JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
20 February 2002 *

In Case T-170/00,

Förde-Reederei GmbH, established in Flensburg (Germany), represented by U. Schrömbges and L. Harings, lawyers, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by A.-M. Colaert and J.-P. Hix, acting as Agents,

and

Commission of the European Communities, represented by E. Traversa, R. Lyal and K. Gross, acting as Agents, with an address for service in Luxembourg,

defendants,

* Language of the case: German.

APPLICATION seeking compensation for damage allegedly suffered following the expiry of the transitional tax exemption arrangements provided by Article 28 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),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 27 November 2001,

gives the following

Judgment

Legal background

1 Before the adoption of the tax arrangements at issue Community legislation in relation to excise duty was to be found in particular in Directive 69/169/EEC of

the Council of 28 May 1969 on the harmonisation of provisions laid down by law, regulation or administrative action relating to exemption from turnover tax and excise duty on imports in international travel (OJ, English Special Edition 1969 (1), p. 232) which provided, in the context of travel between Member States, an allowance on the excise duty on goods in travellers' personal luggage. It allowed tax-free shops on ferries and in airports to sell goods without paying excise duty when such goods were to be exported to other Member States.

2 Later, Article 13 of the Single European Act supplemented the EEC Treaty by inserting therein Article 8a which, in the Treaty on European Union, became Article 7a of the EC Treaty and then, in the Treaty of Amsterdam, Article 14 EC, according to which

'[T]he Community shall adopt measures with the aim of progressively establishing the internal market over a period expiring on 31 December 1992, in accordance with the provisions... of Article... 99.... The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured ...'.

3 Under Article 99 of the EC Treaty (now Article 93 EC) — also introduced by the Single European Act —, the Council is to adopt provisions for the harmonisation of legislation concerning in particular excise duties to the extent that such harmonisation is necessary to ensure the establishment and the functioning of the internal market.

4 It is on the basis of that provision that the Commission, in its proposal for a Council directive on the general arrangements for products subject to excise duty

and on the holding and movement of such products (OJ 1990 C 322 of 21 December 1990, p. 1), considered that, with a view to the abolition of tax barriers between Member States, taxes on imports and exemptions for exports had to be reserved for transactions carried out in territories outside the Community and that tax exemptions were no longer justified in the context of intra-Community trade. That proposal for a directive did not include special rules or derogations for such traffic. However, during the Council's preparatory work, temporary derogating rules for the supply of products to travellers on intra-Community journeys were added to the Commission's initial proposal. Those derogations were included in Directive 92/12/EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, which the Council finally adopted on 25 February 1992 (OJ 1992 L 76, p. 1), as amended by Council Directive 92/108/ECC of 14 December 1992 (OJ 1992 L 390, p. 124) and Council Directive 94/74/EC of 22 December 1994 (OJ 1994 L 365, p. 46) (taken as a whole, 'the Directive').

5 Article 28 of the Directive provides as follows:

'The following provisions shall apply for the period ending on 30 June 1999:

1. Member States may exempt products supplied by tax-free shops which are carried away in the personal luggage of travellers taking an intra-Community flight or sea-crossing to another Member State....

Products supplied on board an aircraft or ship during the intra-Community passenger service shall be treated in the same way as products supplied by tax-free shops....'

6 In that connection, the 23rd recital of the Directive states that a certain period of time will be required to take the necessary measures to alleviate both the social repercussions in the sectors concerned and regional difficulties, particularly in border regions, and that Member States should be authorised, for a period ending on 30 June 1999, to exempt products supplied in the context of passenger traffic by air or sea between the Member States.

7 Since the expiry, on 1 July 1999, of those derogating rules, transactions covered by them have been subject to the general arrangements established by the Directive.

8 Those arrangements, which are intended to ensure the free movement in the internal market of goods subject to excise duty (1st recital of the Directive), are characterised, first, by the 'principle of the country of destination' according to which any delivery or supply of goods to a trader carrying out an economic activity independently which takes place in a Member State other than that in which the product is released for consumption gives rise to chargeability of the excise duty in that other Member State (5th recital) and, second, by the 'principle of the country of dispatch' according to which products subject to excise duty

acquired by private individuals for their own use and transported by them must be taxed in the country where they were acquired (6th recital).

9 The Directive establishes criteria for determining whether products subject to excise duty are held for private or commercial purposes (7th recital). In addition, it is provided that movement from the territory of one Member State to that of another may not give rise to checks liable to impede free movement within the Community but also that, since for the purposes of chargeability it is necessary to know of the movements of products subject to excise duty, provision should be made for an accompanying document for such products (10th recital). Finally, payment of the excise duties in the Member State where the products were released for consumption must give rise to the reimbursement of those duties when the products are not intended for consumption in that Member State (18th recital).

10 The provisions of the Directive establishing the general arrangements at issue read as follows:

'*Article 6*

1. Excise duty shall become chargeable at the time of release for consumption ...

Release for consumption of products subject to excise duty shall mean:

...

(b) any manufacture ...

(c) any importation of those products ...

...'

'*Article 7*

1. In the event of products subject to excise duty and already released for consumption in one Member State being held for commercial purposes in another Member State, the excise duty shall be levied in the Member State in which those products are held.

2. To that end, ..., where products already released for consumption ... in one Member State are delivered, intended for delivery or used in another Member State for the purposes of a trader carrying out an economic activity independently excise duty shall become chargeable in that other Member State.

3. Depending on all the circumstances, the duty shall be due from the person making the delivery or holding the products intended for delivery or from the

person receiving the products for use in a Member State other than the one where the products have already been released for consumption, or from the relevant trader ....

4. The products referred to in paragraph 1 shall move between the territories of the various Member States under cover of an accompanying document ....

5. The person, trader or body referred to in paragraph 3 must comply with the following requirements:

(a) before the goods are dispatched, make a declaration to the tax authorities of the Member State of destination and guarantee the payment of the excise duty;

(b) pay the excise duty of the Member State of destination in accordance with the procedure laid down by that Member State;

(c) consent to any check enabling the administration of the Member State of destination to satisfy itself that the goods have actually been received and that the excise duty to which they are liable has been paid.

6. The excise duty paid in the first Member State referred to in paragraph 1 shall be reimbursed in accordance with Article 22(3).

7. Where products subject to excise duty and already released for consumption in a Member State are to be moved to a place of destination in that Member State via the territory of another Member State, such movements shall take place under cover of the accompanying document referred to in paragraph 4 and shall use an appropriate itinerary.

8. In the cases referred to in paragraph 7:

(a) the consignor shall, before the goods are dispatched, make a declaration to the tax authorities of the place of departure responsible for carrying out excise-duty checks;

(b) the consignee shall attest to having received the goods in accordance with the rules laid down by the tax authorities of the place of destination responsible for carrying out excise-duty checks;

(c) ...

9. Where products subject to excise duty are moved frequently and regularly under the conditions specified in paragraph 7, Member States may agree bilaterally to authorise a simplified procedure in derogation from paragraphs 7 and 8.'

'*Article 8*

As regards products acquired by private individuals for their own use and transported by them, the principle governing the internal market lays down that excise duty shall be charged in the Member State in which they are acquired.'

'*Article 9*

1. Without prejudice to Articles 6, 7 and 8, excise duty shall become chargeable where products for consumption in a Member State are held for commercial purpose in another Member State ....

...

2. To establish that the products referred to in Article 8 are intended for commercial purposes, Member States must take account, *inter alia*, of... the quantity of the products.

...'

11 On the basis of Article 7(4) of the Directive, on 17 December 1992 the Commission adopted Regulation (EEC) No 3649/92 on a simplified accompanying document for the intra-Community movement of products subject to excise duty which have been released for consumption in the Member State of

dispatch (OJ 1992 L 369, p. 17) ('the Regulation'). The simplified accompanying document was intended, in particular, to ensure that the obligations of persons liable to excise duty are observed.

Facts and procedure

12 Förde-Reederei, a German maritime transport company, claims in this action a right to compensation passed on to it by the Danish company Nordisk Faergefart ('NF') of which it is one of the principal subsidiaries. Until 30 June 1999 NF used ferry routes between Faaborg (Denmark) and Gelting (Germany) and between Langeland (Denmark) and Kiel (Germany). These routes involved the transport of persons, cars, lorries and coaches. There was an on-board catering service and products — during that period tax-free — were sold from a kiosk.

13 The revenue from ticket sales during the period 1997/98 was around 17 million Danish crowns (DKK) while the operating cost of the routes increased to DKK 69 million.

14 According to the applicant, a positive economic result could only be achieved through the sale of 'tax-free' goods on board. Once the arrangement of 'tax-free' sales to travellers came to an end on 30 June 1999, NF also terminated its aforementioned activities.

15 By applications of 28 June 1999, NF brought proceedings against the Council

— under Article 230 EC for annulment of the Directive in so far as it limited the application of Article 28 of the Directive to 30 June 1999 (Case T-156/99),

— for the suspension, until the Court of First Instance has given judgment in the main action, of the operation of the Directive in so far as it limited the application of Article 28 of the Directive to 30 June 1999 (Case T-156/99 R).

16 By order of 9 July 1999 the President of the Court of First Instance dismissed the application for suspension. By order of 9 July 1999 the Court of First Instance (First Chamber) dismissed the action for annulment as manifestly inadmissible. Neither of those orders have been the subject of an appeal to the Court of Justice.

17 By application lodged at the Registry of the Court of First Instance on 22 June 2000, the applicant brought this action in which it claims compensation for damage suffered by NF by reason of the prohibition, from 1 July 1999, of the sale of 'tax-free' goods, contained in Article 28 of the Directive. The total damages claimed for the year 1999/2000 amount approximately to 2 000 000 German marks (DEM), the applicant claiming only a partial amount for the period from 1 July to 31 December 1999.

18 On hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure.

19 The parties presented oral argument and gave their replies to the Court's questions at the hearing on 27 November 2001.

Forms of order sought by the parties

20 The applicant claims that the Court of First Instance should:

— order the Council and the Commission jointly and severally to pay compensation for the damage suffered by it as a result of the expiry on 30 June 1999 of the 'tax-free arrangements' under Article 28 of the Directive, the amount of damages claimed being estimated at and limited to DEM 1 000 000 together with interest at 8% to be calculated from the date of the judgment;

— order the defendants to pay the costs.

21 The Council and the Commission contend that the Court of First Instance should:

— dismiss the application;

— order the applicant to pay the costs.

Law

22 The applicant criticises the Council and the Commission for having created a chaotic legal situation for the traders concerned by allowing the derogating arrangements provided by Article 28 of the Directive to expire on 30 June 1999. It complains that it was impossible in practice to implement the provisions on the general arrangements as laid down in the Directive and the Regulation in relation to intra-Community passenger traffic as those provisions were not appropriate for the valid regulation of sales on board a ship on intra-Community sea-crossings. In this connection, it claims that the Community's responsibility for both an unlawful and a lawful act is the cause of the alleged damage.

The Community's liability for an unlawful act

Arguments of the parties

— The allegedly unlawful conduct of the Council and the Commission

23 The applicant maintains that the general arrangements established by the Directive and the Regulation only apply to undertakings and relations between traders. They do not cover retail sales on intra-Community sea-crossings. Under

those general arrangements excise duty is payable when the goods concerned are transferred from the Member State of dispatch to another Member State. The bureaucratic formalities which are imposed effectively prevent the reimbursement of excise duty already levied in the Member State of dispatch so that the Directive entails a double taxation of the goods, thereby creating an obstacle to the functioning of the internal market.

24 The applicant states that the certificate of receipt which is the substantive condition governing reimbursement has a deterrent effect inasmuch as it involves travellers in a fiscal procedure which is beyond their grasp and exposes them to the risk of having to pay the duty in the event of irregularities. As a result of the excessive formalities which have to be complied with, ferry operators suffer serious discrimination within the retail trade. The taxation relating to the crossing of a tax frontier gives rise to obligations such as stock inspection, tax declarations, exemption procedures, repricing, etc., which paralyse sales on board a ship.

25 In response to the defendants' argument that the tax exemption is based on the concepts of 'import' and 'export' and that, in view of the abolition of tax frontiers between Member States, such concepts are no longer adapted to the internal market and must therefore be abolished, the applicant states that tax frontiers are far from being abolished. The avowed objective of the Council to arrive at identical excise duties in all the Member States is not in sight. As a result, the defendants sacrificed a flourishing economic sector consisting in 'tax-free' sales for an unrealistic internal market philosophy.

26 The applicant also criticises the Council for having thus infringed the principle of the rule of law, the prohibitions on quantitative restrictions as between Member States (Articles 28 and 29 EC), the obligations arising from Article 93 EC, the

principle of proportionality and that of protection of legitimate expectations as well as fundamental rights of freedom to engage in its trade, of ownership of property, and of commercial and economic freedom. Moreover, the Council infringed Article 208 EC in failing to request the Commission to submit a proposal for a directive adapted to and in conformity with the aforementioned provisions and principles.

27 The Commission, for its part, manifestly and gravely exceeded its discretion in not taking into account the impossibility of implementing the general arrangements under the Directive and in failing to submit to the Council suitable proposals for accompanying provisions.

28 According to the Council and the Commission, however, the provisions impugned by the applicant are appropriate for sales on board a ship on intra-Community sea-crossings.

29 In particular, the defendants maintain that the applicant's argument is contradicted by the facts. Other shipping companies which use ferry routes between Germany and Denmark continued to sell goods subject to excise duty after 30 June 1999. In this connection, they refer to a formal statement by the Danish Minster for Finance according to which the Scandlines company is carrying on this activity on two ferry crossings between southern Denmark and Germany even though on-board sales of wine, beer, alcohol and tobacco attract Danish or German tax. They state that, in reality, sales to travellers take place on the territory of the Member State which imposes the lowest excise duties, the sale outlets remaining closed during the journey within the territory of the other Member State. Thus, there are no additional administrative formalities or financial constraints.

30 The Commission further contends that, since it is under no legal obligation to act in the way desired by the applicant, it cannot be criticised for omitting to submit proposals to the Council on the subject. It could only be compelled to submit a specific legislative proposal to the Council if its discretion had been reduced to nothing, which is manifestly not the case here.

— The damage suffered by the applicant

31 The applicant claims compensation for the loss of earnings that NF suffered as a result of its ceasing trading following the — unlawful — expiry of the 'tax-free' sales exemption. That loss is based on the projected probable profit in the event of Article 28 of the Directive remaining in force and NF being able to continue to sell 'tax-free' products. On the basis of that hypothesis, the applicant claims that it would have been able to achieve the same turnover as in the past.

32 The Council and the Commission maintain that the determination of the tax arrangements applicable to intra-Community travel is a matter for the legislature. Since the legislature had decided to bring the exemption for tax-free shops to an end on 30 June 1999, a ruling by the Court of First Instance that the exemption should remain as long as the general arrangements prove to be impracticable would constitute an unlawful intrusion on powers reserved to the legislature. As a result, the applicant's damages must in any event be limited to the amount corresponding to turnover that NF would have been able to achieve in continuing its ferry business after the termination of the exemption arrangements. The achievable turnover of NF from 1 July 1999 would have been considerably lower than the turnover achieved on previous sales. Up to that date NF benefited from extremely favourable tax arrangements. In view of these factors, the defendants submit that the applicant has not sufficiently particularised its damage.

— The causal link

33 In the applicant's submission the causal link between the damage suffered by it and the impugned conduct of the Council and the Commission is evident. The loss of earnings pleaded is solely attributable to the unlawful expiry of the arrangements under Article 28 of the Directive. NF could not have avoided that damage since it would not have been reasonable in economic terms for it to undertake structural changes in its activity.

34 The defendants argue that directives are not designed to create directly binding obligations on individuals and so cannot normally cause harm to them. They state that it has still been possible to sell products subject to excise duty on ferry crossings between Denmark and Germany since 30 June 1999. The relevant national legislation enabled NF to continue to sell such products on board its ships if it wished to do so. NF thus ceased its activity voluntarily and there is therefore no causal link between the alleged damage and the impugned conduct of the Council and the Commission.

Findings of the Court of First Instance

35 The action for damages provided for in the second paragraph of Article 288 EC was introduced as an independent form of action with a particular purpose to fulfil within the system of actions and subject to conditions as to its use dictated by its specific nature (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 3; Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 26; and Case C-87/89 *Sonito and Others* v *Commission* [1990]

ECR I-1981, paragraph 14). It differs, *inter alia*, from the action for annulment in that its end is not the abolition of a particular measure but compensation for damage caused by an institution (*Zuckerfabrik Schöppenstedt* v *Council*, cited above, paragraph 3; *Krohn* v *Commission*, cited above, paragraph 32; and *Sonito and Others* v *Commission*, cited above, paragraph 14).

36 It is therefore not open to the applicant, by means of the present action in damages, to obtain findings by the Court of all the infringements of Community law which might objectively affect the directive at issue. The only grounds of challenge open to it are those which have a specific link with the damage for which compensation is sought.

37 According to established case-law, in order for the Community to incur non-contractual liability, the applicant must prove the unlawfulness of the alleged conduct of the institution concerned, actual damage and the existence of a causal link between that conduct and the damage pleaded (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44, Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30, Case T-267/94 *Oleifici Italiani* v *Commission* [1997] ECR II-1239, paragraph 20, and Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125 (the '*Dubois* judgment', paragraph 54). If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for non-contractual liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 19).

38 It is in the light of those principles that the specific conduct whose lawfulness has been challenged by the applicant is to be determined and the extent to which such conduct may have caused the alleged damage is to be examined.

39 As regards that damage, the applicant argues that NF, by reason of the impracticable nature of the relevant provisions of the Directive, was forced to cease trading on 30 June 1999, that NF probably could have continued trading at the same level in the second half of 1999 had the legal possibility for it to do so not been removed by the Directive, and that the damage suffered by it for the second half of the year amounts to DEM 1 million (application, point 85).

40 The applicant specifically adds that the 'expiry of the "tax-free" arrangements on 30 June 1999 forced [NF]... to stop using the ferries and therefore to cease trading', and that the 'entire trading of [NF] depended on the arrangements under Article 28 of Directive 92/12/EEC and their continuance' (application, point 85). Moreover, the accountants, who were asked by the applicant to produce a report, found that NF could not maintain 'a viable level of trade... if the authorisation to sell "tax-free" products within the context of intra-Community transport came to an end' (application, point 3) and assessed the alleged damage 'on the basis of a continuation of "tax-free" sales' (application, point 7).

41 Finally, it is apparent from the figures presented by the applicant itself — indicating that the revenue from the sale of travel tickets during the period 1997/98 was approximately DKK 17 million while NF's operating costs had increased to DKK 69 million (application, point 3) — that the bulk of NF's revenue came not from its activity as a transport company but from the sale of 'tax-free' goods.

42 It follows that, according the applicant's own statements, the alleged damage arose solely from the fact that the derogating arrangements under Article 28 of the Directive were not maintained after 30 June 1999. The assessment of that damage involves a simple extrapolation to the second half of 1999 from the applicant's annual accounts for the years 1995/96 to 1997/98. In particular, the

extent of the damage is not linked to the reduction in the volume of turnover — hampered by the bureaucratic constraints complained of — which NF could or might have achieved after 30 June 1999.

43 The questions of the practicality or otherwise of the general arrangements under the Directive and the Regulation and of the possible excessive nature of the formalities to be complied with — questions which the applicant considers are decisive in this case — are therefore irrelevant for the purposes of the present action. Even if the implementation of those arrangements, particularly as regards the reimbursement in the Member State of destination of excise duties already paid in the Member State of dispatch, had not been the subject of any administrative constraints in intra-Community traffic, NF would nevertheless, according to the applicant's statements, have had to cease trading, given that its business was no longer profitable on account of the imposition of national excise duty, no matter by which Member State, on the goods sold on board its ships.

44 Essentially, it is only the abolition of the 'tax-free' arrangements themselves which, irrespective of the possible impracticality of the general tax arrangements complained of by the applicant, could have caused the damage alleged by the applicant.

45 It is therefore appropriate to examine whether the discontinuance of the 'tax-free' arrangements could have given rise to liability on the part of the Community *vis-à-vis* NF.

46 In that connection, it should be observed that, as the Court of First Instance held in the *Dubois* judgment (paragraph 46), the abolition of customs and tax frontiers is a direct result of the Single European Act (see paragraph 2 above),

which provides that 'the internal market shall comprise an area without internal frontiers'. The implementation, by acts of a legislative nature such as the Directive and the Regulation, of that general provision of primary law manifestly falls within the ambit of economic policy choices and of the Community institutions' wide discretion (see, *mutandis mutandis*, the *Dubois* judgement, paragraph 61), which corresponds to the political responsibilities which the Treaty confers on the Community legislature.

47 It follows that, as regards the complaint that the Council subjected the activity carried out by NF to the general arrangements under the Directive and the Regulation, the liability of the Community can be incurred 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 (*Dubois* judgment, paragraph 59, and judgment in Case C-352/98 P *Bergaderm & Goupil* v *Commission* [2000] ECR I-5291, paragraphs 42 and 43.

48 As regards the complaint that the Commission failed to submit to the Council proposals for suitable legislative measures, it should be observed that the 'clear breach' test also falls to be applied in the case of a wrongful omission (*Dubois* judgment, paragraph 60).

49 In that connection, it is clearly the case that, 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.

50 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 therefore be held to be a wrongful act, and certainly not one of a serious and manifest nature. That finding is all the more valid in view of the fact that Article 28 of the Directive allowed the maritime transport sector a transitional period of seven years to enable the affected traders to adjust to the new situation. Moreover, by virtue of Article 23(5) of the Directive Member States may maintain their national provisions on stores for boats and aircraft until the adoption of Community legislation on the subject, which enabled operators in these sectors to benefit from a total exemption from excise duty on products sold on board for immediate consumption and on fuel for boats.

51 It is true that the realisation of an area without internal frontiers has still not led to the abolition of administrative formalities and checks, such as those under the general arrangements under the Directive and Regulation, upon crossing intra-Community national frontiers. The continuing existence of frontiers in terms of the checks which are carried out is explained by the fact that the Community legislature has still not achieved harmonisation, within the Community, of the rate of national excise duties.

52 However, it is settled case-law that the Community institutions are free to introduce harmonisation in a matter only gradually or to approximate national laws only in stages. The implementation of such measures is, in general, difficult, since the competent Community institutions have first to draw up, on the basis of diverse and complex national provisions, common rules that are in conformity with the aims laid down by the Treaty and approved by the Council, acting by a qualified majority of its members, or even, as is the case in fiscal matters, unanimously (C-166/98 *Socridis* [1999] ECR I-3791, paragraph 26).

53 It follows from the foregoing that the abolition by the Council of the 'tax-free' arrangements under Article 28 of the Directive and the fact that the Commission has not submitted proposals to the Council for the maintenance of such arrangements cannot give rise to liability on the part of the Community on the basis of unlawful conduct.

Liability of the Community for a lawful act

Arguments of the parties

54 In the alternative, the applicant claims a right to compensation on the basis of the principles governing liability for lawful acts. It alleges that the expiry of the derogating arrangements under Article 28 of the Directive caused particular and sufficiently individualised damage to NF.

55 According to the Council and the Commission, the requisite conditions for the liability of the institutions to be incurred for a lawful act are not fulfilled in this case. The applicant has not proved that the damage it suffered exceeded the limits of the economic risks inherent in operating in the sector concerned.

Findings of the Court of First Instance

56 As is clear from the judgment of the Court of Justice of 20 June 2000 in *Dorsch Consult* v *Council and Commission* (Case C-237/98 P [2000] ECR I-4549,

paragraphs 18, 19 and 53), 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. In its judgment of 28 April 1998 in Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 80, confirmed by the above judgment, the Court of First Instance defined those types of damage, stating that 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.

57 Those two conditions are clearly not satisfied in this case. First, the Directive concerned NF 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. There can therefore be no question of a particular sacrifice which NF alone had to make.

58 Second, the economic and commercial risks inherent in NF's operating in the sector concerned were not exceeded. In that regard, it is sufficient to observe that NF's activity was directed to the sale of products which until 30 June 1999 benefited from an exemption from excise duty, the fact that such products were sold on board a ship being a prerequisite for eligibility for that exemption. As is apparent from the figures supplied by the applicant (see paragraphs 13 and 41 above), the transporting of passengers by ferry was only a cover for the 'tax-free' sales. In this context, the applicant itself made it clear that the major element of NF's turnover from 'tax-free' trade arose from excessive consumption driven by the 'idea of getting a good bargain', and that there was an 'occasion-related consumption' created by the attraction of on-board sales (application, point 61).

59 Since that activity, centred on a tax exemption, was inevitably exposed to the risk of changes to Community tax law, NF had to reckon with the consequences of the fact that that exemption was going to be abolished in the general economic interest constituted by the realisation of an area without internal frontiers, especially since seven years' 'notice' of this had been given. This development was objectively foreseeable from the first political discussions on the implementation of the Single European Act in 1986 and, in any event, in 1992 at the time of the adoption of the Directive, when the abolition of the exemption arrangements on 1 July 1999 was definitively announced. NF has not therefore suffered special and unusual damage.

60 As a result, the liability of the Community for a lawful act does not arise either.

61 It follows that the application must be dismissed as unfounded in its entirety.

Costs

62 Under Article 87(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 applicant has been unsuccessful, it must be ordered to bear its own costs and pay those incurred by the Commission, as applied for by the latter.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay all the costs.

Moura Ramos Pirrung Meij

Delivered in open court in Luxembourg on 20 February 2002.

H. Jung — Registrar

R.M. Moura Ramos — President