JUDGMENT OF THE COURT (Fifth Chamber)

10 June 1999 *

In Case C-346/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Länsrätten i Dalarnas län (Sweden) for a preliminary ruling in the proceedings pending before that court between

Braathens Sverige AB, formerly Transwede Airways AB,

and

Riksskatteverket,

on the interpretation of Article 8(1) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12),

* Language of the case: Swedish

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the First Chamber, acting for the President of the Fifth Chamber, J.C. Moitinho de Almeida (Rapporteur), C. Gulmann, D.A.O. Edward and M. Wathelet, Judges,

Advocate General: N. Fennelly,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Transwede Airways AB, by Pether Römbo, of the Göteborg Bar,

— the Commission of the European Communities, represented by Enrico Traversa and Knut Simonsson, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Braathens Sverige AB, represented by Pether Römbo, Henrik Norinder, of the Lund Bar, and Peter Thungren, of the Göteborg Bar, the Riksskatteverket, represented by Maj-Britt Remstam, Processansvarig, acting as Agent, and the Commission, represented by Knut Simonsson, at the hearing on 17 September 1998,

after hearing the Opinion of the Advocate General at the sitting on 12 November 1998,

gives the following

Judgment

1 By order of 3 September 1997, received at the Court Registry on 6 October 1997, the Länsrätten i Dalarnas län (County Administrative Court, Dalarna) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 8(1) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils (OJ 1992 L 316, p. 12).

2 Those questions were raised in proceedings brought by Braathens Sverige AB (formerly Transwede Airways AB, hereinafter 'Braathens') against the Swedish tax administration in relation to the payment in respect of periods between January 1995 and June 1996 of a national environmental protection tax on domestic commercial aviation.

Community legislation

3 According to Article 1 of 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),

'1. This directive lays down the arrangements for products subject to excise duties and other indirect taxes which are levied directly or indirectly on the consumption of such products, except for value added tax and taxes established by the Community.

2. The particular provisions relating to the structures and rates of duty on products subject to excise duty shall be set out in specific directives.'

4 Pursuant to Article 3(1) and (2) of the same directive,

'1. This directive shall apply at Community level to the following products as defined in the relevant directives:

— mineral oils,

— alcohol and alcoholic beverages,

— manufactured tobacco.

2. The products listed in paragraph 1 may be subject to other indirect taxes for specific purposes, provided that those taxes comply with the tax rules applicable for excise duty and VAT purposes as far as determination of the tax base, calculation of the tax, chargeability and monitoring of the tax are concerned.'

5 According to Article 1(1) and (2) of Directive 92/81, Member States are to impose a harmonised excise duty on mineral oils in accordance with the directive and are to fix their rates in accordance with Council Directive 92/82/EEC of 19 October 1992 on the approximation of the rates of excise duty on mineral oils (OJ 1992 L 316, p. 19).

6 As regards mineral oils other than those for which a level of duty is specified in Directive 92/82, Article 2(2) of Directive 92/81 provides that they 'shall be subject to excise duty if intended for use, offered for sale or used as heating fuel or motor fuel. The rate of duty to be charged shall be fixed, according to use, at the rate for the equivalent heating fuel or motor fuel.'

7 Article 8(1) of Directive 92/81 provides:

'1. In addition to the general provisions set out in Directive 92/12/EEC on exempt uses of excisable products, and without prejudice to other Community provisions, Member States shall exempt the following from the harmonised excise duty under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse:

...

(b) mineral oils supplied for use as fuels for the purpose of air navigation other than private pleasure flying.

For the purposes of this directive, "private pleasure flying" shall mean the use of aircraft by its owner or the natural or legal person who enjoys its use either through hire or through any other means, for other than commercial purposes and in particular other than for the carriage of passengers or goods or for the supply of services for consideration or for the purposes of public authorities.

Member States may limit the scope of this exemption to supplies of jet fuel (CN code 2710 00 51);

...'

National legislation

8 According to the order for reference, until 1 January 1997 the 1988 års Lag om Miljöskatt på Inrikes Flygtrafik (Law 1988:1567 on Environmental Tax on Domestic Air Navigation, hereinafter 'the 1988 Law') provided for payment to the State, in respect of domestic commercial aviation, of an environmental protection tax calculated on fuel consumption and emissions of hydrocarbons and nitric oxide.

9 In 1995 and 1996, the tax was calculated in accordance with Article 6(1) of the 1988 Law, as then in force, by reference to data kept by the Luftfartsverket (Swedish Civil Aviation Authority) on the fuel consumption and emissions of hydrocarbons and nitric oxide from the type of aircraft used on an average flight. Under Article 6(2) of the 1988 Law, the tax was charged on each flight, at rates of SEK 1 per kilogram of aviation fuel consumed and SEK 12 per kilogram of

hydrocarbons and nitric oxide emitted. Where no reliable data was available for emissions of hydrocarbons and nitric oxide for the purposes of Article 6(1) of the 1988 Law, the tax was calculated by reference to the maximum permissible take-off weight of the aircraft in question.

10 The 1988 Law was repealed, with effect from 1 January 1997, by Law 1996:1407. Since that date, aviation spirit and kerosene have been exempt from energy and carbon tax in Sweden by virtue of the 1994 års Lag om Skatt på Energi (Law 1994:1776 on the Taxation of Energy).

The dispute in the main proceedings

11 The Skattemyndigheten i Kopparbergs län (renamed the Skattemyndigheten i Dalarnas län with effect from 1 January 1997, hereinafter 'the tax authorities') served several notices of assessment requiring Braathens to pay the tax provided for in Article 6 of the 1988 Law, as amended, in respect of periods between January 1995 and June 1996. Following a complaint lodged by Braathens against those notices of assessment, the latter were confirmed by decision of the tax authorities of 15 August 1996. Braathens then appealed to the Länsrätten i Dalarnas län.

12 By decision of that court in respect of certain periods and by decision of the tax authorities in respect of other periods, Braathens was granted a deferment of payment of the tax owing to the uncertainty of the outcome of the main proceedings. By decision of 12 June 1997, the Riksskatteverket (National Tax Board) was substituted for the Skattemyndigheten i Dalarnas län in the main proceedings.

The questions referred to the Court

13 In the proceedings before the national court, the parties disagree as to whether the tax at issue falls within the scope of Directive 92/81, whether that directive has direct effect and whether it is possible to subdivide the tax into one part which is in conformity with Community law and another which is not. The national court considers that doubts exist as to how those issues should be resolved and has stayed proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'1. Are the taxation measures described herein, adopted under Law 1988:1567 on Environmental Tax on Domestic Air Navigation, contrary to Council Directive 92/81/EEC ("the Mineral Oils Directive"), Article 8(1)(b) of which provides that Member States are to exempt from harmonised excise duty mineral oils supplied for use as aviation fuel except for private pleasure flying?

2. If Question 1 is answered in the affirmative, can Article 8(1)(b) of the Mineral Oils Directive be regarded as having direct effect, so that the provision can be relied on by an individual against a State authority before a national court?

3. If the Mineral Oils Directive is to be applied in the present case, can the taxation measures in question be split up into EC-compatible and EC-incompatible parts, owing to the fact that Swedish environmental tax is calculated partly on the basis of fuel consumption and partly on the basis of emissions of hydrocarbons and nitric oxides?'

The first and third questions

14 It should be noted at the outset that, according to settled case-law, it is not for the Court, in the context of Article 177 of the Treaty, to determine whether national provisions are compatible with Community law. However, the Court may provide the national court with all the criteria for the interpretation of Community law which may enable it to assess whether those provisions are so compatible in order to give judgment in the proceedings before it (see, in particular, Case 6/64 *Costa* v *ENEL* [1964] ECR 585).

15 In those circumstances, by its first and third questions the national court must be deemed to be asking, essentially, whether Article 8(1) of Directive 92/81 precludes the collection of a tax such as that levied on Swedish domestic commercial aviation which is calculated by reference to data on fuel consumption and emissions of hydrocarbons and nitric oxide during an average flight by the type of aircraft used.

16 The Riksskatteverket maintains that the tax at issue in this case is in fact intended to protect the environment and, contrary to the view taken by Braathens and the Commission, is charged not directly on fuel consumption but on the polluting emissions of carbon dioxide and hydrocarbons from aircraft used in national commercial aviation, so that Directives 92/12 and 92/81 are irrelevant.

17 The Riksskatteverket submits that it is clear from the background to the 1988 Law that the legislature's aim was to limit the pollution caused by air traffic, to cover the portion of the macroeconomic costs of air traffic attributable to the exhaust gas emissions of such traffic and to foster the development of more ecologically acceptable aircraft engines.

18 As regards determination of the amount of such pollution, the Riksskatteverket contends that the most satisfactory approach is to calculate the quantity of polluting substances emitted by the aircraft on the basis either of the number of litres of fuel consumed or of the volume of pollution emitted.

19 The Riksskatteverket considers that the calculation of the pollution due to emissions of hydrocarbons and nitric oxide, on which part of the tax at issue is based, does not take fuel consumption into account. The calculation is based on information supplied by the civil aviation authority on the emissions from each type of aircraft during an average flight, which enables the average pollution to be determined.

20 As regards the part of the tax at issue which relates to the carbon dioxide emissions resulting from combustion of fuel from the aircraft's tank, the most precise method of calculation — which has been adopted — is that based on data relating to the fuel consumed. In practice, it is a flat-rate calculation of the average quantity consumed by an aircraft during a standard flight segment, so that the tax is levied in respect of each flight and not on the quantity of kerosene actually burned, which demonstrates that it is not a tax on fuel consumption.

21 The Riksskatteverket concludes that, since the tax at issue is not a tax on the fuel used but an ecological tax on polluting emissions from domestic commercial air traffic, Directives 92/12 and 92/81 are not applicable. In the alternative, the Riksskatteverket contends that, in any event, the part of the tax which is based on emissions of hydrocarbons and nitric oxide is in conformity with Community law since there is no direct link between fuel consumption and those emissions.

22 It must be observed that the tax at issue is calculated on the basis of data supplied by the national civil aviation authority on fuel consumption and emissions of hydrocarbons and nitric oxide by the relevant type of aircraft on an average flight.

23 By virtue of Article 1(1), Directive 92/12 is concerned with products subject to excise duties and other indirect taxes which are levied, even if indirectly, on the consumption of such products. Moreover, as Braathens and the Commission have correctly pointed out, there is a direct and inseverable link between fuel consumption and the polluting substances referred to in the 1988 Law which are emitted in the course of such consumption, so that the tax at issue, as regards both the part calculated by reference to the emissions of hydrocarbons and nitric oxide and the part determined by reference to fuel consumption, which relates to carbon dioxide emissions, must be regarded as levied on consumption of the fuel itself for the purposes of Directives 92/12 and 92/81.

24 In that connection, it is clear from Article 8(1)(b) of Directive 92/81 that a tax of the kind at issue in this case is incompatible with the harmonised tax system introduced by the abovementioned directives. To allow the Member States to levy another indirect tax on products which, as in this case, must be exempted from harmonised excise duty under Article 8(1)(b) of Directive 92/81 would render that provision entirely ineffective.

25 A Member State which has introduced such a tax cannot therefore rely on the right conferred by Article 3(2) of Directive 92/12 to maintain or introduce national taxes for specific purposes in respect of products subject to the harmonised excise duty.

26 In those circumstances, the answer to the first and third questions must be that Article 8(1) of Directive 92/81 precludes the collection of a tax of the kind at issue in this case, which is levied on domestic commercial aviation and is

calculated by reference to data on fuel consumption and emissions of hydrocarbons and nitric oxide during an average flight by the type of aircraft used.

The second question

27 According to the Riksskatteverket, Directive 92/81 does not have direct effect. First, the object of that directive is to harmonise the legislation of the Member States and it does not therefore create rights in favour of individuals and, second, it lacks precision and clarity and its application calls for the adoption of additional procedural rules.

28 That argument cannot be upheld.

29 It is clear from the case-law of the Court that wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the State (see, with respect to Article 13 of the Sixth Directive, Council Directive 77/388/EEC of 17 May 1977 on the harmonisation 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), Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 25).

30 Although Directive 92/81 allows the Member States a varying degree of latitude in implementing certain of its provisions, individuals may not for that reason be denied the right to rely on any provisions which, owing to their particular subject-

matter, are capable of being severed from the general body of provisions and applied as such (see, *mutatis mutandis,* paragraph 29 of *Becker*, cited above).

31 That is the position here. Article 8(1)(b) of Directive 92/81 imposes on the Member States, first, the clear and precise obligation not to levy the harmonised excise duty on fuel used for the purpose of air navigation other than private pleasure flying. Second, the degree of latitude afforded to Member States by the introductory wording of Article 8(1), whereby exemptions are granted by the Member States 'under conditions which they shall lay down for the purpose of ensuring the correct and straightforward application of such exemptions and of preventing any evasion, avoidance or abuse', cannot detract from the unconditional nature of the obligation imposed by that provision to grant exemption (see, *mutatis mutandis,* paragraphs 32 to 35 of *Becker*, cited above).

32 In those circumstances, the obligation to exempt from the harmonised excise duty the fuel used for the purpose of air navigation other than private pleasure flying is sufficiently clear, precise and unconditional to confer on individuals the right to rely on it in proceedings before national courts with a view to contesting national rules that are incompatible with it.

33 Consequently, the answer to the second question must be that the obligation imposed by Article 8(1)(b) of Directive 92/81 to exempt from the harmonised excise duty mineral oils supplied for use as fuel for the purpose of air navigation other than private pleasure flying may be relied on by individuals in proceedings before national courts in order to contest national rules that are incompatible with that obligation.

Costs

34 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable. 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 (Fifth Chamber)

in answer to the questions referred to it by the Länsrätten i Dalarnas län by order of 3 September 1997, hereby rules:

1. **Article 8(1) of Council Directive 92/81/EEC of 19 October 1992 on the harmonisation of the structures of excise duties on mineral oils precludes the collection of a tax of the kind at issue in this case, which is levied on domestic commercial aviation and is calculated by reference to data on fuel consumption and emissions of hydrocarbons and nitric oxide during an average flight by the type of aircraft used.**

2. **The obligation imposed by Article 8(1)(b) of Directive 92/81 to exempt from the harmonised excise duty mineral oils supplied for use as fuel for the**

purpose of air navigation other than private pleasure flying may be relied on by individuals in proceedings before national courts in order to contest national rules that are incompatible with that obligation.

Jann Moitinho de Almeida Gulman

Edward Wathelet

Delivered in open court in Luxembourg on 10 June 1999.

R. Grass

Registrar

J.-P. Puissochet

President of the Fifth Chamber