# OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 27 November 1990 *

*Mr President,*
*Members of the Court,*

1. The preliminary questions submitted by the Danish Højesteret relate to the interpretation of Article 7(1) and Article 10(2) of Council Directive 83/182 of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another. [1]

2. I will briefly summarize the facts which gave rise to these proceedings, they being particularly relevant to identification of the applicable legislation.

Mr Ryborg, a Danish national, the defendant in the main proceedings, was accused of illegally importing into Denmark a motor vehicle registered in Germany where he has been resident since 1973.

It is common ground that, since then, he has resided in Flensburg, in Germany, where he had emigrated for the purposes of employment and had his fixed residence. Mr Ryborg frequently went to Denmark in a car registered in Germany, but without any obligation to register the car in Denmark thereby arising — it would only have arisen if he had transferred his residence to Denmark, as the Danish authorities themselves told him by letter of 6 April 1982.

On 17 January 1984, Mr Ryborg's new car was confiscated on the ground that he had illegally imported it into Denmark, that is to say without declaring it to the customs authorities and registering it in Denmark, and for using it within Danish territory from 12 November 1982 to 17 January 1984 without having paid the applicable taxes.

There were two developments between April 1982 and November of the same year which prompted the change in the attitude of the Danish authorities towards Mr Ryborg: his purchase of a new car in October 1982 (in which he crossed the frontier for the first time on 12 November 1982) and a friendship with a Danish lady who lived in Denmark, which became so intense that Mr Ryborg, with ever-increasing frequency, spent the night and weekends with her (crossing the frontier to do so). It must be emphasized at this point that the relationship in question, according to Mr Ryborg's statements, commenced in Autumn 1981, and therefore he had frequently spent the night in Denmark as from that date. From July or August 1982 onwards, Mr Ryborg himself admits that he spent nearly every night and most weekends at his friend's house.

* Original language: Italian

1 — OJ 1983 L 105, p. 59

In short, the purchase of a new car and a greater frequency of visits to his friend were fatal to Mr Ryborg, in so far as the Danish authorities considered that he had transferred his residence to Denmark, a conclusion which Mr Ryborg rejects.

3. In the criminal proceedings brought against him, the Højesteret (the court before which Mr Ryborg brought an appeal after the case had already been decided by the Kriminalret, Sønderborg, and by the Vestre Landsret) has referred three questions to this Court for a preliminary ruling. In the first question, the Court is requested to establish the State of normal residence, within the meaning of the second subparagraph of Article 7(1) of Directive 83/182, of a citizen of a Member State B who has declared that he has moved to another State A, where he works and has established his residence, given that, for more than a year, he has spent nearly every night and many weekends with a woman friend in State B. The question has been submitted in two slightly differing versions, to take account of the dissimilar findings of fact made by the Kriminalret and the Vestre Landsret; the two versions differ as regards the exact number of nights and weekends spent by Mr Ryborg at his friend's house.

In its second and third questions, the Højesteret also asks whether Article 10(2) of the same directive imposes on the two Member States concerned an absolute obligation to consult each other regarding every individual case to which the directive in question is applicable; and whether that provision is directly applicable.

4. The questions submitted by the national court clearly presuppose that Directive 83/182 is applicable to the facts of the case before it.

I think, however, that I should first consider briefly the problem of the applicability of the directive in question *ratione temporis*, a problem which was discussed at length at the hearing. The events underlying the main proceedings occurred, as I have indicated, from 12 November 1982 to 17 January 1984. Directive 83/182, which is dated 28 March 1983, was to enter into force no later than 1 January 1984 and was implemented in Danish law by an order of 30 January 1984, which entered into force on 1 February 1984.

In principle, it follows that the directive in question has been applicable in Denmark as from the date of entry into force of the implementing order, and in any event since 1 January 1984 for the provisions having direct effect.

However, the Danish Government contended at the hearing that the legislation in force in Denmark even before the adoption of the directive in question was already in conformity with the directive and, therefore, that the directive was to be regarded as applicable in Denmark as early as 28 March 1983.

However, the fact that some of the Danish provisions applicable to the matter at issue were not incompatible with the directive does not appear to me to be relevant; proof of this is provided by the fact that it was nevertheless necessary to adopt a fresh measure to fulfil the obligations deriving

from the directive. Indeed, I consider that, as regards the period within which the events underlying the main proceedings occurred, the directive of which the national court seeks an interpretation was applicable only from 1 January 1984 in the case of the provisions having direct effect and from 1 February 1984 in the case of the remaining provisions.

In view of the foregoing and of the particular features of the problem confronting the national court, I consider that the question referred to the Court may be deemed to be whether, under the applicable Community VAT legislation, a citizen of a Member State B who is resident in State A, where he is employed and has a house, is required to register his car in State B because, with effect from a particular date, he has spent, over a period exceeding one year, nearly every night and weekend at the house of a woman friend in State B.

5. Having thus reshaped the first question submitted by the national court, I would observe that until the entry into force of Directive 83/182 the only rules which could be referred to were those laid down by the Sixth VAT Directive,[2] which makes the chargeable event for imports the mere entry of the goods into the State in question (Article 10(3)). The inflexibility of that rule is mollified by Article 14(1)(c), which requires the Member States to grant an exemption from VAT for imports of goods declared to be under temporary importation arrangements 'under conditions which [the Member States] shall lay down for the purpose of preventing . . . any possible evasion, avoidance or abuse'. Article 14(2) provides for the subsequent adoption of Community legislation in order to harmonize cases of exemption, and, pending its entry into force, the national provisions of the Member States continue to be applicable — provisions which, as the Court itself has stated, 'must observe the limits set by the rules of Community law which they serve to implement'.[3] The Court went on to say that 'the Member States do not enjoy a complete discretion in implementing the exemptions under Article 14 of the Sixth Council Directive, for they have to observe the fundamental objectives of the harmonization of value added tax such as, in particular, to facilitate the free movement of persons and goods and to prevent cases of double taxation'.[4]

Directive 83/182 represents a first step towards harmonization in this area and provides for certain cases of temporary importation of means of transport in which the Member States are required to grant an exemption. An essential precondition for the exemption is that the importer must have his *normal residence* in a Member State other than the State of temporary importation.

General rules for determination of residence are laid down in Article 7; the first subparagraph of Article 7(1) provides that normal residence means 'the place where a person usually lives, that is for at least 185 days in each calendar year, because of personal and occupational ties', personal ties

2 — Directive 77/388, OJ 1977 L 145, p. 1.

3 — Case 249/84 *Ministère publique* v *Profant* [1985] ECR 3237, paragraph 23.

4 — Case 127/86 *Criminal Proceedings against Ledoux* [1988] ECR 3741, paragraph 11, and *Profant, supra*, paragraph 25.

being those 'which show close links between that person and the place where he is living'. The second subparagraph of Article 7(1) provides that, in the event of difficulty in determining a person's normal residence because he has occupational ties in one State and personal ties in another, he is deemed to have his normal residence at the place with which he has personal ties.

Finally, it should be noted that Article 9(3) of the same directive lays down special conditions for Denmark, whereby it is allowed to apply its own rules concerning residence, under which a person is regarded as having his normal residence in Denmark if he lives there for at least a year or 365 days in a period of two years.

6. In the light of the Community legislation just referred to, the following observations are called for in the present case.

First, as regards the period before the entry into force of Directive 83/182, the relevant provisions of the Sixth VAT Directive, as interpreted by the Court, support the statement that the temporary import of motor vehicles into a Member State is subject to the conditions imposed by that State, provided of course that the fundamental principles laid down by the Treaty are observed and double taxation is avoided.

Now, whilst it is true that the concept of residence is not, as such, a factor in Article 14 of the Sixth Directive, the fact remains that it was already incorporated in the Danish legislation before the directive on the grant of exemptions was adopted; and, more generally, it was incorporated in the applicable legislation of the Member States, since they have all ratified the New York Customs Convention of 4 June 1954,[5] Article 2 of which is concerned with tax-free imports, stating that each contracting State is to 'grant temporary admission . . . to vehicles owned by persons normally resident outside its territory which are imported and utilized, for their private use, on the occasion of a temporary visit.'

That means that, even before Directive 83/182 was adopted, a necessary and sufficient condition for grant of the tax exemption was in fact normal residence outside the country of importation, the importation being temporary for that very reason. And the fact that the concept of normal residence was an 'internal' concept is not in fact relevant, in so far as it did not conflict either with the general Community limitations regarding free movement for persons or with the concept — undoubtedly a Community concept — of temporary importation.

As far as the latter concept is concerned, it need only be recalled that the Court, in the judgment in *Ledoux* cited earlier, made it clear that an import is to be classified as temporary where it can be deduced from the facts that the goods in question will subsequently be re-exported and that there is no fraudulent intent:[6] that is equivalent to

5 — United Nations Treaty Series, Volume 282, p. 249.

6 — *Supra*, paragraph 15.

linking the imposition of the tax, essentially, with something very similar to 'normal residence'.

This is further confirmed in the judgment in *Profant*, in which the Court established an even clearer link between the temporary nature of the import and the precarious nature of the residence. [7]

It is therefore clear that even before the entry into force of the directive, the necessary precondition for taxation was essentially 'normal residence' of the taxable person, both under the applicable Community legislation (the Sixth VAT Directive) and under the relevant national provisions.

7. As regards the period after the entry into force of Directive 83/182, it will be remembered that the national court seeks, in order to determine the dispute before it, an interpretation of the *second subparagraph* of Article 7(1), a provision under which, where a person *is required* to live alternately in different places in two or more Member States, as a result of having occupational ties with a place other than that with which he has personal ties, a person's normal residence is deemed to be the place with which he has personal ties, provided that he returns there regularly.

That provision thus governs the very specific case in which a Community citizen works in one or more different Member States but has his family in another State, so that he stays alternately in the States in question. The reasoning underlying that provision is quite clear: the intention is to accord favourable treatment to a citizen who has his family in one Member State and, for reasons of employment, is obliged to reside in another State; and that is the case, therefore, regardless of the fact that he resides in the State with which he has personal links at least 185 days per year as required by the first subparagraph of Article 7(1).

It is doubtful, therefore, whether the present case can be brought within the scope or indeed the *ratio legis* of the second subparagraph of Article 7(1). I consider, in any event, that it is better to look first at the *first subparagraph*, which lays down general conditions for determining residence, indicating that normal residence means the place in which a person usually lives (at least 185 days in each year) because of occupational and personal ties, the latter term being 'ties which show close links between that person and the place where he is living'.

In my opinion, the provision in question is to be interpreted as meaning that the requirements which it lays down are cumulative; account must therefore be taken of all the factors involved, without particular attention being paid to any one, with the result that the quantitative criterion (for example the number of nights spent in a particular place) cannot be regarded as decisive if other factors point to a situation different from that which derives from the quantitative criterion alone.

7 — *Supra*, paragraph 27

That approach is supported by the consistent case-law of the Court concerning the definition and determination of residence, a concept which has been clarified on several occasions with respect to matters of social security, an area in which residence is governed by provisions analogous to those of the first subparagraph of Article 7(1).[8] In that connection, it should be remembered that the Court has defined as a person's residence the place 'in which [he] has established the permanent centre of his interests'[9] and that, for proof of residence, it is necessary to take account of *all factual circumstances which constitute residence.*[10]

8. Now, once residence has been defined as 'a person's habitual or permanent centre of interests', it is clear that occupational links and personal links — in particular the number of days (or nights) spent in a particular place in the course of a year — are all to be regarded as relevant factors, individually and collectively, in determining a person's normal residence for the purpose of granting an exemption upon temporary importation.

In Mr Ryborg's case, I am of the opinion that each and every one of those factors is present: it is undisputed that Mr Ryborg works in Germany (occupational link); it is also undisputed that he has an apartment in Germany, with the financial obligations that that entails (personal link) and that he took up residence in that country in 1973.

Admittedly, having regard to the facts of the case, it is not possible to say, as from 1982, precisely how many days he spent in Germany and how many days (or rather nights) he spent in Denmark. But that may become entirely irrelevant in so far as there is nothing whatsoever to prove that he intended to move his centre of interests, and therefore his residence, to Denmark. The volitional factor, which is not in itself decisive, may in fact contribute to the classification of a place where someone stays as habitual and therefore as a residence, where it is not possible clearly to distinguish one place from others.

The competent Danish authorities based their contentions on the fact that Mr Ryborg's relationship with his Danish friend involved the transfer of his residence from Germany to Denmark, thus determining that his circumstances constituted a case of cohabitation and, as such, could be assimilated to marriage.

Regardless of the fact that marriage, in view of the legal bonds inherent in it, cannot simply be placed on the same footing as cohabitation,[11] I consider that in the present case, in the absence of any factor which might establish that Mr Ryborg was living with his friend, there can be no question of cohabitation either; for example, there is nothing to show that Mr Ryborg ever moved furniture or other personal effects to Denmark or that he contributed in any way to the household expenses. His position is, in fact, that of a guest in his friend's house

8 — See, for example, the concept of residence as defined in Council Regulation No 3 of 1958 on social security for migrant workers (Journal Officiel 1958, p. 561) as amended by Regulation No 24/64 (Journal Officiel 1964, p. 740).

9 — Judgment in Case 13/73 *Angenieux* [1973] ECR 935; see also Case 76/76 *Di Paolo* [1977] ECR 315 and Case 284/87 *Schäflein* v *Commission* [1988] ECR 4475 and, most recently, Case 216/89 *Reibold* [1990] ECR 4163.

10 — See judgment in Case 284/87, *supra*, paragraph 10.

11 — See the judgment in Case 59/85 *Reed* [1986] ECR 1283.

and, moreover, there is nothing in the documents before the Court to show that Mr Ryborg manifested any intention to move permanently into his friend's house.

That is not all: the Danish authorities contend that Mr Ryborg transferred his residence to Denmark as from 12 November 1982, the date on which, as I have said, he crossed the frontier for the first time in his new car, a fact which was also confirmed at the hearing. This is indeed a strange coincidence, which cannot but cause surprise: Mr Ryborg's personal links, and therefore the 'transfer' of his residence, came into being only when he purchased a new vehicle and used it for the first time in Danish territory.

The fact is, it seems to me, that the Danish authorities are confusing the chargeable event (residence in Denmark) and the entry of the goods (the motor vehicle) into Denmark, and they even treat the two points in time as the same. Moreover, they adopted that approach only when he bought a new car but, curiously, not at an earlier stage when he likewise crossed the frontier in his old car, which was also registered in Germany. And in fact, no other factor prompts the conclusion that Mr Ryborg first established stable emotional ties in Denmark on 12 November 1982 — links of such a nature as to support the view that he had transferred his residence to Denmark — except the fact that he crossed the frontier in a car registered in Germany some days earlier.

9. In view of the foregoing observations, I am minded to conclude that Mr Ryborg never transferred his 'normal residence' to Denmark and that he is therefore still resident in Germany, so that he is not required to declare and register his car in Denmark: his stays in that country in fact involve, from the standpoint appropriate to this case, a temporary import for private purposes, let us even say for leisure purposes, which rules out the existence of the 'personal ties' required by both the first and second subparagraphs of Article 7(1).

For the sake of completeness, I will say at this stage that in the course of the hearing a profound disagreement became apparent between the Commission and the Danish Government regarding the rule applicable in Denmark for determining residence. According to the Commission, only Article 9(3) is applicable, which, as will be recalled, provides that a person is regarded as resident in Denmark if he remains there at least one year or 365 days within a period of two years. The Danish Government, on the other hand, considers that provision to be supplementary to Article 7.

I consider that it is necessary, in any event, to refer to Article 7 to identify the components of the [Community] concept of normal residence. In any event, even if, as the Commission maintains, the rule applicable to the present case is only Article 9(3) and not Article 7(1), albeit subject to the limitations and according to the meaning used here, the same conclusion would be reached anyway. In fact, the observations so far made concerning determination of residence, in particular the

conclusion that Mr Ryborg maintained his normal residence in Germany and never transferred his residence to Denmark, remain valid.

10. The answer to the first of the three questions in these proceedings, as outlined in the foregoing considerations, makes it unnecessary, at least for the purpose of determining the dispute before the national court, to consider the second and third questions.

However, I think I must, for the sake of completeness and having regard to the division of powers between the Community Court and the national court under Article 177, also give an answer to those questions, which, it will be remembered, are whether Article 10(2) of Directive 83/182 imposes on the two Member States concerned an absolute obligation to consult each other, whenever a specific case arises; and whether that provision has direct effect.

I would point out in the first place that, according to the provision in question, where 'the practical application of [the] directive gives rise to difficulties, the competent authorities of the Member States concerned shall take the necessary decisions by mutual agreement, particularly in the light of the conventions and Community directives on mutual assistance'.

The very wording of the provision shows that there is an obligation for Member States to cooperate, if and when difficulties arise in the practical application of the directive. According to the Commission, such an obligation arises when two Member States both call for the registration of the same car. There is no doubt that such a case involves difficulties of application; however, it is also beyond doubt that the difficulties are purely of interpretation.

It seems to me very doubtful that the obligation in question relates not only to procedural difficulties but also to difficulties of interpretation — thus involving the very interpretation of the directive by the competent authorities of the various Member States — since, in such circumstances, it will always be for this Court to decide as to the correct interpretation of the provisions of the directive.

Furthermore, the fact that the Member States are to 'take the necessary decisions by mutual agreement' and the reference to the Community directives on mutual assistance seems rather to support the view that the reference is to procedural decisions in the broad sense and not to decisions on specific individual cases.

The foregoing observations therefore prompt me to conclude that the obligation of cooperation referred to in Article 10(2) does not involve an obligation of consultation between Member States concerning each specific case but rather a more general obligation enabling consistent decisions to be arrived at where the application of the directive in question gives rise to procedural difficulties of an administrative nature.

11. As regards the last question, namely whether Article 10(2) has direct effect and thus confers on individuals rights which they can rely on in legal proceedings, it seems to me that the answer must be negative and that few comments are called for. It is well known that, by virtue of consistent and now well-established case-law,[12] there are regarded as directly applicable provisions those which impose clear, precise and unconditional obligations, so that no margin of discretion is left to the Member States. However, the provision at issue is without doubt conditional, in so far as it requires the Member States to cooperate where difficulties arise in the application of the directive.

Finally, it hardly needs saying that, in so far as Article 10(2) is not directly applicable, and since the directive in question was implemented in Denmark after the expiry of the prescribed period, the provision in question is not in any event applicable to the facts of the case before the national court.

12. In view of the foregoing considerations, I conclude by proposing that the Court give the following answers to the questions submitted by the Højesteret:

'1) The applicable Community VAT legislation precludes a Member State B from requiring the registration and payment of taxes upon importation of a vehicle by one of its citizens who has established his residence in a Member State A where he works and lives in an apartment, even where the person concerned has, for more than a year, spent nearly every night and many weekends in the house of a woman friend in State B.

2) The obligation laid down by Article 10(2) of Directive 83/182 does not require consultation regarding every individual practical case in which difficulties arise in applying the directive.

3) The provision in question does not have direct effect.'

12 — See for example the judgments in Case 148/78 *Ratti* [1979] ECR 1629, Case 8/81 *Becker* [1982] ECR 53 and Case 31/87 *Gebroeders Beentjes* [1988] ECR 4635