Provisional text

JUDGMENT OF THE COURT (Fifth Chamber)

8 June 2017 (*)

(Reference for a preliminary ruling — Article 56 TFEU — Article 36 of the Agreement on the European Economic Area — Tax legislation — Income tax — Tax exemption reserved to interest payments by banks complying with certain statutory conditions — Indirect discrimination — Banks established in Belgium and banks established in another Member State)

In Case C?580/15,

REQUEST for a preliminary ruling under Article 267 TFEU from the Rechtbank van eerste aanleg, West-Vlaanderen, afdeling Brugge (Court of First Instance for West Flanders, Bruges Division, Belgium), made by decision of 28 October 2015, received at the Court on 9 November 2015, in the proceedings

Maria Eugenia Van der Weegen,

Miguel Juan Van der Weegen,

Anna Pot,

acting as successors in title to Johannes Van der Weegen, deceased,

Anna Pot

v

Belgische Staat,

THE COURT (Fifth Chamber),

composed of J.L. da Cruz Vilaça, President of the Chamber, K. Lenaerts, President of the Court, acting as Judge of the Fifth Chamber, M. Berger (Rapporteur), A. Borg Barthet and F. Biltgen, Judges,

Advocate General: N. Wahl,

Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 September 2016,

after considering the observations submitted on behalf of:

– Ms Van der Weegen, Mr Van der Weegen and Ms Pot, by C. Hendrickx and M. Vandendijk, advocaten,

– the Belgian Government, by J.-C. Halleux and M. Jacobs, acting as Agents, assisted by S.D. D’Aiola, expert,

– the European Commission, by W. Roels, acting as Agent,

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

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 56 and 63 TFEU and Articles 36 and 40 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3; 'the EEA Agreement').

2 The request has been made in proceedings between Ms Maria Eugenia Van der Weegen, Mr Miguel Juan Van der Weegen, Ms Anna Pot, acting as successors in title to Mr Johannes Van der Weegen, and Ms Anna Pot, on the one side, and the Belgische Staat (Belgian State), on the other, concerning the refusal to grant a tax exemption for remuneration received from a savings deposit in a Member State other than the Kingdom of Belgium.

Belgian law

3 Article 21 of the Wetboek van de inkomstenbelastingen 1992 (Income Tax Code) ('the WIB 1992'), in the version applicable to the tax year 2010 (income from 2009), provided:

'Income from movable property and capital shall not include:

…

5. the first tranche of [EUR] 1 730 (basic amount: [EUR] 1 250) per year of income from savings deposits received, without an agreed fixed period or period of notice, by credit institutions established in Belgium and governed by the Law of 22 March 1993 relating to the status and control of credit institutions, on the understanding that:

– those deposits must, moreover, satisfy the criteria laid down by the King on the advice of the Banking, Finance and Insurance Commission ..., as regards the currency in which the deposits are denominated, the conditions and methods of withdrawal and the structure, level and method for calculating their remuneration;

…'

4 In its judgment of 6 June 2013, *Commission* v *Belgium* (C?383/10, EU:C:2013:364), the Court of Justice held that that provision infringed Article 56 TFEU and Article 36 of the EEA Agreement.

5 Article 170 of the Law of 25 April 2014 laying down various provisions (*Belgische Staatsblad* of 7 May 2014, p. 36946; 'the Law of 25 April 2014') amended Article 21(5) of the WIB 1992 as follows:

'Income from movable property and capital shall not include:

...

5. the first tranche of EUR 1 250 (non-indexed amount) per year of income from savings deposits received, without an agreed fixed period or period of notice, by the credit institutions referred to in Article 56(2)(2a), on the understanding that:

– those deposits must, moreover, satisfy the criteria laid down by the King on the advice of the National Bank of Belgium and the Financial Services and Markets Authority, each in respect of its own field of competence, as regards the currency in which the deposits are denominated, the method of withdrawal and the structure, level and method for calculating their remuneration, or, for deposits received by credit institutions established in another Member State of the European Economic Area, those deposits must meet conditions similar to those laid down by the equivalent competent authoritiesof that other Member State;

...'

6 The explanatory memorandum relating to the amendment of Article 21(5) of the WIB 1992 reads as follows:

'The requirement that the conditions be similar means, first, that savings deposits must be subject to the same basic conditions mentioned in Article 21(5) of the WIB 1992; and, moreover, that they satisfy the criteria laid down by the public authorities in the Member State concernedwith regard to the currency in which the deposits are denominated, and as regards the method of withdrawal and the structure, level and method for calculating their remuneration**.** Those criteria must be similar to those in force in Belgium. This means that — without being identical — they must be comparable in scope. ...'

7 The Koninklijk Besluit (Royal Decree) of 27 August 1993 implementing the WIB 1992 (*Belgische Staatsblad* of 13 September 1993, p. 20096), as amended by the Royal Decree of 7 December 2008 (*Belgische Staatsblad* of 22 December 2008, p. 67513) ('the KB/WIB 92'), lays down the criteria which the savings deposits referred to in Article 21(5) of the WIB 1992 must, moreover, satisfy in order to be able to benefit from application of that article.

8 Article 2 of the KB/WIB 92 provides:

'In order to be able to benefit from the application of Article 21(5) [of the WIB 1992], the savings deposits referred to in that article must also satisfy the following criteria:

1. the savings deposits must be denominated in EUR;

2. withdrawals can be made from savings deposits, directly or by means of a current account, only for settling the following transactions:

(a) redemption in cash;

(b) transfer, other than pursuant toa standing order, to an account opened in the name of the savings deposit holder;

(c) transfer to a savings deposit opened with the same institution in the name of the spouse or of, at most, a second-degree relative of the savings deposit holder;

...

3. the withdrawal conditions must provide for the possibility for the depositary institution to require five calendar days' notice of withdrawals if they exceed [EUR] 1 250 and to limit them to

[EUR] 2 500 per half month;

4. (a) remuneration of savings deposits is to consist exclusively of

– basic interest; and

– a fidelity premium;

(b) basic interest and the fidelity premium shall be calculated at a rate expressed on an annual basis.

Deposits shall bear basic interest at the latest from the calendar day following the calendar day of the payment and shall cease to bear interest from the calendar day of withdrawal.

Payments and withdrawals made on the same calendar day shall be compensated for the calculation of the basic interest and the fidelity premium.

The basic interest acquired shall be paid on deposit once per calendar year in such a way as to produce, by way of derogation from subparagraph 2, basic interest from 1 January of that year.

Savings deposit holders may not be charged overdraft interest.

The fidelity premium shall be allocated to deposits that remain registered on the same account for 12 consecutive months.

In case of transfer of a savings deposit to another savings deposit opened in the name of the same holder with the same institution other than pursuant to a standing order, the vesting period for the fidelity premium on the first savings deposit shall remain acquired, provided that the transfer amount is at least [EUR] 500 and the holder in question has not already made three transfers of that kind, from the same savings deposit, during the same calendar year. ...

(c) the rate of basic interest allocated by an institution to the savings deposits which it receives may not exceed the higher of the following two rates:

– 3%;

– the rate of the main refinancing operations of the European Central Bank applicable on the 10th day of the month preceding the current 6-month period.

Each rise in the rate of basic interest shall be maintained for a period of at least three months except in the case of downward adjustment of the rate of the main refinancing operations of the European Central Bank.

Without prejudice to point (e) below, the rate of the fidelity premium offered may not:

– exceed 50% of the maximum rate of basic interest referred to in subparagraph 1. If that percentage does not equal a multiple of one tenth of one percentage point, the maximum rate of the fidelity premium shall be rounded down to the nearest tenth of one percentage point;

– be lower than 25% of the rate of basic interest offered. If that percentage does not equal a multiple of one tenth of one percentage point, the minimum rate of the fidelity premium shall be rounded down to the nearest tenth of one percentage point;

(d) a single rate of basic interest shall be applicable by deposit of savings at a specific time;

(e) the fidelity premium which is allocated at a specific time shall be the same for new payments and for deposits for which a new fidelity period starts. Without prejudice to the application of subparagraph 7 of paragraph 4(b), the fidelity premium applicable at the time of payment or at the start of a new fidelity period shall remain applicable for the entirety of the fidelity period;

5. the depositary institution shall examine whether the limit laid down in Article 21(5) of the WIB 1992 is reached each time the basic interest and the fidelity premium are charged, and for that it shall take into consideration all the amounts allocated during the taxable period.'

9 The administration published, to that end, the circular Circ. AAFisc No 22/2014 (No Ci.RH.231/633.479) of 12 June 2014, which, in paragraph 2, entitled 'Criteria to be satisfied by foreign savings deposits covered by the exemption', provides:

'4. In accordance with Article 21(5) of the WIB 1992 ..., foreign savings deposits must satisfy criteria defined by the legislature (or a public organ of the executive with competence to enforce tax law) and which have been the subject of prior notice from organs with powers equivalent to the National Bank of Belgium and the Financial Markets and Services Authority.

5. Furthermore, those criteria must be similar to the criteria defined in Article 2 of the KB/WIB 92, relating to:

– the currency in which they are denominated;

– the conditions and methods of withdrawal;

– and the structure, level and method for calculating their remuneration.

For details of those criteria, it is appropriate to refer to that Article 2 of the KB/WIB 92 ...'

The dispute in the main proceedings and the question referred for a preliminary ruling

10 Mr Johannes Van der Weegen and Ms Pot held, with regard to the tax years from 2010 to 2013, five savings deposits with financial institutions established in a Member State other than the Kingdom of Belgium. They applied for the tax exemption provided for in Article 21(5) of the WIB 1992, as amended by the Law of 25 April 2014.

11 On the ground that none of those institutions could demonstrate that the savings deposits held with them complied with conditions similar to those applicable to regulated Belgian savings deposits, in particular as far as basic interest and the fidelity premium were concerned, the Belgian tax authorities refused to allow the income generated by those savings deposits to benefit from a tax exemption.

12 Mr Johannes Van der Weegen and Ms Pot challenged that decision before the referring court, which expresses uncertainty as to whether Article 21(5) of the WIB 1992, as amended by the Law of 25 April 2014, is compatible with EU law.

13 In those circumstances, the Rechtbank van eerste aanleg, West-Vlaanderen, afdeling Brugge (Court of First Instance for West Flanders, Bruges Division, Belgium) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 21(5) of the WIB 1992, as amended by Article 170 of the Law of 25 April 2014, infringe the provisions of Articles 56 and 63 TFEU and of Articles 36 and 40 of the EEA

Agreement, inasmuch as the provision in question, although applicable without distinction to domestic and foreign service providers, requires compliance with conditions similar to those included in Article 2 of the Royal Decree implementing the WIB 1992 which are de facto specific to the Belgian market and consequently amount to a serious obstacle to foreign service providers offering their services in Belgium?'

14 According to the information contained in the file before the Court, Mr Johannes Van der Weegen died on 20 January 2016. Ms Van der Weegen, Mr Miguel Juan Van der Weegen and Ms Pot have been subrogated to his rights.

Consideration of the question referred

Preliminary observations

15 It should be recalled that, in the judgment of 6 June 2013, *Commission* v *Belgium* (C?383/10, EU:C:2013:364), the Court held that, by introducing and maintaining a system of discriminatory taxation of interest payments made by non-resident banks, resulting from the application of a tax exemption reserved solely to interest payments made by resident banks, the Kingdom of Belgium had failed to fulfil its obligations under Article 56 TFEU and Article 36 of the EEA Agreement.

16 Following that judgment, that system was amended in such a way that, from then on, the tax exemption has also been applicable to interest payments made by non-resident banks.

17 According to the WIB 1992, as amended by the Law of 25 April 2014, in order for depositors to be able to avail of such an exemption, the savings deposit system in question must satisfy certain criteria, laid down by statute, such as denomination in euros, withdrawal limits and a method for calculating remuneration that must consist of basic interest and a fidelity premium.

18 The WIB provides that deposits received by credit institutions established in another Member State of the European Economic Area must satisfy similar criteria laid down by the competent authorities of that other Member State.

19 According to the explanatory memorandum to the Law of 25 April 2014, 'the requirement that the conditions be similar means ... that savings deposits must be subject to the same basic conditions as those mentioned in Article 21(5) of the WIB 1992'.

20 At the hearing before the Court, the Belgian Government explained that that text must be taken to mean that the conditions to which savings deposits held in banks in a Member State other than Belgium are subject need not be identical to those to which banks established in Belgium are subject, but that it is enough that they be similar.

21 It must, however, be pointed out that, leaving aside that matter, it is common ground that a savings deposit held with a bank established in Belgium or with one established abroad must, in any event, in order to avail of the tax exemption at issue, comply with two conditions in particular.

22 First, such a savings account must be subject to certain restrictions relating to the methods and conditions of withdrawal from that account and, second, remuneration of such an account must consist of both basic interest and a fidelity premium.

23 It is in the light of those considerations that the question referred by the national court must be answered.

Consideration of the question referred

24 By its question, the referring court asks, in essence, whether Articles 56 and 63 TFEU and Articles 36 and 40 of the EEA Agreement must be interpreted as precluding a national tax exemption system, such as that provided for in Article 21(5) of the WIB 1992, as amended by the Law of 25 April 2014, which, although applicable without distinction to income from savings deposits held with banking service providers established in Belgium or in another Member State of the EEA, is reserved to income from savings deposits held with banks which comply with conditions which are de facto specific to the national market alone.

25 In order to answer that question, it is appropriate, first, to state that, although such national legislation was capable of coming within the scope of the two fundamental freedoms alluded to by the referring court, the fact remains that any restrictive effects which that legislation might have on the free movement of capital would be no more than the inevitable consequence of any restrictions on the freedom to provide services. Where a national measure relates to several fundamental freedoms at the same time, the Court will in principle examine the measure in relation to only one of those freedoms if it appears, in the circumstances of the case, that the other freedoms are entirely secondary in relation to the first and may be considered together with it (see, by analogy, judgments of 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International*, C?42/07, EU:C:2009:519, paragraph 47, and of 11 March 2010, *Attanasio Group*, C?384/08, EU:C:2010:133, paragraph 40; and order of 28 September 2016, *Durante*, C?438/15, not published, EU:C:2016:728, paragraph 14).

26 It follows that the tax exemption system at issue must be examined exclusively in the light of Article 56 TFEU and Article 36 of the EEA Agreement.

27 Moreover, it should be stated that banking services constitute services within the meaning of Article 57 TFEU. Article 56 TFEU precludes the application of any national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide those services (see, to that effect, judgment of 14 January 2016, *Commission* v *Greece*, C?66/15, not published, EU:C:2016:5, paragraph 22 and the case-law cited).

28 In the present case, the legislation at issue in the main proceedings establishes a tax system which is applicable without distinction to the remuneration received from a savings deposit paid by banks established in Belgium and to that paid by banks established in another Member State.

29 However, even national legislation which applies without distinction to all services, irrespective of the place of establishment of the provider, is liable to constitute a restriction on the freedom to provide services in so far as it reserves an advantage solely to users of services which comply with certain conditions which are de facto specific to the national market and thus deny that advantage to users of other services which are essentially similar but do not comply with the specific conditions provided for in that legislation. Such legislation affects the situation of users of services as such and is thus liable to discourage them from using the services of certain providers, since the services offered by them do not comply with the conditions laid down in that legislation, thus directly affecting access to the market (see, to that effect, judgments of 10 May 1995, *Alpine Investments*, C?384/93, EU:C:1995:126, paragraphs 26 to 28 and 35 to 38, and of 10 November 2011, *Commission* v *Portugal*, C?212/09, EU:C:2011:717, paragraph 65 and the case-law cited).

30 It is therefore necessary to verify, as a first step, whether the national legislation at issue in the main proceedings, although applicable without distinction, creates impediments to the freedom

to provide services.

31 In that regard, it should be recalled that, as the circular Circ. AAFisc No 22/2014 states, deposits must satisfy the criteria defined in Article 2 of the KB/WIB 92, which provide, inter alia, that withdrawals from such deposits must be limited in order to distinguish them from a current account and that the remuneration received on savings deposits must necessarily and exclusively consist of basic interest and a fidelity premium.

32 It is also apparent from the clarifications provided by the interested parties in the course of the hearing before the Court that there is no system relating to savings deposits in the Member States of the EEA other than the Kingdom of Belgium that complies with the conditions laid down by Article 2 of the KB/WIB 92, particularly those involving remuneration of such deposits. It appears that that method of remuneration is specific to the Belgian banking market.

33 Thus, the national legislation at issue, although applicable without distinction to remuneration received from savings accounts opened with institutions established in Belgium and from those opened in other Member States of the EEA, first, has the effect of discouraging, in fact, Belgian residents from using the services of banks established in those other Member States and from opening or keeping savings accounts with those latter banks, since the interest paid by those banks cannot benefit from the tax exemption at issue, in particular because the remuneration of the savings accounts does not consist of a rate of basic interest and a fidelity premium.

34 Second, that legislation is such as to discourage holders of a savings account with a bank established in Belgium, which complies with the exemption conditions, from transferring their account to a bank established in another Member State that does not offer accounts meeting those conditions.

35 Therefore, that legislation is capable of constituting an impediment to the freedom to provide services, prohibited, in principle, by the first paragraph of Article 56 TFEU to the extent that it imposes conditions for access to the Belgian banking market on service providers established in other Member States, this being a matter for the referring court to verify, in particular in view of the information set out in paragraph 29 of the present judgment.

36 Second, it is necessary to verify whether such an impediment can be justified by the reasons put forward by the Belgian Government.

37 It should be recalled that national measures which are liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty may nevertheless be allowed provided that they pursue an objective in the public interest, that they are appropriate for attaining that objective and that they do not go beyond what is necessary to attain the objective pursued (see, inter alia, judgment of 6 June 2013, *Commission* v *Belgium*, C?383/10, EU:C:2013:364, paragraph 49 and the case-law cited).

38 The Belgian Government argues that the legislation at issue contributes to consumer protection. It states that, to that end, it is crucial that Belgian residents should have a savings account that is sustainable, protected, stable, sufficient and risk-free so as to be able to cover their significant or unforeseen expenses.

39 In that regard, the Court has held that consumer protection features among the overriding reasons in the public interest capable of justifying a restriction on the freedom to provide services (see, inter alia, judgment of 23 January 2014, *Commission* v *Belgium*, C?296/12, EU:C:2014:24, paragraph 47).

40 It is thus for the referring court to verify, first, whether the legislation at issue addresses such an overriding reason in the public interest.

41 It is for that court, next, to satisfy itself that the tax system at issue — assuming that it does indeed pursue such an objective — does not go beyond what is necessary to attain that objective and that it complies with the principle of proportionality.

42 Even assuming that the system at issue addresses a reason in the public interest, in depriving, in fact, all income from the savings accounts available in the internal market — with the exception of that from accounts held in banks established in Belgium — of the benefit of that exemption, that system is liable to exclude savings accounts opened in banking institutions, particularly in non-Belgian banking institutions, which would enable the same objective as that pursued by that system, namely consumer protection, to be attained. In particular, none of the arguments presented before the Court provides any basis on which to take the view that the application of the conditions laid down in Article 2 of the KB/WIB 92, relating to remuneration of deposits, would be necessary to attain that objective.

43 Thus, consumer protection cannot be invoked as justification for the impediment to the freedom to provide services under examination.

44 As far as Article 36 of the EEA Agreement is concerned, it must be noted that this provision is similar to that set out in Article 56 TFEU, with the result that the considerations relating to that latter article, set out in paragraphs 27 to 43 of the present judgment, also apply in respect of Article 36 of the EEA Agreement.

45 It follows from all of the foregoing considerations that the answer to the question referred is that Article 56 TFEU and Article 36 of the EEA Agreement must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a national tax exemption system, to the extent that that system, although applicable without distinction to income from savings deposits held with banking service providers established in Belgium or in another Member State of the EEA, imposes conditions for access to the Belgian banking market on service providers established in other Member States, this being a matter for the referring court to verify.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

Article 56 TFEU and Article 36 of the Agreement on the European Economic Area of 2 May 1992 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which provides for a national tax exemption system, to the extent that that system, although applicable without distinction to income from savings deposits held with banking service providers established in Belgium or in another Member State of the European Economic Area, imposes conditions for access to the Belgian banking market on service providers established in other Member States, this being a matter for the referring court to verify.

[Signatures]

* Language of the case: Dutch.