JUDGMENT OF THE GENERAL COURT (Second Chamber, Extended Composition)

27 September 2011 (*)

(State aid – Fiscal aid granted by the Danish authorities – Seafarers employed on board vessels registered in the Danish International Register – Commission decision not to raise objections – Action for annulment – Serious difficulties)

In Case T-30/03 RENV,

3F, formerly Specialarbejderforbundet i Danmark (SID), established in Copenhagen (Denmark), represented initially by P. Bentley QC and A. Worsøe, lawyer, and subsequently by Mr. Bentley and P. Torbøl, lawyer,

applicant,

v

European Commission, represented by H. van Vliet and N. Khan, acting as Agents,

defendant,

supported by

Kingdom of Denmark, represented by V. Pasternak Jørgensen and C. Vang, acting as Agents,

intervener,

APPLICATION for annulment of Commission Decision C (2002) 4370 final of 13 November 2002 not to raise objections to the Danish fiscal measures applicable to seafarers employed on board vessels registered in the Danish International Register,

THE GENERAL COURT (Second Chamber, Extended Composition),

composed of N.J. Forwood, President, F. Dehousse (Rapporteur), I. Wiszniewska-Białecka, M. Prek and J. Schwarcz, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 19 January 2011,

gives the following

Judgment

Background to the dispute

1 On 1 July 1988 the Kingdom of Denmark adopted Law No 408 (*Lovtidende* 1997 A, p. 27329), which entered into force on 23 August 1988, establishing a Danish International Register of Shipping (‘the DIS register’). That register was in addition to the ordinary Danish register of ships (‘the DAS register’). The DIS register is intended to combat the flight from Danish flags to flags of third States. Shipowners whose

vessels are registered in the DIS register have the right to employ seafarers from non-member countries on those vessels at the salary rates applicable in their country of origin.

2 On the same date the Kingdom of Denmark adopted Laws Nos 361, 362, 363 and 364, which entered into force on 1 January 1989, introducing various fiscal measures relating to seafarers employed on board vessels registered in the DIS register (*Lovtidende* 1988 A, p. 36130, 36230, 36330 and 36430). In particular, those seafarers were exempted from Danish income tax, whereas seafarers employed on board vessels registered in the DAS register were subject to that tax.

3 On 28 August 1998 the applicant 3F, formerly Specialarbejderforbundet i Danmark (SID), lodged a complaint with the Commission of the European Communities against the Kingdom of Denmark concerning the fiscal measures at issue. The applicant submitted that the fiscal rules applicable to seafarers employed on board vessels registered in the DIS register constituted State aid for the purposes of Article 88 EC and that the aid scheme in question was not compatible with the common market, since it allowed tax exemptions not only to Community seafarers, that is to say, seafarers resident for tax purposes in a Member State, but also to all seafarers including non-Community seafarers, which made it contrary both to the Commission document on financial and fiscal measures concerning shipping operations with ships registered in the Community (document SEC(89) 921 final, ‘the 1989 Guidelines’) and to the Community guidelines on State aid to maritime transport (OJ 1997 C 205, p. 5, ‘the 1997 Guidelines’). The applicant also alleged that the provisions of the double taxation conventions entered into between, first, the Kingdom of Denmark and the Republic of the Philippines and, secondly, the Kingdom of Denmark and the Republic of Singapore also constituted an unlawful aid scheme. It submitted that the Commission should initiate the procedure laid down in Article 88(2) EC and drew attention to the procedure concerning an action for failure to act provided for in Article 232 EC.

4 By letter of 21 October 1998 the applicant drew the Commission’s attention to its obligation to initiate the formal investigation procedure under Article 88(2) EC and stated that, according to its information, the fiscal scheme at issue had not been notified to the Commission.

5 By letter of 6 January 1999 the applicant stated inter alia that it would not bring an action for failure to act before the Court of Justice if the Commission gave it an assurance that it would adopt a decision within two or three months, while reserving the possibility of doing so thereafter.

6 By letter of 4 February 1999 the Commission requested information from the Kingdom of Denmark, in particular as to whether the aid at issue had been paid or was going to be paid.

7 By letter of 18 March 1999 the applicant sent new observations to the Commission in relation to the meaning of ‘Community seafarers’.

8 On 19 March 1999 a meeting took place between the Commission and the Kingdom of Denmark, at which the Commission expressed its concerns regarding the specific fiscal rules which applied at that time to seafarers.

9 By letter of 13 April 1999 the Kingdom of Denmark replied to the Commission’s letter of 4 February 1999, stating inter alia that the tax scheme at issue had been introduced in 1988. It also indicated that it was carrying out an investigation concerning the amendment of the rules for taxing the wages of non-residents. It added that the Commission would be informed as soon as the investigation was completed and the Danish Government had decided whether a draft bill would be presented to the Danish Parliament during the following session.

10 On 4 June 1999 the applicant informed the Commission of the answer of a Danish minister to the Danish Parliament raising the possibility that the DIS scheme might be amended.

11 By letter of 6 December 1999 the Danish Government submitted to the Danish Parliament a draft tax bill amending the DIS scheme.

12 By letter of 10 January 2000 the applicant sent observations concerning the effects of the unamended DIS scheme to the Commission.

13 By letter of 3 April 2000 the Danish Ministry of Taxation informed the Commission of the amendments to the draft bill.

14 A meeting took place on 4 April 2000 between the Commission and the Danish authorities, at the end of which it emerged that a further review would be necessary in the light of the latest amendments to the draft bill.

15 By letter of 6 April 2000 the Kingdom of Denmark stated that the amendments to the draft tax bill introduced following the discussions with the Commission at the meeting of 4 April 2000 would not be submitted to the Danish Parliament until the Commission formally stated that they were not contrary to Community law, and requested a comfort letter from the Commission to that effect as soon as possible.

16 By letters of 18 April and 15 May 2000 the applicant sent observations concerning the amendments to the draft tax bill to the Commission.

17 On 30 November 2000 the Commission sought additional information from the Kingdom of Denmark, in particular concerning fiscal issues. The Kingdom of Denmark responded to that request on 15 January 2001.

18 The applicant sent observations to the Commission by letters of 1 February, 29 June and 5 November 2001.

19 A meeting took place on 27 May 2002 between the Commission and the applicant, at which the applicant raised the possibility of bringing an action for failure to act.

The contested decision

20 On 13 November 2002 the Commission adopted Decision C (2002) 4370 final (‘the contested decision’), in which it decided not to raise any objections to the fiscal measures applied since 1 January 1989 to seafarers employed on board vessels registered in Denmark in either the DAS or the DIS register, since it considered that the arrangements constituted State aid but were compatible with the common market in accordance with Article 87(3)(c) EC.

21 The Commission, first of all, concluded that there was aid that was unlawful because it had not been notified. It examined the case of seafarers resident in the State in which income tax is levied, for whom tax exemption constitutes an advantage. It then examined the case of non-resident seafarers, who are the more specific focus of the applicant’s complaint. It concluded that an advantage existed, also for non-resident seafarers. It considered that State resources were involved, that trade between Member States could be affected, and that the specificity criterion was fulfilled. The Commission therefore found there to be unlawful State aid for the purposes of Article 87 EC, irrespective of whether the favourable tax regime differentiated between resident and non-resident employees.

22 It also considered that the fiscal measures had to be evaluated in the light of Article 87(3)(c) EC and in the light of the 1989 Guidelines in respect of the period from 1 January 1989 to 31 December 1997 and the 1997 Guidelines as from 1 January 1998.

23 It then found that the applicable scheme, both before and after 1 January 1998, was compatible with the common market.

24 It thus answered the question posed by the complaint as to whether exempting nationals of countries not members of the European Union from income tax could be deemed compatible with the 1997 Guidelines. In that regard, it noted that, in those Guidelines, Community seafarers were defined, as regards the taxation

of seafarers, as employees who are 'liable to income tax and/or to social security contributions of a Member State', without further specifications as to the location of their fiscal residence. It noted that that definition of Community seafarers, given in section 3.2 of the 1997 Guidelines, does not refer to any nationality or residence requirement, and added that the definition of Community seafarers in that section, which relates to the taxation of seafarers, is therefore rather wide.

25 It added that general tax reductions or exemptions are also meant to reduce generally the tax burden borne by Community shipowners, that by reducing manning costs the Kingdom of Denmark promoted the implementation of safety standards and of Community working norms on board vessels which would otherwise been flagged to registers of convenience in non-member countries where such standards remain mostly ignored, and that maintaining vessels under Community flags also contributes to securing onshore jobs in the maritime sector, which was also part of the 1997 Guidelines' objectives. The Commission therefore dismissed the applicant's argument and concluded that the fact that nationals of non-member countries also had access to the fiscal advantages in question was in accordance with the 1997 Guidelines.

26 It also noted that the 1989 Guidelines simply held, as regards aid to reduce manning costs, that 'aid in the field of social security and seafarers' income taxation, tending to reduce the costs borne by shipping companies without reducing the level of social security for the seafarers and resulting from the operation of ships registered in the Community may be considered compatible with the common market'. It considered that the fiscal measures at issue fulfilled those conditions and that they were therefore in accordance with the 1989 Guidelines.

27 The Commission also asked the Kingdom of Denmark to submit a report each year allowing the effects of the scheme on the competitiveness of the Danish fleet to be evaluated, and indicated that the fiscal scheme at issue did not affect trade between Member States to an extent contrary to the common interest in the maritime transport sector, since it contributed to the main objectives laid down in the Community guidelines.

28 It finally invited the Kingdom of Denmark to notify it of amendments made to the scheme examined, and reminded it that it could decide to adopt appropriate measures if required by the development of the common market.

Procedure before the General Court and the Court of Justice

29 By application lodged at the Registry of the General Court on 30 January 2003 the applicant sought the annulment of the contested decision and an order that the Commission pay the costs.

30 By separate document lodged at the Registry of the Court on 17 March 2003, the Commission raised a plea of inadmissibility under Article 114 of the Rules of Procedure of the Court, asking it to dismiss the application as manifestly inadmissible and to order the applicant to pay the costs.

31 It its observations of 16 May 2003 on the plea of inadmissibility, the applicant contended that the Court should reject that plea and order the Commission to pay the costs.

32 By order of 23 April 2007 in Case T-30/03 *SID* v *Commission*, not published in the ECR, the Court dismissed the action as inadmissible. It ordered the applicant to bear its own costs and pay those of the Commission. It also ordered the parties to bear their own costs relating to the interventions.

33 By application lodged at the Registry of the Court of Justice on 9 July 2007 the applicant appealed, pursuant to Article 56 of the Statute of the Court of Justice, against the order of the General Court in *SID* v *Commission*, cited in paragraph 32 above, and requested the Court of Justice to set aside that order, declare its application to the General Court admissible, and order the Commission to pay the costs of the appeal.

34 By judgment of 9 July 2009 in Case C-319/07 P *3F* v *Commission* [2009] ECR I-5963, the Court of Justice set aside the order of the General Court in *SID* v *Commission*, cited in paragraph 32 above, in so far as it did not address the applicant's arguments relating, first, to the competitive position of 3F in relation to other trade unions in the negotiation of collective agreements applicable to seafarers and, second, to the social aspects of the fiscal measures in relation to seafarers employed on board vessels registered in the DIS register. The Court of Justice rejected the plea of inadmissibility raised by the Commission before the General Court. Finally, it remitted the case to the General Court for it to rule on the applicant's claim for the annulment of the contested decision, and reserved the costs.

35 The case was assigned to the First Chamber, Extended Composition, of the General Court.

36 On 21 September 2009 the applicant submitted written observations at the Registry's request.

37 Pursuant to Article 119(2) of the Rules of Procedure, the Commission lodged its defence with the Registry of the Court on 25 November 2009. The applicant lodged a reply on 18 January 2010. The Commission lodged a rejoinder on 16 March 2010.

38 The Kingdom of Denmark lodged its statement in intervention on 15 January 2010. The applicant submitted its observations on that statement on 27 May 2010.

39 By order of 8 April 2010 of the President of the General Court (First Chamber, Extended Composition), the Kingdom of Norway was, following its withdrawal, removed from the register of the General Court as intervener. Pursuant to Article 87(4) and (5) of the Rules of Procedure, the Kingdom of Norway was ordered to bear its own costs and each party was ordered to bear its own costs in relation to the intervention of the Kingdom of Norway.

40 Following a change in the composition of the Chambers of the General Court, the Judge-Rapporteur was assigned to the Second Chamber and this case was then assigned to the Second Chamber, Extended Composition.

41 The parties presented oral argument and replied to the Court's questions at the hearing on 19 January 2011.

Forms of order sought by the parties following referral of the case back to the General Court

42 The applicant claims that the Court should:

– annul the contested decision in so far as it was decided not to raise any objections to the fiscal measures that have been applied since 1 January 1989 to seafarers on board vessels registered in Denmark, either in the DAS register or the DIS register;

– order the Commission to pay the costs.

43 The Commission contends that the Court should:

– dismiss the action;

– order the applicant to pay the costs.

Law

44 The applicant submits three pleas in law in support of its application for annulment. The first alleges infringement of Article 88(2) EC and of the principle of sound administration, as the Commission did not initiate the formal investigation procedure. The second plea alleges infringement of Article 87(3)(c) EC,

interpreted in the light of the 1989 and 1997 Guidelines, and of the principle of protection of legitimate expectations. The third plea alleges a manifest error of assessment.

45 In reply to a question from the Court, the applicant stated at the hearing that it was withdrawing the second and third pleas, on condition that the facts described in connection with those pleas were taken into account by the Court in its examination of the first plea, as was noted in the minutes of the hearing.

46 The Court will therefore examine the first plea, alleging infringement of Article 88(2) EC and the principle of proper administration.

Arguments of the parties

47 The applicant claims that serious difficulties were presented by this case. It refers, in that regard, to the fact that the Commission took four years to adopt the contested decision, which proves the existence of serious difficulties. It adds that the Danish Government introduced a draft bill to amend the DIS scheme, which made the situation more complex. The Commission should therefore, in its view, have initiated the formal investigation procedure pursuant to Article 88(2) EC and the principle of proper administration.

48 In its reply to the Commission's arguments that the length of the preliminary investigation was due to the numerous observations sent to it by the applicant, the applicant maintains that it intended by its observations to ensure that the Commission would rule on the issue that concerned it, that is, the meaning of 'Community seafarers', including whether it took the amendments to the DIS scheme envisaged by the Danish Government into account. In its view, while they were a complicating factor, those amendments did not resolve the question posed or prevent the Commission from having to rule on the meaning of 'Community seafarers'.

49 It also notes that the relevant question in this case was whether or not serious difficulties existed, not whether the matter was urgent or whether an unreasonable time had been spent on the preliminary investigation procedure.

50 The applicant adds that the Commission attempts to present the answer to the question asked in this case concerning the meaning of 'Community seafarers' as straightforward, whereas that is not the case. It notes that, before the contested decision, the Commission had not given any clear answer on that point. It further submits that the question was raised at least implicitly in two other cases concerning French and Swedish tax exemption schemes, referred to by the Commission, which confirmed the need to initiate a formal investigation procedure. Moreover, the fact that the Commission decisions concerning those two other schemes were issued more rapidly shows the existence of serious difficulties in the present case.

51 Finally, the applicant considers that the correct criterion is not whether the Commission had doubts when it adopted the contested decision but whether, after the expiry of a reasonable period of time, it was faced with serious difficulties.

52 The Commission and the Kingdom of Denmark, intervening in its support, dispute the applicant's arguments.

Findings of the Court

53 According to settled case-law, the procedure under Article 88(2) EC is essential where the Commission has serious difficulties in determining whether aid is compatible with the common market. The Commission may therefore restrict itself to the preliminary examination under Article 88(3) EC when taking a decision in favour of aid only if it is able to satisfy itself, after an initial investigation, that the aid is compatible with the common market. If, on the other hand, the initial examination leads the Commission to the opposite conclusion, or if it does not enable it to overcome all the difficulties involved in determining whether the aid is compatible with the common market, the Commission is under a duty to obtain all the requisite opinions and to that end to initiate the procedure under Article 88(2) EC (Case

C-225/91 *Matra* v *Commission* [1993] ECR I-3203, paragraph 33; Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 39; Case C-521/06 P *Athinaïki Techniki* v *Commission* [2008] ECR I-5829, paragraph 34; Case C-431/07 P *Bouygues and Bouygues Télécom* v *Commission* [2009] ECR I-2665, paragraph 61; and Case T-359/04 *British Aggregates and Others* v *Commission* [2010] ECR II-0000, paragraph 55).

54 Although it has no discretion in relation to the decision to initiate the formal investigation procedure where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties. In accordance with the objective of Article 88(3) EC and its duty of sound administration, the Commission may, amongst other things, engage in a dialogue with the notifying State or third parties in an endeavour to overcome, during the preliminary procedure, any difficulties encountered (Case T-73/98 *Prayon-Rupel* v *Commission* [2001] ECR II-867, paragraph 45, and Case T-36/06 *Bundesverband deutscher Banken* v *Commission* [2010] ECR II-0000, paragraph 126). That power presupposes that the Commission may bring its position in line with the results of the dialogue it engaged in, without that alignment having to be interpreted, *a priori*, as establishing the existence of serious difficulties (Case T-95/03 *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission* [2006] ECR II-4739, paragraph 139).

55 It must also be borne in mind that, according to the case-law, the notion of serious difficulties is an objective one. Whether or not such difficulties exist requires investigation of both the circumstances under which the contested measure was adopted and its content, in an objective manner, comparing the grounds of the decision with the information available to the Commission when it took a decision on the compatibility of the disputed aid with the common market. It follows that judicial review by the Court of the existence of serious difficulties will, by its nature, go beyond simple consideration of whether or not there has been a manifest error of assessment. The applicant bears the burden of proving the existence of serious difficulties and may discharge that burden of proof by reference to a body of consistent evidence, concerning, first, the circumstances and the length of the preliminary examination procedure and, secondly, the content of the contested decision (see, to that effect, *Prayon-Rupel* v *Commission*, cited in paragraph 54 above, paragraph 47, and *Bundesverband deutscher Banken* v *Commission*, cited in paragraph 54 above, paragraph 127).

56 In support of its plea that there were serious difficulties in this case, the applicant puts forward, first, the length of the preliminary examination procedure and, secondly, arguments relating to the circumstances of that procedure.

57 In relation, in the first place, to the argument relating to the length of the preliminary examination procedure, it should be noted that, according to case-law, where the disputed State measures were not notified by the Member State concerned, the Commission is not required to carry out an initial investigation of those measures within a specified period. However, where interested third parties submit complaints to the Commission relating to State measures which have not been notified, the Commission is bound, in the context of the preliminary stage laid down in Article 88(3) EC, to conduct a diligent and impartial examination of the complaints in the interests of sound administration of the fundamental rules of the EC Treaty relating to State aid. It follows, in particular, that the Commission cannot prolong indefinitely its preliminary investigation into State measures that have been the subject of a complaint, as the purpose of that examination is simply to allow the Commission to form an initial opinion on the classification of the measures submitted for its assessment and their compatibility with the common market (Case T-46/97 *SIC* v *Commission* [2000] ECR II-2125, paragraphs 103, 105 and 107, and *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, cited in paragraph 54 above, paragraph 121).

58 Whether or not the duration of the preliminary investigation procedure is reasonable must be determined in relation to the particular circumstances of each case and, especially, its context, the various procedural stages to be followed by the Commission and the complexity of the case (Case T-395/04 *Air One* v

Commission [2006] ECR II-1343, paragraph 61, and Case T-167/04 *Asklepios Kliniken* v *Commission* [2007] ECR II-2379, paragraph 81).

59 In the present case, between 2 September 1998, the date of receipt of the complaint, and 13 November 2002, the date of the contested decision, more than four years elapsed. To explain that length, the Commission maintains that the complaint was voluminous, that it attempted to address all of its aspects, including the issue of the bilateral tax agreements, and that the behaviour of the applicant, which sent ten letters to the Commission, contributed to the extension of the preliminary examination procedure.

60 In that regard, it must be noted that, in the initial complaint, the applicant set out its argument that, in essence, the tax exemption provided for by the DIS scheme contravened the provisions applicable in respect of State aid, in particular the 1989 and 1997 Guidelines, in that seafarers who neither had the nationality of nor residence in a Member State could benefit from it. The applicant also raised that question in relation to the tax conventions for the avoidance of double taxation entered into between the Kingdom of Denmark, on the one hand, and the Republic of the Philippines and the Republic of Singapore, on the other hand, and the social protection from which seafarers from those non-member countries benefited.

61 Moreover, it is apparent from the chronology of the facts that, following the complaint of 28 August 1998, the applicant on several occasions sent substantial observations concerning the meaning of 'Community seafarers' and the DIS scheme (letters of 18 March 1999, 10 January 2000, 1 February 2001), sometimes accompanied by statistical information such as in the letter of 10 January 2000. It also sent, on 5 November 2001, its comments on the Kingdom of Denmark's responses to the Commission's supplementary questions.

62 Similarly, the applicant drew the Commission's attention to the possibility of an amendment to the DIS scheme by letter of 4 June 1999. The exchanges that followed, in particular with the Kingdom of Denmark, concerned those legislative amendments. The Danish authorities sent the Commission the draft bill on 6 December 1999, followed by the amendments made to that draft bill on 3 April 2000 (see paragraphs 10 to 16 above). The applicant then sent its comments on that draft bill by letters of 18 April and 15 May 2000.

63 In that context, the Commission was entitled to consider it necessary, also in a preliminary examination of the measures at issue, to examine all the matters of fact and law brought to its attention by the initial complaint and the various letters. It thus carried out a further investigation in that regard and requested additional information from the Kingdom of Denmark by letter of 30 November 2000, including in relation to the question of the bilateral tax treaties.

64 It follows that those exchanges indeed contributed to the extension of the length of the preliminary examination.

65 Similarly, following the Danish authorities' letter of 15 January 2001 replying to the Commission's requests for additional information, the applicant sent a letter to the Commission on 1 February 2001, noting, inter alia, the original purpose of its complaint, and a letter dated 29 June 2001, summarising its arguments in one page and stating that it had observations on the Kingdom of Denmark's response of 15 January 2001. Those observations were not then sent to the Commission until 5 November 2001.

66 Finally, during the preliminary examination procedure, various meetings were organised by the Commission on 19 March 1999, 4 April 2000 and 27 May 2002.

67 It follows that those circumstances explain, to a large extent, the length of the preliminary examination in this case.

68 It follows from the above that, even if, considered as a whole, the duration of the preliminary examination can be regarded as exceeding the time usually required for a preliminary examination, that duration is

justified to a large extent by the circumstances and context of the procedure.

69 However, as the applicant notes in its reply, the question in this case is not whether or not the duration of the preliminary examination was reasonable but whether there were serious difficulties.

70 While the length of the preliminary examination can constitute an indication of the existence of serious difficulties, it does not of itself suffice to show the existence of such difficulties.

71 In particular, the mere fact that discussions took place between the Commission and the Member State concerned during the preliminary examination stage and that, in that context, the Commission asked for additional information about the measures submitted for its review cannot in itself be regarded as evidence that the Commission was confronted with serious difficulties of assessment (see *SIC* v *Commission*, cited in paragraph 57 above, paragraph 89 and the case-law cited).

72 Moreover, it is only if it is reinforced by other factors that the passage of time, even if that time considerably exceeds the time usually required for a preliminary examination under Article 88(3) EC, may lead to the conclusion that the Commission encountered serious difficulties of assessment necessitating initiation of the procedure under Article 88(2) EC (see, to that effect, *Asociación de Estaciones de Servicio de Madrid and Federación Catalana de Estaciones de Servicio* v *Commission*, cited in paragraph 54 above, paragraph 135 and the case-law cited).

73 It is therefore necessary to examine, in the second place, the other arguments put forward by the applicant in support of its first plea, relating in essence to the circumstances of the preliminary examination procedure.

74 The applicant submits, first, that the amendments made to the DIS scheme by the draft bill sent by the Kingdom of Denmark appear to be a complicating factor in the file, even though the contested decision did not rule on those amendments.

75 It should be noted that the legislative amendments to the DIS scheme, referred to during the preliminary examination procedure, extended the specific tax exemption provided for in the DIS scheme at issue to all non-residents who would normally have been liable to income tax and consisted, in essence, of exempting all non-resident workers on Danish vessels and aeroplanes engaged in international traffic from income tax.

76 Those legislative amendments, which at the time constituted a new factor, were part of the dialogue between the Commission and the Danish authorities. As such, they were a cause of delay in the context of the preliminary examination of the complaint, as has been previously set out (see paragraphs 62 to 67 above), particularly because the draft bill that was sent by the Kingdom of Denmark to the Commission on 6 December 1999 was later amended, as the Commission was informed on 3 April 2000.

77 However, the applicant has not shown in what respect those legislative amendments constitute an indicator of the existence of serious difficulties of assessment of the measures at issue in this case, in particular in relation to the meaning of ‘Community seafarers’, even though the burden of proof falls upon it in that regard (see paragraph 55 above).

78 It must be recalled that, while it has no discretion in relation to the decision to initiate the formal investigation procedure where it finds that such difficulties exist, the Commission nevertheless enjoys a certain margin of discretion in identifying and evaluating the circumstances of the case in order to determine whether they present serious difficulties (see the case-law cited in paragraph 54 above).

79 In the present case, after being informed that legislative amendments to the DIS scheme were ongoing, the Commission carried out a supplementary investigation. It held a meeting with the Danish authorities on 4 April 2000 and requested additional information from the Kingdom of Denmark, in the light of the latest

amendments to the draft bill. The applicant, indeed, itself sent observations concerning the amendments to the draft bill.

80 Such an approach by the Commission falls within its margin of discretion with reference to determining whether those amendments raised serious difficulties, without in itself establishing that the Commission encountered such difficulties in this case.

81 Moreover, the applicant notes in the reply that, while they were a complicating factor, those amendments did not resolve the question asked and did not relieve the Commission of its obligation to rule on the definition of 'Community seafarers'. It does not show, however, in the light of the ongoing legislative amendments, that the Commission should have had doubts concerning the compatibility of the fiscal measures at issue in this case.

82 It follows that the applicant has not proven that the legislative amendments to the DIS scheme, which were not yet in force at the time the contested decision was adopted, show the existence of serious difficulties as to the assessment of the compatibility of the DIS scheme with the common market.

83 Secondly, the applicant submits that, before the adoption of the contested decision, the Commission did not give any clear response on the meaning of 'Community seafarers'.

84 However, that does not necessarily indicate that the meaning posed serious difficulties. The preliminary examination phase does not require an exchange of views and arguments with the complainant (*Commission* v *Sytraval and Brink's France*, cited in paragraph 53 above, paragraphs 58 and 59) and the Commission is not bound to state its position in this regard to the applicant before the adoption of the contested decision.

85 Consequently, the mere fact that no formal position was taken before the contested decision was adopted does not imply that the Commission encountered serious difficulties.

86 Thirdly, the applicant submits that the two decisions referred to by the Commission, concerning the French and Swedish tax schemes, at least implicitly raised the same question, which confirmed the necessity of initiating a formal investigation procedure.

87 However, the fact that the same question was raised in other cases does not justify, in itself, the initiation of a formal investigation procedure. The same question may be posed in several files without necessarily raising serious difficulties, particularly as, as the applicant notes, the French and Swedish schemes were different from the Danish scheme at issue.

88 Moreover, the argument that the fact that the preliminary examination of those other two schemes was quicker shows the existence of serious difficulties in this case must also be rejected. The circumstances surrounding the preliminary examination procedure in the present case differed greatly from those in the French and Swedish cases. Those schemes had been notified to the Commission, and it was essentially a question of renewing the scheme already in force in Sweden and extending the French scheme.

89 It is apparent from the foregoing that none of the factors raised by the applicant allow the conclusion that, at the end of the preliminary examination procedure, the Commission encountered serious difficulties in this case, requiring the initiation of a formal investigation procedure.

90 Finally, the applicant stated at the hearing that it was withdrawing the second and third pleas, on condition that the facts described in connection with those pleas were taken into account by the Court in its examination of the first plea (see paragraph 45 above).

91 In the reply, the applicant submitted that the Commission's arguments in respect of the second and third pleas show that a serious and complex debate took place during the preliminary examination procedure concerning the concept of 'Community seafarers' who may benefit from the tax exemption at issue.

92 It must be stated that, in doing so, the applicant, while it does not refer to any factual element in particular, in reality refers back not to facts but to a legal argument expounded in support of its second and third pleas. However, it withdrew those pleas at the hearing. That argument cannot therefore be taken into account in the context of this action.

93 For the sake of completeness, the Court does not identify any factor, expounded in support of the second and third pleas, that would establish the existence of a serious difficulty in this case.

94 Therefore, it follows from all of the foregoing that the applicant has not shown that the Commission was confronted with serious difficulties of assessment in classifying the measures at issue with regard to the concept of aid and establishing their compatibility with the common market.

95 It follows that the plea alleging infringement of Article 88(2) EC and of the principle of sound administration, on the ground that the Commission should have initiated the formal investigation procedure, is unfounded.

96 This plea must therefore be rejected and, accordingly, the action must be dismissed in its entirety.

Costs

97 In the judgment on appeal, the Court of Justice reserved the costs. It is therefore for this Court to rule in this judgment on all the costs relating to the various proceedings, in accordance with Article 121 of the Rules of Procedure.

98 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 the costs incurred by the Commission before the Court of Justice and the General Court, in accordance with the form of order sought by the Commission.

99 Under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States intervening in the proceedings are to bear their own costs. In this case, the Kingdom of Denmark, which intervened in support of the Commission, must be ordered to bear its own costs incurred before the Court of Justice and the General Court.

On those grounds,

THE GENERAL COURT (Second Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders 3F, formerly Specialarbejderforbundet i Danmark (SID), to bear its own costs and pay the costs incurred by the European Commission before the Court of Justice and the General Court;**

3. **Orders the Kingdom of Denmark to bear its own costs incurred before the Court of Justice and the General Court.**

Forwood Dehousse Wiszniewska-Białecka

Prek Schwarcz

Delivered in open court in Luxembourg on 27 September 2011.

[Signatures]

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* Language of the case: English.