JUDGMENT OF THE COURT (First Chamber)

20 October 2011 *

In Case C-94/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Vestre Landsret (Denmark), made by decision of 11 February 2010, received at the Court on 17 February 2010, in the proceedings

Danfoss A/S,

Sauer-Danfoss ApS

v

Skatteministeriet,

THE COURT (First Chamber),

composed of A. Tizzano, President of the Chamber, M. Safjan (Rapporteur), A. Borg Barthet, E. Levits and J.-J. Kasel, Judges,

* * Language of the case: Danish.

Advocate General: J. Kokott,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 17 February 2011,

after considering the observations submitted on behalf of:

— Danfoss A/S, by T.K. Kristjánsson and H.S. Hansen, advokaterne,

— Sauer-Danfoss ApS, by A. Møllin and E. Vistisen, advokaterne,

— the Danish Government, by V. Pasternak Jørgensen, K. Lundgaard Hansen and B. Weis Fogh, acting as Agents,

— the Spanish Government, by M. Muñoz Pérez, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, assisted by G. Albenzio, avvocato dello Stato,

— the Polish Government, by K. Rokicka, acting as Agent,

— the Swedish Government, by A. Falk, acting as Agent,

— the United Kingdom Government, by S. Hathaway, acting as Agent, assisted by P. Mantle, Barrister,

— the European Commission, by N. Fenger and W. Mölls, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 March 2011,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of European Union ('EU') law on recovery of sums unduly paid and on the liability incurred by Member States as a consequence of levying a duty which is incompatible with that law.

2 The reference has been made in proceedings between Danfoss A/S ('Danfoss') and Sauer-Danfoss ApS ('Sauer-Danfoss'), on the one hand, and the Skatteministeriet (Danish Ministry of Taxation), on the other, concerning the Skatteministeriet's refusal to grant those undertakings reimbursement of a duty on mineral oils levied in breach of EU law or compensation for the damage suffered as a consequence of the levying of that unlawful duty.

Legal context

EU law

3 Article 1 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products (OJ 1992 L 76, p. 1) provides:

'1. This Directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

2. The particular provisions relating to the structures and rates of duty on products subject to excise duty shall be set out in specific Directives.'

4 Under Article 3(1) and (2) of that directive:

'1. This Directive shall apply at Community level to the following products as defined in the relevant Directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

5 Article 1 of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12) provides:

'1. Member States shall impose a harmonised excise duty on mineral oils in accordance with this Directive.

2. Member States shall fix their rates in accordance with Directive 92/82/EEC on the approximation of the rates of excise duty on mineral oils.'

6 Under Article 8(1) of Directive 92/81:

'1. In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

(a) mineral oils used for purposes other than as motor fuels or as heating fuels;

(b) mineral oils supplied for use as fuels for the purpose of air navigations other than private pleasure flying.

…'

7 The Commission Communication of 7 November 1990 on the proposal for a Council Directive on the harmonisation of the structures of excise duties on mineral oils (COM(90) 434 final) expressly stated that lubricants and hydraulic oils could benefit from the exemption under Directive 92/81.

National law

8 For the purposes of transposing Directives 92/12 and 92/81 into national law, the Danish legislature adopted Law No 1029 of 19 December 1992 on energy duties on mineral oil products ('the DMO Law'). The first paragraph of Article 1 of that Law provided:

'Oil products shall be subject to an excise duty in national territory. The rates shall be fixed as follows:

…

(12) Lubricants, hydraulic oils and other similar goods: DKK 1.78 per litre.'

9 The excise duty on lubricant and hydraulic oils was payable by the oil companies, but the explanatory memorandum to the DMO Law forecast that that duty would be passed on to the purchasers of the taxed oils.

10 Following the delivery of the judgment in Case C-346/97 *Braathens* [1999] ECR I-3419, confirmed by Case C-437/01 *Commission* v *Italy* [2003] ECR I-9861, from which it follows that the introduction of an indirect tax on products exempted from harmonised excise duty would render Article 8(1)(b) of Directive 92/81 entirely ineffective and could not therefore be based on Article 3(2) of Directive 92/12, the Danish tax authorities decided to suspend, at executive level, the levying of the duty on lubricant and hydraulic oils with effect from 1 December 2001. Law No 395 of 6 June 2002 abolished the duty, also with effect from 1 December 2001.

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 Between 1 January 1995 and 30 November 2001, Danfoss purchased lubricant oils from various Danish oil companies which, after paying the duty on mineral oils to the Danish exchequer, passed on the total amount of that duty – DKK 6 108 054 – to Danfoss.

12 Between 1 January 1998 and 30 November 2001, Danfoss sold some of those oils to Sauer-Danfoss, including in the sale price a duty on mineral oils totalling DKK 1 686 096.

13 Following the abolition of the duty on mineral oils, Danfoss and Sauer-Danfoss claimed reimbursement of the part of the total price for the lubricant oils purchased by them which corresponded to that unlawful duty – DKK 6 108 054 and DKK 1 686 096, respectively – from the Danish tax authorities, but stating that, if Danfoss were to recover the total amount claimed from the tax authorities, it would repay Sauer-Danfoss the sum of DKK 1 686 096 representing the duty on mineral oils included in Danfoss' sale price, in which case Sauer-Danfoss would withdraw its claim. Sauer-Danfoss' claim is thus subsidiary to that of Danfoss.

14 Moreover, it emerges from the order for reference that the oil companies have not claimed any reimbursement of the excise duties levied on the lubricant oils sold to Danfoss.

15 In support of their claims, Danfoss and Sauer-Danfoss submitted that, as they had had to bear the financial consequences of the unlawful duty, the principle of effectiveness of EU law required that they alone, and not the oil companies, should be entitled to demand reimbursement of that duty. They also claimed compensation from the Danish State for the damage suffered as a consequence of the duty being levied.

16 The claims of Danfoss and Sauer-Danfoss were rejected. According to the Danish authorities, the right under EU law to the recovery of sums unduly paid accrues only to the person who is directly taxable and not to the subsequent links in the marketing chain, which were not required to pay that duty themselves and did not pay out any amount to the exchequer which they could claim back.

17 As regards the right to compensation, the Danish authorities ruled out any compensation because, they maintained, with regard to the period preceding *Braathens*, the

duty provided for under the DMO Law was not so obviously incompatible with EU law that its being levied would be likely to give rise to State liability and, with regard to the period following that judgment, it was impossible to determine at what stage in the distribution chain damage had been suffered and, in consequence, there was no direct causal link. In a situation where a duty unduly paid is passed on, the question whether – and, if so, to what extent – particular undertakings or consumers further down the distribution chain will actually bear the burden of that duty depends on various factors, including the pricing policy applied, in the case of the products concerned, by the taxable person and by each of the downstream economic agents, the practical use of those products and the competitive situation in the affected market.

18 Danfoss and Sauer-Danfoss therefore appealed against the decisions rejecting their claims before the Vestre Landsret (Western Regional Court), which decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Community law preclude a Member State from rejecting a claim for reimbursement brought by an undertaking to which excise duty imposed contrary to a directive has been passed on, where such rejection – in circumstances such as those of the present case – is on the ground that it is not the undertaking that paid the duty to the State?

(2) Does Community law preclude a Member State from rejecting a claim for damages brought by an undertaking to which excise duty imposed contrary to a directive has been passed on, where such rejection – in circumstances such as those of the present case – is on the grounds put forward by the Member State (specifically, that the undertaking is not the directly injured party and that there is no direct causal link between any loss and the conduct giving rise to liability)?'

Consideration of the questions referred

Question 1

19 By its first question, the national court asks the Court of Justice, in essence, whether a Member State may oppose a claim for reimbursement brought by an operator to whom the amount of the duty unduly paid has been passed on, on the ground that he is not the person liable for payment of that duty and has therefore not paid out the corresponding amount to the tax authorities.

20 In order to answer that question, it should first be borne in mind that the right to a refund of charges levied in a Member State in breach of the rules of EU law is the consequence and complement of the rights conferred on individuals by the provisions of EU law prohibiting such charges. The Member State is therefore required in principle to repay charges levied in breach of EU law (see Case 199/82 *San Giorgio* [1983] ECR 3595, paragraph 12; Case C-264/08 *Direct Parcel Distribution Belgium* [2010] ECR I-731, paragraph 45; and Case C-398/09 *Lady & Kid and Others*, [2011] ECR I-7375, paragraph 17).

21 However, by way of exception to the principle of the reimbursement of charges incompatible with EU law, the repayment of duties wrongly levied can be refused only where repayment would entail unjust enrichment of the persons concerned, that is to say, where it is established that the person required to pay such charges has actually passed them on to the purchaser directly (see, to that effect, *Lady & Kid and Others*, paragraphs 18 and 20).

22 In such circumstances, the burden of the charge levied but not due has been borne not by the taxable person, but by the purchaser to whom the cost has been passed on. Accordingly, to repay the taxable person the amount of the charge already collected from the purchaser would be tantamount to paying him twice over, which may be described as unjust enrichment, whilst in no way remedying the consequences for the purchaser of the illegality of the charge (Joined Cases C-192/95 to C-218/95 *Comateb and Others* [1997] ECR I-165, paragraph 22, and *Lady & Kid and Others*, paragraph 19).

23 It appears from this that the right to the recovery of sums unduly paid helps to offset the consequences of the duty's incompatibility with EU law by neutralising the economic burden which that duty has unduly imposed on the operator who, in the final analysis, has actually borne it.

24 That said, it should also be noted that, in accordance with settled case-law, in the absence of EU rules governing claims for the repayment of taxes, it is for the domestic legal system of each Member State to lay down the conditions under which those claims may be made; subject, nevertheless, to observance of the principles of equivalence and effectiveness (see Case C-291/03 *MyTravel* [2005] ECR I-8477, paragraph 17, and Case C-35/05 *Reemtsma Cigarettenfabriken* [2007] ECR I-2425, paragraph 37).

25 In that regard, given the purpose of the right to the recovery of sums unduly paid, as recalled in paragraph 23 above, observance of the principle of effectiveness requires that the conditions under which an action may be brought for recovery of sums unduly paid be fixed by the Member States, pursuant to the principle of procedural autonomy, in such a way that the economic burden of the duty unduly paid can be neutralised.

26 From that perspective, it has been held that, if the final consumer is able, on the basis of national law, to obtain reimbursement through the taxable person of the amount of the charge passed on to him, that taxable person must in turn be able to obtain reimbursement from the national authorities (see *Comateb and Others*, paragraph 24).

In the same way, a national legal system which allows the supplier who has paid VAT to the tax authorities in error to seek reimbursement, and which allows the recipient of the services to bring a civil law action against that supplier for recovery of the sums paid but not due observes the principle of effectiveness, as that system enables the recipient who bore the tax invoiced in error to obtain reimbursement of the sums unduly paid (see *Reemtsma Cigarettenfabriken*, paragraph 39).

27 It follows that a Member State may, in principle, oppose a claim for the reimbursement of a duty unduly paid made by the final consumer to whom that duty has been passed on, on the ground that it is not that consumer who has paid the duty to the tax authorities, provided that the consumer – who, in the final analysis, bears the burden of that duty – is able, on the basis of national law, to bring a civil action against the taxable person for recovery of the sums unduly paid.

28 However, if reimbursement by the taxable person were to prove impossible or excessively difficult – in particular, in the case of the insolvency of that person – the principle of effectiveness requires that the purchaser be able to bring his claim for reimbursement against the tax authorities directly and that, to that end, the Member State must provide the necessary instruments and detailed procedural rules (see *Reemtsma Cigarettenfabriken*, paragraph 41).

29 Accordingly, the answer to Question 1 is that a Member State may oppose a claim for reimbursement of a duty unduly paid, brought by the purchaser to whom that duty has been passed on, on the ground that it is not the purchaser who has paid the duty to the tax authorities, provided that the purchaser is able, on the basis of national law, to bring a civil action against the taxable person for recovery of the sum unduly paid and provided that the reimbursement, by that taxable person, of the duty unduly paid is not virtually impossible or excessively difficult.

Question 2

30 By its second question, the national court asks the Court of Justice whether a Member State may reject a claim for damages brought by an undertaking to which a duty unduly paid has been passed on by the taxable person, on the ground that a direct causal link between the levying of that duty by the State and the damage suffered by that undertaking is automatically ruled out.

31 In doing so, the national court asks the Court of Justice to state whether the decision freely made by the taxable person to pass on the duty unduly paid down the marketing chain can be regarded as breaking the direct causal link between the action of the Member State and the damage suffered by the purchaser.

32 First of all, it should be borne in mind that it is not for the Court to assign a legal classification to the actions brought by the plaintiffs before the national court claiming reimbursement of a duty unduly paid or claiming compensation for damage suffered (see Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 81, and Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, paragraph 201), and that an action for damages may coexist with an action for the recovery of sums unduly paid (see, to that effect, *Comateb and Others*, paragraph 34).

33 It should also be noted that recognition of the right of individuals harmed to compensation for damage suffered as a consequence of a breach of EU law by a Member State is subject to three conditions: the rule of EU law infringed must be intended to confer rights on those individuals; the breach of that rule must be sufficiently serious; and there must be a direct causal link between the breach and the loss or damage sustained by the individuals (see Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 30, and Case C-568/08 *Combinatie Spijker Infrabouw-De Jonge Konstruktie and Others*, [2010] ECR I-12655, paragraph 87).

34 Concerning the direct causal link requirement, it appears from settled case-law that it is, in principle, for the national court to ascertain whether the loss and damage claimed flows sufficiently directly from the breach of EU law by the Member State (see Joined Cases C-46/93 and C-48/93 *Brasserie du pêcheur and Factortame* [1996] ECR I-1029, paragraph 65; Case C-524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I-2107, paragraph 122; and Case C-470/03 *AGM-COS.MET* [2007] ECR I-2749, paragraph 83).

35 Nevertheless, the Court of Justice may, in order to give the national court a useful answer, provide it with all the guidance that it deems necessary (see, to that effect, Case C-150/99 *Stockholm Lindöpark* [2001] ECR I-493, paragraph 38, and Case C-566/07 *Stadeco* [2009] ECR I-5295, paragraph 43).

36 To that end, it should be observed that a national legal system, such as that concerned in the main proceedings, under which a direct causal link can be established only as between the levying by the State of a duty which is not due, on the one hand, and the damage suffered by the taxable person, on the other, may not interpret that requirement in such a way as to make it virtually impossible or excessively difficult to obtain compensation for the damage suffered.

37 It follows that such a national legal system is, in principle, consistent with the principle of effectiveness, provided that the purchaser to whom the burden of that duty has been passed on by the taxable person is able, on the basis of national law, to bring his action seeking compensation for the consequential damage against that taxable person.

38 However, by analogy with the observation made in paragraph 28 above, if it were to prove impossible or excessively difficult for the taxable person to compensate the purchaser who bore the financial burden of the duty unduly paid and passed on to him for the damage suffered – in particular, in the case of the insolvency of the taxable person – the principle of effectiveness requires that the purchaser be able to bring his claim for reimbursement against the State directly, without that State being

legitimately able to rely on the lack of a direct causal link between the levying of the duty which was not due and the damage suffered by the purchaser.

39 Accordingly, the answer to Question 2 is that a Member State may reject a claim for damages brought by a purchaser to whom a duty unduly paid has been passed on by the taxable person, on the ground that there is no direct causal link between the levying of that duty and the damage suffered, provided that the purchaser is able, on the basis of national law, to bring that claim against the taxable person and provided that the compensation, by that taxable person, of the damage suffered by the purchaser is not virtually impossible or excessively difficult.

Costs

40 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

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

The rules of European Union law must be construed as meaning that:

1. **a Member State may oppose a claim for reimbursement of a duty unduly paid, brought by the purchaser to whom that duty has been passed on, on the ground that it is not the purchaser who has paid the duty to the tax authorities, provided that the purchaser is able, on the basis of national law, to bring**

a civil action against the taxable person for recovery of the sum unduly paid and provided that the reimbursement, by that taxable person, of the duty unduly paid is not virtually impossible or excessively difficult;

2. a Member State may reject a claim for damages brought by a purchaser to whom a duty unduly paid has been passed on by the taxable person, on the ground that there is no direct causal link between the levying of that duty and the damage suffered, provided that the purchaser is able, on the basis of national law, to bring that claim against the taxable person and provided that the compensation, by that taxable person, of the damage suffered by the purchaser is not virtually impossible or excessively difficult.

[Signatures]