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Judgment of the Court of 26 September 2000. - Commission of the European Communities v Kingdom of Belgium. - Loans issued abroad - Prohibition of acquisition by Belgian residents. - Case C-478/98.

European Court reports 2000 Page I-07587

Summary

Parties

Grounds

Decision on costs

Operative part

Keywords

Free movement of capital - Restrictions - National legislation prohibiting the acquisition by residents of the Member State of securities of loans issued abroad - Not permissible - Justification - None

(EC Treaty, Arts 73b and 73d(1)(b) (now Arts 56 EC and 58(1)(b) EC)

Summary

\$\$The prohibition by a Member State of the acquisition by persons residing in its territory of securities of loans issued abroad constitutes a restriction of the free movement of capital, prohibited by Article 73b(1) of the Treaty (now Article 56(1) EC). Such a measure, taken by the State in its capacity as public authority, cannot be justified on the ground of the need to preserve fiscal coherence, where there is no direct link between any fiscal advantage and a corresponding disadvantage which ought to be preserved in order to ensure that coherence. Moreover, such a measure cannot be justified, under Article 73d(1)(b) of the Treaty (now Article 58(1)(b) EC), on the ground of the need to prevent tax evasion and ensure the effectiveness of fiscal supervision, since a general presumption of tax evasion or tax fraud cannot justify a fiscal measure which consists in an outright prohibition on the exercise of a fundamental freedom guaranteed by Article 73b of the Treaty.

(see paras 27, 35 to 36, 40, 45, 47)

Parties

In Case C-478/98,

Commission of the European Communities, represented by H. Michard and B. Mongin, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the Chambers of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

applicant,

v

Kingdom of Belgium, represented by A. Snoecx, Assistant Adviser in the Directorate General for Legal Affairs, Ministry of Foreign Affairs, External Trade and Cooperation with Developing Countries, acting as Agent, assisted by B. van de Walle de Ghelcke, of the Brussels Bar, 15 Rue des Petits Carmes, Brussels,

defendant,

APPLICATION for a declaration that, by prohibiting the acquisition by persons resident in Belgium of securities of a loan issued abroad, the Kingdom of Belgium has failed to fulfil its obligations under Article 73b of the EC Treaty (now Article 56 EC),

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, J.C. Moitinho de Almeida, D.A.O. Edward, L. Sevón and R. Schintgen (Presidents of Chambers), P.J.G. Kapteyn (Rapporteur), C. Gulmann, A. La Pergola, J.-P. Puissochet, P. Jann, and H. Ragnemalm, Judges,

Advocate General: F.G. Jacobs,

Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 28 March 2000, at which the Commission was represented by B. Mongin and the Kingdom of Belgium by B. van de Walle de Ghelcke, assisted by M. Massart, as Principal Inspector in the Belgian Tax Office, Ministry of Finance,

after hearing the Opinion of the Advocate General at the sitting on 15 June 2000,

gives the following

Judgment

Grounds

1 By application lodged at the Court Registry on 21 December 1998, the Commission of the European Communities brought an action under Article 169 of the EC Treaty (now Article 226 EC) for a declaration that, by prohibiting the acquisition by persons resident in Belgium of securities of a loan issued abroad, the Kingdom of Belgium had failed to fulfil its obligations under Article 73b of the EC Treaty (now Article 56 EC).

2 On the basis of a Royal Decree of 4 October 1994 (hereinafter the Royal Decree), the Belgian Minister of Finance contracted a public loan of DEM 1 000 million on the Eurobond market.

3 Article 1 of the Royal Decree states:

Our Finance Minister is authorised to contract a public loan at a fixed rate for 1 000 million German marks with Dresdner Bank AG and Schweizerischer Bankverein (Deutschland) AG in Frankfurt. This loan may be the subject, in whole or in part, of one or more swap transactions.

4 Article 2 of the Royal Decree states:

The terms and conditions of the loan and of any swap transactions will be determined by agreements to be entered into with the financial institutions concerned.

5 Article 3 of the Royal Decree states:

Withholding tax on interest payable on the loan is hereby waived.

Subscription by Belgian residents other than banks, financial intermediaries and institutional investors referred to in the agreements mentioned in Article 2 and the conditions laid down therein is not permitted.

The definitive certificates will be delivered to the holders only on production of a certificate certifying that they are non-resident or that they fulfil the conditions referred to in the preceding paragraph.

6 The second paragraph of Article 3 of the Royal Decree was reflected in the agreements concluded with the financial institutions concerned (under the heading Restrictions on sale), fixing the terms and conditions of the loan in question. It was stated in particular that:

The Bonds may not be offered or sold, directly or indirectly, to residents of, or corporations or other legal entities having their domicile in, the Kingdom of Belgium except, provided that the offer or sale does not constitute an offer to the public of the Kingdom of Belgium, to (i) a bank which is so resident or domiciled, (ii) a broker, similar intermediary or institution of international standing whose business involves dealing in securities or managing customers' funds, which is so resident or domiciled and (iii) an insurance company which is so resident or domiciled.

The administrative procedure

7 On 6 January 1995 the Commission requested the Belgian authorities to provide further information on the provisions of the Royal Decree. The Commission considered that the prohibition, under Article 3 of the Royal Decree, on Belgian residents subscribing to a loan issued abroad constituted a barrier to the free movement of capital, contrary to Article 73b of the Treaty.

8 On 13 February 1995 the Belgian authorities replied that the prohibition against Belgian residents was compatible with Community law. By denying natural persons resident in Belgium the opportunity to subscribe to the public loan issued in German marks, the measure in question made it possible to prevent those persons from evading tax in Belgium by not declaring the interest received. Moreover, the Belgian authorities contended that the Royal Decree was based on Article 73d(1)(a) and (b) of the EC Treaty (now Article 58(1)(a) and (b) EC).

9 Not satisfied with that reply, the Commission, by formal letter of 11 August 1995, opened the infringement procedure and invited the Belgian Government to submit its observations within a period of two months.

10 The Commission stated, first, that, while Article 73d(1)(a) of the Treaty provides for the possibility of differential tax treatment of residents and non-residents, the present case concerned not differential tax treatment but purely and simply a ban on the acquisition by natural persons resident in Belgium of securities of a loan issued abroad.

11 The Commission observed, second, that the Belgian authorities relied on Article 73d(1)(b) of the Treaty in order to argue that the need to ensure compliance with fiscal provisions by taxpayers residing in Belgium may justify a restriction of the free movement of capital. However, the imposition of such a measure was not proportionate to the aim pursued; otherwise, the result of allowing such an approach would be that any movement of capital which might involve risks of tax evasion could be prohibited.

12 By letter of 30 October 1995, the Belgian Government maintained the position it had put forward in its letter of 13 February 1995. It stated that the prohibition was attributable solely to the concern to preserve the coherence of the tax system. It also said that the prohibition was neither arbitrary nor discriminatory, and that in the present case there was no disguised restriction of the free movement of capital and payments.

13 On 16 April 1997 the Commission sent the Belgian Government a reasoned opinion, inviting it to take the necessary measures to comply with the opinion within two months from its notification. There was no response.

14 In those circumstances, the Commission decided to bring the present action.

Substance

15 The Commission submits, in support of its application, that the outright prohibition by the Royal Decree of the acquisition by Belgian residents of securities of a loan on the Eurobond market (hereinafter the contested measure) impairs the free movement of capital laid down in Article 73b of the Treaty, and cannot be objectively justified under Article 73d, in particular because it is not proportionate.

16 It should be noted that it is not disputed that the contested measure affects the free movement of capital between Member States. As the Advocate General observes at point 27 of his Opinion, although the contested measure imposed by the Kingdom of Belgium is addressed to its own residents, it cannot in any event be regarded as a purely internal measure, since the loan in question was issued in German marks on the Eurobond market, was subscribed by an international syndicate of banks and financial institutions, is listed on the Frankfurt stock exchange, and is governed by German law.

17 It is also not disputed that the contested measure constitutes as such a restriction of the free movement of capital within the meaning of Article 73b(1) of the Treaty.

18 Measures taken by a Member State which are liable to dissuade its residents from obtaining loans or making investments in other Member States constitute restrictions on movements of capital within the meaning of that provision (see, to that effect, Case C-484/93 Svensson and Gustavsson v Ministre du Logement et de l'Urbanisme [1995] ECR I-3955, paragraph 10, Case C-222/97 Trummer and Mayer [1999] ECR I-1661, paragraph 26, and Case C-439/97 Sandoz v Finanzlandesdirektion für Wien, Niederösterreich und Burgenland [1999] ECR I-7041, paragraph 19), as do measures which make a direct foreign investment subject to prior authorisation (Joined

Cases C-163/94, C-165/94 and C-250/94 *Sanz de Lera and Others* [1995] ECR I-4821, paragraphs 24 and 25, and Case C-54/99 *Église de Scientologie de Paris v Prime Minister* [2000] ECR I-1335, paragraph 14).

19 The second paragraph of Article 3 of the Royal Decree, by excluding the possibility of Belgian residents subscribing to the loan in question, goes well beyond a measure which is intended to dissuade residents of a Member State from subscribing to a loan issued abroad or which imposes the requirement of prior authorisation, and thus all the more constitutes a restriction of the free movement of capital within the meaning of Article 73b of the Treaty.

20 However, in its defence, the Belgian Government submits, primarily, that the contested measure was taken by the Belgian State not in its capacity as a public authority but in its capacity as a private operator, so that the contested measure does not fall within the scope of Article 73b of the Treaty.

21 In support of this argument, the Belgian Government claims that a distinction must be drawn between the role of the State as public authority and as private operator. It points out that such a distinction is known to Community law, as follows in particular from Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings (OJ 1980 L 195, p. 35) and the judgments in *Joined Cases 231/87 and 129/88 Ufficio Distrettuale delle Imposte Dirette di Fiorenzuola d'Arda and Others v Comune di Carpaneto Piacentino and Others* [1989] ECR 3233 and *Case 29/76 LTU v Eurocontrol* [1976] ECR 1541.

22 On this point, it suffices to state that the waiver of withholding tax in the first paragraph of Article 3 of the Royal Decree constitutes, as the Belgian Government indeed conceded, a regulatory measure which only the State in its capacity as public authority is authorised to take.

23 That regulatory measure is inseparably linked with the prohibition imposed on Belgian residents under the second paragraph of Article 3 of the Royal Decree.

24 Such a prohibition, as a complement to the waiver of withholding tax, can be attributed only to considerations of fiscal policy, as the Belgian Government moreover acknowledged by arguing that the contested measure made it possible to prevent Belgian residents from taking advantage of the waiver to evade tax on the interest received. It follows that it forms an integral part of the measures taken by the Kingdom of Belgium to regulate the tax aspects of the loan to be contracted by the Minister of Finance.

25 The contested measure thus constitutes a measure taken by the Belgian State in its capacity as public authority.

26 The Belgian Government's argument that the State did no more, as a borrower, than agree with the financial intermediaries on a contractual term to be included in the conditions of the loan, in the same way as with contracts concluded by private borrowers, cannot be accepted.

27 In the light of the above considerations, it must be concluded that the contested measure constitutes a restriction of the free movement of capital, prohibited by Article 73b(1) of the Treaty.

28 The Belgian Government submits, in the alternative, that the contested measure is justified and proportionate to the aim pursued.

29 Relying on Article 73d(1)(b) of the Treaty, the Belgian Government argues that the contested measure is justified, first, by the fact that it was necessary to prevent Belgian residents from being able to evade tax by subscribing to the loan in question. The loan on the Eurobond market was effected by the Kingdom of Belgium with a view to sound management of its debt on an equal

footing with private operators.

30 It states in this respect that a particular characteristic of Eurobond loans is that interest is paid gross, with no deductions. Having decided to issue the loan on the Eurobond market, the Kingdom of Belgium thus had to waive deduction of withholding tax. As it wished to prevent the exemption from withholding tax from being a source of tax evasion, the prohibition of the acquisition of the loan securities in question by Belgian residents constituted the only possible measure for avoiding the creation of a domestic loan market with withholding tax and a Eurobond loan market with no withholding tax, both being accessible to individuals resident in Belgium.

31 The Belgian Government submits, second, that the contested measure is justified by the need to preserve fiscal coherence within the meaning of Case C-204/90 *Bachmann v Belgian State* [1992] ECR I-249 and Case C-300/90 *Commission v Belgium* [1992] ECR I-305. Since exemption from withholding tax is an essential condition for the State to be able to raise funds on the Eurobond market, the State must be entitled to prevent that exemption from becoming a source of tax evasion. First, the contested measure thus makes it possible to reconcile these requirements and ensure coherence in loan issuing policy. Second, there is a correlation between the exemption from withholding tax and the almost certain loss of the final tax.

32 The Belgian Government submits, third, that the prohibition in question may also be justified by the need to ensure the effectiveness of fiscal supervision, which was recognised by the Court as an overriding requirement of general interest in Case C-250/95 *Futura Participations and Singer v Administration des Contributions* [1997] ECR I-2471. The Government argues that the Member States are free to adopt all the measures necessary to preserve this general interest in the absence of harmonisation at Community level.

33 The Belgian Government's argument based on the need to preserve fiscal coherence as recognised by the Court in *Bachmann* and *Commission v Belgium* should be considered first.

34 In the *Bachmann* and *Commission v Belgium* cases there was a direct link between the deductibility of contributions and the liability to tax of the sums payable by insurers under pension and life assurance contracts, and it was necessary to preserve that link in order to ensure the coherence of the tax system in question. The loss of revenue resulting from the deduction of life assurance contributions from total taxable income was offset by the taxation of the pensions, annuities or capital sums payable by the insurers. In cases where such contributions were not deducted, those sums were exempted from tax.

35 In the present case, however, as the Advocate General observes in point 57 of his Opinion, there is no direct link between any fiscal advantage and a corresponding disadvantage which ought to be preserved in order to ensure fiscal coherence.

36 Consequently, the contested measure cannot be justified on the ground of the need to preserve fiscal coherence.

37 As to the Belgian Government's arguments based on the need to prevent tax evasion and ensure the effectiveness of fiscal supervision, it should be noted that Article 73d(1)(b) of the Treaty provides that Article 73b(1) is without prejudice to the right of Member States to take all requisite measures to prevent infringements of national law and regulations, in particular in the field of taxation and the prudential supervision of financial institutions, or to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.

38 As the Court has already held in *Joined Cases C-358/93 and C-416/93 Bordessa and Others* [1995] ECR I-361, paragraphs 21 and 22, and *Sanz de Lera*, paragraph 22, the requisite measures to prevent certain infringements in the field of taxation referred to in Article 73d(1)(b) of

the Treaty include measures intended to ensure effective fiscal supervision and to combat illegal activities such as tax evasion.

39 It follows that in the present case the fight against tax evasion and the effectiveness of fiscal supervision may be relied on under Article 73d(1)(b) of the Treaty to justify restrictions of the free movement of capital between Member States.

40 It must therefore be considered whether the contested measure may be regarded as requisite within the meaning of Article 73d(1)(b) of the Treaty for preventing tax evasion and ensuring the effectiveness of fiscal supervision.

41 For a measure to be covered by Article 73d of the Treaty, it must comply with the principle of proportionality, in that it must be appropriate for securing the attainment of the objective it pursues and must not go beyond what is necessary to attain it.

42 It should be observed that the Commission does not challenge either the right of the Kingdom of Belgium to have recourse to this type of loan or the consequent need to waive withholding tax.

43 On the other hand, the Commission does not accept as valid the Belgian Government's argument that the contested measure may be justified for fiscal reasons.

44 It must therefore be ascertained whether that argument can be accepted.

*45 As appears from Case C-28/95 *Leur-Bloem v Inspecteur der Belastingdienst/Ondernemingen Amsterdam 2* [1997] ECR I-4161, paragraph 44, a general presumption of tax evasion or tax fraud cannot justify a fiscal measure which compromises the objectives of a directive. That applies all the more in the present case, where the contested measure consists in an outright prohibition on the exercise of a fundamental freedom guaranteed by Article 73b of the Treaty.*

46 Moreover, with respect to the Belgian Government's argument that the contested measure was the only possible measure for avoiding the creation of a domestic loan market with withholding tax and a Eurobond loan market with no withholding tax, both accessible to Belgian residents, suffice it to observe that nothing prevents Belgian residents wishing to invest from acquiring loan securities issued on the Eurobond market by issuers other than the Kingdom of Belgium which are also not subject to Belgian withholding tax.

47 It follows that the contested measure does not comply with the principle of proportionality and so cannot be covered by Article 73d(1)(b) of the Treaty.

48 Consequently, by prohibiting the acquisition by Belgian residents of securities of a loan issued abroad, the Kingdom of Belgium has failed to fulfil its obligations under Article 73b of the Treaty.

Decision on costs

Costs

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

Operative part

On those grounds,

THE COURT,

hereby:

- 1. Declares that, by prohibiting the acquisition by persons resident in Belgium of securities of a loan issued abroad, under the second paragraph of Article 3 of the Royal Decree of 4 October 1994, the Kingdom of Belgium has failed to fulfil its obligations under Article 73b of the EC Treaty (now Article 56 EC);*
- 2. Orders the Kingdom of Belgium to pay the costs.*