

## JUDGMENT OF THE COURT (Fifth Chamber)

11 December 2014 (\*)

(Failure of a Member State to fulfil obligations — Article 56 TFEU and Article 36 of the EEA Agreement — Services offered in Spain by pension funds and insurance companies established in another Member State — Occupational pension schemes — Obligation to designate a tax representative resident in Spain — Restrictive nature — Justification — Effective fiscal supervision and prevention of tax avoidance — Proportionality)

In Case C-678/11,

ACTION under Article 258 TFEU for failure to fulfil obligations, brought on 22 December 2011,

**European Commission**, represented by F. Jimeno Fernández and W. Roels, acting as Agents, with an address for service in Luxembourg,

applicant,

v

**Kingdom of Spain**, represented by A. Rubio González, acting as Agent,

defendant,

supported by:

**French Republic**, represented by G. de Bergues, D. Colas and J.-S. Pilczer, acting as Agents,

intervener,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, C. Vajda (Rapporteur), A. Rosas, E. Juhász and D. Šváby, Judges,

Advocate General: J. Kokott,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 12 June 2014,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

### Judgment

- 1 By its application, the European Commission asks the Court to declare that, by adopting and maintaining in force the provisions of Article 46(c) of Royal Legislative Decree 1/2002 approving the consolidated text of the Law governing pension schemes and funds (Real Decreto Legislativo

1/2002, por el que se aprueba el texto refundido de la Ley de Regulación de los Planes y Fondos de Pensiones) of 29 November 2002 (BOE No 298, of 13 December 2002, p. 43361) ('the Law governing pension schemes and funds'), Article 86 of Royal Legislative Decree 6/2004 approving the consolidated text of the Law on the organisation and supervision of private insurance (Real Decreto Legislativo 6/2004, por el que se aprueba el texto refundido de la Ley de ordenación y supervisión de los seguros privados) of 29 October 2004 (BOE No 267, of 5 November 2004, p. 36602) ('the Law on the organisation and supervision of private insurance'), Article 10 of Royal Legislative Decree 5/2004 approving the consolidated text of the Law on income tax of non-residents (Real Decreto Legislativo 5/2004 por el que se aprueba el texto refundido de la ley del Impuesto sobre la renta de los no residentes) of 5 March 2004 (BOE No 62, of 12 March 2004, p. 11176), as amended by Law 36/2006 on measures for the prevention of tax evasion (Ley 36/2006 de medidas para la prevención del fraude fiscal) of 29 November 2006 (BOE No 286, of 30 November 2006, p. 42087) ('the Law on income tax of non-residents'), and Article 47 of Law on general taxation 58/2003 (Ley 58/2003, General Tributaria), of 17 December 2003 (BOE No 302, of 18 December 2003, p. 44987) ('the Law on general taxation'), pursuant to which pension funds established in Member States, other than the Kingdom of Spain, offering occupational pension schemes in that Member State, and insurance companies operating in Spain under the freedom to provide services, inter alia, are required to appoint a tax representative who is resident in that Member State, the Kingdom of Spain has failed to fulfil its obligations under Article 56 TFEU and Article 36 of the European Economic Area Agreement of 2 May 1992 (OJ 1994 L 1, p. 3) ('the EEA Agreement').

### **Spanish law**

#### 2 Article 47 of the Law on general taxation provides:

'For the purposes of their dealings with the tax authorities, taxpayers who do not reside in Spain must appoint a representative established in Spain if they operate in that territory through a permanent establishment, or the tax legislation makes express provision for such appointment, or the tax authorities require that appointment because of the nature of the operation or activity carried out or the amount of revenue received.

That appointment must be notified to the tax authorities in accordance with the provisions of the tax legislation.'

#### 3 Article 46 of the Law governing pension schemes and funds provides:

'Pension funds established in other Member States which are seeking to develop occupational pension schemes in Spain subject to Spanish legislation shall be required to designate a representative, that is to say, a natural person habitually resident in Spain or a legal person established in Spain, with the following powers:

...

- (c) to represent the pension fund for the purposes of its tax obligations in relation to activities carried out in Spanish territory. The representative must fulfil the obligations to withhold or pay in advance and to transfer the amount to the treasury for schemes subject to Spanish legislation in accordance with the conditions laid down in the legislation on personal income tax, and perform the obligations to disclose information to the tax authorities under Spanish legislation applicable to pension fund managers.

...'

4 Under Article 86(1) of the Law on the organisation and supervision of private insurance:

‘Insurance companies established in another Member State of the European Economic Area which intend to operate in Spain under the freedom to provide services are required to designate a representative resident for tax purposes in Spain with regard to the tax obligations covered by the present law for activities carried out on Spanish territory.

That representative must perform, on behalf of the insurance company operating under the freedom to provide services, in addition to the obligations mentioned in Article 82, the following tax obligations:

- (a) to withhold or pay in advance and transfer the amount to the treasury for operations carried out in Spain in accordance with the conditions laid down in the legislation governing personal income tax, corporation tax and non-residents’ income tax;
- (b) to inform the tax authorities of operations carried out in Spain in accordance with the provisions of the legislation governing personal income tax, corporation tax and non-residents’ income tax.’

5 Article 10(1) of the Law on non-residents’ income tax is worded as follows:

‘Taxpayers subject to this tax shall be required, before the expiry of the period for filing tax returns for income received in Spain, to appoint a natural or legal person resident in Spain to represent them before the tax authorities with regard to their obligations relating to the present tax when they operate through a permanent establishment in the cases referred to in Article 24(2) and Article 38 of this law, or where the tax authorities so require because of the amount or the nature of the income received in Spanish territory by the taxpayer.

...’

6 Article 99(2) of Law 35/2006 on personal income tax and amending in part the laws on corporation tax, non-residents’ income tax and wealth tax (*Ley 35/2006 del Impuesto sobre la Renta de las Personas Físicas y de modificación parcial de las leyes de los Impuestos sobre Sociedades, sobre la Renta de no residentes y sobre el Patrimonio*) of 28 November 2006 (BOE No 285, of 29 November 2006, p. 41734) provides:

‘Legal persons and entities, including those subject to the rules on attribution of income, which pay income subject to the present tax, shall be required to withhold and to pay an amount as an advance payment of the personal income tax owed by the recipient of the income. The amount to be paid to the treasury, and the conditions and procedure for payment, shall be laid down by regulation. The following shall be subject to the same obligations: taxpayers carrying on economic activities, in respect of the income which they pay in the exercise of their activities, and natural and legal persons, and other entities not resident in Spanish territory but operating in that territory through a permanent establishment, or which do not have a permanent establishment but pay income from employment and other income subject to the withholding or payment in advance of tax, which constitutes deductible expenditure for the purpose of obtaining the income referred to in Article 24(2) of the consolidated text of the Law on non-residents’ income tax.

...

The representative designated in accordance with the provisions of Article 86(1) of the consolidated text of the Law on the organisation and supervision of private insurance, acting on behalf of the insurance company operating under the freedom to provide services, shall be required to withhold

and make an advance payment of tax in respect of operations carried out in Spain.

Pension funds established in another Member State offering occupational pension schemes in Spain subject to Spanish legislation shall be required, under the provisions of Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (OJ 2003 L 235, p. 10), to designate a representative resident for tax purposes in Spain who will represent them so far as concerns tax obligations. That representative shall be required to withhold and make an advance payment of tax in respect of operations carried out in Spain.

...'

### **The pre-litigation procedure and the bringing of proceedings before the Court**

- 7 By letters of 4 April and 1 December 2008, the Commission gave the Kingdom of Spain formal notice to remedy the incompatibility with Article 49 EC and Article 36 of the EEA Agreement of the provisions of Spanish law requiring pension funds established in other Member States offering occupational pension schemes in Spain, insurance companies operating in Spain under the freedom to provide services and certain non-resident entities and natural persons to designate a tax representative resident in Spain.
- 8 Following the responses from the Kingdom of Spain to those letters giving formal notice, the Commission, on 29 January 2010, sent to that Member State a reasoned opinion in which it maintained the provisional analysis set out in the those letters and gave the Member State two months in which to adopt the measures necessary in order to comply with that opinion.
- 9 Not being satisfied with the Kingdom of Spain's response to the reasoned opinion, the Commission brought the present action. It states that it limited the subject-matter of the action to the obligation under Spanish law to designate a tax representative resident in Spain only in the case of pension funds established in other Member States offering occupational pension schemes in Spain and insurance companies operating in Spain under the freedom to provide services.
- 10 By document lodged on 15 March 2012, the Kingdom of Spain raised a plea of inadmissibility pursuant to the first subparagraph of Article 91(1) of the Rules of Procedure of the Court in the version applicable on the date the action was brought. On 2 October 2012, the Court decided to join the plea of inadmissibility to the substance of the case pursuant to paragraph 4 of that article.
- 11 By order of the President of the Court of 9 May 2012, the French Republic was granted leave to intervene in support of the form of order sought by the Kingdom of Spain.

### **The action**

#### *Admissibility*

#### Arguments of the parties

- 12 The Kingdom of Spain raises three arguments in support of its plea of inadmissibility. First, it claims that, by use of the adverbial phrase 'inter alia' in the form of order sought in its application, the Commission has not exhaustively and precisely limited the subject-matter of its action. Secondly, the Member State submits that the Commission wrongly relied, in support of its action, on two provisions of Spanish law, namely, Article 10 of the Law on non-residents' income tax and Article 47 of the Law on general taxation. The Kingdom of Spain claims that the first provision

bears no relation to the situations described in the Commission's application, and that the second merely establishes the principles and general provisions of the Spanish tax system and does not refer to the particular cases in which it is necessary to appoint a tax representative. Thirdly, the Kingdom of Spain criticises the Commission for not clearly stating whether a Member State may not in any circumstances require a non-resident to appoint such a representative or whether there are certain exceptions to that rule on substantiated grounds.

- 13 The Commission rejects the arguments put forward by the Kingdom of Spain in support of its plea of inadmissibility.

#### Findings of the Court

- 14 It is clear from Article 38(1)(c) of the Rules of Procedure, in the version applicable on the date the action was brought, and from the case-law relating to that provision that every application initiating proceedings must state the subject-matter of the dispute and a summary of the pleas in law, and that that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. It is, therefore, necessary for the essential points of fact and of law on which a case is based to be indicated coherently and intelligibly in the application itself and for the form of order sought to be set out unambiguously so that the Court does not rule *ultra petita* or indeed fail to rule on a complaint (see judgment in *Commission v Spain*, C-360/11, EU:C:2013:17, paragraph 26 and the case-law cited).

- 15 In the present case, the Commission's application satisfies those requirements.

- 16 Notwithstanding the use of the term 'inter alia' in the form of order sought in the application, it is clear beyond doubt, both from the form of order sought and from the complaints in the application, that the Commission's application refers to the obligation under Spanish law to designate a tax representative resident in Spain in two specific cases, that is to say, for pension funds established in other Member States offering occupational pension schemes in Spain, and for insurance companies established in other Member States operating in Spain under the freedom to provide services. Moreover, it is clear from the pleadings filed by the defendant Member State that the application was drafted sufficiently clearly and precisely, given that the defendant concentrated its defence on those two specific cases.

- 17 Therefore, the first argument relied on by the Kingdom of Spain in support of its plea of inadmissibility must be rejected.

- 18 Furthermore, since the action refers only to those two specific cases, the Commission cannot be criticised for not taking a clear position on whether it could possibly be lawful, in the light of EU law, for a non-resident to be obliged in other circumstances to designate a tax representative resident in Spain. Therefore, the third argument put forward by the Member State must also be rejected.

- 19 As regards the second argument relied on by the Kingdom of Spain in its plea of inadmissibility, the Commission was right to state that, since its application clearly defined the subject-matter of the action, the possible irrelevance of some provisions of national law referred to by the Commission does not mean that the action is inadmissible. That applies *a fortiori* because, in its plea of inadmissibility, the Kingdom of Spain, for the purposes of the proceedings, acknowledges the relevance of two of the provisions of national law referred to by the Commission in its application, namely, Article 46(c) of the Law governing pension schemes and funds and Article 86(1) of the Law on the organisation and supervision of private insurance.

20 It follows that the plea of inadmissibility raised by the Kingdom of Spain must be rejected.

*Substance*

Infringement of Article 56 TFEU

– Arguments of the parties

- 21 The Commission claims that the obligation for pension funds established in Member States, other than the Kingdom of Spain, offering occupational pension schemes in that Member State and for insurance companies operating in Spain under the freedom to provide services to designate a tax representative resident in that Member State constitutes a restriction of the freedom to provide services. First, that obligation involves an additional burden on those pension funds and those insurance companies. Secondly, it impedes the freedom to provide services for persons and undertakings established in Member States other than the Kingdom of Spain and wishing to provide tax representation services to entities or natural persons operating in Spain.
- 22 Neither the Kingdom of Spain, nor the French Republic as intervener, disputes the restrictive nature of the measures in question.
- 23 The Kingdom of Spain considers that the obligation to designate a tax representative resident in Spain is justified by the need for effective fiscal supervision and the prevention of tax evasion. Furthermore, it claims that the measures at issue do not go beyond what is necessary in order to attain those public-interest objectives.
- 24 In that regard, the Kingdom of Spain states that, as far as non-resident taxpayers are concerned, the intensity of the supervision and the degree of effectiveness of the measures to prevent tax evasion are noticeably greater when an immediate contact, such as a tax representative, is available. By contrast, those objectives would not be achieved as effectively by recourse to the mutual assistance of the authorities of different Member States for the purposes of exchange of information and recovery of claims, as provided for by Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (OJ 1977 L 336, p. 15), as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) ('Directive 77/799'), and Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures (OJ 2008 L 150, p. 28).
- 25 The defendant Member State considers that the ineffectiveness of the system put in place by those directives is demonstrated by the fact that they were repealed as part of a reform of the instruments for administrative cooperation and assistance in the recovery of claims. Furthermore, the Member State relies on supporting data to show the low rate of recovery of claims following, first, eight requests made to the United Kingdom authorities in 2011 and, secondly, requests made to other Member States between 2005 and 2009.
- 26 According to the Kingdom of Spain, since some information required by the Spanish tax authorities in the form of a declaration was general in nature and was not necessarily, or not exclusively, intended to be used to calculate tax, the information contained in the those declarations does not fall within the scope of Directive 77/799. Consequently, the effective application of taxes requires the appointment beforehand of a person with whom the Spanish tax authorities will be in contact during the various procedures.
- 27 As regards payment of the tax due on income coming under occupational pension schemes, the Kingdom of Spain states that, in relation to pension funds established in Member States other than

the Kingdom of Spain and offering occupational pension schemes in Spain and insurance companies established in other Member States operating in Spain under the freedom to provide services, the tax representative's power or obligation to withhold the amount of the tax and to pay that amount in advance to the public treasury, under Article 46(c) of the Law governing pension schemes and funds and Article 86(1)(a) of the Law on the organisation and supervision of private insurance, respectively, reflects the obligation under Article 99(2) of Law 35/2006 of 28 November 2006 to withhold tax on earned income. Although, in accordance with Article 99(2), pension fund management bodies established in Spain withhold the tax themselves, the complex nature of the calculation of that sum makes it necessary for pension funds and insurance companies established in other Member States to designate a tax representative resident in Spain for the purposes of, inter alia, withholding that tax. If there were no such obligation to withhold tax in the case of those non-resident entities, they would have a financial advantage over entities established in Spain which would run counter to the principle of equal treatment and the proper functioning of the internal market.

- 28 Furthermore, the Kingdom of Spain states that the present action brought against it for failure to fulfil obligations led it to remove the condition, under Article 86(1) of the Law on the organisation and supervision of private insurance, that the tax representative is to be resident in Spain through Law 2/2011 on the sustainable economy (Ley 2/2011 de Economía Sostenible) of 4 March 2011 (BOE No 55, of 5 March 2011, p. 25033), even though, according to that Member State, that condition was the best way to ensure the effective fulfilment of its tax obligations.
- 29 In support of the Kingdom of Spain, the French Republic claims that the legislation at issue is justified by the need to ensure the effective collection of tax, which the Court has recognised as an overriding reason in the public interest. That legislation contributes to achieving that objective by making the levying and collection of tax payable simpler and swifter. Tax representatives being subject to the supervision of the Spanish tax authorities, the latter can ensure the compulsory collection of the tax. Furthermore, the Court recognised in the judgments in *FKP Scorpio Konzertproduktionen* (C-290/04, EU:C:2006:630) and *X* (C-498/10, EU:C:2012:635) that the procedure of withholding tax at source and the related liability rules constitute a legitimate and appropriate means of ensuring the tax treatment of a person established outside the State of taxation.
- 30 As regards the proportionality of the obligation under the legislation at issue, the French Republic claims that other possibilities present no fewer disadvantages than the requirement to designate a tax representative resident in Spain. In the first place, an obligation for resident clients of pension funds and insurance companies not resident in Spain to withhold tax at source themselves would involve an additional administrative burden and liability risks which would make cross-border services less attractive than those of the resident providers.
- 31 In the second place, it is clear from paragraphs 50 and 51 of the judgment in *X* (EU:C:2012:635) that collecting the tax from a non-resident service provider could lead to a significant burden on that service provider who might be deterred from providing a service in the Member State concerned. In that regard, the workload of the employees of that service provider would be even greater, given that it would be incumbent on them to comply with tax obligations arising from the legislation of another Member State, and they would, therefore, have to submit a tax return in a foreign language.
- 32 According to the French Republic, the present action may be distinguished from that giving rise to the judgment in *Commission v Belgium* (C-522/04, EU:C:2007:405). In that judgment, the fact that three cumulative criteria had been met led the Court to find that the obligation to appoint a tax representative who is resident in the Member State concerned went beyond what is necessary to ensure payment of the annual tax on the insurance contracts in question. The Court observed, in

particular, that under Belgian law the insured person is personally liable for payment of that tax where the contract concerned was entered into with an insurer not established in Belgium. However, that criterion is not met as far as the present proceedings are concerned, given that the Spanish legislation provides that only the tax representative resident in Spain is liable for the tax owed by non-resident pension funds and insurance companies operating in Spain under the freedom to provide services.

33 The Commission, while acknowledging the legitimacy of the objectives relied on by the Kingdom of Spain in order to justify the obligation to designate a tax representative resident in Spain in the cases referred to in its application, disputes the arguments of that Member State and of the French Republic that such an obligation is necessary in order to attain those aims.

– Findings of the Court

34 As a preliminary point, it must be noted that, as regards the object of the present action, as set out in paragraph 16 above, it is not disputed that, in accordance with the relevant Spanish legislation, pension funds established in Member States other than the Kingdom of Spain and offering occupational pension schemes in that Member State and insurance companies operating in Spain under the freedom to provide services are required to appoint a tax representative resident in Spain.

35 However, as is apparent from paragraph 12 above, the relevance of two provisions of Spanish law relied on by the Commission in its application is disputed by the Kingdom of Spain. In that regard, the Commission acknowledges that Article 10 of the Law on non-residents' income tax concerns the obligation to appoint a representative in circumstances that fall outside the scope of the present proceedings. As regards Article 47 of the Law on general taxation, by merely stating that that provision constitutes the basic rule which requires taxpayers not resident in Spain to designate a representative resident in that Member State, the Commission does not show that amending or repealing that article is necessary in order to put an end to the alleged infringement.

36 In those circumstances, only Article 46(c) of the Law governing pension schemes and funds and Article 86(1) of the Law on the organisation and supervision of private insurance, the relevance of which is, moreover, accepted by the defendant Member State, may be taken into consideration for the purposes of the present proceedings.

37 It must be noted that the services offered by pension funds and insurance companies in relation to occupational pension schemes are services within the meaning of Article 57 TFEU. They are services normally provided for remuneration, the essential characteristic of which lies in the fact that it constitutes consideration for the services in question (see, by analogy, judgment in *Commission v Belgium*, C-296/12, EU:C:2014:24, paragraph 28).

38 It must also be stated that, from the perspective of the single market, and in order to enable the objectives of that market to be attained, Article 56 TFEU precludes the application of any national rules that have the effect of making the provision of services, within the meaning of Article 57 TFEU, between Member States more difficult than the purely internal provision of services within one Member State (see judgment in *Commission v Belgium*, EU:C:2014:24, paragraph 29 and the case-law cited).

39 In addition, according to the settled case-law of the Court, Article 56 TFEU precludes, inter alia, any legislation of a Member State which is liable to prohibit or impede further the activities of a provider of services established in another Member State where he lawfully provides similar services (see, to that effect, judgment in *Commission v Belgium*, EU:C:2007:405, paragraph 38 and the case-law cited).

- 40 In the present case, it is not disputed by the Kingdom of Spain that the national legislation at issue constitutes a restriction of the freedom to provide services, contrary, in principle, to Article 56 TFEU.
- 41 As the Commission rightly states, the obligation to appoint a tax representative in Spain is likely to involve additional costs for pension funds established in Member States, other than the Kingdom of Spain, offering occupational pension schemes in that Member State, and for insurance companies operating in Spain under the freedom to provide services. Consequently, that obligation makes the provision of services by those entities to persons residing in Spain more difficult and less attractive than the provision of similar services to the same persons by entities established in Spain which are not subject to that obligation. Furthermore, the fact that that representative must reside in Spain impedes the freedom to provide services for persons and undertakings established in Member States other than the Kingdom of Spain and wishing to provide tax representation services to entities or natural persons operating in Spain.
- 42 However, according to the Court's well-established case-law, national measures, capable of hindering the exercise of fundamental freedoms guaranteed by the FEU Treaty or of making it less attractive, may nonetheless be allowed provided that they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain the objective pursued (see, *inter alia*, judgment in *van Caster*, C-326/12, EU:C:2014:2269, paragraph 39 and the case-law cited).
- 43 It is for the national authorities, where they adopt a measure derogating from a principle affirmed in EU law, to show in each individual case that that condition is satisfied. The reasons which may be invoked by a Member State by way of justification must be accompanied by an analysis of the appropriateness and proportionality of the measure adopted by that State and by specific evidence substantiating its arguments (see judgment in *Commission v Belgium*, EU:C:2014:24, paragraph 33 and the case-law cited).
- 44 The Kingdom of Spain relies on, as justification for the restrictive effects identified in paragraph 41 above, the necessity of effective fiscal supervision and the prevention of tax evasion.
- 45 In that regard, the Court has held on numerous occasions that the prevention of tax avoidance and the need for effective fiscal supervision may be relied on to justify restrictions of the exercise of the fundamental freedoms guaranteed by the Treaty (see judgment in *Strojírny Prostějov and ACO Industries Tábor*, C-53/13 and C-80/13, EU:C:2014:2011, paragraph 55 and the case-law cited).
- 46 Similarly, the need to ensure the effective collection of income tax, relied on by the French Republic in its statement in intervention, constitutes an overriding reason in the general interest capable of justifying a restriction of the freedom to provide services (see judgment in *X*, EU:C:2012:635, paragraph 39).
- 47 It should be noted that the obligations to disclose information and to withhold and pay sums due to the public treasury, which the tax representatives referred to in the legislation at issue must perform for the pension funds and insurance companies established in Member States other than the Kingdom of Spain, constitute an appropriate means of ensuring the effective collection of the tax due on income paid by the occupational pension schemes.
- 48 In relation to the issue whether that legislation goes beyond what is necessary to attain those objectives, the Kingdom of Spain, supported by the French Republic, relies on a series of arguments based on the obligations and responsibilities incumbent on the tax representatives referred to in that legislation.

- 49 In the first place, so far as concerns the obligation to disclose information relating to tax due and the collection of that tax for the purposes of effective fiscal supervision and the prevention of tax evasion, it must be observed, on the one hand, that Article 1(1) of Directive 77/799 provides for the exchange between the authorities in Member States of any information that may enable them to effect a correct assessment of, inter alia, taxes on income (see, by analogy, judgment in *Commission v Belgium*, EU:C:2007:405, paragraph 52).
- 50 On the other hand, as regards the collection, in particular, of income tax, the Court has previously held that the cooperation mechanisms existing at EU level between the authorities of the Member States, such as those provided for under Directive 2008/55, are sufficient to enable the Member State concerned to recover the tax in another Member State (see, to that effect, judgment in *Commission v Spain*, C-269/09, EU:C:2012:439, paragraph 68 and the case-law cited).
- 51 The arguments and evidence put forward by the Kingdom of Spain in order to demonstrate the ineffectiveness of the mechanisms established by Directives 77/799 and 2008/55 and, therefore, the need for a tax representative to be appointed in order to ensure the transmission of information and the collection of the tax due cannot be accepted. The fact that those directives have been repealed and replaced by new directives does not, in itself, constitute proof that the mechanisms which they had put in place were not effective as regards the transmission of information and the recovery of sums due in respect of income tax from occupational pension schemes managed by entities established in Member States other than the Kingdom of Spain. In addition, it is not disputed that the statistics annexed to the defence, relating to the rates of recovery of debts, do not refer to claims for the recovery of taxes in this domain. As the Commission submitted at the hearing, the evidential value of those statistics is further weakened by the lack of any indication that the unsatisfied claims had been validly submitted or that they had not been withdrawn subsequently. Those statistics, therefore, do not constitute relevant, precise evidence that could support the arguments put forward by the Kingdom of Spain in this case.
- 52 In the second place, the Kingdom of Spain refers to the obligations imposed on tax representatives under the national legislation at issue, concerning the transmission of information which, in its opinion, does not come within the scope of Directive 77/799, and the withholding and payment in advance to the public treasury of the amount of tax owing.
- 53 In that regard, it should be noted at the outset that, contrary to what that Member State suggests in its pleadings, the Commission's application does not concern the obligation to withhold tax as such, but to the obligation to appoint a tax representative for the purposes of, inter alia, withholding that tax. The Commission, therefore, does not seek to end the procedure of withholding tax in respect of income from occupational pension schemes managed by entities established in a Member State other than the Kingdom of Spain. Similarly, the fact that the Court held, in particular in the judgment in *X* (EU:C:2012:635), that the procedure of withholding tax at source constitutes a legitimate and appropriate means of ensuring the effectiveness of the collection of the tax due is irrelevant for the purposes of the present proceedings.
- 54 As far as the obligations referred to in paragraph 52 above are concerned, the Court held, in paragraphs 53 to 55 of the judgment in *Commission v Belgium* (EU:C:2007:405), that, as regards the payment of an annual tax on insurance contracts concluded with an insurer which is not established in Belgium, it follows from the fact that the insured is personally liable for that tax under national law that Belgian law contains measures capable of fulfilling the objective of ensuring payment of the tax that are less prejudicial to the freedom to provide services than the obligation to appoint a representative residing in Belgium.
- 55 Although it is not apparent from the pleadings submitted to the Court in the present proceedings

that, in Spain, the resident recipient of benefits from an occupational pension scheme managed by non-resident entities is personally liable for the tax due on those benefits, the fact remains that, contrary to what the Kingdom of Spain, supported by the French Republic, alleges, the principles laid down in that judgment can be applied to these proceedings.

- 56 In that regard, the Kingdom of Spain has not demonstrated in such a way as to meet the requirements set out in paragraph 43 above that the obligations to disclose information and to withhold and pay tax in advance could not be fulfilled, in the circumstances at issue, by means less prejudicial to Article 56 TFEU than the appointment of a tax representative resident in Spain. In particular, the defendant Member State does not present any arguments capable of countering the Commission's submission that those obligations could be fulfilled by the non-resident pension funds and insurance companies themselves, like the pension funds and insurance companies established in Spain, without those non-resident entities being required to incur the necessary costs involved in designating a tax representative resident in Spain.
- 57 As regards the argument based on paragraph 50 of the judgment in *X* (EU:C:2012:635), that an obligation to withhold tax would involve a significant burden for the pension funds and the insurance companies not residing in Spain, which could deter them from providing services in Spain, it is admittedly conceivable that, in certain cases, the costs which those entities would have to bear if they themselves carried out the tasks which they are required to entrust to their tax representative, could equal or even exceed the necessary costs involved in designating that representative.
- 58 However, as the Commission observes, national legislation giving pension funds established in Member States other than the Kingdom of Spain and offering occupational pension schemes in that Member State and insurance companies operating in Spain under the freedom to provide services the choice of appointing a tax representative or carrying out the tasks themselves, in accordance with the solution which they consider to be the most advantageous from the economic point of view, would be less prejudicial to the freedom to provide services than the general obligation to appoint such a representative imposed by the national legislation at issue (see, by analogy, judgments in *Commission v Portugal*, C-267/09, EU:C:2011:273, paragraph 47, and *National Grid Indus*, C-371/10, EU:C:2011:785, paragraphs 69 to 73).
- 59 Moreover, as regards the justification of the condition that the tax representative at issue is to be resident in Spain, the Kingdom of Spain merely states that that condition has been removed by an amendment to Article 86(1) of the Law on the organisation and supervision of private insurance, and that that condition is the best way to ensure the effective fulfilment of the tax obligations concerned.
- 60 In that regard, it must be noted that whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion, and that the Court may not take account of any subsequent changes (see judgment in *Commission v Belgium*, C-421/12, EU:C:2014:2064, paragraph 45 and the case-law cited).
- 61 Furthermore, the mere assertion that the residence condition is the best way of ensuring that the tax obligations incumbent on the tax representative are performed effectively is irrelevant. It is true that the supervision of such a representative by the tax authorities of a Member State may prove to be more difficult where that representative is in another Member State. However, it is clear from the case-law of the Court that administrative difficulties do not constitute a ground that can justify a restriction on a fundamental freedom guaranteed by EU law (see, to that effect, judgments in *Commission v France*, C-334/02, EU:C:2004:129, paragraph 29; *Papillon*, C-418/07,

EU:C:2008:659, paragraph 54; and *van Caster*, EU:C:2014:2269, paragraph 56).

62 It follows that the legislation at issue goes beyond what is necessary to achieve the objectives referred to in paragraphs 44 and 46 above.

63 In the light of the foregoing, it must be held that by having adopted the provisions contained in Article 46(c) of the Law governing pension schemes and funds and Article 86(1) of the Law on the organisation and supervision of private insurance, pursuant to which pension funds established in Member States other than the Kingdom of Spain and offering occupational pension schemes in that Member State and insurance companies operating in Spain under the freedom to provide services are required to appoint a tax representative resident in that Member State, the Kingdom of Spain has failed to fulfil its obligations under Article 56 TFEU.

#### Infringement of Article 36 of the EEA Agreement

##### – Arguments of the parties

64 The Kingdom of Spain, supported by the French Republic, submits that the main reason relied on by the Commission for finding that the Spanish legislation at issue is disproportionate is the existence of mechanisms for mutual assistance in tax matters between Member States under Directives 77/799 and 2008/55. They state that the framework of cooperation between Member States established by those directives does not exist between those Member States and the competent authorities of a non-Member State, when the latter State has not entered into any undertaking of mutual assistance. When there is no such undertaking, it must be held that the obligation to designate a tax representative does not go beyond what is necessary in order to ensure the effective recovery of the tax payable.

65 The Commission acknowledges that, as far as the European Economic Area is concerned, and in the absence of a bilateral treaty with the Republic of Iceland, the Principality of Liechtenstein or the Kingdom of Norway on mutual assistance in tax matters, the obligation to designate a tax representative may be justified, provided it does not go beyond what is necessary in order to ensure the effectiveness of fiscal supervision and to prevent tax avoidance.

##### – Findings of the Court

66 It should be noted that Article 36 of the EEA Agreement is similar to Article 56 TFEU. Therefore, the restriction of the freedom to provide services found in paragraph 40 above must, in principle, be regarded as contrary to Article 36 too.

67 As is clear from paragraphs 49 to 61 above, that restriction could not be regarded as justified, so far as Article 56 TFEU is concerned, by the need for effective fiscal supervision, the prevention of tax evasion or the need to ensure the effective collection of taxes, given that it goes beyond what is necessary to achieve those objectives. That conclusion is based on the premiss that there are cooperation mechanisms between the authorities of the Member States at EU level sufficient to enable the Kingdom of Spain to achieve those objectives in the present case.

68 However, the framework of cooperation between the competent authorities of the Member States, established by Directives 77/799 and 2008/55, does not exist between those authorities and the competent authorities of a non-Member State, where that non-Member State has not entered into any undertaking of mutual assistance (see judgment in *Commission v Spain*, EU:C:2012:439, paragraph 96).

69 In that regard, the Kingdom of Spain expressly states that it has not concluded any agreement on

the exchange of information with the Principality of Liechtenstein. Given that the Commission has not alleged that there are any bilateral agreements on mutual assistance in tax matters between the defendant Member State and the States party to the EEA Agreement which are non-EU members, it has not established the existence of mechanisms for the exchange of information and for cooperation sufficient to enable the Kingdom of Spain to obtain information on the taxes due and the collection of those taxes (see, by analogy, judgments in *Commission v Portugal*, EU:C:2011:273, paragraph 56, and *Commission v Spain*, EU:C:2012:439, paragraph 98).

70 In those circumstances, it cannot be regarded as established that the obligation to appoint a tax representative resident in Spain goes beyond what is necessary to achieve the objective of ensuring the effectiveness of tax supervision and the prevention of tax avoidance.

71 Consequently, the Commission's application must be dismissed in so far as it seeks a declaration that the Kingdom of Spain has failed to fulfil its obligations under Article 36 of the EEA Agreement.

### Costs

72 Under Article 138(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, they are to be ordered to bear their own costs. Since the Commission and the Kingdom of Spain have each failed in one or more heads of claim, they must be ordered to bear their own costs.

73 Pursuant to Article 140(1) of those Rules, which provides that Member States which have intervened in the proceedings are to bear their own costs, the French Republic is to be ordered to bear its own costs.

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

- 1. Declares that, by having adopted the provisions of Article 46(c) of Royal Legislative Decree 1/2002 approving the consolidated text of the Law governing pension schemes and funds (Real Decreto Legislativo 1/2002, por el que se aprueba el texto refundido de la Ley de Regulación de los Planes y Fondos de Pensiones) of 29 November 2002, and Article 86(1) of Royal Legislative Decree 6/2004 approving the consolidated text of the Law on the organisation and supervision of private insurance (Real Decreto Legislativo 6/2004, por el que se aprueba el texto refundido de la Ley de ordenación y supervisión de los seguros privados) of 29 October 2004, pursuant to which pension funds established in Member States other than the Kingdom of Spain and offering occupational pension schemes in that Member State and insurance companies operating in Spain under the freedom to provide services are required to appoint a tax representative resident in that Member State, the Kingdom of Spain has failed to fulfil its obligations under Article 56 TFEU;**
- 2. Dismisses the remainder of the action;**
- 3. Orders the European Commission, the Kingdom of Spain and the French Republic to bear their own costs.**

[Signatures]

\* Language of the case: Spanish.