means precludes a finding that the taxation of cars involves discrimination prohibited by Article 95 of the Treaty since, on the domestic used-car market, vehicles bought locally and imported vehicles constitute similar or competing products. Such discrimination derives from the use, for the registration duty charged on imported used cars, of an estimated value which is generally higher than their real value, resulting in their being over-taxed in comparison with used cars bought locally which, not being subject to duty upon resale and having been subjected, when new and put on the road for the first time, only to a duty based on their real value, incorporate in their prices only a residual value of a lower level than the said registration duty.

# REPORT FOR THE HEARING
## in Case C-47/88 *

## I — Facts and legislative background

### A — *The national provisions*

Under the Danish rules laid down by Codified Law No 13 of 16 January 1985, as amended, motor vehicles registered in accordance with the road-traffic legislation are subject to a registration duty in Denmark. The duty is levied only upon first registration of the vehicle within Danish territory.

The rates applicable to private vehicles, which are calculated by reference to the value of the vehicle, including value-added tax, are as follows:

| | |
|---|---|
| up to DKR 19 750 | 105% of the value |
| above DKR 19 750 | 105% of DKR 19 750 and 180% of the balance |

The following table shows the incidence of the duty on the purchase prices of new private cars in Denmark.

* Language of the case: Danish.

| Value net of VAT and registration duty | VAT 22 % | Registration duty | VAT + registration duty | % | Total price including fiscal charges | Fiscal charges as percentage of total price |
|---|---|---|---|---|---|---|
| 20 000 | 4 400 | 27 383 | 31 783 | 159 | 51 783 | 61.4 |
| 25 000 | 5 500 | 38 363 | 43 863 | 175 | 68 863 | 63.7 |
| 30 000 | 6 600 | 49 343 | 55 943 | 186 | 85 943 | 65.1 |
| 35 000 | 7 700 | 60 323 | 68 023 | 194 | 103 023 | 66.0 |
| 40 000 | 8 800 | 71 303 | 80 103 | 200 | 120 103 | 66.7 |
| 50 000 | 11 000 | 93 262 | 104 263 | 209 | 154 263 | 67.6 |
| 60 000 | 13 200 | 115 223 | 128 423 | 214 | 188 423 | 68.2 |
| 70 000 | 15 400 | 137 183 | 152 583 | 218 | 222 583 | 68.6 |
| 80 000 | 17 600 | 159 143 | 176 743 | 221 | 254 743 | 68.8 |

In the case of used imported vehicles, Articles 10 to 12 of Law No 13/85 provide that the dutiable value is equal to 100% of the price of the vehicle as new where it is less than six months old and 90% where the vehicle is more than six months old. However, the sale of motor vehicles already registered in Denmark does not attract a further levy of registration duty.

In addition, the Danish tax system comprises, as far as indirect taxes are concerned, value-added tax (VAT) of 22%, which is the only charge that can be properly classified as representing general taxation since it extends to all supplies of goods and services in the country; and various specific duties and additional taxes levied on numerous consumer goods.

With particular reference to charges levied on durable consumer goods, Law No 379 of 1 July 1982, as amended, provides:

'Excise duties on television sets, video-recorders and certain household equipment

*Article 1*

1. Television sets and video-recorders shall be subject to a charge of the following unit amounts:

(1) colour television sets with a screen over 25 inches wide.. DKR 1 050

(2) colour television sets with a screen under 25 but over 16 inches wide ..... DKR 900

(3) colour television sets with a screen 16 inches wide or less ..... DKR 400

(4) other television sets ..... DKR 210

(5) video-recorders .....DKR 1 875.'

B — *The pre-litigation procedure*

By letter of 24 December 1985, the *Commission* informed the Kingdom of Denmark that it considered the registration duty on motor vehicles in Denmark to be incompatible with Article 95 of the Treaty.

It stated in the first place, with regard to new vehicles, that the registration duty was of such an excessive level that it fell outside the general framework of the national taxation system and was consequently contrary to Article 95 of the EEC Treaty, since it jeopardized the free movement of goods in the common market for motor vehicles, a product not manufactured in Denmark.

It went on to state that, in the case of used cars, imports were subjected to a registration duty for which the basis was at least 90% of the initial value of the car as new; that method of taxation gave rise to a fiscal charge which considerably exceeded the percentage of the price of used cars on the Danish market accounted for by duty.

The *Danish Government* replied on 7 May 1986, setting out *inter alia* the following arguments.

In the case of new vehicles, it first contends that the Danish registration duty, which is an internal charge, is not incompatible with Article 95 of the EEC Treaty. In its view, that article cannot be interpreted as meaning that those Member States which have no automobile industry are not entitled to determine their own level of internal taxation for cars.

It goes on to state that, because Denmark does not manufacture motor vehicles or products competing with them, the registration duty is not incompatible with Article 95. It considers that Article 95 of the Treaty is intended to ensure equality of conditions of competition and only applies subject to that limitation; if a Member State does not manufacture similar products or substitutable products, no restriction of its right to tax the products which it imports can be inferred from Article 95.

The fact that the Danish registration duty applies only to one category of products — motor vehicles — rather than to several cannot, in its view, be of decisive importance, nor can there be any justification for comparing the registration duty levied on cars with the duties charged on refrigerators and other durable consumer goods.

Finally, it states that the registration duty has had no adverse impact on the free movement of goods, as is apparent from the fact that the level of vehicle ownership in Denmark is very close to that prevailing in other Community countries with a comparable standard of living.

As far as used cars are concerned, the Danish Government observes in the first place that, by reason of the rise in the prices of certain makes of car, the 90% rule for determining the tax basis for imported used cars may result in the registration duty on such cars not exceeding the residual duty on used cars bought on the Danish market and already registered in Denmark.

It then states that the real competitive relationship is that which exists between imported new and used cars, since a reduction of the registration duty on imported used cars would merely cause imports of such vehicles to increase at the expense of imports of new vehicles.

On 22 June 1987 the Commission issued a reasoned opinion in which it repeated the finding that the heavy taxation of motor vehicles in Denmark is contrary to Article 95 of the EEC Treaty in the case both of new vehicles and of imported used vehicles. By letter of 30 September 1987 the Danish Government gave notice that it maintained its position.

On 12 February 1988, the Commission brought the present action.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

## II — Conclusions of the parties

The *Commission* claims that the Court should:

(i) declare that the Kingdom of Denmark has failed to fulfil its obligations under Article 95 of the Treaty establishing the European Economic Community by charging, pursuant to Law No 13 of 16 January 1985 on registration duties on motor vehicles, as subsequently amended, such a high registration duty on motor cars and other motor vehicles that, as regards those products, the free movement of goods within the Community is impeded;

(ii) further declare, as regards used motor vehicles, that the Kingdom of Denmark has failed to fulfil its obligations under Article 95 because the calculation of the registration duty for imported used motor vehicles is in most cases made on the basis of an estimated value which is higher than the real value of the vehicle with the result that imported used motor vehicles are taxed more heavily than used motor vehicles which are sold on the domestic market after being registered in Denmark;

(iii) order the Kingdom of Denmark to pay the costs.

The *Kingdom of Denmark* contends that the Court should:

(i) dismiss the Commission's application;

(ii) order the Commission to pay the costs.

**III — Submissions and arguments of the parties**

A — *The registration duty on new motor vehicles*

The *Commission* states that the Danish registration duty is an internal tax incompatible with Article 95 of the EEC Treaty, since, because of its very high level and in the absence of national production, it jeopardizes the free movement of goods in the common market and is not within the framework of the general taxation system in Denmark.

According to the Commission, Article 95 of the Treaty must be read in the light of Article 2 et seq. of the Treaty, which are concerned with the principles on which the European Community is based. In that context, Article 95 constitutes one of the essential safeguards, in so far as it is intended to guarantee the free movement of goods within the Community and freedom as regards organization of the economy linked with it.

Article 95 contains an absolute prohibition, which is intended to prevent the maintenance of fiscal obstacles to trade within the Community after the elimination of customs duties and charges having equivalent effect.

Where cars are subject to a registration duty of such a kind as to impede appreciably the movement of the products in question in the Community, the Commission considers that Article 95 of the Treaty may be applied, even though the Member State concerned does not itself produce competing goods.

Such an interpretation is in conformity with the case-law of the Court. The Commission states that, in several judgments, the Court has held that the fact that, for the time being, a Member State does not manufacture a product does not preclude the application of the principles laid down in Article 95 (see in particular Case 31/67 *Stier* v *Hauptzollamt Hamburg-Ericus* [1968] ECR 235, Case 184/85 *Commission* v *Italy* [1987] ECR 2013 and Case 193/85 *Co-Frutta* [1987] ECR 2085).

The Commission observes that, in the above cases, the Court made it clear that the Treaty upholds the powers of the Member States to levy taxes and thus does not prevent the taxation of imported products. On the other hand, the Court also emphasized that the Member States have no right to undermine the principles of the common market by using internal taxation as a means of circumventing an absolute prohibition designed to ensure the viability of the economic Community, namely the prohibition of any tax which hampers the free movement of goods in the Community.

Moreover, the Commission adds, in order to distinguish between a charge having equivalent effect and internal taxation properly so called, the Court held that, in the

absence of national production, the right to tax an imported product without any condition being imposed by the Treaty is subject to the requirement that the tax forms part of a general system of national taxation.

The Commission claims that the Member States may not levy on imported products internal taxes of such a high level that in practice they have the effect of closing the national market to the sale, at normal prices, of the products in question manufactured in the other Member States.

The Commission considers that it is clear that the Danish registration duty which, because of its structure, is an element of internal taxation but, because of its level, does not form part of the Danish general system of taxation, has a restrictive effect on the free movement of goods.

The Commission thus asserts that an internal tax may not be freely levied on an imported product which does not have to compete with any similar or substitutable national product unless it is at the level of the general taxation prevailing in the Member State concerned. In its view, the Danish registration duty by far exceeds the general level of taxes levied in Denmark.

That interpretation is based on a comparison between the registration duty on motor vehicles and the excise duties payable in Denmark on durable consumer goods. According to the Commission, that comparison is permitted by previous decisions of the Court. It relies on the abovementioned judgment in Case 184/85 concerning the consumer tax levied on bananas in Italy, in which the Court held that the tax in question exceeded the level of tax charged on domestic food products which were appreciably different from bananas.

Lastly, the Commission refers to the economic and commercial consequences of the high level of the Danish registration duty. It states that the Danish car fleet is smaller than that of other Member States with a similar standard of living. It also seems that, on average, cars are kept longer by their owners in Denmark than in other Member States of the Community.

It also observes that car importers in Denmark have been forced to adopt a trading policy which has effects which run counter to the logic of the market. Thus, distributors, who are forced to keep prices as low as possible when the car is sold, find it necessary to make up the shortfall through the prices they charge for spare parts; the high price of such parts provokes the importation of cars solely for the purpose of obtaining spares cheaply.

Those sale prices also encourage non-resident buyers to go to Denmark to buy cars for subsequent importation into their own countries. The registration duty is thus conducive to an artificial pattern of parallel imports.

The *Danish Government* agrees with the Commission regarding its classification of the Danish registration duty as an internal tax covered by Article 95. However, it does

not share the Commission's view that the tax is incompatible with Article 95.

In the Danish Government's view, Article 95 must be seen as a necessary complement to the prohibition of tariff and quantitative restrictions and measures having equivalent effect on trade between Member States. Its purpose is to ensure neutrality in the competitive relationships between imported products and domestically manufactured products on the internal market. On the other hand, Article 95 is not intended to protect the free movement of goods as such.

The Danish Government considers that, pursuant to the first paragraph of Article 95, the effective tax burden imposed by the importing Member State on a given imported product must be compared with the tax burden borne by the domestic product which is comparable with the imported product. What is decisive is the tax burden that would have been borne by the imported product if it had been manufactured domestically. If the tax burden borne by a locally manufactured product is lower, the tax system is discriminatory within the meaning of Article 95.

The Danish Government adds that, pursuant to the second paragraph of Article 95, it is the relative tax burden which is important. That means, it contends, that if the differences between competing products justify differing taxation, the second paragraph of Article 95 merely requires that the differences in taxation and the differences between the products be in proportion with each other.

The most important requirement of the second paragraph of Article 95 is that the imported product must not be subjected to taxes of such a nature as to protect another product. Since there are no Danish-made products to compete with cars made in other Member States, there is no proportional relationship between taxes to be appraised. Consequently, in the Danish Government's view, the registration duty is not contrary to Article 95.

In that regard, the Danish Government stresses that its interpretation of Article 95 does not necessarily mean that the Member States are entitled freely to determine the amount of the tax that they intend imposing on imported products in cases where there is no similar or competing domestic production. If, in such circumstances, the Member States impose taxes of such a level as to render the free movement of goods impossible or more difficult, such taxes might be contrary to the prohibition of charges having an effect equivalent to customs duties laid down in Articles 9 and 12.

The Danish Government also considers that the cases referred to by the Commission, (in particular *Stier*, *Commission* v *Italy* and *Co-Frutta*) do not support its argument that Article 95 also applies to a situation in which there is no competing domestic production.

According to the Danish Government, the judgment in *Stier* related to a very specific problem connected with the imposition of a

turnover equalization tax on imported goods to offset a cumulative turnover tax levied on the internal market. In *Stier*, the Court confined itself to saying that such an equalization tax on imported products should be kept within the framework of the cumulative multi-stage value-added tax system for the time being in force.

As regards the *Commission* v *Italy* and *Co-Frutta* judgments, it contends that in those cases there was no total absence of similar competing products. The specific circumstances of each case were covered by the second paragraph of Article 95 since the Court held that domestic fruit production was in competition with the imported bananas on which the tax was levied.

The Danish Government also contends that the Danish registration duty forms part of the Danish general system of registration duties for motor vehicles. That system of registration duties comprises various categories (private cars, buses, delivery vehicles, lorries, motorcycles and tractors) and various rates. In principle, the system is applied to both imported motor vehicles and those of domestic manufacture. In that connection, the Danish Government draws attention to the fact that the Court conceded that the national system of taxation of motor vehicles constitutes an independent system of domestic taxation (see Case 112/84 *Humblot* [1985] ECR 1367 and Case 433/85 *Feldain* [1987] ECR 3521).

The Danish Government considers that on the basis of the *Stier* judgment it in inappropriate to compare registration duties on cars with other taxes on other durable consumer goods (vacuum cleaners, washing machines, refrigerators, cookers, televisions and so forth) as the Commission does. In the opinion of the Danish Government, it is also inappropriate to compare with VAT a tax on consumption (the registration duty) on a specific product (cars), as the Commission also does.

As regards the effect of the registration duty on the free movement of goods, the Danish Government refutes a number of arguments put forward by the Commission. It considers that the level of car ownership in Denmark is not significantly lower than in the other Member States. Moreover, the level of ownership is linked with a number of factors, including the cost of using cars, transport requirements, availability of alternative forms of transport, fashions, the environment, and so on.

The fact that, because of the high price of cars, people keep them longer — which means that, in Denmark, the useful lifetime of a car before replacement is longer than in other Member States — is perfectly legitimate and is an indication of sound economic management.

It is not true, it states, that Danish car importers apply a sales policy which runs counter to the logic of the market. On the contrary, they act in conformity with that logic by seeking to adapt themselves to the conditions of competition prevailing on the Danish market.

The Danish Government also considers that the Commission's statements concerning the effect of the registration duty on the free movement of goods are belied by the facts. Thus, the statistics for new registrations of cars in the last few years show a very considerable expansion of the Danish market.

The Commission also contends that it is only because there is no Danish production of motor vehicles that Denmark has no second-hand market. It recalls that, according to the Community rules, a product becomes definitively a domestic product as soon as it has been imported and cleared through customs. Imported used cars and those bought locally therefore are similar or competing products where their power rating, quality and age are comparable.

B — *The registration duty on used imported vehicles*

The *Commission* states that the registration duty on used cars imported into Denmark is calculated on a flat-rate basis which can never fall below 90% of the taxable value of the new car. It then observes that no new registration duty is levied on used cars bought in Denmark. And it is hardly conceivable that the residual tax on used cars on the Danish market is always equal to 90% of the tax on the car when new.

Furthermore, the fact that certain makes of car may, by reason of their value to collectors or unusual rises in the prices of cars in subsequent years, retain their value or increase it cannot, in the Commission's view, justify the levying on used imported vehicles of a registration duty for which the basis is at least 90% of the value of the car when new, which constitutes manifest over-taxation of those vehicles, by comparison with the residual value of the registration duty on used cars only a few years old which are bought on the Danish second-hand vehicle market.

The Commission considers that, in order to comply with Article 95 of the Treaty, differential taxation of that kind must meet three requirements: (a) it must be based on objective criteria; (b) it must have no directly or indirectly discriminatory effect on imported products; (c) it must not have the effect of protecting domestic products at the expense of imported products which are similar or may be substituted for them.

With regard to those three conditions, the Commission considers:

(a) that no objective criterion enables the registration duty on imported cars to be fixed at a higher level than the residual value of the registration duty initially paid, to which used cars bought on the Danish second-hand market are subject;

(b) that the rule whereby the basis of the registration duty on used cars is at least 90% of the price of the car when new leads in the great majority of cases to discriminatory taxation of used cars;

(c) that Law No 13/85 on the registration duty on cars has the effect of protecting the Danish used-car market.

The Commission then observes that application of the method of calculating the residual value of the VAT paid on imported used articles used by the Court in its judgment in Case 47/84 *Schul II* [1985] ECR 1501 to determine whether the registration duty on an imported used vehicle is compatible with the residual portion of that same duty incorporated in the value of a used vehicle registered in Denmark some years earlier shows, through calculation of the rateable reduction of the duty which was charged on vehicles registered in Denmark, that the flat-rate determination of the basis for the duty on imported used vehicles as 90 or 100% of the value of the vehicle when new results in manifest over-taxation of such vehicles.

The Commission also refers to the judgment of the Court in *Co-Frutta, supra*, arguing that the tax rules must be designed to exclude any tax discrimination against used cars manufactured in a non-member country which are in free circulation in a Member State (Article 9 of the Treaty).

In the Commission's view, it would be entirely alien to the purpose of the Treaty to guarantee non-discriminatory taxation only for used cars manufactured in a non-member country, whilst allowing vehicles produced in the Community to be subjected to a tax of an amount which was not reduced proportionately so as to reflect reasonably the amount of the registration duty still incorporated in the price of a used car bought on Danish territory where it had previously been registered.

The Commission also points out that at present Denmark imports between 15 000 and 16 000 used cars each year, of which only 150 to 200 are registered — the remainder are used for other purposes (scrap, recycling of spare parts, and so on). From this the Commission concludes that, because of the inappropriate taxation of imported used cars, there is a real competitive link between imports of used cars and Danish garages which repair cars already registered in Denmark. That link, asserts the Commission, is strengthened by the fact that no registration duty is levied on used cars imported into Denmark in order to be scrapped.

The *Danish Government* contends that it is the very nature of the registration duty which causes it to be applied to imported used cars and not to used cars already in Denmark, on which the duty was paid on registration as new vehicles. There is no real discrimination favouring Danish products since there is no manufacture of Danish cars and all used cars are of foreign origin. It contests the Commission's assertion that used cars bought on the domestic market and imported used cars are similar or competing products within the meaning of Article 95, since in both cases the cars are manufactured abroad.

The Danish Government then states that the real competitive relationships are those between imported new and used cars. A change in the registration duty in the form of a reduction of the charge on imported used cars would thus lead to an increase in imports of used cars at the expense of imports of new cars.

The Danish Government also challenges the Commission's argument that the method of calculating the residual VAT on used imported articles employed by the Court in *Schul II* is fully applicable to the present case.

In the Danish Government's view, *Schul II* concerned the levying of VAT on used articles sold as between individuals, in particular the calculation of the residual VAT paid in the country of exportation. The position in the present case is, in its view, entirely different since a comparison is to be made between a tax on imported products and the residual value of a tax on goods bought second-hand in the country of importation.

As regards the Commission's argument that tax rules must be designed to exclude any fiscal discrimination against used cars manufactured in a non-member country which are in free circulation in a Member State, the Danish Government observes that the Danish rules on registration duty on imported used cars are so conceived that there is no discrimination against used cars manufactured in non-member countries and later imported to be released into free circulation in a Member State. That is apparent from Article 11 of Law No 13/85.

Finally, the Danish Government observes that it is perfectly justified for some imported used vehicles to be used to provide spare parts. Moreover, it does not see why the relationship — criticized by the Commission — between the import of new cars and the maintenance of old cars would be changed by the fact that a drop in the registration duty on used cars would lead to an increase in imports of used cars at the expense of imports of new cars.

M. Díez de Velasco
Judge-Rapporteur