OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 20 March 1985 *

Mr President,
Members of the Court,

1. Introductory remarks

The subject-matter of this preliminary reference attracted academic lawyers' attention as early as 1982, when an interesting article appeared in the *Revue trimestrielle de droit européen* (p. 288) under the romantic title 'Les "belles étrangères" et le traité de Rome'. The reference is in fact to a special French excise tax on passenger cars which are rated for tax purposes at more than 16 CV (fiscal horsepower). France does not manufacture such cars but other Member States do. The rate of tax on such cars is considerably higher than the maximum rate of differential, progressive tax charged on passenger cars which come within broadly similar price brackets and share many other similar characteristics as far as the consumer is concerned, but are rated as less powerful for tax purposes. Furthermore, the cars liable to the special tax satisfy broadly similar consumer needs to those met by passenger cars bearing a lower tax burden which are manufactured in France as well as in other Member States.

A preliminary difficulty — which is discussed at length in the article referred to above — in assessing the permissibility of a special tax of this kind which in practice affects only imported cars is whether it constitutes a charge having effect equivalent to a customs duty, which is prohibited by Article 12 of the EEC Treaty, or internal taxation in excess of that imposed on similar domestic products, which is prohibited by Article 95 of the Treaty. If the French Government is right in maintaining that, because of their different power rating for tax purposes, cars liable to the special tax are not similar to other types of car, another question arises in regard to the applicability of Article 95, namely whether the taxation in question must be classed as internal taxation affording indirect protection to other cars.

I shall examine those two preliminary issues in greater depth when I have reviewed the facts and the course of the procedure in the dispute which prompted the Tribunal de grande instance [Regional Court], Belfort, to refer two questions to the Court for a preliminary ruling and before I consider the questions themselves. The following review of the facts and procedure is taken from the summary of the case set out in the Report for the Hearing with the addition of a number of supplementary particulars supplied and not contested during the hearing.

2. The facts and the course of the procedure

On 13 April 1981 Michel Humblot acquired in France a Mercedes car rated at 36 CV, as a result of which he had to pay the so-called

* Translated from the Dutch.

'taxe spéciale' amounting to FF 5 000 for 1981.

In France the taxation of motor vehicles is governed by Article 1007 of the Code général des impôts [General Revenue Code]. There are two different types of tax due annually. First, there is a differential, progressive tax to which vehicles rated for tax purposes at 16 CV or less are subject. Secondly, for vehicles rated for tax purposes at more than 16 CV there is a special tax, which is levied at a single rate, and it was that tax which Mr Humblot had to pay.

The special tax was introduced for the first time in 1956, although it has been repeatedly amended over the years. Thus in 1980 the Loi des finances [Finance Law] altered its structure as follows. Previously, vehicles were liable to the special tax for two years only, after which they were subject to the system applied to other vehicles, namely the differential tax. Since 1980 the special tax has been payable for five years and it is only after that five-year period has elapsed that a decreasing rate is applied. Moreover, the rates of taxation have been increased. For instance, whereas, again in 1980, the rates of differential tax were increased from between 40 and 60%, the special tax was raised by 177%. In 1983 the special tax came to FF 8 100 whereas the highest rate of the differential tax — on vehicles rated for tax purposes at 12 to 16 CV and less than five years old — was FF 2 400. According to statements made at the hearing by the representative of the French Government, since 1984/85 a limited amount of variation in rates of tax has been possible from one French department to another, but that does not affect the principle of the difference in tax rates between the aforementioned two main categories of car. It appears from the same source that in Paris the rate for cars rated at more than 16 CV is now more than five times the highest tariff for the other category of car (FF 8 856 as against FF 1 734). Furthermore, at the hearing it was stated on Mr Humblot's behalf and not contested that as from 1983 the high initial rate of special tax of FF 8 100 no longer applies for just the first two but the first five years of a car's life and that for the following fifteen years the car is liable to an annual tax of FF 4 050. Finally it was also pointed out on Mr Humblot's behalf at the hearing that the way in which the power rating for tax purposes is calculated also contains a discriminatory element, which may be relevant for the court making the reference.

Mr Humblot maintains that the special tax is charged on foreign cars only, since no passenger cars rated for tax purposes at more than 16 CV are manufactured in France. He argues therefore that the special tax is a discriminatory measure contrary to Article 95 of the EEC Treaty. Consequently he asked the Direction des services fiscaux [Revenue Directorate] to align the special tax with the highest rate of differential tax (FF 1 100 in 1981) and to repay the difference.

Upon the refusal of the Direction des services fiscaux to comply, Mr Humblot brought an action against it on 23 February 1982 before the Tribunal de grande instance, Belfort. Before that court he argued that the special tax was a measure impeding free movement of foreign motor vehicles by imposing a higher tax on them than on similar, competing products of domestic manufacture, and hence that it conflicts with Articles 30 and 95 of the EEC Treaty.

Considering that it was necessary to ascertain the views of the Court of Justice with regard to that matter, the Tribunal de grande instance, Belfort, by a judgment of

6 March 1984, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'Must Article 95 of the Treaty establishing the European Economic Community, in conjunction with any other provision or fundamental principle of the Treaty, be interpreted as meaning that it prevents (if so, on what terms) a Member State from imposing a specific tax on products from another Member State which it does not manufacture but which, it may be assumed, are similar to or in competition, within the meaning of previous decisions of the Court of Justice, with its own products? In particular, does Article 95 of the Treaty allow a Member State to impose specific taxes such as the special tax imposed in France on vehicles of more than 16 CV when such vehicles are not manufactured in that country but are manufactured in certain other countries of the Community?'

3. The applicable provisions of Community law

3.1. *The distinction between Article 12 and Article 95*

In its judgments, in particular in Case 57/65 (*Alfons Lütticke GmbH* v *Hauptzollamt Saarlouis* [1966] ECR 205) and Case 25/67 (*Firma Milch-, Fett- und Eierkontor GmbH* v *Hauptzollamt Saarbrücken* [1968] ECR 207), the Court has already pointed out that Articles 12 and 95 of the Treaty cannot be applied together to a single set of facts. Consequently before considering the questions raised by the Tribunal de grande instance I shall briefly examine whether that court was right in assuming that Article 95 is applicable in this case. As far as the distinction between the scope of Article 12 and that of Article 95 is concerned, in the first place, it is important to note that according to the Court's judgments in Case 24/68 (*Commission* v *Italian Republic* [1969] ECR 193) and Case 29/72 (*SpA Marimex* v *Italian Finance Administration* [1972] ECR 1309) only pecuniary charges imposed on goods moving within the Community *by reason of the fact that they cross a frontier* constitute charges having an effect equivalent to customs duties. That distinguishing criterion is reiterated in somewhat different terms in paragraph 12 of the Court's more recent judgment of 3 February 1981 in Case 90/79 (*Commission* v *French Republic* [1981] ECR 283). In the present case there is clearly no question of a tax being charged *on account of* importation. In addition the Court's judgments in the *Fink-Frucht* case (Case 27/67 *Firma Fink-Frucht GmbH* v *Hauptzollamt München-Landsbergerstraße* [1968] ECR 223) and in the *Stier* case (Case 31/67 *Firma August Stier* v *Hauptzollamt Hamburg-Ericus* [1968] ECR 235) are in point. According to those judgments the provisions of Article 95 do not preclude Member States from imposing internal taxation (even at the time of importation) on imported products originating in other Member States where there is no similar domestic product or other domestic products capable of being protected. However, such charges may not be of such an amount as to impede the free movement of goods within the Common Market as far as those products are concerned. According to those judgments, such a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part.

Against the background of those judgments I concur with the view held by the Commission and the French Government in this case that the taxation at issue must be considered in the light not of Article 12 but of Article 95 of the EEC Treaty.

3.2. *The distinction between the first and the second paragraphs of Article 95*

As far as the distinction between the first and the second paragraphs of Article 95 is concerned, according to the wording of the article the decisive factor is whether or not the national reference product is similar. According to the previous decisions of the

Court summarized in paragraph 5 of its judgment of 27 February 1980 in Case 169/78 (*Commission* v *Italian Republic* [1980] ECR 385) it is necessary to consider as similar products which 'have similar characteristics and meet the same needs from the point of view of consumers'. The parties disagree as to whether that is true in this case. The plaintiff in the main proceedings and the Commission consider — correctly in my view — that it is true. It appears from information provided at the hearing and from many trade journals, first, that cars rated at more than 16 CV are not invariably more expensive than cars rated at 16 CV or less. On the contrary, between the cheapest and the most expensive cars prices show a linear increase, as may readily be observed from surveys in the trade press. In particular there is no abrupt break between cars of up to and more than 16 CV. Furthermore, it appears from the data provided at the hearing and those generally available that there are also no major differences as regards weight, petrol consumption, top speed, comfort or other aspects of potential importance to the consumer, resulting in an abrupt break occurring as regards those quality aspects at the 16 CV threshold between the most prestigious French-made models and the imported cars liable to the special tax. Accordingly, neither recognized considerations of price nor those of quality justify use of the 16 CV threshold as the criterion for a leap in the tax rate of in some cases over 400% on the ground that, as the Court has recognized in principle (Case 319/81 *Commission* v *Italian Republic* [1983] ECR 601), higher taxation may be charged on luxury products. As appears from the judgment in Case 319/81, that finding is important because, *inter alia*, if there were not a gradual, but a sufficiently sharp, substantial difference, on the market between products depending on whether or not they were in the luxury category, the abrupt increase in the tax rate between the two categories of car could be tested only against the second paragraph of Article 95. Where, as in this case, there is a smooth progression, that is to say a gradual increase in the differences between less luxurious and more luxurious cars, it is possible to consider the special excise tax on cars rated at more than 16 CV in the light of the first paragraph of Article 95, as suggested by the court making the reference. Furthermore, although the question of similarity is in principle a matter for the national court, the Court of Justice may provide an abstract definition of the concept of similarity in a case such as this. Naturally the question whether the first paragraph of Article 95 is applicable is of particular importance in a reference for a preliminary ruling because it is doubtful to what extent, where the second paragraph of Article 95 applies, such an accurate determination of the amount of tax levied in excess is possible that it can be effected by the national court where a claim for repayment is involved, as in this case. The Court's judgment of 12 July 1983 in Case 170/78 (*Commission* v *United Kingdom* [1983] ECR 2265) provides a good illustration of the problems of definition posed in that regard.

4. Answers to the questions

4.1. Before an answer is provided to the questions referred to the Court, it may first be stated, in common with the Commission, that according to paragraph 4 of the Court's judgment in Case 169/78, already referred to, the aim of the first and second paragraphs of Article 95 is to 'ensure free movement of goods between the Member

States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. As the Commission has correctly stated, Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and imported products'.

In paragraph 7 of that judgment it is added that: 'The criterion indicated in the first paragraph of Article 95 consists in the comparison of tax burdens, whether in terms of the rate, the mode of assessment or other detailed rules for the application thereof'.

4.2. Referring to paragraph 14 of the Court's judgment of 3 February 1981 in Case 90/79 (*Commission* v *French Republic* [1981] ECR 283), the French Government argues that the special tax in question is internal taxation 'applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products'. It claims that the taxation threshold of 16 CV — in common with the age criterion applied by the tax — is in fact objective and applied irrespective of the origin of the products. It refers in that connection to paragraph 14 of the Court's judgment of 15 March 1983 in Case 319/81 (*Commission* v *Italian Republic* [1983] ECR 601), which reads as follows: 'Nor can it be denied that in the sphere of harmonized systems of value-added tax Member States have the right to tax some consumer goods, particularly those regarded as luxury products, more heavily. However, the freedom which must therefore be left to Member States in the field of domestic taxation cannot justify any departure from the fundamental principle of non-discrimination in taxation matters laid down in Article 95 but must be exercised within the confines of that provision and observe the prohibitions contained therein.' The French Government contends that it cannot be proved that cars rated at more than 16 CV are similar to cars rated at less than 16 CV. The threshold corresponds to the luxury character of cars of above 16 CV, whose prices exceed by some 60% those of cars rated at less than 16 CV. In view of the objective nature of the criteria employed, the special tax cannot be regarded as discriminatory within the meaning of the first paragraph of Article 95 merely because it mainly affects imported cars.

4.3. The Commission considers that the concept of similarity within the meaning of the first paragraph of Article 95 must be interpreted in accordance with paragraph 5 (quoted above) of the Court's judgment in Case 169/78. The matter turns on whether the products 'have similar characteristics and meet the same needs from the point of view of consumers'. In its opinion, it cannot be denied that the products with which this case is concerned are similar within the meaning of that criterion. The Commission considers that they have similar, if not identical, characteristics as far as the consumer is concerned, meet the same needs and are completely comparable as regards their utilization. The Commission and the plaintiff in the main proceedings provide various specific examples of that comparability, which they supplemented at the hearing. Comparability exists as regards *inter alia* prices; cars rated at above 16 CV are by no means invariably more expensive, and certainly not 60% more expensive, than cars rated at less than 16 CV. In so far as a

Member State, according to previous decisions of the Court, may tax certain products more heavily on account of their being luxury goods, the differentiation criterion employed must — the Commission argues — be consistent with the specified objective and there must be no direct or indirect discrimination. In this case there is no such consistency between the taxation criterion and the luxury character of the products. Many cars rated at less than 16 CV are also manifestly luxury goods irrespective of whether the price in particular or other details demonstrating luxury characteristics are taken into consideration. [1] In addition, as far as petrol consumption is concerned (in so far as energy conservation is one of the objectives of the special tax), the Commission considers that it is clear from actual figures that no such connection exists between the criterion applied for differentiation and any objective of that kind as to make that criterion consistent with the aim of energy conservation. Finally, the Commission considers that, even if it is regarded as a luxury tax, the special tax does not in any case fulfil the requirement laid down by the Court in its previous decisions, namely that it may not result in any direct or indirect discrimination in regard to imports from other Member States. A progressive rate of taxation may only lead to higher taxation on imported goods in so far as the progression of the tax rates is commensurate with the aims pursued by the tax. In no case would a leap in the rate as in this case fulfil the objectives assumed for purposes of argument (luxury tax, energy conservation).

4.4. I concur with the view taken by the Commission, which, as regards its chief aspects, is also supported by the plaintiff in the main proceedings. In that regard no significantly new aspects were adduced at the hearing. Nevertheless, I consider it desirable to go into greater detail than the Commission's proposed answers [2] in two respects. First, I consider it desirable to be more explicit about the applicability of the first paragraph of Article 95 to cases of this kind. Secondly, I consider it desirable to make it clear that although a leap in the rate of tax of the kind involved in this case is at variance with the first paragraph of Article 95 a gradual progression in the rate of tax is not at variance therewith, provided that the gradual increase is commensurate with the non-fiscal aims pursued by the progressive tax rate. Finally, I would point out that it follows from the nature of a special excise tax that the rate of taxation may be adjusted more precisely to suit the products concerned than may general turnover tax.

1 — I refer to those other relevant characteristics in section 3 of this Opinion.

2 — '1. Article 95 of the Treaty establishing the European Economic Community must be interpreted as debarring a Member State from charging a specific tax on vehicles exceeding a given power rating for tax purposes and produced solely in other Member States if a significantly power tax is charged on vehicles not exceeding the said power rating which are produced in that Member State since both types of vehicle must be regarded as similar products within the meaning of the first paragraph of the said Article 95.

2. A system of progressive taxation on similar products, which is based on objective criteria, is compatible with Community law, provided that it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and that its progressive nature is consistent with those objectives and provides for a balanced spread, whilst avoiding any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products.'

5. Conclusions

Having regard to the findings that I have set out above, I propose that the questions referred to the Court be answered as follows:

'(1) The first paragraph of Article 95 of the EEC Treaty must be interpreted as prohibiting a Member State from charging a special excise tax on the use of vehicles exceeding a given power rating for tax purposes and manufactured exclusively or virtually exclusively in other Member States whereas even at its highest progressive rate a considerably lesser tax fixed according to different criteria is levied on vehicles produced in that Member State which do not exceed that power rating. That applies in particular if, as regards price or other characteristics relevant from the consumer's point of view, the two groups of vehicle do not exhibit such differences as are expressed appropriately and proportionately thereto by the above-mentioned criterion for differentiation and if the vehicles satisfy similar needs.

(2) A special tax on vehicles of the type in question in this case is in particular compatible with the prohibition of discrimination laid down in the first paragraph of Article 95 only if both the criterion chosen for the application of differing rates and the method chosen for the application of any progressive rate are adapted to the economic aims pursued by the tax, if the aims themselves are compatible with the requirements of the Treaty and if the selected mode of progression of the various special excise taxes on vehicles falling within the categories defined by the legislation also provides for a balanced spread. A gradual increase in the progressive rate for the two categories in accordance with one and the same progressive factor may be regarded as being compatible with the said prohibition of discrimination but not an abrupt transition to a considerably higher rate above a given threshold.'