings, by a local authority and not by the State itself.

28 Furthermore, it is settled case-law that the transmission, and broadcasting, of television signals comes within the rules of the Treaty relating to the provision of services (see, in particular, Case 155/73 *Sacchi* [1974] ECR 409, paragraph 6; Case 52/79 *Debauve and Others* [1980] ECR 833, paragraph 8; Case C-260/89 *ERT* [1991] ECR I-2925, paragraphs 20 to 25; Case C-353/89 *Commission* v *Netherlands* [1991] ECR I-4069, paragraph 38; Case C-211/91 *Commission* v *Belgium* [1992] ECR I-6757, paragraph 5, and Case C-23/93 *TV10* [1994] ECR I-4795, paragraphs 13 and 16).

29 It must also be noted that, according to the case-law of the Court, Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services (see Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Case C-43/93 *Vander Elst* [1994] ECR I-3803, paragraph 14).

30 Furthermore, the Court has already held that Article 59 of the Treaty precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (*Commission* v *France*, cited above, paragraph 17, and *Safir*, cited above, paragraph 23; Case C-158/96 *Kohll* [1998] ECR I-1931, paragraph 33; Case C-157/99 *Smits and Peerbooms* [2001] ECR I-5473, paragraph 61).

31 In that regard it must be noted that the introduction of a tax on satellite dishes has the effect of a charge on the reception of television programmes transmitted by satellite which does not apply to the reception of programmes transmitted by cable, since the recipient does not have to pay a similar tax on that method of reception.

32 However, the Commission indicated in its written observations that whilst broadcasters established in Belgium enjoy unlimited access to cable distribution for their programmes in that Member State, broadcasters established in certain other Member States do not. The number of Danish, Greek, Italian, Finnish or Swedish channels which can be broadcast by cable in Belgium is thus particularly limited, the Commission noting in that regard a maximum of one channel per State, if any. It follows that most television broadcasting programmes transmitted from those Member States can only be received by satellite dishes.

33 In such circumstances, as the Commission correctly observes, a tax such as that introduced by the tax regulation is liable to dissuade the recipients of the television broadcasting services established in the municipality of Watermael-Boitsfort from seeking access to television programmes broadcast from other Member States, since the reception of such programmes is subject to a charge

which does not apply to the reception of programmes coming from broadcasters established in Belgium.

34 Furthermore, as the Commission also observes, the introduction of such a tax is liable to hinder the activities of operators in the field of satellite transmission by imposing a charge on the reception of programmes transmitted by such operators which does not apply to the reception of programmes transmitted by the national cable distributors.

35 It follows from those considerations that the tax on satellite dishes introduced by the tax regulation is liable to impede more the activities of operators in the field of broadcasting or television transmission established in Member States other than the Kingdom of Belgium, while giving an advantage to the internal Belgian market and to radio and television distribution within that Member State.

36 As stated in paragraph 7 of this judgment, the municipality of Watermael-Boitsfort nevertheless justifies the tax regulation by stating its concern to prevent the uncontrolled proliferation of satellite dishes in the municipality and thereby preserve the quality of the environment.

37 In that regard, it suffices to state that even if the need for protection relied on by the municipality of Watermael-Boitsfort is capable of justifying restriction of the freedom to provide services, and even if it is established that merely reducing the number of satellite dishes as anticipated by the introduction of a tax such as the

one in question in the main proceedings is capable of meeting that need, the tax exceeds what is necessary to do so.

38 As the Commission observed, there are methods other than the tax in question in the main proceedings, less restrictive of the freedom to provide services, which could achieve an objective such as the protection of the urban environment, for instance the adoption of requirements concerning the size of the dishes, their position and the way in which they are fixed to the building or its surroundings or the use of communal dishes. Moreover, such requirements have been adopted by the municipality of Watermael-Boitsfort, as is apparent from the planning rules on outdoor aerials adopted by that municipality and approved by regulation of 27 February 1997 of the government of the Brussels-Capital region (*Moniteur belge* of 31 May 1997, p. 14520).

39 In view of all of the above considerations the answer to the question submitted must be that Articles 59, 60 and 66 of the Treaty must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation.

Costs

40 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, 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 (Fifth Chamber)

in answer to the question referred to it by the Collège juridictionnel de la Région de Bruxelles-Capitale by order of 9 December 1999, hereby rules:

Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Articles 60 and 66 of the EC Treaty (now Articles 50 and 55 EC) must be interpreted as preventing the application of a tax on satellite dishes such as that introduced by Articles 1 to 3 of the tax regulation adopted on 24 June 1997 by the municipal council of Watermael-Boitsfort.

Jann von Bahr Edward

La Pergola Wathelet

Delivered in open court in Luxembourg on 29 November 2001.

R. Grass P. Jann

Registrar President of the Fifth Chamber