JUDGMENT OF THE COURT (First Chamber)

19 June 2014 (*)

(Freedom to provide services — Temporary employment agency — Secondment of workers by an agency established in another Member State — Restriction — Undertaking using the workforce — Tax on the income of those workers withheld at source — Obligation — Payment to national budget — Obligation — Situation of workers seconded by a national agency — Absence of such obligations)

In Joined Cases C-53/13 and C-80/13,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Krajský soud v Ostravě (Czech Republic) and the Nejvyšší správní soud (Czech Republic), by decisions of 16 and 17 January 2013 respectively, received at the Court on 30 January and 15 February 2013, in the proceedings

Strojírny Prostějov, a.s. (C-53/13),

ACO Industries Tábor s.r.o. (C-80/13)

v

Odvolací finanční ředitelství,

THE COURT (First Chamber),

composed of A. Tizzano (Rapporteur), President of the Chamber, A. Borg Barthet, E. Levits, M. Berger and F. Biltgen, Judges,

Advocate General: M. Wathelet,

Registrar: M. Aleksejev, Administrator,

having regard to the written procedure and further to the hearing on 11 December 2013,

after considering the observations submitted on behalf of:

– ACO Industries Tábor s.r.o., by D. Hejzlar, advokát,

– Odvolací finanční ředitelství, by E. Nedorostková, advokátka,

– the Czech Republic, by M. Smolek, T. Müller and J. Vláčil, acting as Agents,

– the Kingdom of Denmark, by M. Søndahl and V. Pasternak Jørgensen, acting as Agents,

– the European Commission, by W. Roels, M. Šimerdová and Z. Malůšková, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 February 2014,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 18 TFEU, 45 TFEU, 49 TFEU and 56 TFEU.

2 The requests have been made in proceedings between Strojírny Prostějov, a.s. (‘Strojírny Prostějov’) and Odvolací finanční ředitelství (Tax Appeals Directorate) and between ACO Industries Tábor s.r.o. (‘ACO Industries Tábor’) and Odvolací finanční ředitelství, concerning the tax treatment to which those two undertakings were subject.

Legal context

Czech law

3 Paragraph 2 of Law No 586/1992 on income tax, as amended, provides:

‘1. Persons liable to tax on the income of natural persons are natural persons (hereinafter referred to as “taxpayers”).

2. Taxpayers who have their residence or habitual abode in the Czech Republic shall be liable to tax both on income from sources in the Czech Republic and on income from foreign sources.

3. Taxpayers not referred to in subparagraph 2 and those in respect of whom international agreements so provide shall be liable to tax only on income from sources in the Czech Republic (paragraph 22). ...

4. Taxpayers having their habitual abode in the Czech Republic are taxpayers who stay there, either continuously or in several periods, for at least 183 days in any calendar year; the 183-day period includes every day or part of day of stay. For the purposes of this law a place of residence in the Czech Republic shall mean a place where the taxpayer has a stable dwelling in circumstances from which it may be inferred that he intends to stay permanently in that dwelling.’

4 Paragraph 6(2) of that law states as follows:

‘A taxpayer who derives income from non-independent activity and emoluments shall be referred to hereafter as an “employee” and the payer of that income as the “employer”. “Employer” shall also mean a taxpayer referred to in Paragraph 2(2) or Paragraph 17(3) for whom employees perform work under his instructions, even where the income for such work is paid, on the basis of a contractual relationship, through the intermediary of a person established or residing abroad. For the purposes of other provisions of this law, income thus paid shall be regarded as income paid by a taxpayer referred to in Paragraph 2(2) or Paragraph 17(3). Where the employer’s payments to a person established or residing abroad include an amount for intermediation, at least 60% of the total sum paid shall be regarded as income of the employee.’

5 Paragraph 22(1)(b) of that law is worded as follows:

‘In respect of taxpayers referred to in Paragraph 2(3) and Paragraph 17(4), income from non-independent activity (employment) ... which is carried on in the Czech Republic shall be regarded as income from sources in the Czech Republic ...’

6 Paragraph 38c of that law states:

‘A taxable person in accordance with Paragraphs 38d, 38e and 38h shall also include a taxpayer referred to in Paragraph 2(3) and Paragraph 17(4) who has a fixed establishment in the Czech Republic (Paragraph 22(2)) or employs his employees there for longer than 183 days, except in cases of service provision within the meaning of Paragraph 22(1)(c) ... In the case referred to in the second and third sentences of Paragraph 6(2), a taxpayer referred to in Paragraph 2(3) and Paragraph 17(4) shall not be a taxable person.’

7 Under Paragraph 38h(1) of that law :

‘A taxable person shall calculate the advance payment on the income of natural persons from non-independent activity and emoluments (hereinafter referred to as the “advance payment”) by reference to the basis for the advance payment calculation. ...’

Agreement on the avoidance of double taxation

8 Article 14(1) of the agreement between the Czech Republic and the Slovak Republic on the avoidance of double taxation and the prevention of tax avoidance with respect to taxes on income and wealth (Communication of the Ministry of Foreign Affairs, No 100/2003, published in the Collection of International Agreements) provides:

‘Salaries, wages and other similar forms of remuneration which a resident of one Contracting State receives in respect of employment shall be taxed, subject to the provisions of Articles 15, 17 and 18, solely in that State, unless the employment in question is carried on in the other Contracting State. If the employment is carried on there, the remuneration received in respect of it may be taxed in that other State.’

9 Article 23(1) and (3) of the agreement provides as follows:

‘1. Nationals of one Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State are or may be subjected in the same circumstances, in particular with respect to residence. This provision shall, notwithstanding the provisions of Article 1, also apply to persons who are not residents of one or both of the Contracting States.

...

3. The taxation of fixed establishment which an undertaking of one Contracting State has in the other Contracting State shall not be less favourable in that other State than the taxation of undertakings of that other State carrying on the same activities. ...’

The disputes in the main proceedings and the questions referred for a preliminary ruling

10 The cases in the main proceedings concern two Czech undertakings, Strojírny Prostějov and ACO Industries Tábor, which used the services of a temporary employment agency established in the Slovak Republic but carrying on its activity in the Czech Republic via a branch registered in the commercial register of the Czech Republic. Those two undertakings, as users, availed themselves, for a fixed term, of the labour of workers employed by that agency.

Case C-53/13

11 The Finanční úřad v Prostějově (Prostějov tax office), by decision of 7 March 2011, required Strojírny Prostějov to pay into the State budget the withholding tax on income payable by the

workers whose labour it had used. In the tax office's view, given that, under Czech law, the branch of a foreign legal person does not have capacity to have rights and obligations, the supplying undertaking must be considered to be a foreign agency. Consequently, the Czech beneficiary of the labour is obliged to withhold the income tax of the workers and to pay it into the State budget.

12 An appeal against that decision, brought by Strojírny Prostějov before the Finanční ředitelství v Ostravě (Ostrava tax directorate), was dismissed by decision of 18 August 2011. That decision is currently subject to a review by the Krajský soud v Ostravě (Regional Court, Ostrava).

13 That court considers that the Czech legislation discriminates between the situation of a Czech undertaking which makes use of the services of a national temporary employment agency and that of a Czech undertaking which uses an agency established in another Member State. It is only in the second case that the Czech undertaking is required to withhold the income tax payable by the workers whose labour it uses pursuant to the contract concluded with the temporary employment agency, whereas in the first case it is for the temporary employment agency, of which the workers are employees, to withhold that tax. That constitutes a restriction on the freedom to provide services and the free movement of workers, given that such an obligation entails costs, inter alia administrative burdens, which are incurred by only the undertakings which choose an agency not established in the Czech Republic.

14 In those circumstances, the Krajský soud v Ostravě decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Articles 56 [TFEU] and 57 [TFEU] preclude the application of national legislation which, where an undertaking (the supplier) supplying workers to another undertaking has its seat in the territory of another Member State, imposes on the undertaking using the workers an obligation to deduct income tax in respect of those workers' salaries and pay it into the State budget, whereas if the supplier is established in the territory of the Czech Republic that obligation is on the supplier?'

Case C-80/13

15 The Finanční úřad v Táboře (Tábor tax office) conducted a tax audit of ACO Industries Tábor and found that, during the years 2007 and 2008, no advance payment on the income tax of workers provided by N-Partner, a temporary employment agency established in the Slovak Republic, had been withheld. For that reason, it ordered ACO Industries Tábor to pay that advance payment. The basis of assessment for calculating the amount of that advance payment corresponded to 60% of the sums invoiced to ACO Industries Tábor by the Czech branch of N-Partner.

16 ACO Industries Tábor brought an appeal against the decision of the Finanční úřad v Táboře before the Finanční ředitelství v Českých Budějovicích (České Budějovice tax directorate), which was dismissed by decision of 13 May 2011. ACO Industries Tábor appealed against that decision before the Krajský soud v Českých Budějovicích (Regional Court, České Budějovice). That court dismissed the appeal by decision of 31 January 2012, against which an appeal on a point of law was brought before the Nejvyšší správní soud (Supreme Administrative Court).

17 The Nejvyšší správní soud considers that the Czech legislation, first, may discourage an undertaking, such as ACO Industries Tábor, from making use of the services offered by a temporary employment agency established in a Member State other than the Czech Republic, given that, in that case, that legislation not only imposes the obligation to withhold tax at source, but also lays down, as to the extent of taxation, a flat tax base which does not take account of the workers' actual earnings. Secondly, that legislation has the effect that it is less attractive for a temporary employment agency established outside the Czech Republic to offer services in that Member State

as opposed to an agency established there. Similarly, access to the labour market in the Czech Republic through non-national temporary employment agencies is made more difficult. For those reasons, that court wonders whether the legislation at issue constitutes a restriction on the freedom of establishment or on the freedom to provide services and, secondarily, also on the freedom of movement of workers.

18 Furthermore, while excluding the possibility of that restriction being justified on grounds of public policy, public security or public health, that court wonders whether considerations relating to the effectiveness of fiscal supervision could justify the restriction, given that, in the present case, the service provider, namely the Slovak temporary employment agency, has a branch, established in the Czech Republic, through which the tax authorities could recover tax. That branch could withhold the income tax as, furthermore, was done in the case in the main proceedings by the Czech branch of N-Partner.

19 As regards the determination of the basis of assessment by application of a flat rate of 60% of the amount invoiced by the Slovak temporary employment agency to the user undertaking, the referring court considers, on the other hand, that that legal fiction may be justified by an interest linked to the effectiveness of fiscal supervision. The aim of that rule is to discourage foreign temporary employment agencies from invoicing the amount due by the user undertakings without distinguishing between the part of that amount due in respect of workers' salaries — for which a deduction must be made — and that due in respect of payment of that agency for the service provided. Thus, that legislation applies only to the situation in which the invoice issued by the non-resident temporary employment agency does not indicate the amount of the intermediation fee.

20 In those circumstances, the Nejvyšší správní soud decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Do Articles 18 [TFEU], 45 [TFEU], 49 [TFEU] and 56 [TFEU] preclude legislation under which an employer established in one Member State is obliged to make advance payments on the income tax of workers (nationals of another Member State) made temporarily available to him by a temporary employment agency established in another Member State through a branch established in the first Member State?

2. Do Articles 18 [TFEU], 45 [TFEU], 49 [TFEU] and 56 [TFEU] preclude legislation under which the basis of assessment of the income tax of such employees is a flat rate of at least 60% of the amount invoiced by the temporary employment agency in cases where an intermediation fee is also included in the amount invoiced?

3. If the answer to the first or second question is in the affirmative, in a situation such as that in the present case, may the said fundamental freedoms be restricted on grounds of public policy, public security or public health, or, where appropriate, the effectiveness of fiscal supervision?'

21 By order of the President of the Court of 20 March 2013, Cases C-53/13 and C-80/13 were joined for the purposes of the written and oral procedure and the judgment.

Consideration of the questions referred

The question referred in Case C-53/13 and the first and third questions referred in Case C-80/13

22 By the question in Case C-53/13 and by the first and third questions in Case C-80/13, which it is appropriate to consider together, the referring courts ask, in essence, whether Articles 18 TFEU, 45 TFEU, 49 TFEU, 56 TFEU or 57 TFEU preclude legislation, such as that at issue in the main

proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first State through a branch, are obliged to withhold tax and to pay to the first State an advance payment on the income tax due by those workers, whereas the same obligation is not laid down for companies established in the first State which use the services of temporary employment agencies established in that State.

Preliminary observations

23 In order to reply to those questions, it must be noted at the outset that, as EU law stands at present, although direct taxation does not as such fall within the purview of the European Union, the powers retained by the Member States must nevertheless be exercised consistently with EU law (see *FKP Scorpio Konzertproduktionen*, C-290/04, EU:C:2006:630, paragraph 30 and the case-law cited).

24 Furthermore, as regards the question whether national legislation falls within the scope of one or other of the freedoms of movement laid down by the Treaties, it is clear from well-established case-law that the purpose of the legislation concerned must be taken into consideration (see, inter alia, *Test Claimants in the FII Group Litigation*, C-35/11, EU:C:2012:707, paragraph 90, and *Cadbury Schweppes and Cadbury Schweppes Overseas*, C-196/04, EU:C:2006:544, paragraphs 31 to 33).

25 In this case, the Czech legislation imposes on Czech undertakings wishing to avail themselves of the intermediary services of a temporary employment agency not established in the Czech Republic an obligation to withhold the income tax payable by the workers seconded for their benefit by that agency, whereas the same obligation is not imposed on Czech undertakings wishing to avail themselves of the intermediary services of a temporary employment agency established in the Czech Republic.

26 According to settled case-law, Article 56 TFEU confers rights not only on the provider of services but also on the recipient of those services (see, inter alia, *Luisi and Carbone*, 286/82 and 26/83, EU:C:1984:35, paragraph 10; *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 32; and *X*, C-498/10, EU:C:2012:635, paragraph 23).

27 Consequently, the legislation at issue in the main proceedings is covered by the freedom to provide services.

28 It is true that, as the European Commission claims, such legislation is also liable to affect the freedom of establishment of temporary employment agencies wishing to provide their services in the Czech Republic while maintaining their seat in another Member State, particularly because, in this case, the agencies concerned carried out their activities in the Czech Republic through a branch.

29 The same is true as regards the freedom movement of workers, given that the legislation concerns detailed rules for the collection of income tax which are imposed on Czech undertakings to which those workers have been seconded in the context of a contractual relationship with the agencies of which they are employees, which is liable indirectly to affect their chance of exercising their freedom of movement.

30 However, notwithstanding the possible restrictive effects of that legislation on freedom of establishment and the free movement of workers, such effects are an unavoidable consequence of any restriction on the freedom to provide services and do not justify, in any event, an independent examination of that legislation in the light of Articles 45 TFEU and 49 TFEU (see, to that effect, *Omega*, C-36/02, EU:C:2004:614, paragraph 27, and *Cadbury Schweppes and Cadbury Schweppes*

Overseas, EU:C:2006:544, paragraph 33).

31 Finally, in those circumstances, there is also no need to proceed to an interpretation of Article 18 TFEU.

32 That provision applies independently only to situations governed by EU law for which the FEU Treaty lays down no specific rules of non-discrimination. In relation to the freedom to provide services, the principle of non-discrimination was implemented by Articles 56 TFEU to 62 TFEU (see, by analogy, *Attanasio Group*, C-384/08, EU:C:2010:133, paragraph 37, and *Schulz-Delzers and Schulz*, C-240/10, EU:C:2011:591, paragraph 29).

33 The Czech legislation at issue in the main proceedings must therefore be examined in the light of Article 56 TFEU.

Restriction on the freedom to provide services

34 In order to determine whether the legislation at issue in the main proceedings is consistent with the freedom to provide services, it should be recalled that, according to the Court's case-law, Article 56 TFEU requires the abolition of any restriction on that fundamental freedom imposed on the ground that the person providing a service is established in a Member State other than the one in which the service is provided (see *Commission* v *Germany*, 205/84, EU:C:1986:463, paragraph 25; *Commission* v *Italy*, C-180/89, EU:C:1991:78, paragraph 15; *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 31; and *X*, EU:C:2012:635, paragraph 21).

35 Restrictions on the freedom to provide services are national measures which prohibit, impede or render less attractive the exercise of that freedom (*X*, EU:C:2012:635, paragraph 22 and the case-law cited).

36 Furthermore, as was noted in paragraph 26 above, Article 56 TFEU confers rights not only on the provider of services but also on their recipient.

37 It is clear that, in the present case, the obligation to withhold an advance payment on the income tax of workers supplied by temporary employment agencies not established in the Czech Republic and to pay that advance payment to the Czech State is inevitably imposed on the recipients of the services provided by those agencies and entails an additional administrative burden which is not required for the recipients of the same services provided by a resident service provider. Consequently, such an obligation is liable to render cross-border services less attractive for those recipients than services provided by resident service providers, and consequently to deter those recipients from having recourse to service providers resident in other Member States (see, to that effect, *FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 33; *Commission* v *Belgium*, C-433/04, EU:C:2006:702, paragraphs 30 to 32; and *X*, EU:C:2012:635, paragraph 28).

38 The Danish Government, relying on *Truck Center* (C-282/07, EU:C:2008:762, paragraphs 49 to 51), maintains that the situation of agencies established in the Czech Republic is objectively different from that of agencies established outside the Czech Republic and that, consequently, the restriction on the freedom to provide services at issue is not discriminatory.

39 In this respect, however, it is sufficient to note that the provider and the recipient of the services are two distinct legal entities, each with its own interests and each entitled to claim the benefit of the freedom to provide services if their rights are infringed (*X*, EU:C:2012:635, paragraph 27).

40 In this case, the difference in treatment established by the legislation at issue in the main proceedings affects the right of recipients of services freely to choose cross-border services. In

addition, in so far as those recipients reside in the Czech Republic, those who decide to have recourse to the services of resident agencies find themselves in a situation comparable to those who prefer the services of a non-resident agency.

41 It follows that legislation such as that at issue in the main proceedings constitutes a restriction on freedom to provide services, prohibited in principle by Article 56 TFEU.

42 That conclusion cannot challenged by the argument of the Czech Government that the effects of the legislation at issue are negligible, given that, according to settled case-law, a restriction on a fundamental freedom is prohibited by the Treaty even if it is of limited scope or minor importance (*Commission* v *France*, C-34/98, EU:C:2000:84, paragraph 49, and *X*, EU:C:2012:635, paragraph 30).

Justification of a restriction on the freedom to provide services

43 As regards the possibility of justifying such a restriction, none of the interested parties which have submitted observations before the Court or the referring courts consider that that restriction may be justified for reasons of public policy, public security or public health.

44 However, according to settled case-law of the Court, where national legislation falling within an area which has not been harmonised at EU level is applicable without distinction to all persons and undertakings operating in the territory of the Member State concerned, it may, notwithstanding its restrictive effect on the freedom to provide services, be justified where it meets overriding requirements in the public interest in so far as that interest is not already safeguarded by the rules to which the service provider is subject in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it (see, inter alia, *Säger*, C-76/90, EU:C:1991:331, paragraph 15, and *Commission* v *Belgium* EU:C:2006:702, paragraph 33).

45 Both the Nejvyšší správní soud, in its request, and the Czech Government, during the hearing, in essence considered that the Czech legislation at issue in the main proceeding is justified in the light of the need to ensure the effective collection of income tax. In this respect, the Government claimed, inter alia, that withholding tax constitutes a very efficient way of recovering tax since it allows the tax administration to acquaint itself with relevant information about the person liable without delay.

46 It should be noted, in that respect, that the Court has already recognised that the need to ensure the effective collection of income tax may constitute an overriding reason in the public interest capable of justifying a restriction on the freedom to provide services (*FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 35, and *X*, EU:C:2012:635, paragraph 39).

47 In particular, the Court even stated that the procedure of retention at source is a legitimate and appropriate means of ensuring the tax treatment of the income of a person established outside the State of taxation and ensuring that the income concerned does not escape taxation in the State of residence and the State where the services are provided (*FKP Scorpio Konzertproduktionen*, EU:C:2006:630, paragraph 36, and *X*, EU:C:2012:635, paragraph 39).

48 However, that conclusion was based, both in *FKP Scorpio Konzertproduktionen* (EU:C:2006:630) and in *X* (EU:C:2012:635), on the fact that the service providers at issue in those cases provided occasional services in a Member State other than that in which they were established, and remained there for only a short period of time (see, in particular, *X*, EU:C:2012:635, paragraph 42).

49 As the Advocate General noted at point 70 of his Opinion, it is clear that, in this case, it cannot be

claimed that the temporary employment agencies at issue in the main proceedings provide their services in the Czech Republic only on an occasional basis, given that they acted through a branch registered in the commercial register of the Czech Republic.

50 In those circumstances, even though, as the Czech Government states, a branch, under Czech law, does not have legal personality and cannot therefore be obliged to pay taxes under Czech law, the fact remains that such a branch provides the service provider with a physical presence in the territory of the host Member State and performs certain administrative tasks on behalf of the temporary employment agency concerned such as signing contracts.

51 In this respect, not only can it not be excluded that the Czech tax authorities recover the tax due from that branch and that therefore that branch carries out the withholding at issue, but it is also apparent from the documents before the Court in Case C-80/13 that, in this case, the advance payments on the salaries of the employees concerned were in fact made by the branch of the Slovak temporary employment agency.

52 Furthermore, the imposition on the resident recipients of those services, instead of on the Czech branch of the agencies resident in other Member States, of the administrative burden linked to the withholding tax on income payable by the seconded workers does not appear to be simpler or more efficient from the point of view of the service providers or from the point of view of the Czech administration. Since the branch of the temporary employment agency of which the workers are employees has the necessary information concerning the income of those workers more easily available to it, the administrative burden connected to the withholding operation would be less onerous for that branch than for the recipient of the services.

53 It follows that, accordingly, the national legislation at issue in the main proceedings is not appropriate to ensure the effective collection of income tax.

54 The Odvolací finanční ředitelství adds that the legislation may nevertheless be justified by the need to prevent tax evasion and avoidance. Furthermore, according to the Czech Government, the arrangements for administrative co-operation in the field of taxation are not sufficiently effective to prevent potential tax avoidance. The experience of the tax authorities shows that there have been numerous cases of tax evasion and avoidance in connection with the international hiring of workers.

55 It is true that the Court has held on several occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions on the exercise of the fundamental freedoms guaranteed by the Treaty (see *Baxter and Others*, C-254/97, EU:C:1999:368, paragraph 18, and *Commission* v *Belgium* EU:C:2006:702, paragraph 35).

56 However, the Court has also stated that a general presumption of tax avoidance or evasion based on the fact that a service provider is based in another Member State is not sufficient to justify a fiscal measure which compromises the objectives of the Treaty (see, to that effect, *Centro di Musicologia Walter Stauffer*, C-386/04, EU:C:2006:568, paragraph 61; *Commission* v *Belgium*, EU:C:2006:702, paragraph 35; and *Commission* v *Spain*, C-153/08, EU:C:2009:618, paragraph 39).

57 First, the contentions of the Czech Republic concerning numerous cases of tax evasion and avoidance in connection with the international hiring of workers are vague, inter alia concerning the specific situation of temporary employment agencies established in other Member States with a branch registered in the Czech Republic.

58 Secondly, the fact that the branch concerned in Case C-80/13 is responsible for the administrative tasks which enable the withholding tax at issue in the main proceedings to be deducted and paid

make it possible to doubt the validity of such a general presumption.

59 In those circumstances, the application of the withholding tax at issue in the main proceedings cannot be justified as being necessary for the prevention of tax evasion and avoidance.

60 In the light of the foregoing, the answer to the question in Case C-53/13 and to the first and third questions in Case C-80/13 is that Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first Member State through a branch, are obliged to withhold tax and to pay to the first Member State an advance payment on the income tax due by those workers, whereas the same obligation is not imposed on companies established in the first Member State which use the services of temporary employment agencies established in that Member State.

Second question in Case C-80/13

61 By its second question in Case C-80/13 the referring court asks, in essence, whether Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which, where the amount invoiced by the temporary employment agency resident in another Member State contains both the salary of the seconded workers and the intermediation fee, the basis of assessment for calculating that advance payment is set at at least 60% of that amount, without it being possible for the taxable person to show that the salary actually received by the workers is less than 60% of that amount.

62 It must be stated that, in so far as the procedure for calculating the withholding tax at question is closely linked to the obligation to carry out that withholding operation and, as is apparent from the order for reference in Case C-80/13, applies only where the recipient of the services at issue is called on to carry out that withholding operation, in the light of the answer given to the question in Case C-53/13 and to the first and third questions in Case C-80/13, there is no need to reply to that question.

Costs

63 Since these proceedings are, for the parties to the main proceedings, a step in the actions pending before the referring courts, the decision on costs is a matter for those courts. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 56 TFEU precludes legislation, such as that at issue in the main proceedings, under which companies established in one Member State using workers employed and seconded by temporary employment agencies established in another Member State, but operating in the first Member State through a branch, are obliged to withhold tax and to pay to the first Member State an advance payment on the income tax due by those workers, whereas the same obligation is not imposed on companies established in the first Member State which use the services of temporary employment agencies established in that Member State.

[Signatures]

* Language of the case: Czech