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Opinion of Mr Advocate General Tesauro delivered on 28 September 1993. - Commission of the European Communities v Kingdom of Denmark. - Article 33 of the Sixth VAT Directive - Turnover tax - Law relating to the labour market contribution. - Case C-234/91.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1. In these proceedings the Commission claims that a Danish tax, the labour market contribution (hereinafter "the contribution") introduced by Law No 840 of 18 December 1987 ("Law No 840"), is incompatible with Article 33 of the Sixth Council Directive 77/338/EEC ("the Sixth Directive"). (1) I would observe forthwith that the Court has already had occasion to give a preliminary ruling on the compatibility of Law No 840 in the judgment in Dansk Denkavit. (2)

2. Whilst I would refer to the Report for the Hearing and to the judgment in Dansk Denkavit for further particulars, I shall start by recalling the main aspects of the rules governing the tax at issue. The contribution in question, as governed by Law No 840 as amended, is imposed in principle on any commercial activity consisting in the supply of goods or services (see Article 1 of Law No 840). Saving a few exceptions, it is charged on both activities subject to VAT and to activities exempt from VAT (see Article 2 of Law No 840).

3. As regards the basis of assessment of the contribution, a distinction can be made between two possibilities: (a) contribution based on value added and (b) contribution based on aggregate wages and salaries.

(a) The contribution levied on value added affects both activities subject to VAT and a number of activities exempt from VAT. As regards the former, the basis of assessment of the contribution is identical to that of VAT; it is therefore charged on the difference between the value of sales and the value of purchases as they are accounted for for the purposes of charging VAT (see Article 7 of Law No 840). As regards the latter, the basis of assessment is also constituted by the value of sales less the value of purchases (see Article 8(1)(1) of Law No 840); in that case, of course, it is not possible to use VAT accounting as the basis, since the activities are not subject to VAT; however, the basic criterion remains the same, since the contribution is levied on the value added by the relevant activities.

(b) The contribution based on aggregate wages and salaries relates to a number of activities which are not subject to VAT and specifically set out in the Law for which the criterion of value added is not applicable (see Article 8(1)(2) of Law No 840). The activities in question are chiefly activities of the financial sector. In relation to such activities, the contribution is charged on the amount of aggregate wages and salaries paid by the undertaking increased by a flat-rate 90%.

4. This action, as the Commission made clear inter alia at the hearing, is directed both against the contribution imposed on value added and against the contribution based on aggregate wages and salaries. I shall consider those two heads of the action separately.

The contribution based on value added

5. In this connection, the Danish Government maintains that the action is to no purpose and hence inadmissible, since the contribution was repealed by Law No 891 of 21 December 1991 and declared incompatible with Article 33 of the Sixth Directive by the Court in the judgment giving a preliminary ruling in Dansk Denkavit.

6. In that connection, as the Court has consistently held, the subject-matter of an action brought under Article 169 of the Treaty is defined by the Commission' s reasoned opinion and even where the contested infringement has been brought to an end after the expiry of the period prescribed by the reasoned opinion, there remains an interest in pursuing the action. (3) In the instant case it is clear that the tax legislation at issue was not amended by the Danish legislature until after the proceedings were brought and that hence when the period prescribed by the reasoned opinion expired, the legislation in question was still in force. Consequently, from that point of view the application cannot be regarded as being to no purpose.

7. As for the fact that in dealing with the request for a preliminary ruling in Dansk Denkavit the Court has already considered whether Article 33 of the Sixth Directive precludes the application of the Danish contribution charged on value added, it should be held that that has no bearing on the admissibility of these proceedings.

In the context of the system of judicial remedies created by the Treaty, references for preliminary rulings under Article 177 have completely independent and different objectives and effects by comparison with the infringement proceedings provided for in Article 169; consequently, the existence of remedies available through the national courts, in the context of which a reference for a preliminary ruling under Article 177 can be made, cannot in any way prejudice the making of the application referred to in Article 169. (4) Subject, therefore, to the Commission' s power to discontinue infringement proceedings at any time, it must be considered that the mere fact that national legislation has already been considered by the Court in proceedings brought under Article 177 is not in itself such as to render proceedings brought by the Commission under Article 169 against the same legislation to no purpose and hence inadmissible.

8. Furthermore, it should also be observed that the Danish Government' s objection to the effect that the Court' s judgment in Dansk Denkavit makes it pointless to pursue these infringement

proceedings is based on an assessment simply of the expediency of maintaining the Article 169 proceedings, which is a matter for the Commission alone to assess and does not fall within the purview of the Court. As the Court has consistently held, under the system established by Article 169 of the Treaty, the Commission enjoys a discretionary power as to whether it will bring and pursue an action for failure to fulfil obligations and it is not for the Court to judge whether that discretion was wisely exercised. (5)

9. As for the substance, I note that the Danish Government acknowledges that the charge made against it is well founded. It therefore recognizes that the contribution charged on the value added by undertakings, whether or not they are taxable persons for the purposes of VAT, which was introduced by Law No 840 constitutes a turnover tax within the meaning of Article 33 of the Sixth Directive and is therefore prohibited by Community law. It is, moreover, for that reason that the Danish legislature decided to repeal the legislation at issue by adopting, albeit belatedly, Law No 891 of 21 December 1991. Furthermore, it should be stressed that in the judgment in Dansk Denkavit the Court clearly held that the contribution based on value added was in the nature of a turnover tax which was incompatible with Article 33 of the Sixth Directive.

10. I therefore consider that the first head of the action is admissible and well founded.

The contribution based on aggregate wages and salaries

11. As for the second head of the action, concerning the contribution based on aggregate wages and salaries (plus 90%), the Danish Government points out that the Commission did not make any complaint specifically with regard to that levy in the pre-litigation phase of the procedure. Indeed, the Government observes, on close examination objections to the contribution based on aggregate wages and salaries do not appear even in the application; it is only in the reply that the Commission, for the first time, challenges the consistency of the contribution based on aggregate wages and salaries with Article 33 of the Sixth Directive. Consequently, the complaint made with regard to that aspect of the Danish legislation at issue should be regarded as inadmissible.

12. I shall say forthwith that I consider that the Danish Government' s objection to that head of the action is completely justified on the following grounds.

I would recall in the first place that, according to well-known case-law, an action brought under Article 169 is inadmissible in so far as it relates to complaints not covered by the pre-litigation procedure and, likewise, a complaint raised before the Court which has not been duly set out in the application is inadmissible. (6)

I would also point out that in a recent judgment it was specifically stated that in infringement proceedings both the complaints made against a Member State and the arguments on which they are based should be set out sufficiently clearly and precisely in order to enable the defendant Member State fully to exercise its right to defend itself and the Court to assess fully and in detail whether the complaints are well founded. According to that case-law, the Commission must indicate the specific complaints on which the Court is called upon to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. (7)

13. In this case, it should be observed that the contribution based on aggregate wages and salaries constituted ° at least in an essential respect, that of the basis of assessment ° a tax which was completely different from the charge based on value added. Consequently, the Commission should have specifically challenged its legality, as it did in the case of the contribution based on value added, by specifying, as from the pre-litigation phase, the legal and factual particulars supporting its claim.

14. In contrast, the Commission merely refers to the contribution based on aggregate wages and salaries in its general description of the system provided for by Law No 840 and neither in the pre-

litigation phase nor in the application itself did it set out any specific complaint regarding that contribution or indicate the reasons for which it maintains that it is incompatible with Article 33 of the Sixth Directive (no such reasons, moreover, are even given in the reply). As the Danish Government rightly observes, the legal arguments set out by the Commission relate in fact only to the contribution charged on value added: the Commission analyses only the nature and lawfulness of that charge ° and not the nature and lawfulness of the different contribution based on aggregate wages and salaries ° in order to reach the conclusion that it is a turnover tax prohibited by Article 33 of the Sixth Directive.

15. Furthermore, it emerged unambiguously from the arguments put forward at the hearing that neither in the form of order sought nor in the part of the application dealing with the law ° and not even in the documents of the pre-litigation phase ° did the Commission actually set out any complaints about the contribution based on aggregate wages and salaries.

16. I therefore consider that the head of the action relating to that contribution, which the Commission set out only in the reply (moreover in vague, general terms), must be regarded as being manifestly inadmissible.

17. In the alternative, in case the complaint should be held to be admissible, I would argue that it should be dismissed in any event as unfounded. As I have already mentioned, the Commission has not adduced ° not even at the hearing ° any particulars showing that the contribution based on aggregate wages and salaries (plus 90%), which has very different characteristics from the contribution based on value added, is in the nature of a turnover tax within the meaning of the Sixth Directive; on the contrary, the details contained in the case file seem instead to suggest that it is not in the nature of a turnover tax, since the contribution based on aggregate wages and salaries is not charged on a "cascade" basis at each stage of the marketing chain and does not take the form of a tax on value added.

18. In the light of the foregoing, I propose that the Court should rule as follows:

By introducing and maintaining by Law No 840 of 18 December 1987 a labour market contribution which, under Article 7 and Article 8(1)(1) of that law, is charged on the value added produced by undertakings subject thereto, the Kingdom of Denmark has failed to fulfil its obligations under Article 33 of the Sixth Directive.

In contrast, that part of the application relating to the labour market contribution which, under Article 8(1)(2) of Law No 840, is charged on the basis of the aggregate wages and salaries, plus 90%, paid by certain undertakings not subject to VAT which are specified in that law, is inadmissible.

(*) Original language: Italian.

(1) ° Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes ° Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1).

(2) ° Judgment of 31 March 1992 in Case C-200/90 Dansk Denkavit and Poulsen v Skatteministeriet [1992] ECR I-2217.

(3) ° See, for example, the judgments in Case 283/86 Commission v Belgium [1988] ECR 3271, in Case C-200/88 Commission v Greece [1990] ECR I-4299 and in Case C-347/88 Commission v Greece [1990] ECR I-4747.

(4) ° See the judgments in Case 31/69 Commission v Italy [1970] ECR 25, paragraph 9, and in Case 85/85 Commission v Belgium [1986] ECR 1149, paragraph 24.

(5) ° Judgments in Case C-200/88 Commission v Greece, cited in footnote 3, and in Case C-209/88 Commission v Italy [1990] ECR I-4313.

(6) ° See the judgment in Case 298/86 Commission v Belgium [1988] ECR 4343, paragraphs 8 and 10.

(7) ° See the judgment in Case C-347/88 Commission v Belgium, cited in footnote 3, paragraphs 24, 28 and 29.