DRAFT OPINION OF ADVOCATE GENERAL JACOBS

delivered on 27 February 2003 [1]

1. In Denmark, new passenger cars are subject to a registration tax levied at a particularly high rate. An association of car importers objects to the level of the tax and has challenged it in the national courts on a number of grounds, alleging in particular that it constitutes a measure having an effect equivalent to a quantitative restriction on imports, prohibited by Article 28 EC. In that connection, the Østre Landsret (Eastern Regional Court) wishes to know (i) whether such a tax is capable of being caught by that prohibition and, (ii) if so, whether it may none the less be justified on any of the grounds set out in Article 30 EC or accepted by the Court in its case-law.

Relevant Treaty provisions

2. The EC Treaty contains three specific sets of provisions prohibiting obstacles to trade in goods between Member States: Articles 23 and 25; Articles 28 to 30, on which a ruling is sought; and Article 90. They apply to different types of obstacle — respectively, customs duties and charges having equivalent effect, quantitative restrictions and measures having equivalent effect, and internal taxation — and the conditions of their application also differ.

3. Articles 23 to 31 EC concern free movement of goods. They provide for a customs union and for a prohibition of quantitative restrictions on trade.

4. In particular, Article 25 provides: 'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature.' [2]

5. Article 28 provides: 'Quantitative restrictions on imports and all measures

1 —Original language: English.

2 — Article 25 is often referred to in tandem with Article 23, which contains the same prohibition but does not explicitly include 'customs duties of a fiscal nature'; for the sake of simplicity I shall refer only to Article 25.

having equivalent effect shall be prohibited between Member States.' Article 29 embodies an identical prohibition as regards exports.

6. In *Dassonville*, [3] the Court defined measures having such an effect as all those which are 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'.

7. Under Article 30 EC, however, Articles 28 and 29 do not preclude 'prohibitions or restrictions... justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants... Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.'

8. In addition, the Court has developed a line of case-law, starting with '*Cassis de Dijon*', [4] to the effect that 'indistinctly applicable' measures (which apply in the same way to domestic and imported goods) may be caught by Article 28 EC if they restrict trade but may be justified if they are necessary in order to satisfy mandatory requirements such as the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer, provided that they are also proportionate to the desired objective and are the means of achieving that objective which least hinders trade.

9. Articles 90 to 93 EC, in the title on common rules on competition, taxation and approximation of laws, concern tax provisions. Article 90 provides:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

3 — Case 8/74 *Dassonville* [1974] ECR 837.

4 — Case 120/78 *Rewe-Zentral* [1979] ECR 649.

Background and procedure

10. All Member States except Germany, France, Luxembourg, Sweden and the United Kingdom levy a registration tax on the acquisition of new passenger cars. In Italy the amount is fixed, in Belgium and Portugal the tax base is the cubic capacity of the vehicle, and in the remaining States the basis of calculation is the price of the car. In Spain, Greece, the Netherlands, Austria and Finland, that basis is the price excluding VAT, whilst in Denmark and Ireland it already includes VAT. Percentage rates vary considerably between Member States, and may also vary according to other criteria (such as cubic capacity or type of use) within each Member State. [5]

11. Although variation is thus great and the differences in method of calculation make precise comparisons difficult, the amount and proportion of registration tax levied in Denmark are very significantly higher than in any other Member State. The tax is levied at a rate of 105% of purchase price up to a threshold determined each year — apparently some DKK 53 000 (EUR 7 122) in 2002 — and 180% of the remainder, where the price taken as tax base already includes 25% VAT and a flat-rate mark-up of 9% to take account of dealer margin, regardless of the margin actually taken by the dealer. It would thus seem that a car with a basic price equivalent to EUR 10 000 is likely to cost the purchaser some EUR 30 000 in all, including some EUR 17 000 in registration tax, and one whose basic price is EUR 30 000 would cost some EUR 107 000 in all, including some EUR 67 000 in registration tax.

12. Such an overall tax burden often exceeding 200% is unrivalled in any other Member State — the next heaviest rates of taxation, in Finland and Greece, do not attain 100% for an engine capacity of under 2000 cc and the proportion of registration tax is less there because it is levied before VAT. In Luxembourg, by complete contrast, the only tax on the purchase price of (new) cars is 15% VAT, and Belgium, Germany, Greece, France, Italy, Sweden and the United Kingdom all levy under 30% in all.

13. The Danish car registration tax dates apparently from 1924 and it seems to be common ground that its purpose has

5 — This and much other useful background information is to be found in the Commission's communication to the Council and the European Parliament on taxation for passenger cars in the European Union — options for action at national and Community levels (COM(2002) 431 final).

always been largely to raise revenue, although other considerations — such as environmental and road-safety concerns — may also be present.

14. Denmark does not possess any car manufacturing industry, so that all new cars entering the Danish market are in practice imported from another Member State or from outside the Community. The tax is levied on a car's first registration in Denmark, but not on any subsequent resale; it is also levied when a second-hand car is imported.

15. Before 1990, the tax was applied to imported second-hand cars in a way which did not adequately reflect depreciation in their value. Considering the tax on both new and second-hand cars to be incompatible with Community rules, the Commission initiated Treaty-infringement proceedings against Denmark, culminating in the Court's judgment of 12 December 1990, [6] in which it was found that, by imposing a registration duty on imported used motor vehicles generally based on an estimated value higher than the real value of the vehicle [7] with the result that imported used motor vehicles were taxed more heavily than used motor vehicles sold on the domestic market after being registered in Denmark, the Kingdom of Denmark had failed to fulfil its obligations under what is now Article 90 EC.

16. The Court dismissed, however, the allegation of infringement in so far as it related to the tax on new cars. Its reasoning was as follows. [8]

17. The Commission's action was based solely on what is now Article 90 EC, and both parties agreed that the tax was internal taxation for that purpose. However, the role of that article is to guarantee complete neutrality of internal taxation as between domestic and imported products. It cannot be invoked against a tax imposed on imported products where there is no similar or competing domestic production; in particular, in the absence of any discriminatory or protective effect, it does not provide a basis for censuring the excessiveness of the level of taxation which a Member State might adopt for particular products.

6 — Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509. At the material time, the threshold between the 105% and 180% rates was DKK 19 750.

7 — 100% of the price of the vehicle when new for a vehicle less than six months old, 90% of that price for all older vehicles.

8 — Paragraphs 5 to 14 of the judgment.

18. The Court acknowledged that, as it had held in *Stier*,[9] Member States may not impose charges so high as to impede the free movement of products where, in the absence of comparable domestic production, the prohibitions in Article 90 EC do not apply. However, such charges could be assessed only on the basis of what are now Articles 28 to 30 EC, and the action was not brought on that basis.[10]

19. The applicant before the national court in the present proceedings, De Danske Bilimportører ('DBI'), is a trade association of car importers. In 1999 it purchased a new Audi motor car — presumably imported from another Member State — for the use of its director, for a total price (including delivery costs) of DKK 498 546 of which DKK 297 456 was registration tax.

20. It has brought proceedings against the Danish Treasury in which it claims that the tax is unlawful in the light of a number of provisions of Community law, and claims a reimbursement.

21. In addition to Articles 28, 29 and 90 EC, quoted above, it refers to Articles 11A(2)(a) and 33 of the Sixth VAT Directive,[11] under which, respectively, the taxable amount for VAT purposes must include all other taxes, duties, levies and charges, and Member States may maintain or introduce taxes, duties and charges other than turnover taxes only if they do not give rise to formalities connected with the crossing of frontiers; to Articles 3(1)(g) and 10 EC, which together require Member States to refrain from any action jeopardising the attainment of undistorted competition in the internal market; to Article 81 EC, which prohibits agreements and concerted practices restricting or distorting competition; and to Regulation No 1475/95,[12] which applies Article 81(3) EC to motor vehicle distribution agreements in the Community.

22. The Østre Landsret, hearing the case, wishes to obtain guidance from the Court specifically on the interpretation of Article 28 EC; in its order for reference, it does not address the alternative claims based on the other provisions mentioned in the preceding paragraph. It has stayed

9 — Case 31/67 *Stier* [1968] ECR 235.

10 — Paragraph 13 of the judgment.

11 — Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, OJ 1977 L 145, p. 1.

12 — Commission Regulation (EC) No 1475/95 of 28 June 1995 on the application of Article [81(3)] of the Treaty to certain categories of motor vehicle distribution and servicing agreements, OJ 1975 L 145, p. 25.

the proceedings and referred the following questions for a preliminary ruling:

'(1) Can an indirect duty (registration duty) charged by a Member State, which in the case of new cars amounts to 105% of DKK 52 800 and 180% of the remainder of the taxable value, be a measure having an effect equivalent to a quantitative restriction on imports and for that reason prohibited under Article 28 EC (reference is made in this connection to the Court's judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 13)?

(2) If the answer to Question 1 is "yes": can that registration duty be justified on the grounds that are mentioned in Article 30 EC or follow from the Court's case-law on Article 28 EC (reference is made to Case 120/78 *Rewe-Zentral* [1979] ECR 649)?'

23. Written observations have been submitted by DBI, by the Danish Government representing the Treasury as defendant in the main proceedings, by the Italian and Finnish Governments, and by the Commission, all of whom except the Italian Government presented oral argument at the hearing.

Assessment

24. The essential question here is whether a car registration tax of the kind described may be assessed under Article 28 EC; the possibility of justification arises in the event of an affirmative answer. The national court does not explicitly seek guidance on any other provisions — indeed, with regard to certain of DBI's contentions, it has rather pointedly refrained from doing so. However, Article 28 must be viewed in the context of the structure of the Treaty, so that some consideration of Articles 25 and 90 will also be necessary.

Articles 25, 28 and 90 EC in general

25. I have set out these provisions briefly above,[13] but a further recapitulation of some of their most relevant features may be helpful.

26. Article 25 EC prohibits any customs duties or charges having equivalent effect.

13 — Paragraphs 3 to 9.

The concept covers any charge, however small, levied by reason of the fact that goods cross a frontier. [14] It includes charges in connection with administrative formalities such as inspections, unless the charges do not exceed the actual costs involved and unless the formalities in question are obligatory and uniform, are prescribed by Community law in the general interest of the Community and promote free movement of goods, in particular by neutralising obstacles which could arise from unilateral measures. [15] Otherwise, the prohibition is absolute and independent of any restrictive effect on trade — although it might be thought that some degree of restrictive effect is normally inherent in any such charge. Where such a duty or charge exists, however minute it may be, compliance with Article 25 can be achieved only by its abolition.

27. Article 90 EC prohibits any internal taxation that discriminates against similar goods from other Member States or indirectly protects domestic production in any way. Supplementing Article 25, its aim is to ensure free movement of goods in normal conditions of competition by eliminating any protection which might result from discriminatory internal taxation, and thus to guarantee complete neutrality of internal taxation as between domestic and imported products. [16]

28. As with Article 25, there is no provision for taxation to escape the prohibition on the basis of any *de minimis* rule or any justifying ground. However, the prohibition is not of taxation but of discrimination or protection so that it is enough to eliminate the discriminatory or protective element in order to comply with the article. The situation is considered globally when deciding whether there is any discrimination or protection, so that compensating factors may come into play — depending on the conditions of its application, a flat-rate tax may in fact give rise to discrimination, [17] and it would be possible to conceive of a charge applied only to imported products which in fact redresses an imbalance caused by the imposition of a different charge on domestic goods at an earlier stage in production.

29. Article 28 EC prohibits all quantitative restrictions and measures having equivalent

14 — Case 24/68 *Commission* v *Italy* [1969] ECR 193, paragraphs 8 to 10 of the judgment, and Joined Cases 2/69 and 3/69 *Diamantarbeiders* [1969] ECR 211, paragraphs 15 to 18; see most recently Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 19.

15 — Case 18/87 *Commission* v *Germany* [1988] ECR 5427, paragraph 8 of the judgment.

16 — See, for example, Case 252/86 *Bergandi* [1988] ECR 1343, paragraph 24 of the judgment.

17 — See, for example, Case 77/69 *Commission* v *Belgium* [1970] ECR 237.

effect. The concept is very broad [18] and again (it is generally accepted) there is no *de minimis* rule. [19] However, in contrast to the situations governed by Articles 25 or 90, if a national measure is in principle caught by Article 28, it may none the less be justified, and thus escape the prohibition, on any of the grounds set out in Article 30 EC and the Court's case-law. [20]

30. Compared to Articles 25 and 90 EC, Article 28 is clearly very broad in scope and serves something of the purpose of a safety-net. The Court has said that it covers in general all barriers to imports which are not already specifically covered by other Treaty provisions. [21] In relation to those articles, each of which constitutes a *lex specialis*, it has been described as a *lex generalis*. [22]

31. Clearly, in view of the different consequences flowing from application of the three articles, it is important to know with certainty in each case which one of them is relevant. If a charge is caught by Article 25 it must be abolished, whereas if it is caught by Article 90 then only the discriminatory or protective element need be removed. A measure caught by Article 28 may be permitted if it pursues one or more justified aims in a manner proportionate to their achievement, whereas the scope for justification under Articles 25 or 90 is very much more limited. On the other hand, those two articles apply only in a limited set of circumstances, always involving a charge or tax, whereas Article 28 is capable of applying to a very wide variety of measures which may hinder trade.

32. In those circumstances, it is not surprising that the Court has repeatedly indicated that there are barriers between the respective scopes of the three articles, only one of which can apply to any given measure.

33. In *Compagnie Commerciale de l'Ouest*, [23] for example, it noted that 'the scope of Article [28] does not extend to the

18 — See the *Dassonville* definition quoted in paragraph 6 above.

19 — See, for example, Joined Cases 177/82 and 178/82 *Van de Haar* [1984] ECR 1797, paragraph 13 of the judgment, Case 16/83 *Prantl* [1984] ECR 1299, paragraph 20, Case 269/83 *Commission* v *France* [1985] ECR 837, paragraph 10, and Case 103/84 *Commission* v *Italy* [1986] ECR 1759, paragraph 18. However, the Court has accepted that some restrictions may be so uncertain and indirect in their effects as not to be regarded as capable of hindering trade: see Case C-266/96 *Corsica Ferries France* [1998] ECR I-3949, paragraph 31 of the judgment, Case C-44/98 *BASF* [1999] ECR I-6269, paragraph 16, and Case C-254/98 *TK-Heimdienst* [2000] ECR I-151, paragraph 30.

20 — See paragraphs 7 and 8 above.

21 — See for example *Bergandi*, cited above in note 16, at paragraph 33 of the judgment.

22 — See for example the Opinion of Advocate General Tesauro in Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest* [1992] ECR I-1847, at p. I-1865.

23 — Cited above in note 22, at paragraphs 20 to 22 of the judgment; see also, for a more recent confirmation, Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 39.

obstacles covered by other, specific provisions of the Treaty... obstacles which are of a fiscal nature or have an effect equivalent to customs duties and are covered by Articles [25 and 90] do not fall within the prohibition laid down in Article [28].... The Court must consider, first, whether a measure... is covered by Articles [25 or 90], and only if it finds that it is not will it have to decide whether the measure in question comes within the scope of Article [28]...'

34. And as regards the separate scopes of Articles 25 and 90, the Court has consistently held[24] that 'provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that, under the system established by the Treaty, the same charge cannot belong to both categories at the same time'.

Articles 25 and 90 EC in the present case

35. The registration tax in issue is clearly fiscal in nature. On the basis of that characteristic and in the light of the case-law quoted in paragraph 33 above, it might fall to be examined under either Article 25 as a charge having an effect equivalent to that of a customs duty or Article 90 as a measure of internal taxation.

36. However, Article 25 applies only to charges levied by reason of the fact that goods cross a frontier. Here, although the tax is probably levied in practice shortly after importation, it seems that the chargeable event is the first registration for use on the road in Denmark rather than the crossing of the frontier. Although the Court does not have full details of the mode of application, it may be presumed that the tax would also apply if an enthusiast were to build his own car in Denmark and seek to use it on the road there. Conversely, it seems plausible that a vehicle imported solely in order to be exhibited in a museum or, perhaps, used exclusively on private property might escape the levy. It has not in any event been suggested, either before this Court or — apparently — before the national court, that the tax is in fact a customs duty or charge having equivalent effect, that it is levied by reason of the fact that cars cross a frontier or that it should be assessed in the light of Article 25 EC.

37. If those assumptions on the application of the registration tax are correct, Article 90 would thus seem the yardstick against which to measure it even if it is in fact

24 — See most recently Case C-234/99 *Nygård*, cited in note 14, at paragraph 17 of the judgment.

levied only on imported cars. As the Court noted in *Commission* v *France*,[25] 'even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article [90] if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products'.

38. The registration tax in issue here appears to meet that definition. It applies systematically to categories of vehicles in accordance with objective criteria. Vehicle registration taxes have moreover consistently been assessed by the Court as internal taxation within the meaning of what is now Article 90 EC.[26] And in *Commission* v *Denmark*,[27] the Danish tax was regarded by both parties and by the Court as internal taxation within the meaning of that article.

39. However, in that judgment the Court very clearly decided that Article 90 EC was not infringed by the tax on new cars since there was no similar or competing domestic production and thus no possible discriminatory or protective effect. With regard to used cars, it appears from the order for reference that Denmark has complied with the judgment in *Commission* v *Denmark* and that the discriminatory element found by the Court has now been eliminated.

40. It is true that DBI has alleged, in a comment on other aspects of its case before the national court, that the fact that a fixed-rate 9% dealer margin is automatically included when taxing new cars but not used cars and that spare parts and repairs are not affected favours used cars (overwhelmingly a 'domestic product') over new cars (all imported) and thus introduces a discrimination prohibited by Article 90. However, no other argument having been submitted — and no question having been referred — in that regard, I do not think it appropriate for the Court to address that point.

41. At this stage, therefore, it seems necessary to conclude that, being part of a system of internal dues rather than being levied by reason of the crossing of a frontier, the registration tax in issue falls to be assessed with reference not to Article 25 EC but to

25 — Case 90/79 [1981] ECR 283, at paragraph 14 of the judgment.

26 — In, for example, a series of cases involving French motor-vehicle taxes; see, for a recent instance, Case C-265/99 *Commission* v *France* [2001] ECR I-2305.

27 — Cited above in note 6.

Article 90; however, since it contains no element which is discriminatory or protective, it is not incompatible with that provision.

Article 28 EC in the present case

42. If the Danish car registration tax falls to be assessed by reference to Article 90, it may be doubted whether, having escaped prohibition under that article, it could then be considered under Article 28. None the less, it might be considered that a manifestly excessive tax, clearly liable to hinder trade in the goods to which it applies, could exceptionally be assessed under Article 28. Indeed, in *Commission* v *Denmark* the Court indicated that Member States may not impose charges so high as to impede the free movement of products where, in the absence of comparable domestic production, the prohibitions in Article 90 EC do not apply, and that such charges could be assessed on the basis of Article 28.

43. However, at least two sets of objections can be raised to that approach. It seems irreconcilable with, first, the system of the Treaty as repeatedly emphasised in the case-law, namely the mutually exclusive nature of the prohibitions contained in Articles 25, 28 and 90 EC, and, second, the Court's overall approach to the analysis of Article 28, in particular as regards the absence of any threshold of applicability and the nature of the justifications which may be available.

Mutually exclusive nature of Articles 25, 28 and 90 EC

44. As I have noted above,[28] the Court has consistently held that Article 28 does not apply to obstacles to trade which fall to be assessed by reference to other specific Treaty provisions, so that obstacles to be assessed under Articles 25 and 90 do not fall within its scope.

45. Such a rule is justified by the structure of the provisions in question.

46. Articles 25 and 28 are clearly parallel provisions designed to cover parallel situations and not to overlap. The same seems clear for Article 90, in relation to those articles, even though its wording is slightly different and it is to be found in a different title of the Treaty.

28 — In paragraph 33.

47. It may also be justified on grounds of legal certainty.

48. The three articles explicitly concern different types of measure and apply different criteria to their assessment. It is important that national authorities — and affected individuals — should know what criteria each specific measure must meet. Member States must be able to determine the areas in which their fiscal sovereignty may freely be exercised and aware of the limits beyond which that sovereignty is constrained. Moreover, if a fiscal obstacle to trade falling within the scope of, but not within the prohibition laid down by, either Article 25 or Article 90 could be assessed under Article 28, it could in principle be allowed if it were justified on one of the grounds set out in Article 30 or in the *Cassis de Dijon* case-law. [29] If on the other hand it fell within either prohibition, it could not be allowed on those grounds. It does not seem reasonable that a fiscal measure adopted by a Member State should be thus assessed on the basis of an alternative standard.

49. To ignore the distinctions between the three sets of rules would thus introduce undesirable uncertainty in an area where clarity is required.

50. It appears that the only case other than *Commission* v *Denmark* in which the Court may have alluded to the possibility of applying what is now Article 28 to exceptionally high internal taxation is *Stier*, which it cited in *Commission* v *Denmark*. It may be noted, though, that in *Stier* the Court did not refer specifically to that provision but more generally to free movement of goods, no restraint on which, resulting from the imposition of particularly high charges, can be presumed to exist 'when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part'. [30] Indeed, it seems plausible that the Court may have been thinking rather of what is now Article 25 EC. [31]

51. It may also be noted that the Court's statements did not in fact lead to examination under Article 28 in either *Stier* or *Commission* v *Denmark* and might thus be viewed as adventitious in those contexts.

52. It is true that the Court has, in more than one other instance, examined under what is now Article 28 EC fiscal measures

29 — But see paragraph 64 et seq. below.

30 — *Stier*, cited above in note 9, at p. 241.

31 — See the Commission's arguments summarised at p. 240 and the Opinion of Advocate General Gand at p. 166.

which might have been thought to fall under Article 90. In *Commission* v *France*,[32] for example, as the Commission has pointed out, it examined a tax advantage granted to newspaper publishers in respect of publications printed in France but not in other Member States, and concluded that since such an advantage was likely to restrict imports it must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by Article 28. And in *Franzén*[33] a national licensing system for importers of alcoholic beverages, under which traders had to pay a high fixed charge to apply for a licence and a high annual fee to keep the licence, was examined with reference to Article 28 and found incompatible. That system, the Court held, constituted an obstacle to the importation of alcoholic beverages from other Member States in that it imposed additional costs on such beverages, including payment of charges and fees for the grant of a licence.

53. However, it might be thought that *Commission* v *France*, in which the possibility that Article 90 might be a more appropriate yardstick does not seem to have been raised, should have been decided on a different basis, and the type of charge involved in *Franzén* can undoubtedly be distinguished from a tax on goods, so that Article 90 would not in any event have been appropriate.

32 — Case 18/84 [1985] ECR 1339; see in particular paragraphs 16 and 17 of the judgment.

33 — Case C-189/95 [1997] ECR I-5909, paragraphs 67 to 77 of the judgment.

54. It thus seems to me desirable, for the reasons expressed in paragraphs 45 to 49 above, that a clear dividing line should be maintained between the scopes of the articles in question and that fiscal measures should not — unless they in some way fall outside the scope of both Article 25 and Article 90 — be examined under Article 28.

Scheme and analysis of Article 28 EC

55. Not only does the suggested assessment of an internal tax under Article 28 EC clash with the scheme of the Treaty, it also and even more significantly clashes in various ways with the scheme of that article itself and with the Court's analysis of it in consistent case-law.

56. However, trade in any product is at least potentially restricted to some extent when it is taxed, compared to trade in the same product untaxed. Actual or appreciable restriction of trade may however be unlikely to result (where there is no alternative domestic product) unless the rate of tax is particularly high. Conversely, there is a clear danger that an exceptionally heavy

domestic tax, such as the one in issue here, will have a noticeable effect on imports.

57. To examine such taxes under Article 28 would, however, give rise to two major difficulties.

— Need for a threshold

58. First, any tax on goods of which there is no domestic production must fall within the *Dassonville* definition as 'capable of hindering, directly or indirectly, actually or potentially, intra-Community trade'. A number of Member States have no car production, so that any registration taxes levied there would be concerned, whatever their level, and other taxes may be levied on many types of goods not produced domestically.

59. Yet to regard all such charges as falling within the scope of the prohibition in Article 28 would be a momentous innovation going far beyond what is suggested in *Commission* v *Denmark*.

60. Thus, if 'charges of such an amount that the free movement of goods within the common market would be impeded' [34] are to be caught by that provision, some (presumably high) threshold of applicability must be set.

61. However, on the one hand, the introduction of such a threshold is impossible to reconcile with the general view, reflected in the Court's consistent case-law, that there is not even a *de minimis* exception to Article 28; [35] and on the other hand, in defining such a threshold, it would seem impossible to meet the necessary requirements of practical applicability and legal certainty without selecting some purely arbitrary criterion.

62. If such difficulties are to be overcome, the proper route might seem to be via clarification in the Treaty itself rather than judicial intervention, particularly since the authors of the Treaty appear to have intended the effects of internal taxation on intra-Community trade to be dealt with in accordance with the provisions of Article 90.

34 — *Commission* v *Denmark*, paragraph 12 of the judgment.

35 — See for example the case-law cited in note 19 above; it may be noted that the criterion of uncertain and indirect effect referred to there would be of no assistance in a case such as the present.

— Type of justification available

63. The second major problem concerns the fact that measures caught by Article 28 cannot, according to the Court's case-law, be justified on economic grounds, a point which relates more particularly to the second question posed by the national court.

64. If the Danish car registration tax is to be examined under Article 28 EC and if it proves to be caught by the prohibition in that article then the answer to that second question is, in principle, clear. Once a restriction falls to be assessed under Article 28, the various grounds of justification available under Article 30 or the *Cassis de Dijon* case-law may come into play.

65. However, as both DBI and the Commission have pointed out, the Court has held that 'aims of a purely economic nature cannot justify a barrier to the fundamental principle of the free movement of goods'. [36]

36 — Case C-120/95 *Decker* [1998] ECR I-1831, paragraph 39 of the judgment; see also Case 7/61 *Commission* v *Italy* [1961] ECR 317 at p. 329, Case 95/81 *Commission* v *Italy* [1982] ECR 2187, paragraph 27, and Case 238/82 *Duphar* [1984] ECR 523, paragraph 23.

66. Yet the primary purpose of taxation is in general always the economic one of raising revenue for the State. Some charges also seek to render less attractive the purchase of certain goods, considered to have harmful or undesirable consequences but not to warrant outright prohibition. None the less, the goods in question often display great elasticity of demand and can thus provide considerable general income for the State.

67. If a charge compatible with Article 90 EC were caught by the prohibition in Article 28, its inherently economic nature would appear, on the basis of the case-law cited, to disqualify it from any justification.

68. Such an outcome would be perverse, requiring taxes not prohibited by Article 90 EC to run, none the less, the gauntlet of Article 28 without allowing the State to plead in justification the very aim for which they were levied, namely the raising of revenue, though it can scarcely be denied that the aim of financing public expenditure by public taxation is itself justifiable.

69. However, the case-law cited by DBI and the Commission is not entirely con-

clusive in support of such a categorical view.

70. In *Duphar*[37] the Court stated that Article 30 cannot justify a measure 'whose primary objective is budgetary', implying that justification can be available only if the primary objective is other than economic. In *Campus Oil*,[38] it accepted that, where measures are justified by the needs of public security, the fact that they also make it possible to achieve other objectives of an economic nature does not exclude the application of Article 30 — which does still not cover a situation where public-interest concerns are merely secondary. In *Decker*,[39] the Court referred only to 'aims of a *purely* economic nature'[40] and allowed that the risk of seriously undermining the financial balance of a social security system might constitute an overriding reason in the general interest.

71. That case-law seems to suggest that an economic objective, such as raising revenue to finance public spending, cannot itself constitute a justification under Article 30 or the *Cassis de Dijon* case-law but that its presence does not negate the existence of a public-interest justification of that kind if (i) it is subsidiary to the latter aim or (ii) it provides the means of achieving that aim. In those circumstances, many levies would still seem likely to remain incapable of justification.

72. In the present case, the Danish Government has stated that the car registration tax is levied essentially for reasons of public finance (it accounts for some 9.5% of all State revenue from excise duties and consumer taxes) but that environmental concerns (to reduce traffic congestion and encourage public transport) are also present.

73. The aims of levying the tax would thus appear incapable of falling within the scope of Article 30 EC or the Court's case-law relating to justification.

74. If they were to do so, however, it would still be necessary for the levying of the tax to comply with the principle of proportionality; it must be proportionate to the objective to be achieved,[41] and it cannot qualify for a derogation if the aims sought can be achieved as effectively using meas-

37 — Cited above in note 36.

38 — Case 72/83 *Campus Oil* [1984] ECR 2727, at paragraphs 33 and 36 of the judgment.

39 — Cited above in note 36.

40 — Emphasis added.

41 — See, for example, Case C-405/98 *Gourmet International Products* [2001] ECR I-1795, at paragraph 28 of the judgment.

ures which are less restrictive of intra-Community trade.[42] In that case, it would be for the national court to verify compliance with the principle.

Final considerations

75. The difficulties involved in establishing — in a manner consistent with the existing case-law — both a threshold which could trigger the application of Article 28 EC to internal taxation and a scheme of possible justifications for such taxation reinforce in my view the conclusion that Article 28 is not the appropriate provision in the light of which to review measures of internal taxation, even though they may have a *de facto* restrictive effect on intra-Community trade.

76. I am aware that such a conclusion appears to indicate a lacuna in the Treaty where none would be expected. It does indeed seem totally incompatible with the aims of the internal market for a Member State to be able to tax certain imported goods to such an extent that the flow of intra-Community trade is appreciably affected.

77. It may also seem anomalous — having regard to the case-law on Articles 25 and 90 EC — that the most minute charge levied on the occasion of goods crossing a frontier infringes the Treaty whilst a very high internal tax in many cases does not, regardless of the respective effects of each on intra-Community trade.

78. However, the answer to both apparent anomalies may lie in part, when compatibility with Article 90 is in issue, in a more careful scrutiny of the extent to which any disputed tax actually forms a coherent part of a normal system of taxation in the Member State in question — scrutiny of a kind which has been carried out, in slightly different contexts, in the past.[43] For that purpose, it might also be relevant to consider the level of the tax in relation both to that of other national taxes in comparable fields and even to differential rates of such taxation in the other Member States.

79. It may finally be recalled that the Commission has submitted certain recommendations to the Council and the Parliament in its communication of 6 September 2002.[44] Those recommendations seek,

42 — See, for a recent example, Case C-121/00 *Hahn*, judgment of 24 October 2002, paragraph 39.

43 — For example in Case 193/85 *Co-Frutta* [1987] ECR 2085, in particular at paragraph 12 of the judgment, concerning the distinction between Articles 25 and 90.

44 — Cited above in note 5.

inter alia, to achieve a degree of restructuring and approximation of national taxation on motor vehicles with a view in particular to improving the functioning of the internal market and encouraging CO_2 emissions reduction. I express no view on the content of those recommendations but a legislative initiative seems to me to be more appropriate, for a matter of taxation, than a case-by-case approach under Article 28.

Conclusion

80. I am therefore of the opinion that the Court should give the following answer to the Østre Landsret:

A charge levied by a Member State on the first registration of a motor vehicle is not in principle a measure having an effect equivalent to a quantitative restriction on imports prohibited under Article 28 EC but falls to be assessed under Article 90 EC as internal taxation, unless the mode of imposition is such that it constitutes a customs duty or charge having equivalent effect within the meaning of Article 25 EC.