JUDGMENT OF THE COURT
31 March 1992 *

In Case C-200/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret (Eastern Regional Court), Denmark, for a preliminary ruling in the proceedings pending before that court between

Dansk Denkavit ApS and **P. Poulsen Trading ApS,**

supported by

Monsanto-Searle A/S,

and

Skatteministeriet (Ministry for Fiscal Affairs),

on the interpretation of Article 9 et seq. and Article 95 of the EEC Treaty and Article 33 of the 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,

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Díez de Velasco, M. Zuleeg and J. L. Murray, Judges,

Advocate General: G. Tesauro,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Danish.

after considering the written observations submitted on behalf of:

— Dansk Denkavit ApS, P. Poulsen Trading ApS and Monsanto-Searle A/S, by K. Dyekjaer-Hansen, of the Copenhagen Bar,

— the Skatteministeriet, by M. Gregers Larsen, of the Copenhagen Bar, and J. Molde, Legal Adviser, acting as Agent,

— the Portuguese Government, by L. Fernandes, Director of the Legal Service of the European Communities Directorate General, A. Correia, Deputy Director General for VAT, and T. Lemos, legal officer in the VAT Administrative Service, acting as Agents,

— the Commission of the European Communities, by J. F. Buhl, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Dansk Denkavit ApS, P. Poulsen Trading ApS and Monsanto-Searle A/S, the Skatteministeriet and the Commission of the European Communities at the hearing on 28 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 30 January 1992,

gives the following

Judgment

1 By order of 20 June 1990, which was received at the Court on 2 July 1990, the Østre Landsret referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty four questions on the interpretation of Article 9 et seq. of the EEC Treaty, Article 95 of that Treaty and Article 33 of the 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 (Official Journal 1977 L 145, p. 1, hereinafter 'the Sixth Council Directive').

2 Those questions were raised in proceedings between two Danish companies, Dansk Denkavit ApS (hereinafter 'Dansk Denkavit') and P. Poulsen Trading ApS (hereinafter 'Poulsen Trading'), and the Skatteministeriet (Danish Ministry for Fiscal Affairs) relating to an application by those companies for reimbursement of the sums paid by them in 1988 and 1989 by way of the employment market contribution (hereinafter 'the levy').

3 It appears from the case file that the levy was introduced by Law No 840 of 18 December 1987 on the employment market contribution ('Lov om arbejdsmarkedsbidrag') and came into effect on 1 January 1988. It formed part of the economic policy pursued at the time by the Danish Government with the aim of stimulating growth and expanding employment. In order to reduce undertakings' costs, the Danish Government considered it necessary to arrange for certain social expenditure, which had until then been borne by employers, to be financed by the State. To obtain the necessary public funds it planned to introduce a levy which would be passed on to Danish consumers.

4 The levy, which was replaced from 1 January 1992 by an equivalent increase in the rate of value added tax (hereinafter 'VAT'), was imposed on undertakings which were taxable persons for VAT purposes and on other undertakings which had also benefited from the financing by the State of the aforementioned costs. The rate of levy was fixed at 2.5% of the total sales effected and services provided by each undertaking during a specified period, less the purchases of goods and services by that undertaking during that period. Where it was not possible for that method to be used, as in the case of certain undertakings that were not taxable persons for VAT purposes, the basis for assessment of the tax consisted of the total amount paid by the undertaking in question as wages, increased by 90%. In addition, the levy was not charged on the export or import of goods or services; in the latter case, importing undertakings were not entitled to deduct the value of the imported goods or services on the occasion of the first transaction in Denmark.

5 The plaintiffs in the main proceedings, Dansk Denkavit and Poulsen Trading, purchase goods in the Netherlands for resale in Denmark; the former deals in feedstuffs, the latter in loudspeakers. Dansk Denkavit paid to the Skatteministeriet the sum of DKR 811 470 in 1988 and 1989, and Poulsen Trading paid that ministry the sum of DKR 745 756 for those years, by way of the levy. The two companies instituted proceedings before the national courts for the annulment of the levy and for an order requiring the Danish State to reimburse them the sums which they alleged had been wrongfully paid. In support of their claim they argued primarily that the levy was a turnover tax which was prohibited by Article 33 of the Sixth Council Directive, and alternatively that it was a charge having equivalent effect which was prohibited by Article 9 et seq. of the EEC Treaty, or, in the event of the latter provisions not being applicable in this case, discriminatory internal taxation caught by Article 95 of that Treaty.

6 The Østre Landsret considered that the outcome of the case depended on the interpretation of the aforementioned provisions and, by order of 20 June 1990, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Should Article 33 of the Sixth Council Directive 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 (77/388/EEC) be interpreted as precluding a Member State from charging a fiscal levy that has the following characteristics:

(i) The levy is paid both on activities that are subject to VAT and on any other business activities which consist in the supply of goods or services for consideration, and is calculated according to criteria laid down by law, which give the tax authorities no discretion and make no distinction between domestically-produced and imported goods.

(ii) For undertakings which are taxable persons for VAT purposes the same basis of assessment is used as for VAT, since the levy, like VAT, is

charged at each stage as a percentage of the undertaking's sales (excluding exports) with deduction of purchases on which the levy has been paid at an earlier stage.

(iii) In contrast to the VAT system, the levy is not paid on importation, but is, however, paid on imported goods on the full sale price at the first sale by a domestic undertaking.

(iv) In contrast to VAT, the levy need not be indicated separately on invoices.

(v) The levy is settled with the customs authorities according to the same principles as VAT, and the customs authorities thus make refunds in the event of a negative basis of assessment.

(vi) The levy is charged alongside the existing VAT system, since it replaces neither wholly nor in part the amount of VAT to be paid under the VAT legislation in force, and the levy is itself included in the price on which VAT is calculated.

2. With regard to a national levy with the characteristics described in the first question, does Article 33 of the said directive create rights for the benefit of individuals which national courts are obliged to protect?

3. If the first or second questions, or both, are answered in the negative, should the prohibition of charges having an effect equivalent to customs duties in Article 9 et seq. of the EEC Treaty be interpreted as meaning that a tax scheme such as that described in the first question is, as far as imported products are concerned, contrary to that prohibition because the levy in respect of under-

takings which are taxable persons for VAT purposes is calculated on the VAT basis without deduction of the value of imported products?

4. If the third question is answered in the negative, should Article 95 of the EEC Treaty be interpreted as meaning that the tax scheme, in particular on the ground of the matters referred to in the third question, is contrary to the prohibition of discriminatory domestic taxation laid down in the said provision?'

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, a detailed description of the Danish levy and a summary of the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Question 1

8 The Østre Landsret's first question seeks essentially to ascertain whether Article 33 of the Sixth Council Directive precludes the introduction or maintenance of a fiscal levy which:

— is paid both on activities subject to VAT and on other industrial or commercial activities which consist in the supply of services for consideration;

— is charged, in the case of undertakings which are taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;

— unlike VAT, is not paid on importation, but is charged on the full sale price of imported goods at the first sale in the Member State concerned;

— unlike VAT, does not have to be indicated separately on invoices; and

— is charged alongside VAT.

9 In answering this question, it should be noted first of all that Article 33 of the Sixth Council Directive provides as follows:

'Without prejudice to other Community provisions, the provisions of this directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterized as turnover taxes.'

10 As the Court has stated on several occasions, including its judgments in Case 252/86 *Bergandi* v *Directeur-Général des Impôts* [1988] ECR 1343, at paragraphs 10 and 11, and in Joined Cases 93/88 and 94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671, at paragraphs 13 and 14, that provision as worded prohibits Member States from introducing or maintaining taxes, duties or charges which can be characterized as turnover taxes. It follows that in order to answer Question 1, it is necessary to determine first what the characteristics of a turnover tax are, and then whether a levy such as the Danish levy is to be regarded as constituting such a tax.

11 With respect first of all to the concept of 'turnover taxes', it should be noted that, as the Court stated in the abovementioned judgments and in the judgment in Case 295/84 *Rousseau Wilmot* v *Organic* [1985] ECR 3759, at paragraph 16, the purpose of Article 33 is to prevent the functioning of the common system of VAT from being jeopardized by the introduction of taxes, duties or charges levied on the movement of goods and services in a way comparable to VAT. Taxes, duties and charges must in any event must be regarded as being imposed on the

movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT. As the Court stated in the above judgments, those characteristics are as follows. VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; it is charged at each stage of the production and distribution process; and finally it is imposed on the added value of goods and services, since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction.

12 Secondly, it is necessary to examine whether a levy such as the Danish levy exhibits the essential characteristics of VAT, and consequently whether it is to be regarded as a turnover tax. It should be noted in that respect that the levy, like VAT, was charged on commercial or industrial activities, whether or not subject to VAT, which consisted in the supply of goods or services for consideration; it was charged at all stages of production and distribution; and it was calculated, in the case of undertakings that were taxable persons for VAT purposes, as a percentage of the value of the goods sold or services provided during a specified period, after deducting purchases of goods and services during that period.

13 Admittedly, as the Danish Government has emphasized, the levy differed from VAT in certain respects. First, it was imposed on undertakings which were not taxable persons for VAT purposes, in which case the basis of assessment, where it was not possible to apply the method used for undertakings which were taxable persons for VAT purposes, was the total amount paid by the undertaking as wages, increased by 90%. Secondly, the levy was not charged on imports, and importing undertakings were not allowed to deduct from the basis for assessment of the levy the value of goods or services imported. Finally, it was regarded as part of the cost of the goods or services and for that reason was not indicated separately on invoices.

14 However, for a tax to be characterized as a turnover tax, it is not necessary for it to resemble VAT in every respect; it is sufficient for it to exhibit the essential characteristics of VAT. In the present case, the differences which have been mentioned do not affect the nature of a levy such as the Danish levy, which

resembled VAT in all essential respects. It follows that, notwithstanding those differences, the levy still retained the character of a turnover tax.

15 Accordingly, the answer to Question 1 must be that Article 33 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of VAT: uniform basis of assessment (77/388/EEC) precludes the introduction or maintenance of a fiscal levy which:

(i) is paid both on activities subject to VAT and on other industrial or commercial activities which consist in the supply of services for consideration;

(ii) is charged, in the case of undertakings which are taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;

(iii) unlike VAT, is not paid on importation, but is charged on the full sale price of imported goods at the first sale in the Member State concerned;

(iv) unlike VAT, does not have to be indicated separately on invoices; and

(v) is charged alongside VAT.

Question 2

16 With respect to the second question, as to whether Article 33 can be relied upon before the national courts, the Danish Government argued that that provision is purely procedural and was inserted in the Sixth Council Directive exclusively in the interest of the Communities. It stated at the hearing that only substantive provisions aimed at safeguarding the interests of individuals could have direct effect and that those conditions were not met in the present case.

17 It is sufficient to point out in that regard that, according to the settled case-law of the Court, a provision of a directive can be relied upon by individuals before the national courts if it is clear, precise and unconditional, and that the rule in Article 33, prohibiting Member States from introducing taxes, duties or charges which can be characterized as turnover taxes, satisfies those conditions.

18 It follows that the answer to Question 2 must be that Article 33 of the Sixth Council Directive creates rights for the benefit of individuals which the national courts are obliged to protect.

Questions 3 and 4

19 In view of the answers to the Questions 1 and 2, there is no need to deal with Questions 3 and 4.

Effects of this judgment *ratione temporis*

20 The Danish Government has asked the Court, with reference to the judgments in Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455, Case 24/86 *Blaizot* v *University of Liège* [1988] ECR 379, and Case C-262/88 *Barber* v *Guardian Royal Exchange*

Assurance Group [1990] ECR I-1889, to limit the effects of its judgment *ratione temporis* in the event of a decision that the levy is incompatible with Community law. In support of its request it described the extremely serious consequences which such a decision would have for Denmark's public finances and its judicial system. It explained at the hearing that the amount yielded by the contested levy was approximately 7 000 million ECU, or 4% of Denmark's revenue during the period in question. Merely having to consider applications for repayment of the levy, which had moreover been passed on to consumers, from only some of the 150 000 to 200 000 taxable persons would lead to the collapse of the Danish judicial system. Moreover, the Danish Government argued that, in the light of the Court's case-law at the time, the Government had been entitled to consider that the levy contested in the main proceedings did not jeopardize the functioning of the common system of VAT and was thus not prohibited by Article 33.

21 It must be held in that regard that the Danish Government has not shown that at the time when the contested levy was introduced, Community law could reasonably be construed as permitting such a tax. The prohibition of turnover taxes contained in Article 33 is quite apparent from the wording of that provision. The scope of that prohibition has already been defined by the Court in the *Rousseau Wilmot* judgment, cited above, in which it held that Article 33 'seeks to prevent the functioning of the common system of VAT from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to VAT' (paragraph 16). It follows that a tax which is levied alongside VAT and which exhibits the essential characteristics of VAT, as specified in paragraph 15 of the *Rousseau Wilmot* judgment, is charged on commercial transactions in a way comparable to VAT and thus jeopardizes the functioning of the common system.

22 Moreover, the Commission, which had been notified by the Danish Government of its proposal in November 1987, drew that Government's attention as early as 29

January 1988, only a few weeks after the introduction of the levy, to the problems which that levy could give rise to from the point of view of Article 33.

23 It follows that in those circumstances it is inappropriate to limit the effects of this judgment *ratione temporis.*

Costs

24 The costs incurred by the Portuguese Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Østre Landsret, by order of 20 June 1990, hereby rules:

1. Article 33 of the Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of VAT: uniform basis of assessment (77/388/EEC) precludes the introduction or maintenance of a fiscal levy which:

— is paid both on activities subject to VAT and on other industrial or commercial activities which consist in the supply of services for consideration;

— **is charged, in the case of undertakings which are taxable persons for VAT purposes, on the same basis of assessment as that used for VAT, in other words as a percentage of the volume of sales after deduction of purchases;**

— **unlike VAT, is not paid on importation, but is charged on the full sale price of imported goods at the first sale in the Member State concerned;**

— **unlike VAT, does not have to be indicated separately on invoices; and**

— **is charged alongside VAT.**

2. **Article 33 of the Sixth Council Directive 77/388/EEC creates rights for the benefit of individuals which the national courts are obliged to protect.**

Due Joliet Schockweiler Grévisse

Mancini Kakouris Moitinho de Almeida

Rodríguez Iglesias Díez de Velasco Zuleeg Murray

Delivered in open court in Luxembourg on 31 March 1992.

J.-G. Giraud
Registrar

O. Due
President