

OPINION OF ADVOCATE GENERAL

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delivered on 6 April 2006¹

1. Is a Member State which obliges principals and contractors which use operators in the construction sector who are not registered in Belgium to withhold 15% of the sum payable to those operators, and which imposes on those principals and contractors joint and several liability for the tax debts of their contracting partners who are not registered in Belgium, in breach of Articles 49 and 50 EC? That is the question which the European Commission is asking the Court of Justice to answer in the action brought against the Kingdom of Belgium by application of 8 October 2004, pursuant to Article 226 EC.

provide services within the Community. In particular, according to the first paragraph of Article 49 EC, ‘restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.’

3. Reference must then be made to Article 50 EC, which provides as follows:

I — Legislative framework

The relevant Community law

‘Services shall be considered to be “services” within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.

2. For the purposes of this case, reference must first be made to Article 49 EC, which, as we know, guarantees the freedom to

“Services” shall in particular include:

¹ — Original language: Italian.

(a) activities of an industrial character;

(b) activities of a commercial character;

persons is, in principle, subject to a requirement of registration as a 'contractor' with one of the provincial commissions responsible for registration.

(c) activities of craftsmen;

(d) activities of the professions.

6. An *Arrêté royal* (royal decree) of 26 December 1998² lays down the categories of work and activity subject to that requirement³ (Article 1), the requirements to be met in order to register (Article 2)⁴ and the procedure governing applications for registration (Articles 4 to 6).

Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State in which the service is provided, under the same conditions as are imposed by that State on its own nationals'.

7. Operators who are *not* registered in Belgium are not excluded from access to the national market but are subject to special tax arrangements laid down in Articles 400 to 408 (Title VII) of the 1992 Code des impôts sur les revenus (1992 Income Tax Code; hereinafter: the 'TTC 1992').

4. I would point out, in conclusion, that, according to Article 46 EC, to which Article 55 EC refers, restrictions on the freedom to provide services may be justified on 'grounds of public policy, public security or public health.'

2 — Arrêté royal portant exécution des articles 400, 401, 403, 404 et 406 du Code des impôts sur les revenus 1992 et de l'article 30bis de la loi du 27 juin 1969 révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs (Royal decree implementing Article 400, 401, 403, 404 and 406 of the 1992 Income Tax Code and Article 30a of the Law of 27 June 1969 amending the Decree — Law of 28 December 1944 on workers' social security), *Moniteur belge* of 31.12.1998.

3 — For example, construction, demolition, renovation, the installation of heating systems and sanitary appliances and resurfacing work.

4 — Those conditions include the following, for example: entry in the companies' register or professional register in accordance with the requirements laid down by the State of establishment; registration for VAT in Belgium; status of not being insolvent or banned from exercising commercial activities; non-commission of irregularities in relation to tax, social security or the payment of salaries and wages; absence of debts relating to the payment of tax, social-security contributions or salaries and wages; possession of financial, administrative and technical resources capable of guaranteeing compliance with obligations in relation to tax, social security or the payment of salaries and wages.

National law

5. In Belgium, the provision of services in the construction sector by natural or legal

8. Those provisions include, in so far as is relevant for our purposes, two measures designed to guarantee that such individuals pay their taxes.

It shall apply to the principal payment and to any increases, costs and interest, regardless of the time at which they arise:

9. The first is Article 402 of the ITC 1992, which provides:

(1) of all debts consisting of direct taxes and charges equivalent to income taxes for the taxable periods during which the work in question has been carried out and for earlier taxable periods;

'1 A principal who ... has recourse to a contractor who is not registered at the time the contract is concluded shall be jointly and severally liable for the payment of that contractor's tax debts.

(2) of all debts consisting of deductions for the periods during which work was carried out as well as earlier periods;

2 A contractor who ... has recourse to a subcontractor who is not registered at the time the contract is concluded, shall be jointly and severally liable for the payment of that subcontractor's tax debts.

(3) of tax debts of foreign origin in respect of which recovery is requested under an international convention'.

...

10. Secondly, in accordance with Article 403 of the ITC 1992:

5. Joint and several liability shall be limited to 35% of the total price, excluding value added tax, of the work commissioned from an unregistered contractor or subcontractor.

'1. A principal who pays a contractor who is not registered at the time of payment for all

or part of the cost of the works ... must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, and in accordance with the detailed rules laid down by the latter.

2. A contractor who pays a subcontractor for all or part of the cost of the works ... must, at the time of payment, withhold 15% of the sum invoiced, excluding value added tax, and pay that amount to the official appointed by the King, and in accordance with the detailed rules laid down by the latter.'

11. Article 406(1) of the ITC 1992 provides that:

12. In the event of failure to pay the sums covered by the withholding obligation, the principal or contractor may be ordered, in accordance with Article 404 of the ITC 1992, to pay an administrative fine equivalent to double the amount to be withheld.

13. Article 403(7) to (9) of the ITC 1992 provides that, in order to obtain reimbursement of the sums paid to the tax authorities, operators who are not registered must submit the appropriate request to those authorities; the latter will reimburse the sums in question only after they have established that the operator has no outstanding tax obligations.

14. I should finally point out that, pursuant to Article 407 of the ITC 1992, the above-mentioned provisions concerning joint and several liability and the withholding obligation do not apply to a principal who is a natural person and is commissioning work for purely private purposes.

II — Facts and procedure

'The sums paid under Article 403 shall first be allocated to the settlement of the tax debts referred to in Article 402, to the payment of the fines, and, thereafter, to debts in respect of value added tax.'

15. On 13 February 2001, the Commission sent to the Kingdom of Belgium a letter of formal notice complaining that various fiscal

and social-security provisions applicable to the construction sector were not compatible with the Treaty rules on the freedom to provide services.

III — Legal analysis

(a) *Preliminary remark*

16. That letter was followed by a reasoned opinion of 23 October 2001.

17. As it was not satisfied with the explanations and answers provided by the Belgian Government in relation to the abovementioned provisions of the ITC 1992, the Commission, by application registered on 8 October 2004, requested the Court of Justice to:

‘declare that, by obliging principals and contractors who have recourse to foreign contracting partners not registered in Belgium to withhold 15% of the sum payable for work carried out, and by imposing on those principals and contractors joint and several liability for the tax debts of their contracting partners who are not registered in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 50 EC’.

18. Belgium and the Commission have submitted written observations to the Court.

19. I must first point out that the Commission’s objections do not concern the registration procedure *per se* but rather — and exclusively — the two abovementioned provisions which are applicable to non-registered contracting partners, that is to say, Article 402 of the ITC 1992 concerning the principal’s joint and several liability and Article 403 concerning the withholding of 15% of the amount invoiced.

20. The Court’s answer must, therefore, be confined to those provisions. Consequently, I shall not analyse the arguments which the Belgian authorities have put forward to demonstrate the legality of the registration procedure, to which the Belgian Government in fact devotes a large part of its defence. It claims that, in order to avoid the application of the two contested provisions, it is sufficient to register as a contractor using an appropriate procedure which, it claims, is neither discriminatory nor particularly onerous (particularly since it is free of charge) for a foreign operator in the construction sector which is interested in providing services in Belgium. As already stated, however, it is specifically the treatment accorded to those operators who are *not registered* that is the subject matter of this application, and my analysis will focus on that.

(b) *The existence of a restriction on the freedom to provide services*

21. That said, and moving on to consider the Commission's objections, I would point out that the parties disagree, first and foremost, on whether it is in fact possible to classify the provisions at issue as restrictions on the freedom to provide services within the meaning of Article 49 EC.

22. Indeed, according to Belgium, these are provisions which apply equally to Belgian and non-Belgian operators and are designed simply to secure the recovery of tax debts, without in any way affecting the conditions governing access to the national market or for engaging in economic activities in the construction sector.

23. It is not, therefore, possible to speak in terms of obstacles to the free movement of services, as the Commission does, by claiming that such provisions deter both unregistered foreign operators from offering their services on the Belgian market and national operators from having recourse to such foreign operators.

24. Let me say immediately that I share the Commission's view.

25. I would point out that it is settled case-law that any national measure which, 'even if applicable without distinction to national providers of services and to those of other Member States, ... [is] liable to prohibit or render less advantageous the activities of a provider of services established in another Member State, where he lawfully provides similar services'⁵ must be deemed to be a restriction on the freedom to provide services. Consequently, the prohibition laid down by the Treaty also covers measures which are liable to 'deter' an operator from exercising that freedom.⁶

26. According to that same case-law, pursuant to Article 49 EC, a Member State not only must allow a foreign contractor to provide services within its own territory but must also permit a national operator to have recourse to the services offered by a foreign service-provider.⁷ In other words, restrictions on both 'entry' into and 'exit' from the national territory are prohibited.

5 — Case C-76/90 *Säger* [1991] ECR I-4221, paragraph 12; Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453, paragraph 33; Case C-58/98, *Corsten* [2000] ECR I-7919, paragraph 33; Case C-205/99 *Analir and Others* [2001] ECR I-1271, paragraph 21; Case C-17/00 *De Coster* [2001] ECR I-9445, paragraph 29; Case C-131/01 *Commission v Italy* [2003] ECR I-1659, paragraph 26; and Case C-514/03 *Commission v Spain* [2006] ECR I-963, paragraph 24.

6 — See, for example, *De Coster*, paragraph 33; Case C-289/02 *AMOK* [2002] ECR I-15059, paragraph 36; and Case C-8/02 *Leichtle* [2004] ECR I-2641, paragraph 32.

7 — See, among many, *Säger*, paragraph 14; Case C-224/97 *Ciola* [1999] ECR I-2517, paragraph 11; Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447; Case C-243/01 *Gambelli and Others* [2003] ECR I-13031, paragraph 55.

27. Applying those principles to the present case, and as the Commission rightly contends, it seems to me to be indisputable that the two national provisions at issue are at least liable to deter operators from both Belgium and other Member States from taking advantage of the freedom established in Article 49 EC.

28. In the first place, simply by having recourse to suppliers who are not registered in Belgium, the recipient of the services provided is considered, on the basis of Article 402 of the ITC 1992, to be jointly and severally liable for the payment of any tax debts of its own contracting partner. Such liability is a particularly broad in scope, since it applies, up to a level equivalent to 35% of the cost of the work commissioned, to 'all' the supplier's tax debts, including those relating to 'taxable periods' prior to the contract in question (Article 402(5) of the ITC 1992). The recipient of the services provided may, therefore, also be required to assume liability for debts which arose in the context of contractual relations in which he had absolutely no involvement. It seems to me self-evident that this entails, in relation to the selection of a foreign operator who is not registered in Belgium, a financial risk that is liable (to say the least!) to make this a 'less attractive' option.

29. Secondly, the provision in Article 403 of the ITC 1992 produces a restrictive effect in relation to operators established in other

Member States. Under that provision, the Belgian tax authorities withhold for a certain period 15% of the amount invoiced by unregistered construction companies. The result is that, whether or not those companies have tax debts, they are unable to enjoy immediate use of a substantial portion of their own earnings, which they are able to recover only on the conclusion of an appropriate administrative procedure. It is thus hard to deny that an automatic 'delay in payment' of that nature constitutes an 'obstacle' that is likely to have a direct — and negative — effect on the decision of foreign operators who are not registered in Belgium whether or not to provide services in that country.

30. Moreover, the markedly deterrent effect of the two provisions at issue has been confirmed by the Belgian Constitutional Court in a judgment cited by the Belgian Government itself, in which the *Cour d'arbitrage* observed that the purpose of those measures was to ensure that 'no-one has an interest in having recourse to the services of unregistered operators'.⁸

31. In the light of the above considerations, I therefore take the view that the two Belgian fiscal provisions constitute, as outlined above, a restriction on the freedom to provide services and are, therefore, incompatible with Articles 49 EC and 50 EC.

⁸ — Decision No 188/2002 of 19.12.2002, *Moniteur belge* of 18.3.2003.

(c) *The alleged justification for the national measures at issue*

32. That said, we have still to ascertain whether the incompatibility of the rules at issue may not be mitigated on the basis of the grounds cited in justification of them by the Belgium Government.

33. The Belgian Government contends, in the alternative, that the two measures at issue form part of an integrated system designed to combat the serious problems of tax fraud affecting the construction sector. In order effectively to counter activities of that nature, which ‘constitute fraud to the detriment of the public authorities, distort competition and disrupt the labour market’,⁹ that Government claims that it is necessary to encourage the provision of services by registered operators, which, it contends, offer sounder guarantees as regards compliance with tax and social-security obligations¹⁰ and, more generally, ‘reliability’.

34. Even if the Court were to take the view that the provisions of Articles 402 and 403 of

the ITC 1992 amount to a restriction of the freedom to provide services, such restriction — the Belgian Government maintains — would be lawful in so far as it is designed to combat tax fraud and thereby meet a need which, it alleges, Community case-law recognises as being capable of justifying such measures.

35. For my part, and simplifying the issue, I would first point out that, in terms of the authorised exceptions to the fundamental freedoms, Community law draws a clear distinction between discriminatory and non-discriminatory measures. Discriminatory measures are permitted only if they may be covered by a derogation specifically provided for by the Treaty, and thus, as far as the freedom to provide services is concerned, by Article 46 EC, to which Article 55 EC refers. By contrast, those measures which apply without distinction to nationals of the State in question and to nationals of other Member States may be permitted only if they are justified by overriding reasons based on the public interest and, in any event, on condition that they are capable of securing the attainment of the objective pursued and do not go beyond what is necessary to attain that objective.¹¹

9 — Statement of defence, at paragraph 14, in which the Belgian Government refers to the parliamentary proceedings concerning one of the laws containing the two measures at issue.

10 — The conditions laid down by Article 2 of the Arrêté royal of 26.12.1998 for the purposes of registration include ‘non-commission of irregularities in relation to tax, social security or the payment of salaries and wages’ and ‘absence of debts relating to the payment of tax, social-security contributions or salaries and wages’.

11 — See, among many, *Säger*, paragraph 15; Case C-19/92 *Kraus* [1993] ECR I-1663, paragraph 32; Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37; *Arblade*, paragraphs 34 and 35; *Corsten*, paragraphs 38 and 39; *Gambelli*, paragraph 65, and *Commission v Spain*, paragraph 26.

36. However, in this case, it cannot be ruled out, and even the Commission does not, in theory, exclude this, that, although the rules at issue appear to apply without discrimination, they are in fact discriminatory. In point of fact, as I noted earlier, the measures at issue apply solely to operators not registered in Belgium. If that is the case, however, it must be concluded, also in the light of the Court's traditional case-law,¹² that a criterion of that nature is of itself capable of giving rise to disparity of treatment between operators on the basis of their country of establishment or citizenship. Unregistered operators will, in effect, be (almost) exclusively foreign operators, and, in particular, those wishing to provide services in Belgium only on an occasional basis, whereas national operators will be (almost) always registered as contractors as they have to meet that requirement specifically in order to be able to pursue their activities in Belgium.

37. It follows that, from that perspective, the measures at issue may be permitted only if they are justified by one of the derogations

specifically provided for by Article 46 EC, that is to say, on grounds of public policy, public security or public health. Not only that, but as these are in fact derogations from a fundamental principle of the Treaty, they must be given a restrictive interpretation, and the Court has indeed made reliance on the safeguarding of public policy and public security subject to the existence of a 'genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society'.¹³

38. It seems to me that the mere risk, which the Belgian Government outlines, that operators who are not registered in Belgium may not meet their own fiscal obligations cannot constitute a 'threat' of that kind to one of the abovementioned 'fundamental interests of society' and thereby come within the scope of Article 55 EC.

39. But even were it to be assumed that the measures at issue are not discriminatory in nature, the outcome would still be the same. The reason for this is that the conditions which Community case-law cumulatively requires for cases of restrictions which are indiscriminately applicable — that is to say, the existence of overriding reasons based on

12 — It is settled case-law that breaches of Articles 49 EC and 50 EC consist in 'not only overt discrimination based on the nationality of the person providing a service but also all forms of *covert* discrimination which, although based on criteria which appear to be neutral, in practice lead to the same result' (Joined Cases 62/81 and 63/81 *Seco* [1982] ECR 223, paragraph 8) (emphasis added). For examples of discrimination of that nature, see Case C-3/88 *Commission v Italy* [1989] ECR 4035, paragraph 8; Case C-113/89 *Rush Portuguesa* [1990] ECR I-1417, paragraph 12; and Case C-360/89 *Commission v Italy* [1992] ECR I-3401, paragraph 12.

13 — See, among many, Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 35; Case C-348/96 *Calfa* [1999] ECR I-11, paragraphs 21 and 23; and Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 39.

the public interest, as well as the need for and proportionality of the restrictions at issue (see point 35 above), are not met here.

objectives pursued and must, therefore, be regarded as disproportionate.¹⁶

40. While it is certainly true, as the Belgian Government states, that combating tax fraud and ensuring effective fiscal supervision constitute overriding grounds capable of justifying restrictions on the exercise of fundamental freedoms,¹⁴ the Court has also had occasion to make clear, in a number of instances, that grounds of that nature may not be relied upon to legitimise measures which are based on a '*general presumption of tax evasion or tax fraud*' by taxpayers who have exercised their right of free movement.¹⁵ These are in fact provisions which apply to such taxpayers in a general, automatic and preventive manner; as such, they are in excess of what is required to attain the

41. The two provisions at issue are in fact based on a similar premise insofar as they, always and in any event, presume that an operator in the construction sector who is not registered in Belgium has 'fraudulent intent', regardless, as we have seen, of whether that operator has tax debts or presents other risks of tax evasion (see points 28 and 29 above).

42. The disproportionate nature of the national provisions is, in my view, compounded by the fact that the two measures are applied cumulatively, with the result that the recipient of the services provided is, in any event, jointly and severally liable for the tax debts of its own contracting partner even though, in accordance with the withholding obligation, substantial sums have already been frozen to guarantee the aforementioned — and, as I have pointed out, only potential — debts.

43. I would add that the objective pursued, that is to say, combating tax fraud, may in this case be achieved through measures

14 — See, for example, Case C-250/95 *Futura Participations and Singer* [1997] ECR I-2471, paragraph 31; Case C-478/98 *Commission v Belgium* [2000] ECR I-7587, paragraph 45; Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 51; Case C-334/02 *Commission v France* [2004] ECR I-2229, paragraph 27; and Case C-446/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 49.

15 — *Commission v Belgium*, paragraph 45; *X and Y*, paragraph 63; *Commission v France*, paragraph 27, and Case C-9/02 *Hughes de Lasteyrie du Saillant* [2004] ECR I-2409, paragraphs 51 and 52 (emphasis added).

16 — *Ibid.*

which are less invasive and less restrictive of the freedom to provide services. For instance, it would be possible to ask unregistered operators to provide the tax authorities with certain information concerning their tax situation and, in particular, the existence of any outstanding debts owed to the Belgian tax authorities. A declaration of that kind would both offer guarantees, by way of information, very similar to those furnished by registered contractors and would also allow the Belgian authorities to exercise supervision when the work was being carried out, and, if need be, to adopt the necessary measures, on an individual basis and only in the presence of demonstrated risks of evasion. That would avoid unduly prejudicing the freedom to provide services and indiscriminately penalising all unregistered operators.¹⁷

foreign contracting partner only if the latter does *not* provide a certificate issued by the tax authorities attesting to the fact that it has properly fulfilled its tax obligations.

45. In the final analysis, I conclude from the foregoing that the national provisions at issue are justified neither on the basis of Article 55 EC nor on the basis of the overriding requirements cited by the Belgian Government. Consequently, they must be held to be incompatible with Articles 49 EC and 50 EC.

46. I therefore propose that the Court declare the Commission's application to be well founded and for that reason uphold it.

44. Moreover, similar systems are already in operation in a number of Member States. By way of example, the Commission cites German legislation under which the recipient of services provided in the construction sector is to be regarded as jointly and severally liable for the tax debts of the national or

IV — Costs

47. Pursuant to 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 Commission has applied for costs, the Kingdom of Belgium, which is the unsuccessful party, must be ordered to pay the costs.

¹⁷ — In that context, I would point out that the Court has viewed information of this nature as a valid and effective alternative to more restrictive measures (work permits, for instance) which some Member States require of employees of foreign companies on temporary assignment in connection with the provision of services. See Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paragraph 46, and Case C-244/04 *Commission v Germany* [2006] ECR I-885, paragraph 41.

V — Conclusion

48. In the light of the above considerations, I therefore propose that the Court should declare that:

- (1) By obliging principals and contractors who have recourse to contracting partners not registered in Belgium to withhold 15% of the sum payable for work carried out, and by imposing on those principals and contractors joint and several liability for the tax debts of their contracting partners who are not registered in Belgium, the Kingdom of Belgium has failed to fulfil its obligations under Articles 49 EC and 50 EC.
- (2) The Kingdom of Belgium is ordered to pay the costs.