

Case T-170/00

Förde-Reederei GmbH

v

Council of the European Union
and Commission of the European Communities

(Non-contractual liability of the Community — Directive 92/12/EEC on the general arrangements for products subject to excise duty — Damage caused by transitional tax exemption arrangements for products bought by travellers during sea-crossings between two Member States)

Judgment of the Court of First Instance (Second Chamber), 20 February
2002 II- 518

Summary of the Judgment

1. *Non-contractual liability — Conditions — Legislative measure involving choices of economic policy — Sufficiently serious breach of a superior rule of law for the protection of individuals — Abolition by the Community legislature of tax exemption arrangements for products supplied in the context of the transport of passengers between the Member States — Community liability — Not incurred (Art. 288, second para., EC; Council Directive 92/12, Art. 28)*

2. *Non-contractual liability — Conditions — Abolition by the Community legislature of tax exemption arrangements for products supplied in the context of the transport of passengers between the Member States — Lawful act — Lack of unusual and special damage — Community liability — Not incurred*
(Art. 288, second para., EC; Council Directive 92/12, Art. 28)

1. The implementation, by acts of a legislative nature, of Article 8a of the Treaty (which was inserted by the Single European Act, subsequently became Article 7a of the Treaty and then, after amendment, Article 14 EC), which provides that ‘the internal market shall comprise an area without internal frontiers’, manifestly falls within the ambit of economic policy choices and of the Community institutions’ wide discretion, with the result that non-contractual liability of the Community can be incurred in that respect only if it is found that there has been a clear, that is to say, a manifest and serious, breach of a higher-ranking rule of law for the protection of individuals.

The abolition by the Council of the tax exemption arrangements for products supplied in the context of passenger transport by air or sea between the Member States, laid down in Article 28 of Directive 92/12 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and the fact that the Commission has not submitted proposals to the Council

for the maintenance of such arrangements cannot give rise to non-contractual liability on the part of the Community on the basis of unlawful conduct causing damage to an undertaking providing intra-Community transport by ferries selling tax-free goods on board. The abolition of the tax exemption in question, on the ground that it is contrary to the principle of an area without internal frontiers, cannot be held to be a wrongful act, and certainly not one of a serious and manifest nature, since, in the context of the area without internal tax frontiers created by the Single European Act, within which all goods are subject to excise duty, there is no higher-ranking rule of law obliging the Community legislature to link the mere crossing a national frontier in a boat to a tax exemption for goods bought during the journey. On the contrary, the principle of a single area authorises the legislature to treat such transport for tax purposes in the same way as, for example, travel within a single State, which has neither internal frontiers nor purely transport-related tax exemptions, or intra-Community transport by coach or train which does not benefit from ‘tax-free’ arrangements either.

(see paras 46-50, 53)

2. In the event of the principle of Community liability for a lawful act being recognised in Community law, a precondition for such liability would in any event be the existence of 'unusual' and 'special' damage to be defined as follows: special damage is that which affects a particular class of economic operators in a disproportionate manner by comparison with other operators and unusual damage is that which exceeds the limits of the economic risks inherent in operating in the sector concerned, the legislative measure that gave rise to the damage pleaded not being justified by a general economic interest.

As regards the abolition by the Council of the tax exemption arrangements for products supplied in the context of passenger transport by air or sea between the Member States, laid down in Article 28 of Directive 92/12 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, and the fact that the Com-

mission has not submitted proposals to the Council for the maintenance of such arrangements, those two conditions are clearly not satisfied where an undertaking has, following the abolition of the tax exemption in question, ceased to exercise its commercial activity of providing intra-Community transport by ferries selling tax-free goods on board since, first, the Directive concerns the undertaking only in its objective capacity as an economic operator which, after the expiry of the transitional arrangements under Article 28, could engage in an economic activity to which the Directive applied, in the same way as all the other economic operators within the Community carrying on the same activity and since, second, the economic and commercial risks inherent in that activity were not exceeded as the activity, which was centred on a tax exemption, was inevitably exposed to the risk of changes to Community tax law.

(see paras 56-59)