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Case C-150/04

Commission of the European Communities

v

Kingdom of Denmark

(Failure of a Member State to fulfil obligations – Freedom of movement for workers – Freedom to provide services – Free movement of capital – Freedom of establishment – Income tax – Pensions – Policy taken out with a pension institution in another Member State – Tax legislation – Limitation on the deductibility or exemption from taxable income of contributions paid into a pension scheme – Overriding reasons in the public interest – Effectiveness of supervision of taxation – Coherence of the tax system – Symmetry of the tax system – Double taxation convention)

Opinion of Advocate General Stix-Hackl delivered on 1 June 2006

Judgment of the Court (Grand Chamber), 30 January 2007

Summary of the Judgment

Freedom of movement for persons – Workers – Freedom of establishment – Freedom to provide services – Restrictions – Tax provisions

(Arts 39 EC, 43 EC and 49 EC)

A Member State which provides that the rights to deduct or to omit from taxable income contributions paid to a pension scheme are granted only for payments under contracts entered into with pension institutions established in national territory, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, fails to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC.

By refusing in general to grant a tax advantage in respect of contributions paid to a pension institution established in another Member State, such legislation cannot be justified by the need to guarantee the coherence of the national tax system since the factor liable adversely to affect the latter is to be found in the fact that the transfer of the taxpayer’s residence occurs between the time of payment of contributions to a pension scheme and that of payment of the corresponding benefits, that Member State being deprived only in that case of the power to tax the benefits corresponding to the contributions deducted or exempted.

Since the provisions of the Treaty on freedom to provide services, freedom of movement for workers and freedom of establishment preclude the contested legislation, it is not necessary to consider that legislation separately in the light of Article 56 EC on free movement of capital.

(see paras 64, 71-74, 76, operative part)

JUDGMENT OF THE COURT (Grand Chamber)

30 January 2007 (*)

(Failure of a Member State to fulfil obligations – Freedom of movement for workers – Freedom to provide services – Free movement of capital – Freedom of establishment – Income tax – Pensions – Policy taken out with a pension institution in another Member State – Tax legislation – Limitation on the deductibility or exemption from taxable income of contributions paid into a pension scheme – Overriding reasons in the public interest – Effectiveness of supervision of taxation – Cohesion of the tax system – Symmetry of the tax system – Double taxation convention)

In Case C-150/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 23 March 2004,

Commission of the European Communities, represented initially by S. Tams, and subsequently by R. Lyal and H. Støvlbæk, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Kingdom of Denmark, represented by J. Molde, acting as Agent, with an address for service in Luxembourg,

defendant,

supported by

Kingdom of Sweden, represented by A. Kruse, acting as Agent,

intervener,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Lenaerts, P. K?ris (Rapporteur) and E. Juhász, Presidents of Chambers, R. Silva de Lapuerta, K. Schiemann, J. Makarczyk, G. Arestis, A. Borg Barthet and A. Ó Caoimh, Judges,

Advocate General: C. Stix-Hackl,

Registrar: H. von Holstein, Deputy Registrar,

having regard to the written procedure and further to the hearing on 31 January 2006,

after hearing the Opinion of the Advocate General at the sitting on 1 June 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities seeks a declaration by the Court that, by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States ('the contested legislation'), the Kingdom of Denmark has failed to fulfil its obligations under Articles 39 EC, 43 EC, 49 EC and 56 EC.

Legal context

Community legislation

2 The scope of Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15), as amended by 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; 'Directive 77/799'), now covers indirect taxation.

3 The first recital in the preamble to Directive 77/799 states:

'Whereas practices of tax evasion and tax avoidance extending across the frontiers of Member States lead to budget losses and violations of the principle of fair taxation and are liable to bring about distortions of capital movements and of conditions of competition; whereas they therefore affect the operation of the common market'.

4 Article 1(1) of Directive 77/799 provides:

'In accordance with the provisions of this Directive the competent authorities of the Member States shall exchange any information that may enable them to effect a correct assessment of taxes on income and on capital …'

5 Article 8 of the Directive states:

'1. This Directive shall impose no obligation to have enquiries carried out or to provide information if the Member State, which should furnish the information, would be prevented by its laws or administrative practices from carrying out these enquiries or from collecting or using this information for its own purposes.

2. The provision of information may be refused where it would lead to the disclosure of a commercial, industrial or professional secret or of a commercial process, or of information whose disclosure would be contrary to public policy.

3. The competent authority of a Member State may refuse to provide information where the State concerned is unable, for practical or legal reasons, to provide similar information.'

6 Article 1(1) of Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty (article repealed by the Treaty of Amsterdam) (OJ 1988 L 178, p. 5)

provides:

‘Without prejudice to the following provisions, Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States. To facilitate application of this Directive, capital movements shall be classified in accordance with the Nomenclature in Annex I.’

7 Part X of Annex I to Directive 88/361 on transfers in performance of insurance contracts states:

‘A – Contributions and payments in respect of life assurance

…

2. Contracts concluded between foreign life assurance companies and residents.’

National legislation

8 The Danish legislation codified by Law No 816 on, inter alia, the taxation of pensions (bekendtgørelse af lov om beskatningen af pensionsordninger m.v., *Lovtidende* 2003 A, p. 5522; ‘the Law on the taxation of pensions’) of 30 September 2003 contains provisions concerning the taxation of pension schemes, including life assurance (‘pension schemes’). It distinguishes two categories of pension scheme, each being treated differently for tax purposes. The first category of pension scheme is covered by Part I of that law and its holder enjoys tax advantages. The second category is governed by Part II of that law and its holder receives no tax advantages.

9 With regard to the first category of pension scheme, the Law on the taxation of pensions provides, essentially, for contributions paid into a pension scheme covered by Part I of that law to be deductible or exempted, whether those contributions were paid into a pension scheme set up under the terms of an employment relationship or paid into a private pension scheme independent of an employment relationship.

10 Tax is payable by the beneficiary on benefits received under a pension scheme covered by Part I of the Law on the taxation of pensions. Benefits paid on maturity of a pension scheme with periodic payments, benefits provided on maturity of a pension scheme with payment of a capital sum and benefits provided in advance are taxed at different rates.

11 In order to enjoy the tax advantages granted by Part I of the Law on the taxation of pensions, the pension scheme must meet certain conditions relating, inter alia, to the retirement age, the authorised beneficiaries and the type of benefits. There are also requirements with regard to the pension institution with which the scheme is held. Pension schemes must be taken out with a life assurance company, a pension fund or a financial institution.

12 Life assurance companies must:

– have their registered office in Denmark

– carry on life assurance business through a permanent establishment in Denmark and be authorised by the authorities supervising the financial sector to pursue life assurance business there, or

– carry on life assurance business through a branch office in Denmark and hold authorisation issued in another Member State of the European Union.

13 Pension funds must:

– comply with Codified Law No 148 on the supervision of pension funds (bekendtgørelse af lov om tilsyn med firmapensionskasser) of 7 March 2003 (*Lovtidende* 2003 A, p. 953), which presupposes that they are established in Denmark, or

– comply with Law No 453 on financial activities (lov om finansiel virksomhed) of 10 June 2003 (*Lovtidende* 2003 A, p. 2822), which applies to certain pension funds with a registered office in Denmark and to foreign pension funds which are authorised in another Member State of the European Community and which pursue their activities through a branch office in Denmark.

14 Financial institutions must:

– be authorised by the financial supervision authorities to operate a financial institution in Denmark, which requires that they have a registered office in that Member State, or

– be foreign credit institutions which are authorised in another Member State of the European Community and which pursue their activities through a branch office in Denmark.

15 With regard to the second category of pension schemes, Part IIA of the Law on the taxation of pensions, headed ‘Pension schemes, insurances, etc. subject to income tax’, contains provisions governing pension schemes which do not fall within the scope of Part I because they do not meet the relevant conditions and pension schemes whose members have opted not to be taxed under Part I.

16 Part IIA of that Law comprises Paragraph 53A and Paragraph 53B and concerns, in particular, pension schemes held with foreign pension institutions.

17 Paragraph 53A of the Law on the taxation of pensions provides:

‘(1) The provisions of subparagraphs 2 to 5 shall apply to

1. life assurance contracts which do not fall within the scope of Chapter 1,

2. life assurance contracts which meet the conditions of Chapter 1 but with respect to which the policyholder, on entering into the insurance contract, opted not to be taxed in accordance with the provisions of Part I,

3. schemes with pension funds which do not fall within the scope of Chapter 1,

4. schemes with pension funds which meet the conditions of Chapter 1 but with respect to which the persons entitled to benefit opted not to be taxed in accordance with the provisions of Part I, and

5. sickness and accident insurance policies where the policyholder is the insured person.

(2) For the purposes of calculating taxable income, it shall not be permitted to deduct premiums or contributions to pension and other insurance schemes listed in subparagraph 1. For the purposes of calculating an employee’s taxable income, premiums or contributions paid by his present or a former employer shall be included ...

(3) For the purposes of calculating taxable income, returns from life assurance contracts and pension schemes listed in subparagraph 1 shall be included …

…

(5) For the purposes of calculating taxable income, benefits payable under pension and other insurance schemes listed in subparagraph 1 shall be disregarded.’

18 Paragraph 53B of that law provides:

‘(1) Without prejudice to the provisions of Paragraph 53A, where in respect of life assurance contracts listed in point 1 of Paragraph 53A(1), schemes with pension funds listed in point 3 of Paragraph 53A(1) and sickness and accident insurance policies listed in point 5 of Paragraph 53A(1) the conditions of subparagraphs 2 and 3 are met the provisions of subparagraphs 4 to 6 shall apply. The same shall apply in respect of foreign pension schemes which have been established with financial institutions.

(2) It shall be a requirement that the pension or other insurance scheme listed in subparagraph 1 was entered into at a time when the policyholder or person entitled under the scheme was not liable to tax under Paragraph 1 of the Law on deduction of tax at source or when, notwithstanding that person’s liability to tax under Paragraph 1 of the Law on deduction of tax at source, he was resident abroad, on the Faroe Islands or in Greenland within the meaning of the provisions of a double tax convention.

(3) It shall be a requirement that all contributions to pension or other insurance schemes referred to in subparagraph 1 made during the period in which the policyholder or person entitled under the scheme was neither liable to tax nor resident in Denmark were deducted from his positive taxable income in accordance with the tax law applicable in the State in which the policyholder or person entitled under the scheme was liable to tax or resident at the time when the contributions were made or that the contributions were paid by an employer in such manner that in accordance with the tax law applicable in the State in which the policyholder or person entitled under the scheme was liable to tax or resident at the time the contributions were made they were disregarded for the purpose of calculating that person’s taxable income.

(4) Paragraph 53A(2) shall apply in respect of premiums and contributions to pension and other insurance schemes referred to in subparagraph 1.

(5) For the purposes of calculating taxable income, investment returns including interest and profit entitlements derived from pension and other insurance schemes referred to in subparagraph 1 shall be disregarded.

(6) For the purposes of calculating taxable income, benefits from pension and other insurance schemes referred to in subparagraph 1 shall be included … For the purposes of calculating taxable income, those benefits shall be disregarded where they are derived from contributions made by the policyholder or person entitled under the scheme after he became liable to tax or resident in Denmark and where pursuant to subparagraph 4 and Paragraph 53A(2) deduction of the contributions for income tax purposes was not permitted.’

19 Having regard to the foregoing considerations and the explanations presented to the Court, it may be deduced from the contested legislation, firstly, that the contributions made to pension schemes covered by Part IIA of the Law on the taxation of pensions can be neither deducted nor exempted.

20 Secondly, ongoing investment returns are taxed as income on capital in accordance with Paragraph 53A(3) of the Law on the taxation of pensions. If the pension scheme is covered by

Paragraph 53B of the Law, ongoing returns are, however, not taxable.

21 Thirdly, benefits provided under pension schemes covered by Paragraph 53A of the Law on the taxation of pensions are exempt. Benefits provided under pension schemes covered by Article 53B of the Law are taxed as personal income if the policy holder was able to deduct or exempt his contributions.

22 Fourthly, Paragraph 53B of that law governs pension schemes taken out abroad by persons who, at the time the scheme was taken out, were not resident in Denmark. If the insured establishes himself in that Member State and is still resident there when the pension is paid, the benefits provided are taxable in that State. That paragraph gives Denmark the legal basis necessary for the taxation of benefits provided under foreign pension schemes where that Member State has the right to levy tax as the State of residence pursuant to a double tax convention.

Double taxation conventions

Taxation of benefits provided by retirement pension schemes pursuant to double taxation conventions entered into by the Kingdom of Denmark

23 Article 18 of the Organisation for Economic Cooperation and Development's Model Convention with respect to taxes on income and on capital ('the OECD Convention') provides, essentially, that private pensions are generally taxable in the State of residence of the recipient.

24 Denmark has entered into conventions for the avoidance of double taxation with a number of States. The conventions adopt the principles of the OECD Convention and govern, inter alia, the right to tax benefits provided under private pension schemes.

25 There are provisions corresponding to Article 18 of the OECD Convention in the conventions concluded between the Kingdom of Denmark and, respectively, the French Republic (Convention of 8 February 1957, Article 13); the Republic of Austria (Convention of 23 October 1961, as amended by the Protocol of 19 October 1970, Article 15); the Grand Duchy of Luxembourg (Convention of 17 November 1980, Article 18); the Kingdom of the Netherlands (Convention of 1 July 1996, Article 18); and the Kingdom of Spain (Convention of 3 July 1972, as amended by the Protocol of 17 March 1999, Article 18(1)). There is an analogous provision to those cited above in the convention concluded with the Swiss Confederation (Convention of 23 November 1973, Article 18).

Deductibility of contributions to foreign pension schemes pursuant to the double tax conventions entered into by the Kingdom of Denmark

26 Certain of the double tax conventions entered into by the Kingdom of Denmark permit insured persons resident in one Contracting State, when calculating their taxable income in that State, to deduct contributions made to pension schemes established in the other Contracting State.

27 This is the case with the conventions concluded with the United Kingdom of Great Britain and Northern Ireland (Convention of 11 November 1980, as amended by the Protocol of 13 October 1996, Article 28(3)), the Kingdom of the Netherlands (Convention of 1 July 1996, Article 5(5)) and the Kingdom of Sweden (Additional Agreement of 29 October 2003 to the Convention of 23 September 1996, Article 19(1) to (3)). There is a corresponding provision in the convention concluded with the Swiss Confederation (Convention of 23 November 1973, Article 25(4)).

Pre-litigation procedure

28 In its letters of formal notice of 5 April 1991 and 31 July 1992 and its supplementary letter of formal notice of 11 April 2000, the Commission drew the attention of the Danish authorities to the incompatibility of certain national provisions, concerning the deductibility or exemption of contributions to pension schemes at the time of the calculation of taxable income, with Articles 39 EC, 43 EC, 49 EC and 56 EC.

29 Following the responses of the Danish Government of 12 March and 22 December 1992 and 29 June 2000, and, after having heard the arguments of the Danish authorities at the meetings on 4 November 1997 and 14 January 2000, the Commission sent that government a reasoned opinion on 5 February 2003 claiming that, by retaining the contested legislation, the Kingdom of Denmark had failed to fulfil its obligations under those articles.

30 On 15 April 2003, in its response to the Commission's reasoned opinion, the Danish Government acknowledged that the legislation was liable to constitute an obstacle to freedom to provide services, freedom of movement for workers and freedom of establishment, but claimed that it would not constitute an obstacle to free movement of capital.

31 The Danish Government takes the view, however, that the restrictions on those freedoms are justified by overriding reasons in the public interest and the need to maintain the cohesion of the national tax system. According to that government, the national provisions on the taxation of pensions are symmetrical because a direct connection exists between the deductibility or exemption of contributions and the taxation of benefits provided.

32 Taking the view that the explanations provided by the Kingdom of Denmark in response to the reasoned opinion were not satisfactory, the Commission decided to bring the present action.

33 By order of the President of the Court of 19 November 2004, the Kingdom of Sweden was granted leave to intervene in support of the Kingdom of Denmark.

The action

The obstacles to the freedoms

34 It should be noted, at the outset, that, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law (see, in particular, Case C?80/94 *Wielockx* [1995] ECR I?2493, paragraph 16; Case C?35/98 *Verkooijen* [2000] ECR I?4071, paragraph 32; and Case C?422/01 *Skandia and Ramstedt* [2003] ECR I?6817, paragraph 25).

35 It is necessary to consider whether the contested legislation is, as the Commission argues, an obstacle to freedom to provide services, freedom of movement for workers, free movement of capital and freedom of establishment. The Danish Government disputes only the existence of an obstacle to free movement of capital.

36 According to that government, the contested legislation places no direct restriction on cross-border capital transactions paid to or by foreign pension institutions. There are merely indirect limitations arising from the obstacles which that legislation may constitute to freedom to provide services, freedom of movement for workers and freedom of establishment.

37 In that regard, first, it should be noted that the provision of insurance constitutes a service within the meaning of Article 50 EC and that Article 49 EC precludes the application of any

national legislation which, without objective justification, impedes a provider of services from actually exercising the freedom to provide them (see, to that effect, Case C?118/96 *Safir* [1998] ECR I?1897, paragraph 22; Case C?136/00 *Danner* [2002] ECR I?8147, paragraphs 25 to 27; and *Skandia and Ramstedt*, paragraphs 22 to 24).

38 With reference to the single market and in order to permit the achievement of its objectives, Article 49 EC also precludes the application of any national rules which have the effect of making the provision of services between Member States more difficult than the provision of services purely within one Member State (see *Safir*, paragraph 23).

39 In the present case, in order for pension institutions established in other Member States to offer their services on the Danish market with the same tax advantages as those offered by pension institutions established in Denmark, they must have a branch office or a permanent establishment in that Member State.

40 With regard to Article 49 EC, two categories of situation in which such a requirement is liable to have a dissuasive effect must be distinguished. In the first, service providers are dissuaded from establishing themselves in Denmark because of the costs involved. Such a situation constitutes, of itself, a denial of that freedom (see, to that effect, Case C?496/01 *Commission* v *France* [2004] ECR I?2351, paragraph 65, and Case C?439/99 *Commission* v *Italy* [2002] ECR I?305, paragraph 30). In the second, the recipients of those services are dissuaded from becoming members of a pension scheme with a pension institution established in another Member State, in view of the important role played, at the time when a pension insurance contract is taken out, by the possibility of obtaining tax relief under that head (see *Danner*, paragraph 31).

41 Secondly, with regard to freedom of movement for workers, salaried workers who have carried on an occupation in a Member State other than the Kingdom of Denmark and who are subsequently employed, or seek employment, in the latter Member State will normally have concluded their pension and life assurance contracts or invalidity and sickness insurance contracts with insurers established in the first State. It follows that there is a risk that the provisions in question may operate to the particular detriment of these workers who are, as a general rule, nationals of other Member States (see, to that effect, Case C?204/90 *Bachmann* [1992] ECR I?249, paragraph 9, and Case C?300/90 *Commission* v *Belgium* [1992] ECR I?305, paragraph 7).

42 In the present case, the grant of a right to deduct or exempt contributions, provided that the pension scheme is taken out with a pension institution established in Denmark, is, because of the efforts and costs which it entails, liable to dissuade the insured person from transferring his place of residence to Denmark and, therefore, constitutes an obstacle to freedom of movement for workers.

43 Thirdly, for the same reasons as above, the view must be taken that the contested legislation also constitutes an obstacle to the freedom of establishment in Denmark of self-employed workers who are nationals of another Member State.

44 By not granting any right to deduct or exempt contributions paid to pension institutions established in other Member States, the contested legislation is liable to dissuade self-employed workers from establishing themselves in Denmark.

45 Having regard to the foregoing, it must be held that the contested legislation constitutes an obstacle to freedom to provide services, freedom of movement for workers and freedom of establishment.

46 According to well-established case-law, however, national measures which are liable to

hinder the exercise of fundamental freedoms guaranteed by the EC Treaty or make them less attractive may nevertheless be allowed if they pursue a legitimate objective in the public interest, are appropriate to ensuring the attainment of that objective, and do not go beyond what is necessary to attain it (Case C?470/04 *N* [2006] ECR I?0000, paragraph 40).

47 Consequently, it is necessary to consider whether the obstacles found may be justified by overriding reasons in the public interest, on the one hand, as argued by the Danish Government, with the aim of maintaining the cohesion of the national tax system and, on the other, as argued by the Swedish Government, with the aim of ensuring the effectiveness of fiscal supervision and, as was argued in particular at the hearing, with that of preventing the risk of tax avoidance.

The justifications put forward

With regard to the effectiveness of supervision of the taxation and the prevention of tax avoidance

– Arguments of the parties

48 According to the Commission, other grounds in Directive 77/799, such as the requirement incumbent on the taxpayer to supply the proof required to assess whether the conditions for deductibility or exemption of contributions are met, are sufficient to ensure effective supervision of the taxation. That directive, like Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of the agricultural levies and customs duties (OJ 1976 L 73, p. 18), as amended by Council Directive 2001/44/EC of 15 June 2001 (OJ 2001 L 175, p. 17), guarantees the recovery of income tax in other Member States.

49 At the hearing, the Danish Government submitted that although the scope of Directive 76/308, as amended by Directive 2001/44, was extended in 2001 to cover direct taxes, no new obligation is imposed on foreign pension institutions to retain the tax due from taxpayers resident in the Member State in question. Accordingly the conditions on the basis of which the Court delivered the judgment in *Bachmann* remain valid.

50 According to the Swedish Government, the effectiveness of Directive 77/799 is limited by the fact that it is the national laws of the Member States which determine what information they may hold and are required to furnish pursuant to that directive. In particular, as is clear from Article 8 of the Directive, a Member State is not obliged to furnish information which it has been asked to provide where it is prevented by its laws or administrative practices from carrying out enquiries or from collecting or using such information for its own purposes or where it relies on legislation on confidentiality.

– Findings of the Court

51 The Court has held that the prevention of tax avoidance (see Case C?264/96 *ICI* [1998] ECR I?4695, paragraph 26; Joined Cases C?397/98 and C?410/98 *Metallgesellschaft and Others* [2001] ECR I?1727, paragraph 57; and Case C?315/02 *Lenz* [2004] ECR I?7063, paragraph 27) and the effectiveness of fiscal supervision (see, Case C?436/00 *X and Y* [2002] ECR I?10829, paragraph 51, and Case C?334/02 *Commission* v *France* [2004] ECR I?2229, paragraphs 31 and 32) constitute overriding requirements of general interest capable of justifying legislation which restricts the exercise of fundamental freedoms guaranteed by the Treaty (see, to that effect, Case C?386/04 *Centro di Musicologia Walter Stauffer* [2006] ECR I?0000, paragraph 32).

52 In that connection, it should be recalled that Council Directive 77/799 enables a Member State to obtain from the competent authorities of another Member State all the information

enabling it to determine the correct amount of income tax (see Case C?55/98 *Vestergaard* [1999] ECR I?7641, paragraph 26), or all the information it considers necessary to ascertain the correct amount of income tax payable by a taxpayer according to the legislation which it applies (see, to that effect, *Wielockx*, paragraph 26).

53 In the present case, the Danish authorities are in a position to check whether contributions have actually been paid by a taxpayer to an institution established in another Member State. Pursuant to Paragraph 11C(1) and (3) of Codified Law No 726 on supervision of the taxation (Bekendtgørelse af skattekontrolloven), of 13 August 2001 (*Lovtidende* 2001 A, p. 4620), persons who are members of a pension scheme abroad and who are fully taxable in Denmark are required to inform the tax administration thereof.

54 The fact that Article 8(1) of the Directive imposes no obligation on the tax authorities of Member States to collaborate where the conditions laid down in that provision are met cannot justify the lack of deductibility or exemption of contributions paid to pension schemes. There is nothing to prevent the Danish tax authorities from demanding from the person involved such proof as they consider necessary and, where appropriate, from refusing to allow deduction or exemption where such proof is not forthcoming (see, to that effect, *Bachmann*, paragraphs 18 and 20, and Case 300/90 *Commission* v *Belgium*, paragraphs 11 and 13).

55 It follows that the difficulties connected with the exchange of information in view of Directive 77/799, insofar as the latter does not permit effective verification of whether foreign pension schemes meet the conditions to which the contested legislation makes deductibility or exemption subject, do not justify the obstacles set out in paragraph 45 of the present judgment.

56 Clearly, too, the effectiveness of the supervision of the taxation of pensions paid to insured persons resident in Denmark may be ensured by means less restrictive on the freedom to provide services than the contested legislation, in particular by an obligation on taxpayers to provide documentary evidence when applying for a deduction or exemption.

57 It should be pointed out that, before receiving a pension provided by a scheme managed by a foreign pension institution, the taxpayer will normally have applied for deduction or exemption of the contributions relating thereto. The application for deduction or exemption and the documentary evidence provided by taxpayers at the time such applications are made will constitute in that regard a valuable source of information about the pensions which will be paid to taxpayers at a later stage.

58 Furthermore, it must be noted that the mere fact that a taxpayer makes contributions to a pension scheme taken out with an institution established outside Denmark cannot form the basis for a general presumption of tax avoidance or justify a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the Treaty (see, to that effect, Case C?478/98 *Commission* v *Belgium* [2000] ECR I?7587, paragraph 45, and Case C?334/02 *Commission* v *France*, paragraph 27).

59 In the light of all the foregoing, the obstacles resulting from the contested legislation cannot be justified by the effectiveness of the supervision of taxation and the prevention of tax avoidance.

The cohesion of the tax system

– Arguments of the parties

60 With regard to the existence of the cohesion of the tax system, the Commission takes the view that that cohesion is maintained if two conditions are met. On the one hand, there should be

a direct connection between deduction or exemption of contributions and taxation of benefits and, on the other, the contested legislation should provide for the possibility of granting deductibility or exemption of contributions paid to a pension scheme in another Member State except where the State of residence cannot tax the benefits provided by that scheme.

61 According to the Danish Government, as long as the contested legislation excludes taxation of benefits provided if the contributions were not deductible or exempt, it would be compatible with the Treaty to limit or exclude the possibility of deducting or exempting contributions paid to pension institutions established in other Member States. The Danish rules are symmetrical in that they do not tax benefits provided where they do not grant the right to deduct or exempt contributions paid, but tax those contributions where they do grant the right to deduct or exempt them. The cohesion of the tax system is also ensured at the level of a single taxpayer.

62 With regard to the need to ensure the cohesion of the tax system, the Commission takes the view that all pension schemes taken out with pension institutions established in other Member States should enjoy the same tax advantages as those taken out in Denmark. It is pertinent to take into account the need to ensure the cohesion of the tax system only in the event that the Kingdom of Denmark did not have the right to tax the benefits provided. The Commission adds that that Member State would lose the right to tax such benefits provided to the insured person resident in its territory, whether the pension scheme was taken out on its territory or abroad, only if that insured person transferred his residence to another Member State.

63 According to the Danish Government, the uncertainty surrounding the receipt of tax paid on benefits provided by foreign pension institutions is the determining factor justifying the need to ensure the cohesion of the tax system. On the transfer of residence of an insured person, the authorities in the Member State in question do not know at the time when contributions are being made whether the insured person will emigrate and it is also unknown, therefore, whether, pursuant to a double taxation convention, tax will be paid not in the Member State in which the contributions were made and in respect of which deductions or exemptions were granted, but in the new State of residence.

64 The Swedish Government states that the cohesion of the tax system requires that the tax authorities accept deductibility or exemption of contributions to pension schemes from taxable income only if they are certain that the capital paid by the pension institution on maturity of the pension scheme will actually be taxed.

– Findings of the Court

65 At the outset, it is necessary to consider the argument of the Danish Government that the Commission, by arguing that the need to ensure the cohesion of the tax system can be relied on only in the event that the Kingdom of Denmark could no longer tax the benefits provided by foreign pension institutions, that is to say in the event that the insured persons ceased to be resident in Denmark, put forward an argument which did not appear in the letter of formal notice or in the reasoned opinion.

66 In that regard, in the context of proceedings for failure to fulfil obligations, the purpose of the pre-litigation phase is to give the Member State concerned an opportunity, on the one hand, to comply with its obligations under Community law and, on the other, to avail itself of its right to defend itself against the charges formulated by the Commission (see Case C?494/01 *Commission* v *Ireland* [2005] ECR I?3331, paragraph 33).

67 Furthermore, it is clear from the case-law of the Court that the Commission’s reasoned opinion and the action must be based on the same grounds without, however, going so far as to

make it necessary that in every event they should be completely identical (see, to that effect, Case C?417/02 *Commission* v *Greece* [2004] ECR I?7973, paragraph 17).

68 In the present case, by producing merely an argument intended to support one of the complaints set out in the reasoned opinion to show that the cohesion of the tax system is not sufficient to justify obstacles to the abovementioned freedoms, the Commission has not raised a new ground, nor has it failed to respect the principle of the rights of the defence of the Danish Government.

69 It follows that the plea of inadmissibility raised by the Danish Government must be rejected.

70 With regard to the justification of the cohesion of the tax system, it is established that the need to preserve such cohesion requires the existence of a direct link between a tax advantage and a corresponding disadvantage (see Case 300/90 *Commission* v *Belgium*, paragraph 14; Case C?484/93 *Svensson and Gustavsson* [1995] ECR I?3955, paragraph 18; *ICI*, paragraph 29; *Vestergaard*, paragraph 24; Case C?478/98 *Commission* v *Belgium*, paragraph 35; and *X and Y*, paragraph 52).

71 In that regard, the factor liable adversely to affect the cohesion of the Danish tax system is to be found in the fact that the transfer of the residence of the person concerned occurs between the time of payment of contributions to a pension scheme and that of payment of the corresponding benefits, and less in the fact that the pension institution is in another Member State.

72 When a Danish resident, having become a member of a pension scheme with an institution established in Denmark, receives tax advantages on the contributions paid into that scheme, then, before benefits fall to be paid, transfers his residence to another Member State, the Kingdom of Denmark is deprived of the power to tax the benefits corresponding to the contributions deducted or exempted, at least where it has concluded with the Member State to which the person concerned has transferred his residence a double taxation convention based on the OECD Convention. However, in such a case, that result is not due to the fact that the pension institution is established abroad.

73 Conversely, there is nothing to prevent the Kingdom of Denmark from exercising its power of taxation over the benefits paid by a pension institution established in another Member State to a taxpayer still resident in Denmark when that payment is made, as a counterbalance to the contributions which it allowed to be deducted or exempted. It is only in the case where, before benefits fall to be paid, that taxpayer transferred his residence to a Member State other than the Kingdom of Denmark that it might encounter difficulties in taxing the benefits paid and where, therefore, the cohesion of the Danish tax system with regard to the taxation of private pensions would be adversely affected.

74 It follows that, by refusing in general to grant a tax advantage in respect of contributions paid to a pension institution established in another Member State, the contested legislation cannot be justified by the need to guarantee the cohesion of the tax system.

75 It follows from the foregoing that the contested legislation cannot be justified either by considerations of the effectiveness of the supervision of taxation and the prevention of tax avoidance or by the need to ensure cohesion of the tax system.

76 Since the provisions of the Treaty on freedom to provide services, free movement for workers and freedom of establishment preclude the contested legislation, it is not necessary to consider that legislation separately in the light of Article 56 EC on free movement of capital (see, to that effect, Case C?345/05 *Commission* v *Portugal* [2006] ECR I?0000, paragraph 45).

77 Consequently, it must be held that, by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC.

Costs

78 Under the first subparagraph of Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission applied for the Kingdom of Denmark to be ordered to pay the costs and the latter has been unsuccessful, it must be ordered to pay the costs. Under the first subparagraph of Article 69(4), the Kingdom of Sweden, which has intervened in the proceedings, is to bear its own costs.

On those grounds, the Court (Grand Chamber) hereby:

1. **Declares that, by introducing and maintaining in force a system for life assurance and pensions under which tax deductions and tax exemptions for payments are granted only for payments under contracts entered into with pension institutions established in Denmark, whereas no such tax relief is granted for payments made under contracts entered into with pension institutions established in other Member States, the Kingdom of Denmark has failed to fulfil its obligations under Articles 39 EC, 43 EC and 49 EC;**

2. **Orders the Kingdom of Denmark to pay the costs;**

3. **Orders the Kingdom of Sweden to bear its own costs.**

[Signatures]

* Language of the case: Danish.