JUDGMENT OF THE COURT (First Chamber)

1 December 2011 (*)

(Failure of a Member State to fulfil obligations – Free movement of persons – Purchase of immovable property intended as a new principal residence – Calculation of a tax advantage – Registration duties – Cohesion of the tax system)

In Case C-250/08,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 10 June 2008,

European Commission, represented by P. van Nuffel, R. Lyal and W. Roels, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Belgium, represented by L. Van den Broeck, acting as Agent, and by B. van de Walle de Ghelcke, advocaat,

defendant,

supported by:

Republic of Hungary, represented by R. Somssich, K. Borvölgyi and M.Z. Fehér, acting as Agents,

intervener,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, M. Safjan, M. Ilešič, E. Levits, and M. Berger, Judges,

Advocate General: E. Sharpston,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 23 September 2010,

after hearing the Opinion of the Advocate General at the sitting on 21 July 2011,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that, in so far as, in the Flemish Region, for the calculation of a tax advantage upon the purchase of immovable property intended as a new principal residence, the amount of registration duties paid upon the purchase of a previous principal residence is taken into account only if the

latter was situated in the Flemish Region but not if it was situated in a Member State other than the Kingdom of Belgium or in a Member State of the European Free Trade Association (EFTA), the Kingdom of Belgium has failed to fulfil its obligations under Articles 18 EC, 43 EC and 56 EC and under Articles 31 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

National legal context

2 Article 61.3 of the Code of registration duties, mortgage duties and registry fees (Wetboek der registratie-, hypotheek- en griffierechten), as amended by the decree adopted by the Flemish Region on 1 February 2002 ('the Wb.Reg.'), introduced into the Flemish Region the system of the 'portability' of registration duties. That article states:

'When immovable property used or intended to be used for residential purposes is purchased in a normal sale transaction by an individual in order to establish it as his principal residence, his statutory portion of the duty payable under Articles 44, 53, 2° or 57 on the acquisition of the dwelling previously used as his principal residence, or of the land upon which that dwelling was constructed, is to be offset against his statutory portion of the duty payable on the acquisition of the new property, provided that the latter acquisition is duly dated within two years of the date of the registration of the document giving rise to the determination of the proportional duty on either the resale of the previous dwelling by normal sale transaction, or on the division of joint ownership of that dwelling, the individual having relinquished all of his rights.

There can be no offset under this article of duty paid on the acquisition of a property which is not situated in the Flemish Region.

There can also be no offset of additional duty payable on a purchase for any reason whatsoever.

Offset of a duty in accordance with the present article shall not, under any circumstances, give rise to a refund.

When a transaction, as referred to in the first paragraph, is preceded by one or more similar transactions and/or by one or more transactions as referred to in the first paragraph of Article 212a, the duty that was not already offset at the time of those previous transactions following the application of the third or fifth paragraphs of the present article, and/or the duty that was not already reimbursed following application of the third or fifth paragraphs of Article 212a shall, should the case arise, be added to the individual's statutory portion of the duty payable under Articles 44, 53, 2° or 57 on the last purchase but one, in order to determine the amount to be offset against the last purchase.

The amount to be offset that is obtained by application of the first or fourth paragraphs cannot in any case exceed EUR 12 500. This maximum amount to be offset is determined in proportion to the share that the individual obtains of the newly acquired property.'

3 In addition, Article 212a of the Wb.Reg., which is applicable in the Flemish Region, provides, under the same conditions and, *mutatis mutandis*, in identical terms, for the reimbursement of registration duty paid upon the first acquisition of immovable property in the Flemish Region in the case where a property previously purchased in the Flemish Region, and previously used as a principal residence, is sold within two years, or within five years in the case where land is acquired for the purpose of constructing a dwelling house, of the purchase of a dwelling in the Flemish Region destined to become the person's new principal residence.

The pre-litigation procedure

4 As it took the view that Article 61.3 of the Wb.Reg. breached Articles 18 EC, 43 EC and 56 EC, as well as Articles 31 and 40 of the EEA Agreement, the Commission, on 23 December 2005, sent to the Kingdom of Belgium a letter of formal notice inviting it to submit its comments on those breaches.

5 In its response of 22 March 2006, the Kingdom of Belgium outlined the reasons why it considered that the system in question did not constitute an infringement of the EC Treaty or of the EEA Agreement.

6 In those circumstances, the Commission, on 13 July 2006, issued a reasoned opinion to the Kingdom of Belgium in which it called on it to take the necessary measures to comply with that opinion within two months of receipt.

7 On 13 September 2006, the Belgian authorities replied to the Commission that the tax system in question did not constitute an infringement of the Treaty. In any event, even if that were the case, the system satisfied the requirements laid down by the Court in Case C-204/90 *Bachmann* [1992] ECR I-249 concerning the conditions required for the deductibility of tax, with the result that that system was permissible under European Union law inasmuch as it allowed the cohesion of the Belgian tax system to be safeguarded.

8 As it was not satisfied with that reply, the Commission brought the present action.

9 By order of the President of the Court of 10 December 2008, the Republic of Hungary was granted leave to intervene in support of the form of order sought by the Kingdom of Belgium.

The action

Arguments of the parties

10 The Commission takes the view, first, that the legislation at issue is contrary to Article 18 EC.

11 The right of a citizen of the European Union to ‘reside’ in a Member State other than that person’s Member State of origin includes the right to establish a principal residence in that other Member State, which implies the right to buy or build that residence. Therefore, the Commission argues, by granting a reduction of registration duties to persons acquiring immovable property situated in the Flemish Region only if they already had their principal residence in that same region, the Flemish Region would be conferring on them a tax advantage to which persons who had previously acquired their principal residence in a Member State other than the Kingdom of Belgium are not entitled. That discrimination, the Commission submits, interferes with an essential element of the right to intra-Community mobility, namely the purchase of immovable property.

12 Second, that legislation infringes Article 43 EC, relating to the right of establishment, and Article 31 of the EEA Agreement.

13 Since the freedom of establishment also includes, under Article 44(2)(e) EC, the right to acquire immovable property situated in the territory of another Member State, the legislation of the Flemish Region concerning registration duties distinguishes between Community nationals who change the location of the seat of their economic activities, according to whether the move occurs within the Flemish Region or from a Member State other than the Kingdom of Belgium to that region. That discrimination concerns, in particular, ‘self-employed’ activities by reason of the fact that the place

of establishment in respect of those activities frequently coincides with that of the principal residence of the self-employed worker.

14 Since Article 31 of the EEA Agreement grants the right of establishment to nationals of an EFTA Member State in identical terms, the legislation here at issue is also contrary to that article.

15 Third, according to the Commission, that legislation infringes Article 56 EC in so far as that article prohibits all restrictions on the movement of capital between Member States, including transactions by which non-residents make investments in immovable property, as is clear from the nomenclature of capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article [56 EC] (OJ 1988 L 178, p. 5). The same holds true with regard to Article 40 of the EEA Agreement, which is substantively the same as Article 56 EC.

16 Finally, the legislation at issue treats objectively comparable situations unequally. The Commission considers that the situations here are objectively comparable because all of the cases involve persons who move the location of their principal residence within the European Union and the European Economic Area (EEA). It is not appropriate to draw a distinction according to whether the move is confined within the Flemish Region or takes place from a Member State other than the Kingdom of Belgium to the Flemish Region. While, in both those cases, registration duties are payable upon the purchase of the new principal residence, the Flemish legislation grants a tax advantage only to those persons who previously had their principal residence in the Flemish Region.

17 Furthermore, according to the Commission, the discrimination is not justified on grounds of public interest.

18 As regards the reasons put forward by the Kingdom of Belgium relating to tax cohesion, the Commission takes the view that that Member State cannot rely on the judgments in *Bachmann* (paragraph 21) and in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305, paragraph 14, in which the Court accepted the need to maintain cohesion of the tax system as a ground on which an infringement of the free movement of persons could be justified.

19 In order for that justification to be acceptable, the Court’s case-law states that a direct link must be established between the tax advantage concerned and the offsetting of that advantage by a particular tax levy (Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 46). That case-law is intended to prevent a situation in which the same transaction is taxed twice or not at all. However, in the present case, there is no direct tax link between the acquisition of the first principal residence and the corresponding registration duties and the acquisition of the second and the registration duties collected thereon.

20 For its part, the Kingdom of Belgium explains, first of all, that the system at issue applies to all individuals, irrespective of their nationality, and has a threefold objective, namely, first, the increase of work-related mobility, the proportional reduction in the scale of shuttle transportation and traffic jams for the benefit of the environment and public health, second, promotion of the renovation of buildings and dwellings, and, third, reduction of rents.

21 As regards the breach of Articles 18 EC, 43 EC and 56 EC, the Kingdom of Belgium submits that the Flemish legislation should be examined only in relation to the free movement of capital, since, according to settled case-law, first, the acquisition of immovable property in a Member State by a non-resident constitutes a movement of capital between Member States (see Case C-302/97 *Konle* [1999] ECR I-3099, paragraph 22, and Case C-423/98 *Albore* [2000] ECR I-5965, paragraph 14), the restriction of the freedom of establishment thus being merely a direct consequence of the restriction of the free movement of capital (Case 203/80 *Casati* [1981] ECR 2595, paragraph 8).

The Kingdom of Belgium also refers to the judgments in Case C-367/98 *Commission* v *Portugal* [2002] ECR I-4731, Case C-483/99 *Commission* v *France* [2002] ECR I-4781 and Case C-503/99 *Commission* v *Belgium* [2002] ECR I-4809 on that point.

22 Second, to the extent that Article 18 EC finds specific expression in the traditional fundamental freedoms, it can be applied independently only to situations in which European Union law applies but in respect of which the Treaty lays down no particular provisions. The Kingdom of Belgium invokes the judgments in Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 22, and in Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 26, in that regard.

23 So far as the merits of the case are concerned, the Kingdom of Belgium relies on the absence of interference with the free movement of capital, primarily on the ground that there is no discrimination between objectively comparable situations. With respect to the first acquisition in the Flemish Region of residential property intended as a principal residence, similar situations are treated in the same manner, since every first-time buyer of residential property which is intended to be that person's principal residence in the Flemish Region is liable to registration duty amounting to 10% of the market value of the immovable property purchased.

24 By contrast, at the time of the second acquisition of residential property intended as a principal residence, the treatment differs depending on whether the previous principal residence was, or was not, situated in the territory of the Flemish Region. The Kingdom of Belgium invokes the Court's case-law, including the judgments in Case C-279/93 *Schumacker* [1995] ECR I-225 and in Case C-169/03 *Wallentin* [2004] ECR I-6443, according to which, in relation to direct taxes, the situations of residents and non-residents are, as a general rule, not comparable and the fact that a Member State does not grant to a non-resident certain tax advantages which it grants to a resident is not, generally, discriminatory.

25 The Kingdom of Belgium also claims that the system at issue is in conformity with the fiscal principle of territoriality recognised by European Union law in Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471 and in Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, pursuant to which independent tax systems coexist without a hierarchy between them. That may give rise to disparities and distortions which could only be the consequence of the differences between the tax systems and which, for that reason, do not come within the scope of the Treaty provisions concerning free movement, as the Court ruled in Case C-403/03 *Schempp* [2005] ECR I-6421, paragraph 45.

26 Finally, in the alternative, the Kingdom of Belgium considers that the portability system can be justified on grounds of public interest and in particular by reason of the principle of cohesion of the tax system adopted by the Court in *Bachmann* (paragraph 28), in so far as there is a direct link between the first purchase of residential property intended as a principal residence and the offset accorded at the time of the second purchase of residential property, a link which does not arise until the completion of that second purchase.

27 In its statement in intervention in support of the Kingdom of Belgium, the Hungarian Government expresses its agreement with the defendant's arguments, in particular its contention that the situations are not objectively comparable and that there is consequently no discrimination under European Union law.

28 The Hungarian Government refers to respect for the principle of territoriality in tax law and expresses its view that the fiscal competence of Member States is absolute as regards national

immovable property – including the acquisition of such property – but does not apply in the case of the acquisition of foreign immovable property. However, as the fiscal competence of Member States includes not only the assessment of the duty but also the granting of tax advantages, Member States are entitled to exclude foreign immovable property from the benefit of tax advantages. The potential limitation of the fundamental freedoms relied on by the Commission is, it submits, the necessary consequence of the territorial division of the fiscal competence of Member States. In any event, it is justified by the principle of cohesion of the tax system.

Findings of the Court

29 First of all, it should be noted that the Kingdom of Belgium takes the view that it is unnecessary to examine the legislation at issue in the light of Articles 18 EC and 43 EC and accordingly considers that the failure should be examined only in relation to the free movement of capital.

30 In that regard, it should be borne in mind that, according to settled case-law, Article 18 EC can apply independently only to situations where European Union law applies but in respect of which the Treaty lays down no particular provisions (see, to that effect, *Skanavi and Chryssanthakopoulos*, paragraph 22; *Oteiza Olazabal*, paragraph 26; and Case C-318/05 *Commission* v *Germany* [2007] ECR I-6957, paragraphs 35 and 36).

31 Furthermore, it is also settled case-law that national measures liable to prevent or limit the acquisition of immovable property situated in another Member State may be deemed to constitute restrictions on the movement of capital (see Case C-377/07 *STEKO Industriemontage* [2009] ECR I-299, paragraph 24, and Case C-35/08 *Busley and Cibrian Fernandez* [2009] ECR I-9807, paragraph 21).

32 Having regard to those elements, the legislation at issue is thus to be examined solely in the light of Article 56 EC. First, Article 18 EC cannot be applied independently in the present case, as cases involving the purchase of a new residence in the Flemish Region by a person moving to that region of Belgium from another Member State without economic reasons are covered by the free movement of capital. Second, in the present case, as the Kingdom of Belgium notes, the potential breach of Article 43 EC would be the unavoidable consequence of the interference with the free movement of capital.

33 It is necessary to recall at the outset that, according to settled case-law, while direct taxation falls within the competence of the Member States, the latter must none the less exercise that competence in a manner consistent with European Union law (Case C-334/02 *Commission* v *France* [2004] ECR I-2229, paragraph 21; Case C-155/09 *Commission* v *Greece* [2011] ECR I-0000, paragraph 39; and Case C-10/10 *Commission* v *Austria* [2011] ECR I-0000, paragraph 23).

34 In this regard, the disagreement between the parties concerning the classification of the registration duties at issue as direct or indirect taxation is irrelevant since, as the Commission noted in its application, in the absence of any harmonisation measures concerning registration duties, Member States must exercise their powers in a manner consistent with European Union law. This implies that those duties must be subject to an examination similar to that carried out when examining the compatibility of direct taxes with European Union law.

35 It is thus necessary to examine, first, whether, as the Commission claims, Article 61.3 of the Wb.Reg., which establishes the portability system, amounts to a restriction on the free movement of capital enshrined in Article 56 EC and Article 40 of the EEA Agreement, in that it excludes, from the tax advantage for which it provides, the purchase of property with capital from a Member State other than the Kingdom of Belgium.

36 Article 56(1) EC prohibits all restrictions on the movement of capital between Member States and between Member States and non-member countries. While the Treaty does not define the concept of a movement of capital, it is also common ground that Directive 88/361, together with the nomenclature annexed to it, has indicative value for defining that term (see Joined Cases C-282/04 and C-283/04 *Commission* v *Netherlands* [2006] ECR I-9141, paragraph 19). Furthermore, investments in immovable property come under, first, heading II (entitled 'Investments in real estate (not included under I)') of Annex I to Directive 88/361. Second, it follows from that heading that that type of investment is implicitly included under heading I of that annex, entitled 'Direct investments'.

37 In the present case, Article 61.3 of the Wb.Reg. provides that, when immovable property used or intended to be used for residential purposes is purchased by an individual in order to establish it as his principal residence, the registration duty due on that immovable property is offset against the registration duty paid on the previous residence sold in order to finance the subsequent acquisition, provided that the subsequent acquisition was completed within two years from the sale of the previous property and that the previous property was situated in the Flemish Region.

38 As the Kingdom of Belgium acknowledged, the beneficiaries of that offset can therefore only be individuals having their principal residence in the Flemish Region who, under the conditions laid down in Article 61.3 of the Wb.Reg., purchase a new principal residence within that Region.

39 Consequently, it must be noted that the portability system excludes first-time buyers of immovable property intended for use as a principal residence in the Flemish Region, and who sold their principal residence in another Member State in order to finance the purchase in that Region, from the possibility of benefiting from the offsetting of registration duties for which that system provides.

40 Under the legislation at issue, first of all, persons who move the location of their principal residence from the territory of a region of Belgium other than the Flemish Region to the latter Region are excluded from the benefit of the portability of registration duties.

41 It must, however, be borne in mind that European Union law cannot be applied to such a purely internal situation where there has been no question of the exercise of freedom of movement within the European Union (see, to that effect, Case C-212/06 *Government of Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraphs 37 and 38).

42 The legislation at issue in the present case also excludes from the benefit of the tax advantage the nationals of Member States other than the Kingdom of Belgium who move the location of their principal residence from a Member State other than the Kingdom of Belgium to the territory of the Flemish Region and who use the funds obtained on the sale of their previous principal residence to finance the acquisition of their new immovable property situated in the Flemish Region.

43 Consequently, that legislation is liable to prejudice persons exercising their freedom of movement and must for that reason be examined in the light of European Union law (see, to that effect, *Government of Communauté française and Gouvernement wallon*, paragraph 42).

44 In that regard, it is common ground that, in excluding the persons referred to in paragraph 42 of this judgment from the benefit of the fiscal offsetting of the registration duties at issue, the system of the portability of registration duties entails for them a heavier tax burden than for those who benefit from that offsetting. Since the tax advantages are liable to influence the attitude of the person purchasing a new principal residence, it cannot be ruled out that the fact that registration duties paid in a Member State other than the Kingdom of Belgium cannot be offset may, in certain cases, discourage individuals exercising their right of free movement from purchasing immovable property

in the Flemish Region (see, to that effect, Case C-318/07 *Persche* [2009] ECR I-359, paragraph 38, and Case C-10/10 *Commission* v *Austria*, paragraph 26).

45 In the light of the foregoing, it must be stated that Article 61.3 of the Wb.Reg. constitutes a restriction of the movement of capital.

46 It is therefore appropriate, next, to determine whether this is a prohibited restriction within the terms of Article 56(1) EC. According to the Kingdom of Belgium, that is not the case in this instance, because the system at issue is in conformity with the fiscal principle of territoriality and the restriction of the free movement of capital is a consequence of the disparities between the various national legal rules.

47 In that regard, it is necessary to point out, as the Commission did, that the restriction here at issue results, not from the disparities between national legal rules, but solely from the Belgian portability system.

48 Furthermore, it is true that the Member State at issue, by planning the taxation of purchases of residential property in its territory, is proceeding in accordance with the principle of territoriality enshrined in international tax law and recognised by European Union law (see, inter alia, *Futura Participations and Singer*, paragraph 22). However, the powers which Member States are recognised as having by virtue of the principle of territoriality must be exercised in accordance with the principles of European Union law.

49 According to Article 58(1)(a) EC, Article 56 EC is without prejudice to the right of Member States 'to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation … with regard to the place where their capital is invested'. However, that derogation is itself limited by Article 58(3) EC, which provides that the national provisions referred to in Article 58(1) EC 'shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 56' (Case C-319/02 *Manninen* [2004] ECR I-7477, paragraph 28, and Case C-10/10 *Commission* v *Austria*, paragraph 28).

50 Acceptance of the proposition that a Member State may freely apply a different treatment solely on the basis of the location of the first principal residence would deprive the rules relating to the free movement of capital of all meaning (see, to that effect, in relation to the freedom of establishment, Case 270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 42; and Case C-418/07 *Papillon* [2008] ECR I-8947, paragraph 26).

51 It should be noted in this regard, at the outset, that, according to the Court's case-law, for national tax legislation, such as that at issue, which distinguishes between offsetting of registration duties paid in the Flemish Region and those paid in another Member State, to be regarded as compatible with the Treaty provisions on the free movement of capital, the difference in treatment must relate to situations which are not objectively comparable, or must be justified by an overriding reason in the public interest (see, to that effect, Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43; *Manninen*, paragraph 29; and Case C-10/10 *Commission* v *Austria*, paragraph 29).

52 In that context, the Kingdom of Belgium submits that the situations are not comparable.

53 As was set out at paragraphs 23 and 24 of this judgment, that Member State claims in particular that all first-time buyers of immovable property in the Flemish Region are treated in a similar manner, in that they are liable to pay a registration duty amounting to 10% of the market value of

the property purchased. By contrast, the situation of those persons is not comparable to the situation of those who have previously purchased in the Flemish Region immovable property intended as their principal residence, since the latter have already paid, upon the purchase of their previous principal residence, registration duties in that Region.

54 That argument cannot, however, be accepted.

55 It is true that, according to the Court's case-law, in relation to direct taxes, the situations of residents and of those not resident in a State are generally not comparable, because, on the one hand, the income received in the territory of a State by a non-resident is in most cases only a part of that person's total income, which is concentrated at his place of residence, and, on the other, a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (*Schumacker*, paragraphs 31 and 32; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21; and *Wallentin*, paragraph 15).

56 Moreover, and as the Kingdom of Belgium points out, the fact that a Member State does not grant a non-resident certain tax advantages which it grants to a resident is not, as a rule, discriminatory, having regard to the objective differences between the situation of residents and that of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (see *Schumacker*, paragraph 34; Case C-234/01 *Gerritse* [2003] ECR I-5933, paragraph 44; and *Wallentin*, paragraph 16).

57 However, it is important to note that those principles were developed by the Court in the context of case-law relating to income tax, a field in which the objective differences between taxable persons, such as the source of their income, their personal ability to pay tax or their personal and family circumstances, may have a bearing on the taxation of individual taxpayers and are generally taken into account by the legislature.

58 That is not, however, the case with regard to the registration duties here at issue, which are determined in relation to the sale price of the immovable property. Moreover, the Kingdom of Belgium has not claimed, and it is not apparent from any of the documents before the Court, that the legislation at issue actually takes into account one or other of those objective differences at the time of payment of those duties.

59 In those circumstances, as regards the registration duties at issue, the only difference between the situation of persons not resident in Belgium, including Belgian nationals who have availed of their right to move freely in the European Union, and that of residents in the Flemish Region, whether Belgian nationals or nationals of another Member State, who acquire a new principal residence in that Region stems from the location of their previous principal residence. In both situations, those persons will have acquired immovable property in the Flemish Region in order to establish themselves there and, at the time of purchasing their previous principal residence, some will have paid, in the State in which that residence was located, a tax similar in nature to the registration duties, while others will have paid those duties in the Flemish Region.

60 The view must therefore be taken, as the Commission maintains, that the two situations described in the previous paragraph are objectively comparable.

61 That said, it should be noted that, in order to establish whether discrimination exists, the comparability of the situations in question must also be examined by taking into account the objective pursued by the national provisions at issue (see, to that effect, Case C-231/05 *Oy AA*

[2007] ECR I-6373, paragraph 38, and *Papillon*, paragraph 27).

62 In that respect, the Kingdom of Belgium indicates in its statement in defence that the decree adopted on 1 February 2002 by the Flemish Region, which made several modifications to the Wb.Reg. in its earlier version, was essentially intended to achieve three objectives.

63 First, that decree was designed to increase work-related mobility and to reduce road traffic in order to benefit the environment. In that context, the portability system encourages, in particular, the move to a more suitable residential property. Second, that system promotes the renovation of buildings and dwellings rather than new construction. Third, the decrease in registration duties allows for rent reduction by increasing, in particular, the gross return for landlords.

64 In that regard, even if the legislation at issue could indeed help to achieve those objectives, it must be held that the Kingdom of Belgium has not explained how the fact of excluding, from the benefit of the portability system, persons who sold their principal residence in a Member State other than the Kingdom of Belgium would facilitate the attainment of those objectives.

65 As the Commission correctly states, the discrimination brought about by that legislation, that is to say, the exclusion of certain types of purchasers of immovable property situated in the Flemish Region from the benefit of the portability system, does not contribute to the attainment of the objectives indicated inasmuch as the residents of Member States who live near to the Flemish Region and who carry out an economic activity in that Region as employed or self-employed persons might be encouraged by the system at issue to transfer their principal residence to that Region and thus to avail of the benefits outlined in paragraph 63 of this judgment.

66 Consequently, the argument put forward by the Kingdom of Belgium based on the non-comparability of the situation of domestic taxpayers to that of taxpayers from another Member State cannot be accepted.

67 In the light of the foregoing considerations, it must be stated that, in so far as, from a taxation perspective, situations covered by European Union law are placed at a disadvantage in comparison with domestic situations, Article 61.3 of the Wb.Reg. constitutes a restriction which is prohibited by Article 56(1) EC.

68 Finally, it should be noted that, according to the Court's case-law, such a restriction can be permissible only if it is justified by overriding reasons of public interest. It is further necessary, in such a case, that its application should be appropriate to ensuring the attainment of the objective in question and not go beyond what is necessary to attain it (Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 35, and Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 64).

69 In that context, the Kingdom of Belgium, supported by the Hungarian Government, argues that the restriction on the free movement of capital resulting from Article 61.3 of the Wb.Reg. is justified by the need to safeguard the cohesion of its tax system.

70 The Court has previously held that the need to safeguard the cohesion of the tax system may justify rules that are liable to restrict fundamental freedoms (*Bachmann*, paragraph 21; Case C-300/90 *Commission* v *Belgium*, paragraph 14; *Manninen*, paragraph 42; and Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 43).

71 However, according to settled case-law, in order for an argument based on such a justification to succeed, a direct link must be established between the tax advantage concerned and the offsetting of that concession by a particular tax levy (see, inter alia, *Verkooijen*, paragraph 57; Case C-168/01

Bosal [2003] ECR I-9409, paragraph 29; and *Manninen*, paragraph 42 and the case-law cited).

72 In that regard, it must be noted that, as the Kingdom of Belgium argues, under the system established by Article 61.3 of the Wb.Reg., the registration duties paid at the time of the acquisition of residential property in the Flemish Region intended as a principal residence may, under certain conditions, be offset, up to a maximum of EUR 12 500, against the registration duties payable on the acquisition of a new principal residence in that Region.

73 However, it should be noted that, as the Kingdom of Belgium has no power of taxation on a purchase transaction which was carried out previously in another Member State by persons who decide to establish their new principal residence in the Flemish Region, the configuration of that tax advantage reflects a logical symmetry (see, by analogy, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42).

74 If those persons were to benefit from the portability system upon acquiring a property in the Flemish Region, they would be deriving an undue advantage from a tax system to which their previous immovable property acquisition outside Belgium was not subject.

75 It follows that, under that system, there is a link between the tax advantage and the initial levy. That system involves, first, the same taxpayer, who has already paid the duties at issue and who is eligible for the offset and, second, an advantage awarded within the context of the same taxation.

76 In that context, it should be noted that those two conditions, in this case the same taxpayer and the same taxation, were considered sufficient by the Court to establish the existence of such a link (see, to that effect, *Verkooijen*, paragraph 58; *Bosal*, paragraphs 29 and 30; and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 42). Furthermore, it is important to emphasise that the Commission does not dispute, and has even admitted in its response, that the tax advantage at issue is granted to the same taxpayer and in the context of the same tax.

77 In the light of the foregoing, it must be held that the restriction resulting from Article 61.3 of the Wb.Reg. is justified by the need to safeguard the cohesion of the tax system.

78 The fact none the less remains that, in order for the restriction to be justified in that regard, it is still necessary, as noted in paragraph 68 of this judgment, that it be appropriate and proportionate in relation to the objective pursued.

79 In this respect, it should be noted from the outset that, in their pleadings, neither the Commission nor the Kingdom of Belgium took a position on the proportionality of the system at issue.

80 It is important to note that, in the light of the Court’s case-law, the restriction at issue is appropriate to achieve such an objective, in that it operates in a perfectly symmetrical manner, as only the registration duties previously paid under the Belgian tax system may be offset (see, to that effect, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 44).

81 Furthermore, it is also settled case-law of the Court that that restriction is entirely proportionate to the objective pursued, since the provision at issue limits to a maximum of EUR 12 500 the amount which may be offset against the registration duties payable by the person who purchases a new principal residence in the Flemish Region (see, to that effect, *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 45). In providing for such a limitation, the system at issue retains its character as a tax advantage and is not in the nature of a disguised exemption.

82 It follows that the restriction on the free movement of capital is justified by reasons which relate to the safeguarding of the cohesion of the tax system.

83 With regard to the adverse effect that the system at issue has on Article 40 of the EEA Agreement, a point raised by the Commission, it should be noted that, in so far as the provisions of that article have the same legal scope as the substantially identical provisions of Article 56 EC (see Case C-521/07 *Commission* v *Netherlands* [2009] ECR I-4873, paragraph 33, and Case C-72/09 *Établissements Rimbaud* [2010] ECR I-0000, paragraph 22), all of the foregoing considerations may, in circumstances such as those of the present case, be transposed, *mutatis mutandis*, to Article 40 of the EEA Agreement.

84 In those circumstances, the complaint alleging infringement of the free movement of capital is unfounded. Consequently, the Commission's action must be dismissed.

Costs

85 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Kingdom of Belgium has applied for costs and the Commission has been unsuccessful, the Commission must be ordered to pay the costs.

On those grounds, the Court (First Chamber) hereby:

1. Dismisses the action;

2. Orders the European Commission to pay the costs.

[Signatures]

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* Language of the case: Dutch.