JUDGMENT OF THE COURT (First Chamber)

15 September 2005 *

In Case C-464/02,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 December 2002,

Commission of the European Communities, represented by N.B. Rasmussen and D. Martin, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

defendant,

* Language of the case: Danish.

supported by

Republic of Finland, represented by T. Pynnä, acting as Agent, with an address for service in Luxembourg,

intervener,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric (Rapporteur), K. Schiemann, E. Juhász and E. Levits, Judges,

Advocate General: F.G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 24 November 2004,

after hearing the Opinion of the Advocate General at the sitting on 20 January 2005,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration from the Court that:

— in so far as its legislation and administrative practice do not allow employees who are employed in a neighbouring Member State and resident in Denmark to use for business or private purposes a company vehicle registered in that neighbouring Member State where the undertaking of their employer is established,

— in so far as its legislation and administrative practice allow employees who are employed in another Member State of the European Union and resident in Denmark to use for business and/or private purposes a motor vehicle, in particular a company vehicle, which is registered in another Member State in which their employer has its registered office or principal establishment, only subject to the condition that the work in the foreign undertaking is their main employment and that tax is paid for that purpose,

the Kingdom of Denmark has failed to fulfil its obligations under Articles 39 EC and 10 EC, and must be ordered to pay the costs of the present proceedings.

2 The Kingdom of Denmark contends that the action should be dismissed and the Commission ordered to pay the costs.

Law

Community legislation

3 Article 10 EC reads as follows:

'Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'

4 Article 39 EC provides:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this article shall not apply to employment in the public service.'

5 Articles 3 and 4 of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59) concern the temporary importation of certain means of transport for private use and the temporary importation of private vehicles for business use. Those provisions apply to individuals having their normal residence in a Member State other than the Member State of temporary importation.

National legislation

National legislation at 8 April 1997 and related administrative practice

6 The legislation in force at the time of the Commission's first letter of formal notice of 8 April 1997 and its reasoned opinion of 18 May 1998 ('the original scheme') resulted from Decree No 592 of the Ministry of Transport of 24 June 1996 on the registration of motor vehicles ('Decree No 592'). That legislation was amended during the pre-litigation procedure. It has remained applicable after 1 July 1999, the date of entry into force of the amendment, in so far as the latter is not applicable.

7 Pursuant to Decree No 592, a resident of Denmark is entitled in principle to use in Denmark only a vehicle registered in that Member State and provided with registration plates before it is used, Article 1 of that decree providing that '[a]ny motor vehicle or tractor, except for those referred to in Articles 74 and 75 of the Road Traffic Law (færdselslov), must be registered and provided with registration plate(s) before being used'.

8 The registration of a vehicle in Denmark is subject to payment of a registration tax.

9 The use in Denmark of a vehicle registered in another Member State without Danish registration may be authorised only on an exceptional basis. Under Article 106 of Decree No 592, such authorisation is issued by the central register only if the vehicle is mainly used outside Denmark and if there are altogether exceptional reasons not to require its registration in Denmark.

10 Pursuant to Article 106(2) of Decree No 592, that authorisation is in principle granted only for private use. In accordance with the derogations in that article, authorisation to use for private purposes a vehicle registered in another Member State is however granted in certain cases.

11 In the framework of that legislation, it was Danish administrative practice to refuse to issue authorisations requested for business trips within Denmark, including visits to clients. Under no circumstances was it permitted to use company vehicles for private purposes, for example, outside working hours. However, authorisation was in principle granted, in respect solely of the driver, to make return journeys between the border and the driver's (main) residence in Denmark, during weekends, holidays, and public holidays.

12 Persons failing to observe those limits when using company vehicles were liable to a fine.

National legislation in force from 1 July 1999 and related administrative practice

13 From 1 July 1999, the Law on registration tax on motor vehicles (lov om registreringsafgift af motorkøretøjer; 'the Law on Registration Tax') and Decree No 916 of 8 December 1997 on the registration and technical inspection of motor vehicles, which had replaced Decree No 592, were amended and Decree No 502 of 21 June 1999 on registration tax on motor vehicles was adopted (all referred to together as the 'amended scheme').

14 According to the explanations given by the Danish Government at the hearing, there are two fundamental differences between the original scheme and the amended scheme. First, according to the amended scheme, a vehicle registered in another Member State no longer has to be registered with Danish registration plates. Second, the amended scheme provides that the registration tax no longer has to be paid at the full rate, but on a pro-rata basis according to the amount of time the vehicle is used in Denmark.

15 Article 1(1) and (2) of the Law on Registration Tax provides:

'1. The State shall levy a tax on motor vehicles which must be registered in accordance with the Road Traffic Law (færdselslov) and on trailers and semi-trailers for such vehicles. That tax becomes due on first registration of the vehicle, except as otherwise provided by this law.

2. The tax shall also be payable on the motor vehicles referred to in Articles 4 and 5 which are registered with foreign number plates and used by a resident of Denmark, in accordance with Article 3a(6).'

16 Articles 4 and 5 of the Law on Registration Tax, referred to in the previous paragraph of this judgment, include mainly the rules for calculating the amount of registration tax to which different categories of vehicles such as new cars, second-hand cars taxed according to their age, and commercial vehicles are subject.

17 Article 3a of that law, which includes the rules on registration tax in cases of temporary registration ('the temporary registration tax'), provides:

'1. The national customs and tax authorities may, on request, authorise payment of registration tax for taxable motor vehicles which are registered for temporary use in Denmark to be made in accordance with paragraph 2 if:

(1) the motor vehicle belongs to a foreign national and is used by the latter during a temporary stay; or

(2) the motor vehicle is made available by a company or a fixed establishment located abroad to a person resident in Denmark for business and private use in the foreign country concerned and in Denmark, where the employment by the undertaking or the fixed establishment constitutes that person's principal employment.

2. The tax shall be paid in advance on a quarterly basis, at the rate of 3% of the calculated tax by quarterly period started. The payment shall be increased by 1.5% of the balance which remains due after the previous payment by quarterly period started. When the first payment is made, a deposit corresponding to the amount of the tax due in the first quarterly period and an additional sum to cover any payment arrears relating to registration shall also be paid.

3. The person who makes the vehicle available to the person resident in Denmark shall be liable for payment of the tax under paragraph 1(2). ...

...

6. The provisions of paragraphs 1 to 5 shall apply correspondingly to motor vehicles referred to by paragraph 1(2) which are registered with foreign registration plates.

7. In the case of a motor vehicle referred to in Article 4 and Article 5(1), which is used in Denmark by a resident for the sole purpose of performing work for an employer referred to in paragraph 1(2), the customs and fiscal authorities may authorise the tax to be paid per day on which the vehicle is used in Denmark. That tax shall be set at DKK 60 per day for motor vehicles referred to in Article 4 and DKK 30 per day for motor vehicles referred to in Article 5(1). No tax is payable on motor vehicles referred to in Article 5(3), in Article 5(5)(2) and in Article 5(10) [concerning certain categories of commercial vehicles of a certain weight or intended for certain purposes], where the resident uses the motor vehicles in Denmark only for performing work for an employer referred to in paragraph 1(2).

...

9. The Minister for Taxation may adopt detailed rules in relation to authorisation requests and payment of the taxes and other charges referred to in paragraphs 1 to 8.'

18 For persons who do not meet the requirements laid down in Article 3a(1) of the Law on Registration Tax, in particular the requirement that the employment must be the employee's principal employment, the original scheme remains applicable.

19 The new paragraph 4 of Article 115 of Decree No 916, which entered into force on 1 July 1999, provides:

'... a person resident in Denmark may drive a motor vehicle made available by an undertaking or a fixed establishment located abroad either for business use or for business and private use, in the foreign State concerned and in Denmark. The employment in that undertaking or fixed establishment must be the main employment of the person concerned. The use of the vehicle is subject to the issuing, on request, by the national customs and fiscal authorities of the authorisation for registration tax on the vehicle to be paid in accordance with the special provisions adopted in that respect. The authorisation must be kept in the vehicle during journeys in Denmark and must be presented to the police on request.'

20 Article 117(3) of that decree provides that 'the national customs and fiscal authorities may, on request, grant authorisation for the tax payable on a registrable motor vehicle which is registered for temporary use in Denmark to be paid in accordance with the special provisions adopted in that respect in cases where the vehicle belongs to a foreign national and is used by the latter in Denmark during a temporary stay'.

21 Chapter 2 of Decree No 502, adopted pursuant to Article 3a(9) of the Law on Registration Tax, sets out the rules relating to the payment of the proportional tax at issue.

22 Article 5(3) and (6) of that decree provides:

'3. Any resident to whom a registrable motor vehicle is made available for business or private use by an undertaking or a fixed establishment located abroad may, on request, be authorised by the national customs and fiscal authorities to pay the tax in accordance with the rules in paragraph 1 if the work in that undertaking or establishment constitutes his principal employment. The authorisation may be granted only in respect of a motor vehicle which is to be used both in Denmark and in the country where the undertaking or fixed establishment is located. It shall be granted in accordance with the following rules:

(1) The vehicle must be presented to the national customs and fiscal authorities for the purpose of calculating the tax liability.

(2) The request shall be accompanied by documentary evidence that the employment in the foreign undertaking constitutes the principal employment of the person resident in Denmark.

...

6. During travel in Denmark, the authorisations referred to in paragraphs 1 and 3 must be kept in the vehicle. A sticker issued by the national customs and fiscal

authorities must also be affixed to the inside of the windscreen where it is directly visible from outside. On motorcycles, the sticker must be affixed directly where it is visible to passers-by.'

23 Article 6(1) of Decree No 502 provides:

'Any resident to whom a registrable motor vehicle referred to in Article 4 or 5(1) of the Law on Registration Tax is made available for business use in Denmark by an undertaking or a fixed establishment located abroad may, on request, be authorised by the national customs and fiscal authorities to pay the daily tax if the employment in that undertaking or establishment is his principal employment. The request must be accompanied by documentary evidence that the employment in the foreign undertaking is the principal employment of the resident.'

24 As regards the daily tax, paragraph 1.4 of Circular No 102 of 28 June 1999, replaced in 2001 by the Customs and Tax Administration's Guide to excise duties and its Guide to tax assessment ('Ligningsvejledning', see Circular No 172 of 20 September 2001), provides:

'Vehicles subject to the provisions relating to the daily tax must not be used for private use, including the journey between the home and the place of employment, unless that journey is made for the express benefit of the undertaking ... . On the other hand, the normal (daily) journey by a resident in Denmark between his home and place of employment cannot be regarded as being made for the express benefit of the undertaking.'

25 Danish administrative practice relating to the payment of the quarterly or daily tax operates, according to the Danish Government, as follows:

— A written request specifying whether it relates to the daily or quarterly tax is sent to the regional customs and tax office.

— That request is accompanied by an attestation concerning the employment abroad, which sets out the terms of employment, and which certifies, in particular, that the work undertaken is the principal employment of the employee.

— The request is generally dealt with within three or four days of being submitted.

— The granting of authority is conditional on the vehicle being used both in the country of the employer and that of the employee. If the vehicle is used exclusively in the country where the employee resides, that does not constitute cross-border activity.

— If the request satisfies the requirements laid down by law, in particular the requirement concerning principal employment, authorisation is automatically granted either for the daily tax, or for the quarterly tax.

— Where the authorisation to pay the quarterly or daily tax has been granted, the recipient may be issued with the appropriate stickers by the customs and fiscal authorities.

— The legislation relating to the daily tax provides for the issuing of a number of stickers on which the vehicle registration number appears. So that the vehicle may be driven in Denmark, the employer or the employee must indicate the date on which the vehicle is to be driven on a sticker. On payment of the quarterly tax, a sticker is issued for the period in respect of which the authorisation is valid (a maximum of two years). The period of validity is indicated on stickers which are issued for a quarter of a year. The vehicle's registration number appears on the stickers. Stickers must be affixed visibly to the windscreen.

— When issuing authorisation to pay the tax on a quarterly basis, the regional customs and tax office undertakes a provisional assessment of the vehicle's value. That phase of the procedure is common to all vehicles which are registered in Denmark for the first time, including new vehicles in respect of which a price has not been declared and approved in advance. It therefore applies primarily to imported second-hand vehicles.

— As part of the assessment, it is necessary to present the vehicle to the local customs and tax office. However, it is not generally necessary to physically present the vehicle, since the assessment of the value of a vehicle which is widely available can be based on the documents relating to it.

Pre-litigation procedure

26 Taking the view that the original scheme did not comply with the provisions of Article 5 of the EC Treaty (now Article 10 EC) in conjunction with Articles 48 and 59 of the EC Treaty (now, after amendment, Articles 39 EC and 49 EC), the Commission initiated the procedure in respect of failure to fulfil Treaty obligations.

27 By letter of 8 April 1997, the Commission gave the Kingdom of Denmark formal notice to submit its observations and then issued a reasoned opinion on 18 May 1998 requesting that Member State to take the measures necessary to comply with it within two months.

28 In a supplementary letter of formal notice of 14 September 1999, the Commission declared that the amended scheme was also incompatible with Articles 10 EC, 39 EC and 49 EC for three reasons. First, the use in Denmark of company vehicles registered abroad is conditional on special authorisation being issued. Second, a tax must be paid in order for that authorisation to be issued. Third, the amended scheme is wrongly reserved for residents in Denmark whose employment in the undertaking or establishment is their principal employment.

29 Following the Danish Government's reply, the Commission issued a supplementary reasoned opinion on 26 September 2000 concerning the amended scheme and requested the Kingdom of Denmark to take the measures necessary to comply with it within two months.

30 Since it considered the Danish Government's response to be unsatisfactory, the Commission brought the present action.

The action

31 The Commission claims that both the original scheme and the amended scheme (together 'the Danish legislation') impede freedom of movement for workers, contrary to the provisions of Article 39 EC in conjunction with Article 10 EC, and cannot be justified by overriding reasons relating to the public interest.

The scope of Article 39 EC

Arguments of the parties

32 The Commission submits that the Danish legislation at issue falls within the scope of Article 39 EC on the ground that the provisions governing the pursuit of an occupational activity also affect access to the labour market.

33 The Danish Government, supported by the Finnish Government, counters that the Danish legislation falls outside the scope of Article 39 EC since it does not affect access to the labour market. The Danish Government takes the view that the legislation relates solely to conditions of employment. The principle according to which an employee resident in Denmark is not allowed to drive there freely in a company car registered abroad is not covered by Article 39 EC.

Findings of the Court

34 The provisions of the Treaty on freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 94; Case C-232/01 *Van Lent* [2003] ECR I-11525, paragraph 15; and Case C-387/01 *Weigel* [2004] ECR I-4981, paragraph 52).

35 Provisions which preclude or deter a national of a Member State from leaving his country of origin in order to exercise his right to freedom of movement therefore constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned (*Bosman*, paragraph 96).

36 However, in order to be capable of constituting such an obstacle, they must affect access of workers to the labour market (Case C-190/98 *Graf* [2000] ECR I-493, paragraph 23).

37 The manner in which an activity is pursued is liable also to affect access to that activity. Consequently, legislation which relates to the conditions in which an economic activity is pursued may constitute an obstacle to freedom of movement within the meaning of that case-law.

38 It follows that the Danish legislation at issue in this case is not excluded from the outset from the scope of Article 39 EC.

The existence of restrictions on freedom of movement for workers

Arguments of the parties

39 The Commission submits that both the original scheme and the amended scheme are contrary to the freedom of movement for workers enshrined in Article 39 EC on the basis that they have the effect of hindering the right of employees to seek employment in another Member State and the freedom of employers in other Member States to take on employees resident in Denmark.

40 The original scheme prohibits Danish residents from driving in that country with company cars registered abroad. The obstacle resulting from the amended scheme consists in the requirement to obtain prior authorisation and the payment of a tax equivalent to the payment by instalment of the total amount of the registration tax. The Commission takes the view that, in the light of the Danish legislation, undertakings established in other Member States will refrain from employing employees resident in Denmark.

41 The Danish Government asserts that the Danish legislation does not constitute discrimination on grounds of nationality. The rules relating to company vehicles ensure equality between all residents in Denmark, irrespective of whether they are employed in that country or abroad. The rules on registration tax put Danish nationals or foreign nationals residing and working in Denmark and Danish nationals or foreign nationals residing in Denmark but working abroad on a level footing.

42 The Danish Government concedes that, in cases where a company vehicle forms part of the terms of employment, the Danish rules on registration tax, taken in isolation, might appear to be such as to encourage an employer to take on an employee from his own country rather than an employee resident in Denmark. However, it argues against such an isolated assessment, since the additional charges are not necessarily and always an obstacle to taking on an employee resident in Denmark. Where the company vehicle may be used for private purposes, that vehicle constitutes an element of the employee's remuneration. The employer may take account of the additional expense associated with such use when determining other recruitment conditions, in particular salary conditions. For an employer, the overall amount of expense that the future employee will necessitate is a relevant factor. That expense includes, for example, in addition to the salary in the narrow sense, employers' contributions to social security schemes.

43 According to the Finnish Government, the Danish tax system applicable to company vehicles registered abroad and made available to permanent Danish residents does not constitute an obstacle to freedom of movement for workers within the meaning of Article 39 EC. A vehicle which employees use freely is treated in the same way as an employee's personal vehicle. The vehicle is not used on a temporary basis, but on a permanent one.

44 The Commission replies to the argument claiming that there is no discrimination that there is clear discrimination against an employee resident in Denmark compared with an employee resident abroad who makes exactly the same use, in Denmark, of a company vehicle registered abroad. The Danish legislation is incompatible with Community law to the extent that it deters an employer from taking on an employee resident in Denmark to pursue occupational activities in that country with the aid of a company vehicle registered abroad, whereas employees in the same undertaking, resident abroad, are able to pursue their activities without difficulty. It is not a matter of conferring on residents in Denmark a tax position which is more advantageous than that conferred on their colleagues resident abroad. It is not relevant to compare a resident in Denmark employed by a Danish undertaking with a resident in Denmark employed by a foreign undertaking.

Findings of the Court

45 It is settled case-law that Article 39 EC prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their freedom of movement (*Graf*, paragraph 18, and *Weigel*, paragraphs 50 and 51).

46 It is clear that the original scheme, in so far as it remains applicable, could, on account of the obligation to register in Denmark a company car made available to the employee by an employer established in another Member State, deter such an employer from taking on an employee resident in Denmark for work which is not the employee's principal employment and, consequently, impede access to such employment by residents in Denmark.

47 As regards employees resident in Denmark who wish to pursue their principal employment in an undertaking established in another Member State, the amended scheme also impedes freedom of movement for those workers since it imposes additional costs in the form of a temporary registration tax.

48 In so far as the undertaking established in another Member State bears those costs without being compensated, it is deterred from taking on an employee resident in Denmark in respect of whom the costs are higher than those borne for an employee who does not reside in that State.

49 It is true, as the Danish Government asserts, that the employer could attempt to adjust the salary of an employee resident in Denmark in order to offset the additional expense in question. In other words, he could try to pay to that employee a salary lower than that paid to an employee engaged in the same activity, but who resides in another Member State.

50 However, an employee resident in Denmark might already be deterred from seeking employment in another Member State faced with the prospect of receiving a salary lower than that of a comparable employee resident in that other Member State. As the Court ruled in paragraph 18 of Case 127/86 *Ledoux* [1988] ECR 3741, the fact

that an employee is placed at a disadvantage in regard to working conditions compared to his colleagues residing in the country of their employer has a direct effect on the exercise of his right to freedom of movement within the Community.

51 As regards the Finnish Government's argument that, in the case of mixed-use company vehicles registered in another Member State and made available to permanent Danish residents, there is no obstacle to freedom of movement for workers on the basis that such a vehicle is treated in the same way as an employee's personal vehicle, that argument is based on a false premiss. An employee resident in Denmark, who is able to use a company vehicle not only for business purposes but also for private purposes, does not have the same freedom to use that vehicle as he might have with his private car, the use of which is not restricted by the requirements of his professional duties.

52 Consequently, it must be held that the Danish legislation, both in its original version and in its amended version, constitutes a restriction on freedom of movement for workers.

53 Such measures could be allowed only as a derogation expressly provided for by Article 39(3) EC or if they pursued a legitimate aim compatible with the Treaty and were justified by pressing reasons of public interest. But even if that were so, application of those measures would still have to be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, in particular, *Bosman* paragraph 104, and Case C-224/01 *Köbler* [2003] ECR I-10239, paragraph 77).

Justification of the restriction on freedom of movement for workers

Arguments of the parties

54 The Danish Government, supported by the Finnish Government, states that the Danish legislation is lawful and compatible with Community law and that the obligation to register is the natural corollary of the exercise of the powers of taxation. It is therefore lawful to adopt measures in order to ensure that registration tax is collected, provided that those measures do not go beyond what is necessary and appropriate for that purpose.

55 The Danish Government asserts that any restrictive effect both of the original scheme and of the amended scheme is based on the need to ensure that the liability of Danish residents to registration tax is not circumvented. Without the rules, Danish residents might avoid paying the tax by setting up companies or branches in another Member State through which to acquire and use in Denmark vehicles registered in the other State.

56 As regards the amended scheme, the Danish Government submits that the requirement of prior authorisation to pay the tax in the form of a daily or quarterly tax is prompted by the need to undertake, in advance, an assessment as to whether the conditions relating to the application of the Danish legislation have been met, just as it is prompted by the need to be able to demonstrate that subsequently. The procedure for obtaining authorisation is relatively simple in so far as authorisation is automatically granted to any person requesting it who satisfies the conditions laid down.

57 As regards the obligation to pay a quarterly or daily tax as laid down by the amended scheme, the Danish Government asserts that, in Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, the Court accepted that a consumption tax proportionate to the duration of the registration of the vehicle in the State where it is used is proportionate. The Danish Government adds that the Court's ruling that the consumption tax at issue in that case was unlawful appeared particularly to be prompted by the fact that the amount of the tax was not proportionate to the duration of that registration. The Danish Government concludes from those statements that its legislation on registration tax applicable to vehicles registered in another Member State is not incompatible with the Treaty provisions on freedom of movement for workers.

58 The Danish Government submits that the condition of 'principal employment', which must be satisfied for the amended scheme to apply, is proportionate. 'Principal employment' arises when the Danish resident is employed by a foreign undertaking in work equivalent to full-time employment or where he receives, from that employment, at least half his income.

59 That condition seeks to ensure that an employee benefiting from a company car is genuinely employed by the provider; a purely formal employment relationship is not sufficient. The condition is objective and easy to verify. The Danish Government adds that if the amended scheme were applicable to any Danish resident employed, whether full or part time, in another Member State, it would be much more difficult to guard against abuse. It considers that if that were the case the police would have to check every foreign-registered car driven in Denmark by a resident of that State with a view to verifying that such drivers were genuinely employed, whether full or part time, in another Member State, which would be inappropriate.

60 The Commission disputes all justification. It objects to the Danish registration tax being classified as a lawful tax. It submits that the Danish legislation is not appropriate to ensuring the attainment of the objective of being able to verify efficiently that the vehicle is being used only lawfully.

61 According to the Commission, the prohibition on using a company vehicle registered abroad without taking into account whether the vehicle is being imported on a temporary basis, whether the vehicle has to be used both in Denmark and in the State where it is legally registered, and whether the vehicle is frequently driven back to the State in which it is registered, is neither appropriate, nor proportionate in the light of road safety. The general obligation to obtain prior authorisation to pay the tax in the form of a daily or quarterly tax brought in by the amended scheme is disproportionate. Such measures cannot be justified by the fight against tax evasion.

62 As regards the prior administrative procedure, the Commission disputes that it is a simple procedure.

Findings of the Court

— The original scheme

63 As regards the original scheme referred to in the first part of the claim, the Commission complains that the legislation and the administrative practice of the Kingdom of Denmark do not allow employees resident in Denmark and employed in a neighbouring Member State in work which is not their principal employment to use for business or private purposes a company vehicle registered in the neighbouring Member State where their employer's undertaking is established.

64 In that respect, it must be noted that, in the framework of Article 39 EC, a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration must be considered to be a worker. Any person who pursues activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, is entitled to freedom of movement as a worker (see, to that effect, Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17, and Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 26).

65 In order to justify the application of the original scheme to employees whose employment in the undertaking established in another Member State is not their principal employment, the Danish Government relies on the prevention of abuse.

66 It follows from the case-law, in particular from Case C-212/97 *Centros* [1999] ECR I-1459, paragraph 24, that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law.

67 However, the fact that a worker resident in Denmark, who uses a company car of an employer established in another Member State, is employed in work in that State which is not his principal employment cannot form the basis for a general presumption of abuse.

68 To automatically deny such workers the possibility afforded by the amended scheme to use in Denmark, without registering with Danish registration plates, a company vehicle registered in another Member State, goes beyond what is necessary in order to avoid abuses.

69 Consequently, the Commission's action is well founded in so far as it concerns the original scheme.

— The amended scheme

70 As regards the amended scheme, referred to in the second part of the claim, the Commission complains that the authorisation granted to an employee resident in Denmark to use a vehicle registered in another Member State is subject, first, to the condition that the employment in the undertaking established in that other Member State is the principal employment of the worker — an issue which has been dealt with above — and, second, to payment of a tax.

71 The requirement of prior authorisation to pay that tax in the form of a daily or quarterly tax is not referred to in the Commission's head of claim. There is therefore no need to examine the complaints made in that respect.

72 It must also be observed that this case does not concern the normal operation of the registration tax, but its application to vehicles registered in another Member State by an owner established in that Member State.

73 The Court has ruled, in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, paragraph 43, that a tax such as the Danish tax on the registration of new motor vehicles is not contrary to Articles 28 EC and 90 EC. However, that does not mean that the temporary registration tax does not restrict freedom of movement for workers contrary to Article 39 EC.

74 Subject to certain exceptions which are not relevant here, the taxation of motor vehicles has not been harmonised. Member States are therefore free to exercise their powers of taxation in that area, provided they do so in compliance with Community law (*Cura Anlagen*, paragraph 40).

75 For the purposes of determining the restrictions imposed by Article 39 EC on the power of the Kingdom of Denmark to levy a registration tax, it should be borne in mind that the *Cura Anlagen* case concerned only the situation created by a three-year leasing contract concluded by a company registered in Austria with a company registered in another Member State concerning a vehicle intended to be used essentially in Austria. In paragraph 35 of that judgment, the Court stated that hiring contracts made for short periods, such as the hiring of a replacement vehicle from a company established in another Member State were not therefore concerned.

76 Where the company vehicle is intended to be used essentially in Denmark on a permanent basis or where it is in fact used in that manner, the situation is comparable to that at issue in *Cura Anlagen*.

77 In those circumstances, it is open to the Kingdom of Denmark to impose a registration tax on a vehicle made available to an employee who resides there by a company established in another Member State.

78 In that situation, treating equally the use of a company car by the employees in question and other residents of the Kingdom of Denmark as regards the imposition of such a tax is legitimate and is sufficient to justify the restriction on freedom of movement for workers.

79 On the other hand, if the conditions set out in paragraph 76 above are not satisfied, the connection with Denmark of the company vehicle registered in another Member State is weaker, so that another justification for the restriction in question is necessary.

80 In that regard, it should be noted that the temporary registration tax cannot be justified on the basis that it seeks to prevent fiscal erosion. It is settled case-law that reduction in tax revenue cannot be regarded as an overriding reason in the public interest which may be relied on to justify a measure which is in principle contrary to a fundamental freedom (Case C-319/02 *Manninen* [2004] ECR I-7477 paragraph 49).

81 In so far as the Danish Government submits that the temporary tax registration system is justified by the aim of preventing tax avoidance through the use of a company vehicle registered in another Member State, it should be noted that the fact that an employer established in a Member State other than Denmark makes available to an employee resident in Denmark a vehicle for business purposes, or indeed for business and private purposes, cannot form the basis for a general presumption of tax avoidance or tax evasion. Such a presumption cannot therefore justify a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the Treaty.

82 Consequently, the Commission's action in relation to the amended scheme is in part well founded.

83 That finding is valid not only in respect of use of a company vehicle for business purposes but also in respect of use for private purposes that are incidental to the business use (see, to that effect, *Ledoux*, paragraph 18).

Article 10 EC

84 There are no grounds for holding that there has been a failure to fulfil the general obligations contained in Article 10 EC which is separate from the failures, previously noted, to fulfil the more specific Community obligations which the Kingdom of Denmark was bound to do under Article 39 EC.

85 Having regard to all of the foregoing considerations it must be held that, in so far as

— its legislation and administrative practice do not allow workers resident in Denmark and employed in another Member State in work which is not their principal employment to use for business or private purposes a company vehicle registered in that other Member State where the undertaking of their employer is established, and

— its legislation and administrative practice allow employees resident in Denmark and employed in another Member State to use for business purposes or business and private purposes a company vehicle registered in that other Member State in which their employer has its registered office or principal establishment, the vehicle neither being intended to be essentially used in Denmark on a permanent basis nor being actually so used, only subject to the condition that the employment with that employer is their main employment and that a tax is paid for that purpose,

the Kingdom of Denmark has failed to fulfil its obligations under Article 39 EC, and the remainder of the action must be dismissed.

Costs

86 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. However, according to the first subparagraph of Article 69(3) of those rules, where each party succeeds on some and fails on other heads, the Court may order that the parties bear their own costs. As the Commission and the Kingdom of Denmark have been partly unsuccessful, they should be ordered to bear their own costs. Under the first subparagraph of Article 69(4) of the Rules of Procedure, the Republic of Finland, as intervener, is to bear its own costs.

On those grounds, the Court (First Chamber) hereby:

1. Declares that, in so far as

— **its legislation and administrative practice do not allow workers resident in Denmark and employed in another Member State in work which is not their principal employment to use for business or private purposes a company vehicle registered in that other Member State where the undertaking of their employer is established, and**

— **its legislation and administrative practice allow employees resident in Denmark and employed in another Member State to use for business**

purposes or business and private purposes a company vehicle registered in that other Member State in which their employer has its registered office or principal establishment, the vehicle neither being intended to be essentially used in Denmark on a permanent basis nor being actually so used, only subject to the condition that the employment with that employer is their main employment and that a tax is paid for that purpose,

the Kingdom of Denmark has failed to fulfil its obligations under Article 39 EC;

2. **Dismisses the remainder of the action;**

3. **Orders the parties to bear their own costs;**

4. **Orders the Republic of Finland to bear its own costs.**

[Signatures]