JUDGMENT OF THE COURT (First Chamber)

15 December 2005 *

In Joined Cases C-151/04 and C-152/04,

REFERENCES for a preliminary ruling under Article 234 EC, from the Tribunal de Police de Neufchâteau (Belgium), made by decision of 16 January 2004, received at the Court on 25 March 2004, in the criminal proceedings against

Claude Nadin,

Nadin-Lux SA (C-151/04)

and

Jean-Pascal Durré (C-152/04),

* Language of the case: French.

THE COURT (First Chamber),

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

Advocate General: F.G. Jacobs,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 24 February 2005,

after considering the observations submitted on behalf of:

— Mr Durré, by J.-F. Cartuyvels, avocat,

— the Belgian Government, by E. Dominkovits, acting as Agent, assisted by B. van de Walle de Ghelcke, avocat,

— the Finnish Government, by T. Pynnä and A. Guimaraes-Purokoski, acting as Agents,

— the United Kingdom Government, by C. White and K. Manji, acting as Agents, and P. Whipple, Barrister,

— the Commission of the European Communities, by D. Martin and N.B. Rasmussen, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 26 May 2005,

gives the following

Judgment

1 These references for a preliminary ruling concern the interpretation of Articles 10 EC, 39 EC, 43 EC and 49 EC.

2 The references were made in the course of two sets of criminal proceedings brought against Mr Nadin and Mr Durré, both residing in Belgium, for infringement of the Belgian legislation requiring registration in Belgium of company cars made available to them by companies for which they work and which are established in another Member State.

The legal framework

The relevant provisions of Community law

3 Article 10 EC states:

'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 Article 43 EC provides:

'Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the

setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 48, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the chapter relating to capital.'

6 The first paragraph of Article 49 EC provides:

'Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.'

The relevant provisions of domestic law

7 Article 1 of the Royal Decree of 20 July 2001 concerning the registration of vehicles (*Moniteur belge* of 8 August 2001, p. 27031, 'the Royal Decree of 2001') states that:

'For the purposes of the application of this decree,

...

(27) "fixed establishment" shall mean:

— a physical and settled establishment in which a legal person has its registered office or its main administration, or the place where one or more of its bodies meets or meet and takes or take its or their decisions, or the place where an activity, falling within its economic activity or its company objects is carried on or where that person is represented by one or more natural persons acting in its name or on its behalf.'

8 Article 3 of that decree provides that:

'(1) Persons residing in Belgium shall register the vehicles that they intend to put into circulation in Belgium in the register of vehicles referred to in Article 6, even if those vehicles have already been registered abroad.

Persons shall be deemed to be resident in Belgium if they meet one of the following conditions:

(a) they are registered in the population registers of a Belgian commune;

(b) they are registered in a Belgian business register or in the Belgian trades and crafts register as a natural or legal person;

(c) they are legal persons not entered in a Belgian business or trades and crafts register, formed by or in accordance with international, foreign or Belgian law, and have a permanent establishment in Belgium where the vehicle is managed or used.

2. Nevertheless, in the cases referred to below, the registration in Belgium of vehicles registered abroad and put into circulation by the persons mentioned in paragraph 1, is not compulsory for:

...

(2) a vehicle used by a natural person for business purposes where the vehicle is registered abroad in the name of a foreign owner to whom that person is linked by a contract of employment; in such a case a certificate issued by the Belgian VAT authorities ("VAT certificate") must be carried in the vehicle; the detailed conditions for the use of the vehicle shall be fixed by the Minister for Finance.'

9 Article 14 of Circular No 1/2000 of the Belgian tax authorities of 3 May 2000, titled 'Use of vehicles in Belgium — Transfer and non-transfer rules', provides:

'The vehicles referred to here are all motor vehicles which, as company vehicles, do not fall within the definition set out in No 12 above. They include inter alia cars, goods/passenger vehicles, minibuses, all-purpose vehicles etc.

When such vehicles are used by natural persons residing in Belgium, for work purposes on the orders of an employer established in another Member State, the non-transfer rules shall apply to those vehicles on the basis of Article 12a(2)(7) of the VAT Code, in so far as the rules governing temporary admission with complete exemption from import duties would be applicable if that vehicle had been sent to Belgium from a non-member country. In addition, that vehicle may be used for private purposes by an employee residing in Belgium provided that such private use is ancillary and occasional in nature in relation to the use for work purposes and that such private use is provided for by the contract of employment.

With regard to those vehicles, the special exemption rules on temporary admission and ipso facto the non-transfer rules can be regarded as applicable only if the strict conditions set out in No 15 have been satisfied.'

10 Article 15 of that circular sets out the conditions that must be satisfied in order for the temporary admission rules to apply and provides, in particular:

'...

(b) the vehicle must be the property of the employer. With regard to vehicles hired or leased reference is made to No 9 above;

...

(f) where the person concerned is a manager or director of a company he may rely on the special rules only if his status is that of an employee and, in consequence, if he can show that there is a genuine relationship of subordination between him and the company. The existence of a relationship of subordination means that the manager or director of the undertaking must prove that he is subject to the authority of another person representing the company or of an organ of the company (board of directors, executive committee, management committee, ...), in a position of authority in relation to which the person concerned exerts no decisive influence. For this purpose, persons running a single-member company, the founder members of a company or the principal shareholders are in all circumstances excluded from the ambit of the special rules.'

11 The first sentence of Article 9 of that circular states:

'Where a hired or leased vehicle is made available by a foreign employer with a view to its use by an employee residing in Belgium who may claim the benefit of the special rules set out in Nos 14 and 15 below, that employee may apply for a certificate on the conditions set out therein and subject to observance of the formalities laid down.'

12 In Belgium, various taxes on motor vehicles are closely linked to registration. Vehicles are thus subject, on registration, to a tax on placing vehicles in circulation pursuant to Article 94(1)(1) of the Code of Taxes comparable to income tax ('CTC').

13 That provision states that:

'A tax comparable to income tax shall be levied in favour of the State on:

(1) cars, goods/passenger vehicles, minibuses and motorcycles, as those vehicles are defined in the rules governing the registration of motor vehicles and trailers, in so far as those vehicles are or must be issued with a registration plate other than "test" or "commercial" plates other than an international registration plate issued under those rules.'

14 In this respect Article 99(1) of the CTC lays down that:

'Vehicles referred to in Article 94(1) shall be regarded as put into use on the public highways in Belgium if they are, or are required to be, entered in the register kept by the Road Traffic Office.'

15 Article 21 of the CTC, which fixes the circulation tax for motor vehicles, provides:

'The tax is payable by the natural or legal person who is, or who is required to be, mentioned in the registration certificate, so long as a vehicle is or is required to be entered in that person's name in the register kept by the Road Traffic Office.

The vehicles referred to in subparagraph 1 are cars, goods/passenger vehicles, slow goods/passenger vehicles, minibuses, ambulances, motorcycles, motor tricycles, motor quadricycles, vans, slow vans, boat-trailers, caravans, camping vehicles, trailers and semi-trailers with a permitted maximum load of up to 3 500 kg.'

The disputes in the main proceedings and the question referred for a preliminary ruling

Case C-151/04

16 Mr Nadin, a Belgian national, resides in Belgium but works in Luxembourg as managing director of the company Nadin-Lux SA.

17 On 21 March 2001, when driving a vehicle registered in the Grand Duchy of Luxembourg and belonging to the company Credit Lease SA, a company established in Luxembourg, he was stopped in Belgium for a check by the customs and excise service.

18 In the criminal proceedings before the court making the reference, Mr Nadin declared that the vehicle had been bought by the company Nadin-Lux SA, that he himself had signed the order form and that the vehicle had been paid for by the company Credit Lease SA. He possessed a contract for hire for a term of about 42 months beginning in January 2000.

19 The documents enclosed with the decision making the reference also make it apparent that the person in question had applied for the VAT certificate, but had been refused it on the ground that he was a director of the company employing him.

20 He was charged with having on 21 March 2002 used in the course of carrying on his occupation a vehicle registered abroad in the name of a foreign owner to which he was linked by a contract of employment without carrying a VAT certificate in the vehicle.

21 Mr Nadin argues that he must be considered to be a Community worker.

Case C-152/04

22 Mr Durré, a Belgian national, resides in Belgium but works in Luxembourg for the company Delisalade SA.

23 On 15 March 2002, when driving a vehicle registered in Luxembourg in the name of Delisalade SA, he was stopped in Belgium for a check by the customs and excise service.

24 At that check, Mr Durré produced a certificate from his employer concerning the use of the vehicle, a certificate countersigned by the Luxembourg social security body. The contract of employment between Mr Durré and his employer provided that the latter should make a vehicle available to the former and that the vehicle might be used, in addition, for private purposes. Mr Durré was not in possession of the VAT certificate.

25 Delisalade SA was originally a single-member company formed by Mr Durré, which subsequently became a public limited company in 1997 in which he was a minority shareholder and director.

26 Mr Durré was charged with having on 15 March 2002, while residing in Belgium, failed to register a vehicle that he intended to put into circulation in Belgium, even though that vehicle was already registered abroad.

27 Mr Durré too claims that he must be regarded as a Community worker.

28 In those circumstances the Tribunal de police (local criminal court), Neufchâteau, has decided to stay proceedings in the two cases and to refer the following question to the Court of Justice for a preliminary ruling:

'Do Articles 10, 39, 43 and 49 [EC] preclude a Member State from adopting a measure requiring a worker who is resident within its territory to register his vehicle there even when that vehicle belongs to his employer, a company established in another Member State and to which that worker is linked by an employment contract but in which at the same time he occupies a position of shareholder, director, day-to-day manager or similar?'

Concerning the question referred

29 The national court seeks in essence to ascertain whether it is contrary to Articles 10 EC, 39 EC, 43 EC and 49 EC to impose an obligation on a person residing in one Member State to register in that State a company vehicle made available to him by the company that employs him, established in another Member State, when that

employee, the holder of a contract of employment, is also a shareholder in or a director or manager of that company.

On the status of employed or self-employed worker

30 Whilst employed workers fall within the ambit of Article 39 EC, self-employed workers are covered by Article 43 EC.

31 Since the essential characteristic of an employment relationship within the meaning of Article 39 EC is the fact that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration, any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Article 43 EC (see Case C-268/99 *Jany and Others* [2001] ECR I-8615, paragraph 34 and the decisions cited there).

32 It is not for the Court of Justice to establish whether or not there exists a relationship of subordination in the disputes in the main proceedings.

33 The legislation at issue permitting an employed worker residing in Belgium to use a company vehicle in Belgian territory made available to him by his employer, established in another Member State, without any obligation to register the vehicle, it remains to be considered whether the fact that self-employed workers are not so authorised is contrary to Article 43 EC.

Concerning the existence of restrictions on freedom of movement for self-employed workers

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-464/02 *Commission* v *Denmark* [2005] ECR I-7929, paragraph 34, and the decisions cited there).

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 (Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 96, and *Commission* v *Denmark*, paragraph 35).

36 With regard to the obligation to register in Denmark a company car made available to employees residing in Denmark by a company established in another Member State, the Court has held that such obligation constitutes a barrier to freedom of movement for workers (see *Commission* v *Denmark*, paragraphs 46 and 52). There can be no doubt that an obligation to register, such as that at issue in the cases in the main proceedings, also constitutes a barrier to freedom of movement in so far as it imposes that obligation on self-employed workers.

37 In point of fact, it impedes the access of persons resident in Belgium to self-employed work in the other Member States and is therefore capable of deterring those persons from exercising their right of free movement.

38 Contrary to the Belgian Government's arguments, the obligation to register does not cease to be an impediment just because the company established in another Member State may obtain registration of the vehicle in its own name in Belgium without having a fixed establishment there in order to prevent the director's being required to register it himself.

39 Such a measure could be allowed only as a derogation expressly provided for by Article 46(1) EC or if it pursued a legitimate aim compatible with the Treaty and was justified by overriding reasons in the public interest. But even if that were so, its application would still have to be such as to ensure attainment of the aim in question and not go beyond what is necessary for that purpose (see, by analogy, *Commission* v *Denmark*, paragraph 53, and the decisions cited there).

Concerning the justification of the restriction on the free movement of persons

40 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 (Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 40).

41 It is clear from paragraphs 75 to 78 of *Commission* v *Denmark* that a Member State may levy a registration tax on a company vehicle made available to a worker residing

in that State by a company established in another Member State when it is intended that that vehicle should be used essentially in the first Member State on a permanent basis or where it is in fact used in that manner.

42 It is for the national court to decide whether the workers in question have made such use of the vehicles made available to them.

43 If they have not, an obligation to register such as that at issue in the cases in the main proceedings is contrary to the principle of freedom of movement for persons and cannot be justified by the arguments put forward in these cases, especially by the Belgian Government.

44 First of all, paragraphs 80 and 81 of *Commission* v *Denmark* make it clear that, if the conditions set out in paragraph 39 above have not been met, the aim of preventing tax avoidance cannot justify a tax and, in consequence, an obligation to register in a situation such as that in question in the cases in the main proceedings.

45 So far as prevention of abuse is concerned, 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.

46 However, the fact that a self-employed worker resident in Belgium uses a company car made available to him by the company for which he works established in another Member State cannot form the basis for a general presumption of abuse (see, to that effect, *Commission* v *Denmark*, paragraph 67).

47 Furthermore, the Court has held before that Articles 39 EC and 43 EC afford the same legal protection (Case C-363/89 *Roux* [1991] ECR I-273, paragraph 23).

48 So far as the argument that reliable identification is essential is concerned, the fact is that to require the registration of company vehicles belonging to companies established in another Member State in order to guarantee the reliable identification of the owners of such vehicles goes beyond what is necessary in order to attain that object. As a matter of fact, all Member States having a system of vehicle registration, it appears possible to identify the owner of a vehicle whatever the Member State in which it is registered.

49 The argument based on road safety does indeed constitute an overriding reason in the public interest capable of justifying a hindrance to freedom of movement for persons (*Cura Anlagen*, paragraph 59).

50 However, when a vehicle has undergone roadworthiness testing in a Member State, the principle of equivalence and mutual recognition laid down in Article 3(2) of Council Directive 96/96/EC of 20 December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1997 L 46, p. 1) requires all the other Member States to recognise the certificate issued on that occasion, but does not prevent them from requiring

additional tests for the purposes of registration in their territory, provided those tests are not already covered by that certificate (*Cura Anlagen*, paragraph 62).

51 Although the Court has recognised that additional tests for the purposes of registration in their territory are permissible, provided that those tests are not already covered by a roadworthiness test certificate, it does not follow from the Belgian legislation at issue that the requirement to register is directed at that road safety objective.

52 As to the environmental policy argument, it follows, admittedly, from paragraph 68 of *Cura Anlagen* that a consumption tax such as that at issue in that case may be intended to serve the general interest of discouraging the purchase or possession of vehicles with heavy fuel consumption. Nevertheless, on the one hand, the United Kingdom Government has not explained how the environment may be protected by an obligation to register such as that at issue in the cases in the main proceedings and, on the other, the reasons given by the Belgian Government for requiring a company vehicle to be registered are tax objectives.

53 Nor, when a company vehicle is not used in the conditions listed in paragraph 41 above, is the obligation to register at issue justified if the self-employed worker may additionally use the company vehicle for private purposes (*Commission* v *Denmark*, paragraph 51).

54 That being so, it is unnecessary to consider Articles 10 EC or 49 EC.

55 Having regard to all the foregoing considerations, the reply to the question referred for a preliminary ruling must be that it is contrary to Article 43 EC for the domestic legislation of one Member State, such as the legislation at issue in the cases in the main proceedings, to require a self-employed worker residing in that Member State to register there a company vehicle made available to him by the company for which he works, established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.

Costs

56 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:

It is contrary to Article 43 EC for the domestic legislation of one Member State, such as the legislation at issue in the cases in the main proceedings, to require a self-employed worker residing in that Member State to register there a

company vehicle made available to him by the company for which he works, established in another Member State, when it is not intended that that vehicle should be used essentially in the first Member State on a permanent basis and it is not, in fact, used in that manner.

[Signatures]