DIRECT TAXATION, CASE LAW

5 CIBA. Vocational training levy is a restriction. Double taxation. Freedom of establishment. Court of Justice (comments by Kofler)

CIBA, a company resident in Hungary, was obliged to pay a levy on vocational training even in the case of employees working in a branch based in the Czech Republic, and despite the fact that it paid taxes and social security contributions in that country. The referring court asked whether this legislation was compatible with the freedom of establishment. In its judgment of 15 April 2010 in the CIBA case (C-96/08), the CJ did not find a restriction in the dual burden itself but argued that the Hungarian legislation was nevertheless incompatible with the freedom of establishment if, in practice, the Hungarian undertaking was prevented, with regard to the foreign branch, from benefiting from the possibilities provided for in that legislation of reducing that levy or from having access to those possibilities.

European Court of Justice, 15 April 2010, no. C-96/08

JUDGMENT OF THE COURT (Third Chamber)

15 April 2010[1]

(Freedom of establishment – Direct taxation – Vocational training levy – Basis for calculating the levy to be paid by undertakings established in the national territory – Account taken of the wage costs of workers employed in a branch established in another Member State – Double taxation – Whether it is possible to reduce gross liability to the levy)

In Case C-96/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Pest Megyei Bíróság (Hungary), made by decision of 12 March 2007, received at the Court on 3 March 2008, in the proceedings

CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft

v

Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály,

THE COURT (Third Chamber),

composed of J. N. Cunha Rodrigues, President of the Second Chamber, acting as President of the Third Chamber, A. Rosas and U. Lõhmus (Rapporteur), Judges,

Advocate General: E. Sharpston,

Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 18 February 2009,

after considering the observations submitted on behalf of:

– CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft, by D. Deák, ügyvéd,
– the Hungarian Government, by J. Fazekas, M. Fehér and K. Veres, acting as Agents,
– the United Kingdom Government, by R. Hill, acting as Agent,
– the Commission of the European Communities, by R. Lyal and K. Talabér-Ritz, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 17 December 2009,

gives the following

Judgment

1. This reference for a preliminary ruling concerns the interpretation of Articles 43 EC and 48 EC.

2. The reference has been made in the course of proceedings between CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Keresdedelmi kft ('CIBA') and Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály (Tax and Finance Inspection Office – head office) relating to CIBA's liability to the vocational training levy ('VTL').

1 Language of the case: Hungarian.

Legal context

National legislation

3. Under Article 2(1) of Law No LXXXVI of 2003 on the Vocational Training Levy and Support for the Development of Training (A szakképzési hozzájárulásról és a képzés fejlesztésének támogatásáról szóló 2003. évi LXXXVI. törvény) (*Magyar Közlöny* 2003/131, 'the 2003 Law'):

'In view of the provisions in paragraphs 3 and 4, trading companies whose seat is situated on the national territory … shall be liable to pay [VTL]'

4. Under Article 2(2) of the 2003 Law:

'Legal entities which have their seat abroad but pursue commercial activities in Hungary, businesses without legal personality, associations of persons and other organisations whose seats are abroad, where they are permanently established or have a branch in Hungary, shall also be liable to pay [VTL].'

5. Pursuant to Article 3(1) of the 2003 Law:

'The basis of assessment for [VTL] shall be made up of:

(a) wage costs calculated in accordance with Article 79(2) of Law C of 2000 on accounting (A számvitelről szóló 2000. évi C. törvény) …'

6. It is apparent from the written observations submitted by CIBA and the Hungarian Government that the fund for the employment market established in the Republic of Hungary contains a part dedicated to vocational training, whose objective is, under Article 8(1) of the 2003 Law, inter alia, to increase the number of trained specialists on the basis of the requirements of the national economy and to develop the professional skills of those specialists.

7. According to those observations, a taxpayer's gross liability to VTL to be paid to that part of the fund can be reduced:

– by organising practical training pursuant to Article 4 of the 2003 Law,

– by entering into a training contract for the benefit of its employees, up to a maximum of 33% of its gross liability, and

– by offering development grants to a higher education institution or vocational training institution, up to a maximum of 75% of its gross liability.

The dispute in the main proceedings and the question referred

8. CIBA is an undertaking which has its seat in Hungary and which is liable to pay VTL. It has a branch in the Czech Republic, where it pays taxes and social security contributions in respect of those workers employed in that branch, including contributions relating to public policy on employment, as laid down in Czech domestic law.

9. During an ex post facto review of the years 2003 and 2004, the Hungarian tax authorities found that CIBA owed tax. Hearing an appeal against that decision, the defendant in the main proceedings upheld that tax debt, including, inter alia, liability to VTL unpaid by CIBA.

10. Before the referring court, CIBA argued that the basis for calculating liability to VTL is not consistent with Article 43 EC, in that it includes, for an undertaking which has its seat in Hungary, the undertaking's wage costs including those relating to branches established outside Hungary. CIBA claimed that, consequently, it is subject to a dual obligation to pay such a contribution in respect of its workers employed in the Czech Republic. Furthermore, as regards those workers, it cannot benefit from the advantages which accrue from vocational training organised by the Hungarian national market employment services and it is precluded from organising practical training, entering into training contracts or offering development grants.

11. The referring court points out that VTL does not come within the scope of the convention between the Republic of Hungary and the Czech Republic, signed at Prague on 14 January 1993, to prevent double taxation and tax avoidance in the field of income and capital taxes, with the result that it is necessary to find out whether the 2003 Law contains a restriction on exercising freedom of establishment, in that a company with its seat in Hungary is obliged to pay VTL even where it employs workers outside Hungary.

12. In those circumstances, the Pest Megyei Bíróság decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Can the principle of freedom of establishment under Articles 43 EC and 48 EC be interpreted as

precluding a legal rule under which a company established in Hungary must pay [VTL] if it employs workers in a branch abroad and meets its tax and social security obligations with regard to such workers in the State where the branch is situated?'

The jurisdiction of the Court

13. The dispute in the main proceedings concerns the tax years 2003 and 2004 for CIBA, whereas the Republic of Hungary acceded to the European Union only on 1 May 2004.

14. The Court has jurisdiction to interpret the provisions of the EC Treaty only as regards their application in a new Member State with effect from the date of that State's accession to the European Union (see, to that effect, Case C-302/04 *Ynos* [2006] ECR I-371, paragraph 36, and Case C-64/06 *Telefónica O2 Czech Republic* [2007] ECR I-4887, paragraph 23).

15. As the facts in the main proceedings occurred in part after that date, the Court has jurisdiction to reply to the question referred.

The question referred for a preliminary ruling

16. By its question, the referring court asks, in essence, whether Articles 43 EC and 48 EC preclude Member State legislation under which an undertaking which has its seat in that State is obliged to pay a levy such as VTL, the amount of which is calculated on the basis of its wage costs, including those wage costs incurred at a branch of that undertaking established in another Member State in which it also pays tax and social security contributions in respect of the workers employed in that branch.

17. According to settled case-law, freedom of establishment, which Article 43 EC grants to Member State nationals and which includes the right for them to take up and pursue activities as self-employed persons and to set up and manage undertakings, under the conditions laid down for its own nationals by the law of the Member State where such establishment is effected, entails, in accordance with Article 48 EC, for companies or firms formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the European Union, the right to exercise their activity in the Member State concerned through a subsidiary, branch or agency (see, inter alia, Case C-466/03 *Marks & Spencer* [2005] ECR I-10837, paragraph 30; Case C-374/04 *Test Claimants in Class IV of the ACT Group Litigation* [2006] ECR I-11673, paragraph 42; and Case C-314/08 *Filipiak* [2009] ECR I-0000, paragraph 59).

18. Even though, according to their wording, the provisions concerning freedom of establishment are aimed at ensuring that foreign nationals are treated in the host Member State in the same way as nationals of that State, they also prohibit the State of origin from hindering the establishment in another Member State of one of its nationals or of a company incorporated under its legislation (see Case C-298/05 *Columbus Container Services* [2007] ECR I-10451, paragraph 33; Case C-157/07 *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt* [2008] ECR I-8061, paragraph 29; and *Filipiak*, paragraph 60).

19. It is also settled case-law that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as constituting restrictions on the freedom of establishment (see *Columbus Container Services*, paragraph 34, and *Krankenheim Ruhesitz am Wannsee-Seniorenheimstatt*, paragraph 30).

20. CIBA takes the view that the national legislation concerning VTL is likely to deter an undertaking which has its seat in Hungary from setting up a place of business in another Member State. According to CIBA, the obligation to pay VTL – calculated on the basis of the wage costs of such an undertaking, including those wage costs in respect of the workers employed in that place of business – leads to a dual obligation in so far as the Member State in which that place of business is established imposes a similar charge in respect of those workers. In the present case, CIBA is liable to pay such a charge in terms of contributions relating to public policy on employment in the Czech Republic, for those workers employed in its branch established in that Member State.

21. CIBA also claims that the VTL is not a tax, since it is paid into a part of a public fund dedicated to vocational training which is distinct from the State's budget and there is a direct link between the contributions made and the payments from that fund to vocational training institutions and/or educational institutions under the national law.

22. In that regard, it is apparent from the order for reference and the observations submitted to the Court that VTL is a charge which is imposed on those companies coming within the scope of the 2003 Law, as set out in Article 2(1) and (2) of that law, and is calculated, pursuant to Article 3 of that law, with regard to the wage costs of those companies. The VTL payments go into a part of the Hungarian fund for the employment market, offering, as CIBA points out, grants to vocational training institutions in Hungary.

23. Neither the fact that VTL is calculated on the basis of the wage costs of the companies liable to that levy and not on their turnover or profits, nor the fact that it is paid directly to a fund distinct from the State's central budget and ring-fenced for a particular use, is, of itself, such as to preclude that levy from coming within the field of direct taxation.

24. Moreover, as the Advocate General states in point 21 of her Opinion, it does not seem that those companies receive any form of benefits directly in consideration for the VTL paid. In that regard, the Hungarian Government contends, in its observations, that VTL is not a levy which is contributory in nature granting to the workers an individual right to participate in vocational training. It is for the State to decide in what way the amount paid should be allocated to improve the level of vocational training on the Hungarian employment market. It is however for the referring court to verify those assertions.

25. It should be observed that, assuming that VTL comes within the field of direct taxation and assuming that CIBA's liability to pay, on the one hand, VTL on the basis of a calculation which takes account of the wage costs in respect of its branch in the Czech Republic and, on the other, contributions relating to that Member State's public policy on employment in respect of the workers employed in that branch may be considered to be double taxation, such a fiscal disadvantage results from the exercise in parallel by two Member States of their fiscal sovereignty (see, to that effect, Case C-513/04 *Kerckhaert and Morres* [2006] ECR I-10967, paragraph 20, and Case C-67/08 *Block* [2009] ECR I-883, paragraph 28).

26. In that regard, double taxation conventions are designed to eliminate or mitigate the negative effects on the functioning of the internal market resulting from the coexistence of national tax systems referred to in the preceding paragraph (*Kerckhaert and Morres*, paragraph 21, and *Block*, paragraph 29).

27. European Union law, in the current state of its development and in a situation such as that at issue in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Union. Consequently, apart from Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (OJ 1990 L 225, p. 6), the Convention of 23 July 1990 on the elimination of double taxation in connection with the adjustment of profits of associated enterprises (OJ 1990 L 225, p. 10) and Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments (OJ 2003 L 157, p. 38), no uniform or harmonisation measure designed to eliminate double taxation has as yet been adopted at European Union law level (*Kerckhaert and Morres*, paragraph 22, and *Block*, paragraph 30).

28. It follows from this that, in the current state of the development of European Union law, the Member States enjoy a certain autonomy in this area provided they comply with European Union law, and are not obliged therefore to adapt their own tax systems to the different systems of taxation of the other Member States in order, inter alia, to eliminate the double taxation arising from the exercise in parallel by those States of their fiscal sovereignty (see, to that effect, *Columbus Container Services*, paragraph 51, and *Block*, paragraph 31).

29. Therefore, the double taxation alleged by CIBA, assuming it exists, does not alone constitute a restriction prohibited by the Treaty (see, to that effect, Case C-194/06 *Orange European Smallcap Fund* [2008] ECR I-3747, paragraph 42, and Case C-128/08 *Damseaux* [2009] ECR I-0000, paragraph 27).

30. The Commission of the European Communities contends, however, that VTL is a special tax, imposed in the interest of employees, which may be treated in the same way as the employers' contributions which were the subject-matter in the main proceedings in Joined Cases C-369/96 and C-376/96 *Arblade and Others* [1999] ECR I-8453.

31. In paragraph 50 of the judgment in that case, the Court held that national rules which require an employer, as a provider of services within the meaning of the Treaty, to pay employers' contributions to the host Member State's fund, in addition to those which he has already paid to

the fund of the Member State in which he is established, constitute a restriction on freedom to provide services, since such an obligation gives rise to additional expenses and administrative and economic burdens for undertakings established in another Member State, with the result that such undertakings are not on an equal footing, from the standpoint of competition, with employers established in the host Member State, and may thus be deterred from providing services there.

32. Unlike those contributions, which had to be paid for each seconded worker for the purposes of his social security (see *Arblade and Others*, paragraphs 48, 49 and 80), VTL does not seem, as was indicated in paragraphs 22 and 24 of this judgment, to be paid by the undertakings liable to it for the purposes of granting a direct benefit to those undertakings, and even less so to their employees, but is paid into a State fund which offers grants to vocational training institutions in Hungary. VTL cannot therefore, subject to the verification by the referring court referred to in paragraph 24, be treated in the same way as the contributions which were at issue in *Arblade and Others*.

33. CIBA and the Commission also point to two aspects of the legislation on VTL which, according to them, hinder the freedom of establishment irrespective of whether there is double taxation.

34. First, the obligation to pay that levy relates to the total wage costs of an undertaking which has its seat in Hungary but which has places of business outside that Member State, although only the workers employed in that home Member State can benefit from the training financed by the Hungarian fund for the employment market.

35. Second, an undertaking which has its seat in Hungary, but which has places of business outside of that Member State, is obliged to pay VTL for employees in respect of whom the possibilities laid down by national law to reduce gross liability to VTL are not available.

36. Even though the referring court does not raise a specific question in relation to those two aspects of the national legislation at issue in the main proceedings, it is apparent from the order for reference, as is indicated in paragraph 11 of this judgment, that the referring court questions whether the obligation of a company with its seat in Hungary to pay VTL relating to the wage costs of a branch of that company situated in another Member State is consistent with the freedom of establishment. Since the two aspects referred to seem relevant in that context, it is necessary to examine them in order to give a useful answer to the referring court.

37. As regards the argument that the workers employed in the Czech Republic cannot benefit from the training financed by the Hungarian fund for the employment market, it must be recalled that the Member State in which the seat of the undertaking is located enjoys, in the absence of a double taxation convention, the right to tax that undertaking overall (see, to that effect, Case C-279/93 *Schumacker* [1995] ECR I-225, paragraph 32, and Case C-414/06 *Lidl Belgium* [2008] ECR I-3601, paragraph 33).

38. The possible lack of opportunity, for CIBA's workers employed in the Czech Republic, to benefit from that training is merely the consequence of the taxation and spending powers which the Republic of Hungary enjoys, taking account of the fact that, according to the order for reference, VTL does not come within the scope of the convention referred to in paragraph 11 of this judgment. Therefore, such a factor cannot constitute, in itself, a restriction contrary to the freedom of establishment.

39. In relation to the possibilities for a company coming within the scope of the 2003 Law to reduce its gross liability to VTL, it is apparent from the observations of CIBA and the Hungarian Government, as was indicated in paragraph 7 of this judgment, that such a company may, to that end, organise practical training, enter into a training contract for the benefit of its employees or offer development grants to a higher education institution or vocational training institution.

40. In so far as such a company has taken such steps irrespective of its obligation to pay VTL, which might be the case, in particular, as regards the organisation of training for its own employees, the possibility of offsetting the cost of those steps against gross liability to VTL must be held to be an advantage.

41. However, CIBA's observations indicate that the abovementioned possibilities for reducing gross liability to VTL are defined under Hungarian national law. At the hearing, both CIBA and the Hungarian Government claimed that the training thus organised must take place in Hungary. According to CIBA, although the staff employed in the Czech Republic branch are not precluded from participating in that training, such participation would involve additional costs linked to, inter alia, travel expenses and would be pointless in the light of the differences between the Hungarian and Czech training systems.

42. It is for the referring court to verify the specific features of the system referred to in the foregoing three paragraphs and their practical effects. Subject to that verification, it seems that the possibilities under Hungarian law for a company, such as the applicant in the main proceedings, to reduce its gross liability to VTL are not available in practice with regard to a place of business situated in another Member State.

43. In that event, a company which has its seat in Hungary and has a place of business in another Member State is, as regards the advantage identified in paragraph 40 of this judgment, in a less favourable position than a company which restricts its activity to Hungarian territory alone (see, by analogy, *Lidl Belgium*, paragraph 25, and *Filipiak*, paragraph 67).

44. Thus, the difficulty in practice for a company which has its seat in Hungary to rely, with regard to a place of business situated in another Member State, on the means provided for in Hungarian legislation to reduce its gross liability to VTL can, in so far as it is confirmed by the referring court, deter that company from taking advantage of the freedom of establishment under Articles 43 EC and 48 EC and amounts to a restriction of that freedom (see, by analogy, *Filipiak*, paragraph 71 and case-law cited).

45. According to the case-law of the Court, a measure restricting one of the fundamental freedoms guaranteed by the Treaty may be accepted only if it is justified by overriding reasons in the public interest. Even if that were so, application of that measure would still have to be such as to ensure achievement of the aim pursued and not go beyond what is necessary for that purpose (see, inter alia, Case C-527/06 *Renneberg* [2008] ECR I-7735, paragraph 81).

46. No possible justification has been advanced by the Hungarian Government or envisaged by the referring court.

47. In any event, a restriction such as that identified in paragraph 44 of this judgment cannot be justified by the need to preserve the coherence of a system such as the VTL system at issue in the main proceedings. For an argument based on such a justification to succeed, the Court requires that a direct link be established between the advantage concerned and the offsetting of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question (see, to that effect, Case C-182/08 *Glaxo Wellcome* [2009] ECR I-0000, paragraph 78 and case-law cited). In the main proceedings, the fact that, for a company with its seat in Hungary, all of the staff belonging to a place of business situated in another Member State is taken into account does not seem to be offset by any possibility, in practice, for that company to benefit from the means provided for in Hungarian legislation to reduce gross liability to VTL with regard to training costs incurred in such a place of business.

48. In addition, it is apparent from Article 8(1) of the 2003 Law and the observations of the Hungarian Government that the VTL system is intended to improve the level of training of workers in the Hungarian employment market. In that regard, an offsetting of the costs of training paid outside of Hungary against gross liability to VTL could, admittedly, bring about a reduction in the revenue intended for the attainment of that objective. However, such a consideration is purely economic and cannot, therefore, according to settled case-law, constitute an overriding reason in the public interest (see, to that effect, Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 50, and *Glaxo Wellcome*, paragraph 82).

49. In the light of the foregoing considerations, the answer to the question referred is that Articles 43 EC and 48 EC preclude Member State legislation under which an undertaking, which has its seat in that State, is obliged to pay a levy such as VTL, the amount of which is calculated on the basis of its wage costs including those wage costs incurred at a branch of that undertaking established in another Member State, if, in practice, such an undertaking is prevented, with regard to that branch, from benefiting from the possibilities provided for in that legislation of reducing that levy or from having access to those possibilities.

Costs

50. 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 (Third Chamber) hereby rules:

Articles 43 EC and 48 EC preclude Member State legislation under which an undertaking, which

has its seat in that State, is obliged to pay a levy such as the vocational training levy, the amount of which is calculated on the basis of its wage costs including those wage costs incurred at a branch of that undertaking established in another Member State, if, in practice, such an undertaking is prevented, with regard to that branch, from benefiting from the possibilities provided for in that legislation of reducing that levy or from having access to those possibilities.

[Signatures]

Comment

On 15 April 2010, the CJ rendered its judgment in the *CIBA* case (C-96/08) concerning the compatibility with the freedom of establishment of the Hungarian rules on a vocational training levy. This levy was based on the total amount of wage costs, both in Hungary and abroad, and irrespective of whether a similar levy is borne for employees in a branch in another Member State. The question in this case was whether the disputed rule was compatible with the freedom of establishment (now Arts. 49 and 54 TFEU) when such vocational training levy is imposed on workers employed through a branch in the Czech Republic, where CIBA also paid tax and social security contributions in respect of the workers employed in that branch. As for the legal framework at issue, the vocational training payments went into a Hungarian fund for the employment market that offers grants to vocational training institutions in Hungary, and which is distinct from the State's central budget and ring-fenced for a particular use; the levy was also not contributory in nature granting to the employer or to workers an individual right to participate in vocational training; it was also not covered by the tax treaty between Hungary and the Czech Republic.

Based on this background, the Court proceeded in a three-step analysis to assess the compatibility of the vocational training levy with EU law:

'Double Taxation'

Even if the vocational training levy were to be considered a direct tax, the alleged double taxation did not in itself constitute a prohibited restriction (paras. 20-29). The CJ hereby confirmed its prior case law in *Kerckhaert and Morres* (ECJ 14 November 2006, C-513/04), *Block* (ECJ 12 February 2009, C-67/08) and *Damseaux* (ECJ 16 July 2009, C-128/08), according to which disadvantages which could arise from the parallel exercise of tax competences by different Member States, to the extent that such an exercise is not discriminatory, do not constitute restrictions prohibited by the TFEU. In CIBA, however, the Court extended this position by arguing that the possible lack of opportunity for CIBA's workers employed in the Czech Republic to benefit from the training financed by the Hungarian fund for the employment market was 'merely the consequence of the taxation and spending powers which the Republic of Hungary enjoys' (paras. 37 - 38).

'Dual Burdens' in Social Security

The ECJ also briefly dealt with the Commission's argument that the vocational training levy should be considered a special tax, imposed in the interest of employees, which may be treated in the same way as the employers' contributions in *Arblade* (ECJ 23 November 1999, C-369/96 and C-376/96). The Court, however, distinguished *CIBA* from *Arblade* by noting that the vocational training levy at issue does not seem 'to be paid by the undertakings liable to it for the purposes of granting a direct benefit to those undertakings, and even less so to their employees, but is paid into a State fund which offers grants to vocational training institutions in Hungary' (paras. 30 - 32).

Discriminatory Features of the Hungarian 'Offset Facilities'

In the third step, the Court focused on the possibilities under Hungarian law for a company, such as CIBA, to reduce its gross liability to the vocational training levy. These included organising practical training, entering into a training contract for the benefit of its employees, and offering development grants to a higher education institution or vocational training institution. Should these possibilities not be available in practice with regard to a place of business situated in another Member State – an assessment the CJ left to the domestic court – this

disadvantage would amount to a restriction of the freedom of establishment (paras. 39 - 44); in such case, the restriction may also not be justified by the need to preserve the coherence of the tax system or by the reduction in revenue (paras. 45 - 48).

The ruling on the *CIBA* case was eventually based on the 'discriminatory' features of the 'offset facilities' provided under Hungarian law in respect of workforce training. What is surprising, though, is that the Court focused its analysis on the factual disadvantages of having the Czech workforce enjoy training in Hungary (such as travel expenses and the pointlessness in the light of the differences between the Hungarian and Czech training systems), rather than on legal disadvantages. Furthermore, the Court seems to indicate a dividing line between social security cases and tax cases when it comes to non-discriminatory 'double burdens'. Indeed, in *Arblade*, Belgian rules that required an employer to pay employer's contributions to a host Member State's fund, in addition to those paid to his Member State of establishment, were found to constitute a restriction on the freedom to provide services. Against this background, the Commission's argument in CIBA was especially noteworthy as the Court's diverging approach towards 'double burden' issues in social security cases on the one hand and double taxation on the other is frequently viewed as inconsistent (see, e.g., Kofler and Mason, 'Double Taxation: A European 'Switch in Time'?', 14 CJEL (2007), 63, 79 - 81). The dividing line indicated by the Court in *CIBA*, however, seems to be whether the charge at issue confers direct benefits to either the employer or the employee, and only if that is the case 'dual obligations' should be prohibited under the freedoms. This, of course, is not entirely satisfying as it leaves Member States virtually unlimited leeway to define such 'direct link' and to escape scrutiny under the freedoms dependent on whether or not they grant their citizens direct benefits.

Georg Kofler

6 X Holding. Refusal of advantage of a cross-border tax consolidation a justified restriction of the freedom of establishment. Court of Justice (comments by Weber)

In 2003, X Holding BV, a company resident in the Netherlands, requested to be included in a fiscal unity (full consolidation) for corporate income tax purposes with its subsidiary F, a company resident in Belgium. The Netherlands tax authorities refused the fiscal unity, since F did not meet the applicable requirements that it be either resident in the Netherlands for tax purposes, or that it has a permanent establishment in the Netherlands. According to X Holding BV, the refusal to allow a (cross-border) fiscal unity is incompatible with EC law.

The Court of Justice ruled that the exclusion of a non-resident subsidiary from the fiscal unity for the purposes of the Corporate Income Tax was not in conflict with the freedom of establishment. The CJ ruled that: 'The exclusion of such an advantage for a parent company which owns a subsidiary established in another Member State is liable to render less attractive the exercise by that parent company of its freedom of establishment by deterring it from setting up subsidiaries in other Member States.' The CJ found, however, the restriction of the freedom of establishment was justified on the basis of the preservation of the allocation of the power to impose taxes between Member States. The reason for this is: 'Since the parent company is at liberty to decide to form a tax entity with its subsidiary and, with equal liberty, to dissolve such an entity from one year to the next, the possibility of including a non-resident subsidiary in the single tax entity would be tantamount to granting the parent company the freedom to choose the tax scheme applicable to the losses of that subsidiary and the place where those losses are taken into account.

Since the dimensions of the tax entity can therefore be altered, acceptance of the possibility of including a non-resident subsidiary in such an entity would have the consequence of allowing the parent company to choose freely the Member State in which the losses of that subsidiary are to be taken into account.'

The CJ concluded that the freedom of establishment does not preclude legislation of a Member State which makes it possible for a parent company to form a single tax entity with its resident subsidiary, but which prevents the formation of such a single tax entity with a non-resident subsidiary, in that the profits of that non-resident subsidiary are not subject to the fiscal legislation of that Member State.

European Court of Justice, 25 February 2010, no. C-337/08