JUDGMENT OF THE COURT (Fifth Chamber)
15 January 2002 *

In Case C-43/00,

REFERENCE to the Court under Article 234 EC by the Vestre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

Andersen og Jensen ApS

and

Skatteministeriet

on the interpretation of Article 2(c) and (i) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1),

* Language of the case: Danish.

THE COURT (Fifth Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, S. von Bahr, A. La Pergola, L. Sevón and C.W.A. Timmermans, Judges,

Advocate General: A. Tizzano,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Andersen og Jensen ApS, by M. Serup, advokat,

— Skatteministerium and the Danish Government, by J. Molde, acting as Agent, assisted by K. Lundgaard Hansen, advokat,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Commission of the European Communities, by H.P. Hartvig and H. Michard, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Andersen og Jensen ApS, Skatteministerium, the Danish Government and the Commission at the hearing on 27 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 11 September 2001,

gives the following

Judgment

1 By order of 9 February 2000, received at the Court on 14 February 2000, the Vestre Landsret (Western Regional Court) referred to the Court for a preliminary ruling under Article 234 EC four questions on the interpretation of Article 2(c) and (i) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States (OJ 1990 L 225, p. 1) ('the directive').

2 Those questions have been raised in proceedings between the company Andersen og Jensen ApS and Skatteministerium (Danish Ministry of Fiscal Affairs) concerning the taxation of a transfer of assets.

Legal background to the main proceedings

Community law

3 The directive establishes a common system of taxation for mergers, divisions, transfers of assets and exchanges of shares between companies in different Member States. According to the fourth recital in its preamble, this common tax system ought to avoid the imposition of tax in connection with any of those operations, while at the same time safeguarding the financial interests of the State of the transferring or acquired company.

4 Article 2 of the directive provides:

'For the purposes of this Directive:

...

(c) "transfer of assets" shall mean an operation whereby a company transfers without being dissolved all or one or more branches of its activity to another company in exchange for the transfer of securities representing the capital of the company receiving the transfer;

...

(i) "branch of activity" shall mean all the assets and liabilities of a division of a company which from an organisational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.'

5 Article 4(1) of the directive, which, by virtue of Article 9, also applies to transfers of assets, provides:

'A merger or division shall not give rise to any taxation of capital gains calculated by reference to the difference between the real values of the assets and liabilities transferred and their values for tax purposes. The following expressions shall have the meanings assigned to them:

— value for tax purposes: the value on the basis of which any gain or loss would have been computed for the purposes of tax upon the income, profits or capital gains of the transferring company if such assets or liabilities had been sold at the time of the merger or division but independently of it,

— transferred assets and liabilities: those assets and liabilities of the transferring company which, in consequence of the merger or division, are effectively connected with a permanent establishment of the receiving company in the Member State of the transferring company and play a part in generating the profits or losses taken into account for tax purposes.'

The national legislation

6 Paragraph 15c of the Fusionsskattelov (Danish law on the tax treatment of mergers, *Lovbekendtgørelse* 1996-11-05, No 954) provides:

'1. In the case of the transfer of assets, companies may be taxed under the rules in Paragraph 15d in the case where both the transferring company and the receiving company come within the definition of a company from a Member State given in Article 3 of Directive 90/434/EEC. A precondition for the application of those rules is that the relevant authorisation has been obtained from the *Ligningsråd*. The *Ligningsråd* may lay down special conditions for such authorisation.

2. A transfer of assets is to be understood as referring to the operation whereby a company, without being dissolved, transfers all or one or more branches of its activity to another company in exchange for the transfer of securities in the receiving company. A branch of activity is to be understood as meaning all the assets and liabilities of a division of a company which from an organisational point of view constitute an independent business, that is to say, an entity capable of functioning by its own means.'

7 The preparatory documents relating to the Fusionsskattelov (*Folketingstidende* 1991/92, Supplement A, columns 495 and 514) indicate *inter alia* as follows:

'The draft Law is intended to implement in Danish tax legislation those changes necessitated by compliance with the merger directive.

The draft Law is also intended to implement rules corresponding to those of the merger directive applicable to divisions, transfers of assets and exchanges of shares concerning companies all of which are established in Denmark.

...

"Transfer of assets" is defined in Paragraph 15c(2) in the same way as in Article 2(c) of the merger directive. A branch of activity is given the same definition as in Article 2(i) of the merger directive.'

The dispute in the main proceedings and the questions referred to the Court

8 According to the order for reference, the claimant in the main proceedings was originally a limited company incorporated under Danish law called Randers Sport A/S which operated a wholesale and retail business in sports equipment. In 1996, with a view to passing the business on to the next generation, the shareholders of the claimant in the main proceedings set up a new company, Randers Sport Nyt A/S, to which the undertaking's business was to be transferred. According to the documents before the Court, the capital of Randers Sport A/S was DKK 300 000 and that of Randers Sport Nyt A/S was DKK 500 000. Since it was the intention of those shareholders that the existing capital should for the most part be protected from the burdens to be borne by the future business and should remain within the claimant company, the latter took out a loan of DKK 10 million, the proceeds of which were to remain with that company, whilst the financial obligation arising from the loan was to be transferred to Randers Sport Nyt A/S. It was also arranged that Randers Sport Nyt A/S's cash-flow requirements would be covered by a line of credit granted by a financial institution which, by way of security, would seek a lien over all the

shares representing the capital of Randers Sport Nyt A/S. It was also provided that the claimant would retain a small number of shares in a third company, which at that time was in receivership.

9 By letter of 6 June 1996 the claimant applied to the Ligningsråd, which is the highest administrative authority in Denmark responsible for a number of matters relating to taxation, for authorisation to carry out the planned transfer of assets with the benefit of the tax exemption provided for in Paragraphs 15c and 15d of the Fusionsskattelov.

10 By letter of 20 November 1996 the Ligningsråd replied that the requested authorisation would be granted provided that two conditions were fulfilled:

— the proceeds of the loan of DKK 10 million and the corresponding debt should either remain entirely with the transferring company or be transferred entirely to the company receiving the transfer;

— neither the transferring company, nor the main shareholders who were natural persons, nor any third parties should provide security — whether in the form of a bond, a lien, a deposit of shares or any other kind — for the benefit of the company receiving the transfer.

11 On 15 March 1997 the claimant in the main proceedings brought an action before the Vestre Landsret against Skatteministerium in which it sought a review of the legality of the conditions imposed by the Ligningsråd.

12 The Vestre Landsret is of the opinion that, even though the dispute in the main proceedings is confined to a purely national context, its outcome depends on the interpretation of Community rules. It refers in this regard to the drafting history and the wording of the relevant provisions of the Fusionsskattelov, from which it is clear that the Danish legislature wished to ensure that those provisions would be applied uniformly both to national transactions and to those involving more than one Member State. Relying on the judgment in Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, it considers that, in those circumstances, the Court has jurisdiction to give a preliminary ruling.

13 The Vestre Landsret therefore stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Must the provisions of Directive 90/434/EEC (the merger directive) be understood as meaning that it is contrary to the provisions of that directive, in particular Article 2(c) and (i), for the authorities of a Member State to refuse to treat an arrangement as being covered by the directive's provisions on the transfer of assets where the effect of the arrangement in question is that all of the transferring company's assets and liabilities are transferred to a second company (the receiving company), with the exception of a minor block of shares and the proceeds of a loan taken out by the transferring company?

2. Does it have any bearing on the answer to Question 1 that it can be assumed that the transferring company took out the loan in question with a view to reducing the net value of the assets and liabilities to be transferred to the receiving company, inasmuch as the loan proceeds are to remain in the transferring company while the debt liability is transferred to the receiving company?

3. Does it have any bearing on the answer to Question 1 and/or Question 2 that it can be assumed that the loan in question was taken out with a view to making it possible for previous associates, as a step in a generation change within the undertaking, to finance the subscription of shares in the receiving company?

4. Must the provisions of the merger directive, in particular Article 2(i) thereof, be understood as meaning that it is contrary to those provisions for a condition to be imposed, before an arrangement can be treated as being covered by the asset-transfer provisions of the directive, under which the transferring company, the principal shareholders in person or any other third party may not provide security for the benefit of the receiving company, on the ground that it is indicated that the future cash requirements of the receiving company are to be financed by working credit from a financial institution which wishes to obtain a lien on the shares of the receiving company?'

The jurisdiction of the Court

14 The Danish and Netherlands Governments and the Commission are of the opinion that, in accordance with the test laid down in *Leur-Bloem*, cited above, the Court should declare that it has jurisdiction to rule on the questions submitted. They argue that, even if the situation at issue in the main proceedings does not fall directly within the scope of the directive, the Danish legislature decided, as is clear from the drafting history of the Fusionsskattelov, to treat purely internal situations in the same way as those governed by the directive and, to that end, aligned the provisions governing purely internal situations with Community law.

15 It must be borne in mind at the outset that under Article 234 EC the Court has jurisdiction to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions.

16 It is common ground that the main proceedings are concerned with a provision of national law which applies in a purely national context.

17 However, the national court has indicated that the Danish legislature, when transposing the provisions of the directive into national law, had decided to treat purely internal situations in the same way as those governed by the directive and had therefore aligned the provisions governing purely internal situations with Community law. The national court adds that an interpretation of the terms 'transfer of assets' and 'branch of activity', in their Community context, is required in order to decide the case before it, that those terms feature in the directive, that they were incorporated in the national law transposing the directive and that their application has been extended to purely internal situations.

18 According to the case-law of the Court, where, as in the case before the national court, in regulating purely internal situations, domestic legislation adopts the same solutions as those adopted in Community law in order, particularly, to avoid discrimination against foreign nationals or any distortion of competition, it is clearly in the Community interest that, in order to forestall future differences of interpretation, provisions or concepts taken from Community law should be interpreted uniformly, irrespective of the circumstances in which they are to apply (*Leur-Bloem*, paragraph 32).

19 It follows that the Court has jurisdiction to interpret the provisions of the directive even though they do not directly govern the situation at issue in the main proceedings. The questions submitted by the Vestre Landsret must for that reason be answered.

The first, second and third questions

20 By its first, second and third questions, which it is appropriate to consider together, the national court seeks in essence to ascertain whether Article 2(c) and (i) of the directive must be interpreted as meaning that there is a transfer of assets within the meaning of the directive where, first, the terms of a transaction are such that the proceeds of a loan contracted by the transferring company remain with that company and the obligations arising from the loan are transferred to the company receiving the transfer and, second, the transferring company retains a small number of shares in a third company.

21 According to the claimant in the main proceedings, the answer to this should be in the affirmative. The focus, it argues, should be essentially on the independent nature of the business made up of the assets and liabilities transferred rather than on the precise nature of those assets.

22 The Danish and Netherlands Governments and the Commission, in contrast, submit that the relevant provisions of the directive must be interpreted as meaning that the proceeds of a loan and the financial obligation arising from the loan cannot be dissociated from each other. The prohibition of an arbitrary severance of those two elements is clear from the wording of Article 2(c) and (i) of

the directive, which refers, first, to the transfer of all assets and liabilities relating to a branch of activity and, second, to the transfer, in exchange, of securities representing the capital of the company receiving the transfer.

23 The Danish Government also refers to paragraph 36 of the judgment in *Leur-Bloem*, in which the Court held that the provisions of the directive apply to all transfers of assets 'irrespective of the reasons, whether financial, economic or simply fiscal, for those operations'.

24 It is clear from the wording of Article 2(c) and (i) of the directive, and from Article 4(1) thereof, that, in order to be covered by the directive, a transfer of assets must encompass all the assets and liabilities relating to a branch of activity. Under Article 2(i) of the directive, only an entity capable of functioning by its own means can constitute such a branch of activity.

25 As the Advocate General has stated in point 22 of his Opinion, the Community legislature therefore considered it necessary that the assets and liabilities relating to a branch of activity should be transferred in their entirety. However, if the transferring company retains the proceeds of a large loan contracted by it and transfers the obligations deriving from that loan to the company to which the assets are transferred, those two elements are dissociated.

26 Moreover, the transferring company and the company receiving the transfer in the main proceedings would have achieved the same result if the latter company had contracted the loan and had then acquired the assets of the transferring company by way of consideration consisting, first, of its own shares and, second, of the capital borrowed. However, such a transfer, made partly in cash, would not constitute a transfer of assets within the meaning of the directive.

27 It follows that, as far as the loan transaction at issue in the main proceedings is concerned, the requirements of Article 2(c) and (i) of the directive have not been met.

28 As regards the fact that the transferring company retained a small number of shares in a third company, suffice it to state, as the Advocate General has observed in point 27 of his Opinion, that, whilst the retention of such shares may exclude a transfer of all the business of the transferring company, it cannot exclude a transfer of a branch of activity unrelated to those shares.

29 The answer to the first, second and third questions must therefore be that Article 2(c) and (i) of the directive must be interpreted as meaning that there is no transfer of assets within the meaning of the directive where the terms of a transaction are such that the proceeds of a significant loan contracted by the transferring company remain with that company and the obligations arising from the loan are transferred to the company receiving the transfer. It is immaterial in this regard that the transferring company retains a small number of shares in a third company.

The fourth question

30 By its fourth question the national court seeks in essence to ascertain whether Article 2(i) of the directive must be interpreted as meaning that an independent business, that is to say, an entity capable of functioning by its own means, can exist even where the future cash-flow requirements of the company receiving the transfer must be satisfied by a credit facility from a financial institution which

insists, in particular, that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company.

31 The claimant in the main proceedings and the Commission submit that, under Article 2(i) of the directive, an operation will not necessarily be regarded as falling outside the scope of the directive where the shareholders of the company receiving the transfer subject their shares representing the capital of that company to a lien as security for a loan granted to it.

32 The claimant in the main proceedings maintains that the condition that the business receiving the transfer must be independent merely requires that the receiving company's capital and credit rating are such that it is capable of continuing to exist. According to the claimant in the main proceedings, the tax authorities must undertake a comprehensive assessment of each individual case.

33 The Danish and Netherlands Governments also take the view that the question whether a company can function by its own means depends on the circumstances of each individual situation. In the present case, in view of the existence of a substantial debt and the lien on the entire share capital of the company receiving the transfer, it would appear that the company could not function independently by its own means.

34 In that regard, it must be remembered that Article 2(i) of the directive defines a branch of activity as 'all the assets and liabilities of a division of a company which from an organisational point of view constitute an independent business, that is to say an entity capable of functioning by its own means.'

35 It follows that the independent operation of the business must be assessed primarily from a functional point of view — the assets transferred must be able to operate as an independent undertaking without needing to have recourse, for that purpose, to additional investments or transfers of assets — and only secondarily from a financial point of view. The fact that a company receiving a transfer takes out a bank loan under normal market conditions cannot in itself mean that the transferred business is not independent, even where the loan is guaranteed by shareholders of the receiving company who provide their shares in that company as security for the loan granted.

36 The position may, however, be different where the financial situation of the receiving company, as a whole, makes inevitable the conclusion that it will very probably not be able to survive by its own means. That may be the case where the income of the company receiving the transfer does not appear sufficient to cover the payments of principal and interest due in respect of its debts.

37 The assessment as to whether or not a business is independent must, however, be left to the national court, having regard to the particular circumstances of each case.

38 The answer to the fourth question must therefore be that it is for the national court to determine whether a transfer of assets involves an independent business within the meaning of Article 2(i) of the directive, that is to say, an entity capable of functioning by its own means, where the future cash-flow requirements of the company receiving the transfer must be satisfied by a credit facility from a financial institution which insists, in particular, that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company.

Costs

39 The costs incurred by the Danish and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Vestre Landsret by order of 9 February 2000, hereby rules:

1. **Article 2(c) and (i) of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States must be interpreted as meaning that there is no transfer of assets within**

the meaning of that directive where the terms of a transaction are such that the proceeds of a significant loan contracted by the transferring company remain with that company and the obligations arising from the loan are transferred to the company receiving the transfer. It is immaterial in this regard that the transferring company retains a small number of shares in a third company.

2. It is for the national court to determine whether a transfer of assets involves an independent business within the meaning of Article 2(i) of Directive 90/434, that is to say, an entity capable of functioning by its own means, where the future cash-flow requirements of the company receiving the transfer must be satisfied by a credit facility from a financial institution which insists, in particular, that the shareholders of the company receiving the transfer provide security in the form of shares representing the capital of that company.

Jann von Bahr La Pergola

Sevón Timmermans

Delivered in open court in Luxembourg on 15 January 2002.

R. Grass P. Jann

Registrar President of the Fifth Chamber