JUDGMENT OF THE COURT

17 June 2003 *

In Case C-383/01,

REFERENCE to the Court under Article 234 EC by the Østre Landsret (Denmark) for a preliminary ruling in the proceedings pending before that court between

De Danske Bilimportører

and

Skatteministeriet, Told- og Skattestyrelsen,

on the interpretation of Articles 28 EC and 30 EC,

THE COURT,

composed of: J.-P. Puissochet, President of the Sixth Chamber, acting for the President, M. Wathelet (Rapporteur) and R. Schintgen (Presidents of

* Language of the case: Danish.

Chambers), C. Gulmann, A. La Pergola, P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

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

after considering the written observations submitted on behalf of:

— De Danske Bilimportører, by K. Dyekjær-Hansen and T. Ryhl, advokaterne,

— the Danish Government, by J. Molde, acting as Agent, and K. Hagel-Sørensen, advokat,

— the Italian Government, by U. Leanza, acting as Agent, and M. Fiorilli, avvocato dello Stato,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Commission of the European Communities, by H.C. Støvlbæk, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of De Danske Bilimportører, represented by K. Dyekjær-Hansen, of the Danish Government, represented by J. Molde and K. Hagel-Sørensen, of the Finnish Government, represented by T. Pynnä, acting as Agent, and of the Commission, represented by H.C. Støvlbæk, at the hearing on 6 November 2002,

after hearing the Opinion of the Advocate General at the sitting on 27 February 2003,

gives the following

Judgment

1 By order of 26 September 2001, received at the Court on 5 October 2001, the Østre Landsret (Eastern Regional Court) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 28 EC and 30 EC.

2 The questions were raised in the context of proceedings between De Danske Bilimportører ('DBI'), a professional association of car importers, and the Skatteministeriet (Danish Ministry of Fiscal Affairs) concerning the levy of a charge on the registration of new motor vehicles.

Legal background

Community provisions

3 Articles 23 EC to 31 EC, which form Title I, entitled 'Free movement of goods', of the EC Treaty, introduce a customs union and prohibit quantitative restrictions on trade between Member States.

4 In particular, Article 25 EC states:

'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.'

5 Furthermore, under Article 28 EC, '[q]uantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Article 29 EC contains an identical prohibition in respect of exports.

6 However, under Article 30 EC:

'The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit 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.'

7 Articles 90 EC to 93 EC form Chapter 2, entitled 'Tax provisions', of Title VI, entitled 'Common rules on competition, taxation and approximation of laws', of the Treaty.

8 Article 90 EC states:

'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.'

National legislation

9 The lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of

14 April 1999, which was applicable at the material time, provides for the levy of a charge, known as 'registration duty', on new motor vehicles. That charge, levied upon first registration of the vehicle in the national territory, is based on the purchase price. The rate of the charge is 105% on the first portion, which is fixed annually, and 180% on the remainder of the price. In 1999, the first portion was DKK 52 800.

10 Furthermore, the price taken as the tax base already includes 25% value added tax and a flat-rate mark-up of 9% to take account of dealer margin, regardless of the margin actually taken by the dealer.

11 It is apparent from the documents before the Court that the principal purpose of the registration duty is to raise tax revenue, although other considerations such as environmental protection and road safety may also account for the levy.

12 Since the duty is levied upon first registration of the vehicle in Denmark, but not upon any subsequent resale, it is also levied when a used vehicle is imported into Denmark.

13 Before 1990, the registration duty was applied to imported used vehicles in a way which did not adequately reflect depreciation in their value. Therefore, in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, the Court held that, by imposing a registration duty on imported used motor vehicles generally based on an estimated value which is higher than the real value of the vehicle, 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 Article 95 of the EEC Treaty (which became Article 95 of the EC Treaty and is now, after amendment, Article 90 EC).

14 In the infringement proceedings which resulted in that judgment, the Commission also contested the compatibility of the registration duty on new motor vehicles with Article 95 of the Treaty, having regard in particular to the very high level of the duty.

15 The Court however rejected that claim of infringement after having found that Article 95 of the Treaty could not be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production, and that, in particular, that article did not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect (*Commission* v *Denmark*, paragraph 10).

16 In paragraph 12 of *Commission* v *Denmark*, the Court admittedly noted that, as it had held in Case 31/67 *Stier* [1968] ECR 235, it is not permissible for the Member States to impose on products which, in the absence of comparable domestic production, escape the application of the prohibitions contained in Article 95 of the Treaty charges of such an amount that the free movement of goods within the common market would be impeded as far as those goods were concerned. It added, however, in paragraph 13 of *Commission* v *Denmark*, that the only possibility of appraising an adverse effect of that kind on the free movement of goods is by reference to Article 30 of the EEC Treaty (which

became Article 30 of the EC Treaty and is now, after amendment, Article 28 EC) et seq. The Commission's action in that case was not however based on those articles.

The main proceedings and the questions referred for a preliminary ruling

17 It should be stated at the outset that, as is apparent from the documents before the Court, there is no production of motor vehicles in Denmark. During the period from 1985 to 2000, the total number of registered vehicles in Denmark rose from 1 501 000 to 1 854 000 and the number of new registrations varied between 78 453 and 169 492 per year.

18 In January 1999, DBI purchased a new Audi vehicle for the use of its director for a total price (including delivery costs) of DKK 498 546, including DKK 297 456 in registration duty.

19 Since DBI took the view that that charge had been levied in breach, *inter alia*, of Article 28 EC, it requested its repayment from the tax authorities, relying in particular on paragraphs 12 and 13 of *Commission* v *Denmark*. In its submission, the excessive level of the registration duty made it impossible to import motor vehicles to Denmark under normal commercial conditions, to the benefit of domestic purchases of previously registered used vehicles, which were to be regarded as Danish products, in accordance with the case-law of the Court (*Commission* v *Denmark*, paragraph 17, and Case C-228/98 *Dounias* [2000] ECR I-577, paragraph 42).

20 The Skatteministeriet responded that, according to the case-law of the Court (see, *inter alia*, *Dounias*, paragraph 39), fiscal contributions cannot be caught by Article 28 EC, since the lawfulness of domestic taxation may be assessed only in the light of Article 90 EC. It stated further that, in Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567, paragraph 17, the Court found that, as Community law stands at present, the Member States are at liberty to make products such as cars subject to a system of tax which increases progressively in amount according to an objective criterion and that Article 95 of the Treaty does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products in the light of considerations of social policy.

21 According to the Skatteministeriet, the proviso adopted by the Court in paragraphs 12 and 13 of *Commission* v *Denmark* relates only to cases in which, as a result of internal taxation, trade in the product in question ceases or is insignificant in volume. The registration duty on motor vehicles, however, is not prohibitive and the total number of motor vehicles in Denmark is comparable to that in other Member States.

22 In those circumstances the Østre Landsret decided to stay proceedings and to refer the following two questions to the Court 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* ("Cassis de Dijon") [1979] ECR 649)?'

The first question referred for a preliminary ruling

23 By its first question, the national court is essentially asking the Court whether Article 28 EC must be interpreted as precluding, as a rule, the levy of a charge on the registration of new motor vehicles, such as the registration duty at issue in the main proceedings.

Observations submitted to the Court

24 DBI claims, in substance, that the Danish registration duty impedes the free movement of new vehicles since, because of its excessive level, it prevents the importation of those goods to Denmark under normal commercial conditions, whilst benefiting domestic purchases of used vehicles previously registered in Denmark, which must be regarded as Danish products. That duty thus amounts to a quantitative restriction on imports contrary to Article 28 EC.

25 The applicant in the main proceedings bases its analysis on paragraphs 12 and 13 of *Commission* v *Denmark*, from which it is apparent that charges of an amount such that they impede the free movement of goods may be assessed in the light of Article 28 EC.

26 The Danish Government submits that the registration duty cannot be regarded as a quantitative restriction on imports prohibited under Article 28 EC. It argues that the assertion in paragraph 13 of *Commission* v *Denmark* has never been reiterated by the Court in subsequent judgments. On the contrary, it follows from settled case-law that barriers of a fiscal nature to the free movement of goods must be assessed in the light of Articles 23 EC to 25 EC or Articles 90 EC to 93 EC. In the main proceedings, however, the registration duty on new motor vehicles, which is internal taxation, neither discriminates against imported products nor protects domestic production, with the result that it is not prohibited by Article 90 EC.

27 As to the remainder, if the Commission were to consider that the registration duty is excessively high, it would be for it to draw up a proposal for a measure on the basis of Article 93 EC with a view to harmonising national legislation.

28 In the alternative, the Danish Government contends that paragraph 13 of *Commission* v *Denmark* must be interpreted as meaning that the prohibition on quantitative restrictions on imports, laid down in Article 28 EC, relates only to fiscal provisions which have such an impact on intra-Community trade that, as far as the taxed product is concerned, that trade is reduced to nothing or becomes insignificant. However, that is not the case in the main proceedings since the number of motor vehicles per inhabitant in Denmark is comparable to that in other Member States.

29 The observations of the Italian and Finnish Governments are to the same effect.

30 The Commission considers that barriers of a fiscal nature which do not have an effect equivalent to a customs duty fall, as a rule, under Article 90 EC, which is a *lex specialis* as opposed to the general prohibition on barriers to trade, laid down in Article 28 EC. Barriers of a fiscal nature which are not covered by Article 90 EC — or by Articles 23 EC to 25 EC — may therefore be caught by Article 28 EC where they impede the free movement of goods. By contrast, according to the case-law of the Court, a barrier of a fiscal nature cannot fall at the same time under the two provisions.

31 As a consequence, it is for the national court to assess, in the light of the facts in the main proceedings, whether the registration duty on new motor vehicles is of a level such that it impedes the free movement of goods. The Commission notes, in that regard, that it is apparent from the order for reference that a considerable number of motor vehicles are registered each year in Denmark, that the variations in the number of registrations appear to be purely short-term and that the number of motor vehicles per inhabitant is at the same level as in other countries of the Organisation for Economic Cooperation and Development (OECD). It is therefore not established that the Danish legislation at issue in the main proceedings impedes the free movement of goods.

Reply of the Court

32 The scope of Article 28 EC does not extend to the obstacles to trade covered by other specific provisions of the Treaty and obstacles of a fiscal nature or having

an effect equivalent to customs duties, which are covered by Articles 23 EC, 25 EC and 90 EC, do not fall within the prohibition laid down in Article 28 EC (see Joined Cases C-78/90 to C-83/90 *Compagnie Commerciale de l'Ouest and Others* [1992] ECR I-1847, paragraph 20, and *Dounias*, paragraph 39).

33 Furthermore, as regards the scope of Articles 25 EC and 90 EC, it is settled case-law 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 (see Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 17).

34 In the present case, since a charge on the registration of new motor vehicles, such as the Danish registration duty at issue in the main proceedings, is manifestly of a fiscal nature and is charged not by reason of the vehicle crossing the frontier of the Member State which introduced the charge, but upon first registration of the vehicle in the territory of that State, the charge must be regarded as part of a general system of internal dues on goods and thus examined in the light of Article 90 EC.

35 The fact that a charge of that sort is in fact imposed solely on imported new vehicles, because there is no domestic production, is not such as to cause it to be characterised as a charge having equivalent effect, for the purposes of Article 25 EC, rather than internal taxation, within the meaning of Article 90 EC, since it is part of a general system of internal dues applied systematically to categories of vehicles in accordance with objective criteria irrespective of the origin of the products (see, to that effect, Case 90/79 *Commission* v *France* [1981] ECR 283, paragraph 14).

36 Since the applicability of Article 90 EC in the main proceedings is thus established, it should be noted that that article expressly prohibits the imposition on products from other Member States of internal taxation in excess of that imposed on similar domestic products or internal taxation of such a nature as to afford indirect protection to other products (see *Commission* v *Denmark*, paragraph 8).

37 It should also be noted that, as paragraph 9 of *Commission* v *Denmark* shows, the aim of Article 90 EC as a whole is to ensure the free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which may result from the application of internal taxation that discriminates against products from other Member States. Thus Article 90 EC must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products.

38 On the other hand, Article 90 EC cannot be invoked against internal taxation imposed on imported products where there is no similar or competing domestic production. In particular, it does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products, in the absence of any discriminatory or protective effect (see *Commission* v *Denmark*, paragraph 10).

39 At present there is no domestic production of cars in Denmark, as has already been noted in paragraph 17 above, nor indeed of any products liable to compete with cars. In those circumstances, it must be concluded that the Danish registration duty imposed on new motor vehicles is not covered by the prohibitions laid down in Article 90 EC.

40 It is true, as DBI pointed out, that the Court held, in paragraph 12 of *Commission* v *Denmark*, that it is not permissible for the Member States to impose on products which, in the absence of comparable domestic production, escape the application of the prohibitions contained in Article 90 EC charges of such an amount that the free movement of goods within the common market would be impeded as far as those goods were concerned.

41 It is however sufficient in that regard to state that, in any event, the figures communicated by the national court as to the number of new vehicles registered in Denmark, and thus imported into that Member State, do not in any way show that the free movement of that type of goods between Denmark and the other Member States is impeded.

42 In those circumstances, it cannot be considered that a charge such as the Danish registration duty has ceased to be internal taxation, within the meaning of Article 90 EC, and should be classified as a measure having equivalent effect to a quantitative restriction, for the purposes of Article 28 EC, nor is it appropriate to examine the scope of the proviso adopted by the Court in paragraphs 12 and 13 of *Commission* v *Denmark*.

43 In conclusion, the answer to the first question referred for a preliminary ruling must be that:

— a charge on the registration of new motor vehicles established by a Member State which does not have any domestic production of vehicles, such as that

laid down by the lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, constitutes internal taxation whose compatibility with Community law must be examined in the light not of Article 28 EC, but of Article 90 EC;

— Article 90 EC must be interpreted as not precluding such a charge.

The second question referred for a preliminary ruling

44 Having regard to the considerations set out in connection with the first question, it is not necessary to examine the justifications put forward in the alternative by the Danish Government in support of the compatibility of the Danish registration duty with Community law, with the result that the second question becomes devoid of purpose.

Costs

45 The costs incurred by the Danish, Italian and Finnish Governments and by the Commission, which have submitted observations to the Court, are not recover-

able. 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.

On those grounds,

THE COURT,

in answer to the question referred to it by the Østre Landsret by order of 26 September 2001, hereby rules:

1. **A charge on the registration of new motor vehicles established by a Member State which does not have any domestic production of vehicles, such as that laid down by the lov om registreringsafgift af motorkøretøjer (Law on registration duty on motor vehicles), in the version resulting from Consolidating Law No 222 of 14 April 1999, constitutes internal taxation whose compatibility with Community law must be examined in the light not of Article 28 EC, but of Article 90 EC.**

2. **Article 90 EC must be interpreted as not precluding such a charge.**

Puissochet Wathelet Schintgen

Gulmann La Pergola Jann

Skouris Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 17 June 2003.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President