OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 20 March 1997 *

1. The questions referred by the Diikitiko Protodikio Thessaloniki require the Court to consider an important aspect of the rules governing tax exemptions applicable to the temporary importation of means of transport laid down in Directive 83/182/EEC ('the Directive'). [1] The issue before the Court is this: may an individual obtain tax exemption in respect of more than one vehicle temporarily imported for private or business use into a Member State other than that in which he resides? Together with that question, others arise as to whether the system of penalties laid down in the rules transposing the Directive into Greek law is compatible with the principles of Community law. [2]

2. Article 1 of the Directive determines the scope of the legislation: it provides that under certain conditions the Member States are to exempt temporary imports from another Member State of *motor-driven road vehicles* from turnover tax, excise duties and any other consumption tax and the taxes listed in the annex to the Directive.

3. Article 3 provides for exemption from tax to be granted — for a period, continuous or otherwise, of not more than six months in any 12 months — where certain *means of transport* for private use are temporarily imported. There are essentially three requirements to be met: first, the individual importing *the means of transport* must have his normal residence in a Member State other than the Member State of temporary importation; second, the *means of transport* must be used for private purposes and, accordingly, not in connection with any activity carried out for reward or profit; third, *the means of transport* may not be disposed of or hired out in the Member State of temporary importation or lent to a resident of that State. [3]

* Original language: Italian.

1 — Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59).

2 — Case C-9/92 *Commission* v *Greece* [1993] ECR I-4467. More generally, it would seem appropriate to recall some of the principal judgments in which the Court has dealt, directly or indirectly, with questions concerning the arrangements for temporary importation free of tax: Case 823/79 *Carciati* [1980] ECR 2773; Case 134/83 *Abbink* [1984] ECR 4097; Case 249/84 *Profant* [1985] ECR 3237; Case 127/86 *Ledoux* [1988] ECR 3741, and Case C-297/89 *Ryborg* [1991] ECR I-1943.

3 — Article 4, an important provision in the circumstances of this case, concerns the grant of exemption from tax on the temporary importation of *private vehicles for business use*. In this specific case, conditions are laid down which are in many aspects similar to those governing importation for private use: the individual importer must have his normal residence in a Member State other than the Member State of temporary importation; he may not use *the vehicle* within the Member State of temporary importation to carry passengers for hire or reward, or for the industrial or commercial transport of goods, whether for reward or not; *the private vehicle* may not be disposed of, hired out or lent *in the Member State of temporary importation*. Article 4(2) provides, in addition, that the exemption for business use is to apply for a period, continuous or not, of six months in any twelve.

Finally, the Directive contains provisions governing specific cases of temporary importation, [4] and special arrangements. [5]

4. The facts of the case may be summarized as follows.

Mr Siegfried Klattner (also 'the applicant') resides in Germany but frequently stays in Greece, where he owns a second home.

On 27 November 1989 he imported a car into Greece temporarily, with the benefit of exemption from taxes under the Greek rules, and re-exported it on 30 April 1990. During that period Mr Klattner returned to Germany to undergo medical treatment required as a result of a car accident in Yugoslavia. When the treatment was finished, he returned to Greece on 14 April 1990, driving a second vehicle which was re-exported on 16 July 1991 through the customs post at Evzoni. On the same day, however, Mr Klattner went with his vehicle to the Doïrani customs post in order to re-import it and benefit again from exemption from tax on importation.

5. From checks then carried out on the applicant's passport (passports, in fact), the customs authorities were able to establish two infringements of the Greek legislation implementing the Directive: the vehicle in question had already been granted a previous exemption and, consequently, had been in circulation for a period longer than the 15 months permitted by the legislation, and during the period from 14 April 1990 to 30 April 1990 the applicant had used two vehicles imported under the same tax exemption arrangements in Greece.

6. Order No D-1254/141 of the Minister for Finance of 1 November 1984 ('the Order') [6] sets the maximum period of exemption at six months (Article 4(2)) — consecutive or

4 — The specific cases are set out in Article 5, which provides that *private vehicles* imported temporarily are to be exempt from tax (a) for an indefinite period where a *private vehicle* registered in the country of normal residence of the user is used regularly for the journey from his residence to his place of work in the territory of another Member State and vice versa and (b) for a limited period where the user is a student and the *private vehicle* is registered in the Member State of his normal residence, not being the Member State in which he is studying.

5 — Article 9, 'Special arrangements', allows Member States to maintain and/or introduce more liberal arrangements than those provided for in the directive. In particular, they may permit, at the request of the importer, temporary importation for a period longer than that provided for by the Community provisions. The legislature took care, however, to set a definite limit on the discretion allowed the Member States: in no circumstances (Article 9(2)) may they apply, in pursuance of the Directive, tax exemptions within the Community which are less favourable than those which they would grant in respect of means of transport originating in a third country.

6 — The order was subsequently amended by Order No D-247/13 of 1 March 1988, ΦΕΚ (Official Journal of the Hellenic Republic 1951, B/6-4-88).

otherwise — in a 12-month period, renewable for nine more months (a total, thus, of 15 months) and prohibits (Article 8(4)) a person who has already obtained one exemption from tax from importing a second means of transport under those arrangements.

7. The director of the Doïrani Customs issued a notice of assessment requiring the applicant to pay, pursuant to national law, DR 21 043 856 by way of customs duties, other taxes and additional duties and DR 29 430 by way of circulation tax. Where the offence consists of something other than merely failing to meet the time-limit for re-exportation, the Greek rules provide (Article 10(7)) for a twofold penalty: the customs duties and other taxes applicable at the time when the offence is found to have been committed (VAT, consumer tax, circulation tax) are payable forthwith, together with a surcharge equal to 100% of the sum so calculated. [7]

8. Mr Klattner brought an action before the national court for annulment of the notice of assessment, claiming in essence that the Greek implementing measures were incompatible with the provisions of the directive inasmuch as (a) they limited to one the number of vehicles for which a person could obtain exemption and (b) they imposed penalties on the driver disproportionate to the offences with which he was charged.

9. Considering that the applicant was justified in his doubts as to the interpretation of the provisions, the national court referred the following four questions to the Court of Justice for a preliminary ruling:

'(1) Where certain means of transport for private use within the Community are temporarily imported within the meaning of Article 3 of Council Directive 83/182/EEC of 28 March 1983, is the exemption from tax granted for a single private vehicle or for more than one? Does the abovementioned directive in fact draw a distinction concerning the number of private vehicles which may be temporarily imported free of tax according to whether they are intended for private or business use?

(2) Does the Directive specifically require the competent Greek authorities not to restrict by legislation the parallel or

7 — As regards penalties, the order establishes a complex system which I shall explain, for the sake of completeness: *where a vehicle is not re-exported within the specified period* (Article 10(1)), it provides for (a) fixed additional duty of DR 10 000; (b) additional duty, depending on the cubic capacity of the engine, calculated for every day the vehicle has remained on Greek territory after the time-limit for re-exportation; (c) circulation taxes payable for the same period. *Where, at the time when exemption is applied for, incorrect information is supplied to the authorities,* the order provides (Article 10(5)) for the payment of the additional duties referred to in (a) and (b) above, calculated for every day the vehicle has remained on Greek territory from the time it was imported. Finally, Article 10(8) provides that in the case of multiple offences, the additional duties are to be charged cumulatively.

simultaneous temporary importation free of tax of more than one vehicle for private use by one and the same person? May an individual rely on Articles 3 and 9 of the Directive against the authorities before a national court, claiming that the rules contained in a provision of law are incompatible with those articles of the Directive?

(3) Is it compatible with the objective and terms of the Directive for the national legislature to provide that where certain provisions (such as Article 8(4) which prohibits the importation of a second vehicle by the same person) of the ministerial order transposing the Directive into national law are infringed, the applicable customs duties and other taxes and additional duty of the same amount as well are payable immediately, inasmuch as it is shown that the private vehicle is imported temporarily and not permanently?

(4) Is it compatible with the Community principle of proportionality to provide, as in the above case, for additional duty equal to 100% of the applicable duties and other taxes to be levied regardless of the length of time for which the second private vehicle remained in Greece?'

Question 1

10. The first question should be divided into two parts.

By the first, the national court asks the Court of Justice whether exemption from tax may be granted in respect of the contemporaneous importation of more than one motor vehicle or only one; by the second, on the other hand, it asks whether from that point of view the Directive draws any distinction between vehicles imported free of tax according to whether they are intended for private or business use.

I shall consider the questions in the order in which they have been put to the Court.

11. As regards the first question, the parties' views are clear.

12. The Hellenic Republic maintains that, for various reasons, Article 3 of the Directive is to be interpreted as meaning that exemption may be granted for one vehicle only.

The first argument concerns the wording of the provision. The legislature used the plural 'means of transport' to indicate all such means and a singular term, by contrast, to identify among means of transport as a whole 'each particular category of vehicles belonging to persons subject to special rules'. [8]

Second, the Greek Government claims that if the legislature had intended to permit any individual to import more than one vehicle, it would have limited the number. In its view, unlimited imports of means of transport are incompatible with private or business use which is, as we have seen, the essential prerequisite for exemption.

The third argument, on the other hand, is based on the purpose of the Directive. The measure constitutes a stage in the process of harmonizing the taxation systems of the Member States and must of necessity be interpreted as granting the right to import free of tax only within certain narrowly-defined limits.

Finally, the Greek Government points to the need to combat tax evasion. The Directive should, it considers, be read strictly in the light of the need, expressly recognized by the Court, for national laws to embody objective, verifiable criteria for preventing evasion. [9] It is only in exceptional circumstances that double importation free of tax should be permissible.

13. The applicant, together with the Commission, considers on the other hand that Article 3 gives the right to exemption in respect of more than one vehicle belonging to the same person.

14. Here, too, the argument is based primarily on the wording: the relevant provision uses the plural to indicate the means of transport for which exemption may be claimed. [10] If the legislature had intended to limit the goods eligible for exemption, there would have been an express provision to that effect, but there is none. That conclusion is compatible, moreover, with the purpose of

8 — Observations of the Hellenic Republic, pp. 17 and 18. It cites, respectively, Article 3 ('the individual importing *such goods*') and Article 5(1) ('*Private vehicles imported*'), and Article 4 ('the individual importing *the private vehicle*') and Article 5(1)(a) ('where *a private vehicle* (...) is used') and (b) ('where a student uses *a private vehicle*').

9 — It refers to *Abbink*.

10 — He cites Article 3(a)(bb), where it is provided that 'the individual importing *such goods*' must employ 'the *means of transport* in question for his private use'.

the Directive, which is to guarantee freedom of movement for persons, a freedom which would be hampered by restricting the number of vehicles which may be imported free of tax. [11]

As regards the argument concerning the need to prevent tax evasion, the Commission objects that such an aim could be pursued by other means without unduly restricting, as in the circumstances of this case, the exercise of freedom of movement safeguarded by the directive.

Legal assessment

15. As is apparent from the first recital in the preamble, the Directive was adopted in order to eliminate the obstacles to the free movement of Community residents within each Member State caused by the taxation arrangements applied to the temporary importation of certain means of transport for private or business use, including cars. [12] In addition, it is clear from various acts of the Commission that the aim of the legislature was to avoid double taxation and reduce customs formalities at borders so as to remove obstacles to the free movement of private cars and thus resolve a major problem for citizens moving within the Community. [13]

16. The Directive gives no details of the actions required at State level in order to prevent tax evasion. It would therefore seem appropriate to recall what the Court decided in *Commission* v *Greece*: the Member States are free to adopt control measures. [14] Furthermore, in its proposal for an amendment to Directive 83/182, the Commission expressly acknowledged that since the levels of taxation on motor vehicles vary significantly from one Member State to another,

11 — In support of this argument, the applicant gives examples of obstacles to freedom of movement caused by setting a quantitative limit on imports: where a vehicle is immobilized by a road accident, or where vehicles are used by several members of a family.

12 — The Commission's proposal of 24 October 1975, document COM (75) 527, recognized that because the relevant international conventions (New York Convention of 4 June 1954 and the convention on the taxation of road vehicles for private use in international circulation signed in Geneva on 18 May 1956) were no longer appropriate to the economic reality of the Community it was necessary to adopt measures governing the importation of vehicles onto the domestic market. The texts of those conventions are contained in the UN Treaty Series, Volume 282, p. 249, and Volume 339, p. 3, respectively. For a detailed examination of the provisions of those conventions, see *Carciati*, at p. 2775, point B(a).

13 — Commission proposal for a directive of 24 October 1975, cited above, No 1; see also the communication from the Commission of 28 July 1989 concerning the temporary importation of a private vehicle for business or private use, Document COM (89) 359 final, paragraph 1.

14 — Case C-9/92, cited above, paragraph 38; see also *Carciati*, cited above, paragraph 9.

certain restrictions appear to be justified. [15] Moreover, in one of its communications on the matter the Commission recognized that a process of evolution was under way within the Community which would lead to giving European citizens the maximum freedom of movement, but did not fail to add that that level of freedom had to be 'consistent' with the need to combat tax evasion. [16]

17. The question at issue here is precisely whether the provision of Greek law which limits the grant of tax exemption to one vehicle only — which can and must fall within the definition *lato sensu* of a fraud-prevention measure — is compatible with the objectives of the directive and the principles of the Treaty concerning freedom of movement for persons. [17]

18. The question under consideration cannot, in my view, be settled on the basis of the wording of the directive. Both the interpretation proposed by the Hellenic Republic and the opposite interpretation given by the Commission and Mr Klattner fit the wording used by the legislature equally well. I see no good reason for preferring one to the other. An intention to limit the right to exemption to one vehicle only is not clearly indicated either in the preparatory documents or in the Commission's proposal for amendments to the Directive, even when the term designating the means of transport is used in the singular. [18]

19. The cases to which I have referred demonstrate that the answer is therefore to be found elsewhere. The Community interest pursued by the Directive is to encourage free movement of residents and must be assessed in relation to the equally legitimate interest of the Member State which seeks rather to prevent tax evasion linked to importation

15 — Document COM (87) 14 final of 2 January 1987, Commission proposal for a directive amending Directive 83/182/EEC, paragraph 1; see also COM (89) 359 final, paragraph 1.

16 — COM (89) 359 final, paragraph 1.

17 — See *Ledoux*, cited above, although it relates directly to the system under the Sixth Directive — Directive 83/182 not then having been adopted —, in which the Court stated that the conditions required by the Member States for granting exemption from VAT for vehicles imported under temporary arrangements 'must take account, on the one hand, of the objectives of harmonization of the rules relating to VAT which are (...) further progress in the effective removal of restrictions on the movement of persons and goods (...) and, on the other hand, the objective of preventing evasion, avoidance or abuse in cases of temporary importation' (paragraph 10).

18 — See, to this effect, and purely by way of example, the Commission's communication cited above, in which (pp. 4 to 6) only the singular is mentioned (as indeed in the title of the Convention): thus members of the importer's family may use 'the vehicle'; a student is entitled during his studies to temporary exemption for 'his vehicle'; if 'his vehicle' is immobilized while he is abroad, the resident of one Member State may use a private vehicle registered in another Member State during the time taken for the repairs. It should be noted, however, how that uncertainty is reflected in the wording of provisions of national implementing legislation drawn up strictly with reference to the requirements of Community law. See, for example, the Irish European Communities (Exemption from Import Charges of Certain Vehicles etc. temporarily imported) Regulations 1983 (S. I. N. 422 of 1983, section 4(i) and 5(i)); the Portuguese Decree-Law No 129/90 (DDR No 90 of 18 April 1990, Arts 2 and 4). For a specific limitation, see the French implementing legislation. Article 5(1) of the decree of 30 December 1983, Conditions for the application of the arrangements for temporary importation of certain means of transport and other goods for the personal use of non-resident travellers (JORF of 18 January 1985, p. 634), limits the exemption to one vehicle only, but provides for the possibility of paying a surety, upon which more vehicles may be imported.

free of tax. How are the two interests at work to be reconciled?

20. In addressing this question we must bear in mind the first recital in the preamble to the directive — that is to say, we must remember that the right to import free of tax is provided for for the purpose of achieving full freedom of movement and that it may operate as long as the interest which justifies it is specifically pursued by Community legislation, but not otherwise.

21. The Greek rules, however, do not correspond to the provisions of the Directive, which describes precisely enough the right to the exemption for which it provides. The right to import free of duty is given relative, not absolute, recognition: it is *conditional* on the private or business *use* of the vehicle, as well as on the requirements referred to above.

In the legislation, application of the rules depends on the intended use of the vehicle. In its proposal for the Directive, the Commission stated that tax-free imports would be permitted *on condition* that the vehicle was used for private purposes only. [19] To my mind, this means that *ab initio* recognition of the right to import and use of the vehicle imported are closely connected.

22. This is an important point. Freedom of movement for persons is the aim pursued by the legislation under consideration and must be protected wherever it is actually exercised.

23. That is the interpretation of the legislation which reflects the objectives pursued by the Community legislature. To my way of thinking, the opposite interpretation proposed by the Hellenic Republic — one man, one car, we might say — loses sight of the flexibility required to ensure the development of the fundamental freedom guaranteed by Community law.

24. Having said that, one important aspect of the case remains to be clarified in order to establish whether the conclusions I have just reached are well founded. The Greek Government stated at the hearing that that country's rules are 'in no way' linked to ownership of the means of transport concerned and therefore apply to *anyone* who (lawfully, of course) temporarily imports a car into Greece.

19 — Document COM (75) 527 final, cited above, p. 2.

25. That is useful information. Tax-free importation is not confined to the status of owner of the vehicle, and consequently the exercise of the right to free movement is not unduly restricted. The fact remains, however, that other important aspects of freedom of movement are unjustifiably restricted. In this connection Mr Klattner's case is a classic example. After returning to Germany to undergo medical treatment required as a result of an accident in Yugoslavia, he wished to return to Greece driving his second car. That choice, which seems to me to fall squarely within the ambit of what a resident individual is legitimately entitled to do under the system, was as a result of the rules laid down in the Greek legislation treated as a prohibited action for which penalties were imposed.

26. But even leaving aside borderline cases such as Mr Klattner's, in which to my mind the elements of a case of *force majeure* may be discerned, what I would call the practical consequences of the interpretation proposed by the Greek Government cannot be endorsed. Consider the extremely awkward situations in which Community residents could find themselves if they were forced to return to their own country with another car, not the one previously imported, and were then prohibited from returning with the second car to the country in which they spend the summer. Then consider the position of a frontier worker, as referred to in Article 5 of the Directive, if one of his cars is immobilized by an accident or mechanical failure. And in any event, even if national laws made exceptions for those unusual situations, the fact remains that the specific exemption so obtained would then involve the bureaucratic formalities which the Directive, as we have seen from the accompanying text cited above, is intended to eliminate.

27. I would conclude with a more general point: the prohibition laid down by the Greek legislation seems to me all the more unjustified because multiple car ownership in Europe today is becoming a habit — whether or not it should be encouraged is another matter — for many Community residents. In short I consider that the freedom safeguarded by the Directive, namely that of unhindered movement, also includes the right to use other cars owned by the person concerned, should the occasion arise. [20]

28. Furthermore, I do not believe that the Greek rules are justified by the need to restrict or prevent tax evasion. As the judgments cited make abundantly clear, the Member States retain power to adopt measures to prevent tax evasion, but they must exercise it in a manner compatible with the need to ensure the full development of the freedoms conferred by the Treaty. There are means of controlling the number of vehicles imported which do not infringe the principle

20 — Moreover, it may be observed that nowadays cars can have different features and therefore be used for different purposes. I am thinking, for example, of jeeps and two-seater sports cars which are used — at least in general, if one looks at the surprising increase in the number of four-wheel drive vehicles with disquieting names on the urban scene — for different purposes. In many cases, in short, vehicles are in economic terms to be regarded as non-interchangeable products.

of freedom of movement for Community residents and which are therefore to be preferred to that used in the Greek system. An example, which the Court has held to be entirely lawful, would be to stamp the car user's passport. [21] This is a method which can be regarded as effective: it was ultimately a check of that sort which enabled Mr Klattner's allegedly unlawful conduct to be discovered.

29. Last, the directive lays down clear prohibitions on persons importing vehicles, whether for private or business use, which substantially restrict the opportunity to rely on legal mechanisms in order to evade tax. Proper compliance with those rules can satisfy the requirements of, in this case, the Greek Government. The Court found to that effect in its judgment in *Carciati* — which, moreover, expressly referred to the provisions of Directive 83/182, which was at that stage a mere proposal. On that occasion the Court described that series of prohibitions as 'an effective way of preventing tax frauds and ensuring that taxes are paid in the country of destination of the goods'. [22]

30. Having given that answer to the first part of the question, I shall now go on to consider the second. Does the Directive draw a distinction concerning the number of private vehicles which may be temporarily imported free of tax according to whether they are intended for private or business use?

31. On this point a few comments will, in my view, suffice. The rules laid down in Articles 3 and 4 bear a strong resemblance to each other in terms of objectives, requirements and structure.

Article 4 is designed to grant the right to exemption to individuals using their own vehicles for business purposes, as Article 3 is intended to grant it to individuals employing vehicles for their private purposes. The interest protected is accordingly freedom of movement for persons, and it is still the same, except that it is considered from the more specific point of view of freedom of movement for workers. Second, the residence requirements laid down in the rules in order to obtain exemption are the same. Last, the restrictions on the use of the vehicle are also similar — it is unlawful to dispose of, hire or lend the vehicle to residents of the

21 — See *Commission* v *Greece*, cited above, paragraphs 37 and 39.

22 — *Carciati*, paragraph 10.

State of importation — to those imposed by the directive on those who import for business purposes. [23]

That having been said, the solution preferred in respect of vehicles for private use must be valid also in respect of vehicles for business use.

33. I do not think it necessary to linger on the first part, which seems to me to be covered in full by the foregoing conclusions as to the rules laid down by the Directive. I can only repeat that the Community legislation in question precludes limitation of the number of vehicles which may be imported free of tax to one per person.

Question 2

32. The second question referred by the court in Thessaloniki also falls into two separate parts.

First, the Court is asked to determine whether the Directive specifically requires the Greek authorities not to restrict the number of vehicles which may be imported free of tax.

Second, the national court asks whether Articles 3 and 9 of the Directive have direct effect.

34. Nor, to my mind, does the second part of the question raise any particular problems. [24] According to the Court's settled case-law concerning direct effect, the provisions of a directive may be relied upon directly by an individual wherever their subject-matter is sufficiently clear, unconditional and precise. [25]

Article 3 of the Directive establishes an actual personal right to obtain exemption. The wording of the Community provision is clear, precise and unconditional and may therefore be relied upon directly by an individual who satisfies the prescribed requirements.

23 — In fact, the limitations on use of the vehicle are, as the Commission says, more restrictive in the case of those imported for business use. These, unlike vehicles for private use, may not be lent to non-residents; see Article 3(b) 'or lent to a resident of that State', and Article 4(b) 'the (...) vehicle is not (...) lent in the Member State of temporary importation'.

24 — All the parties agree that Article 3 of the Directive is directly applicable. On the other hand, unlike the other parties, the Commission does not accept that Article 9(1) has direct effect, in so far as it grants a right to Member States.

25 — Case 8/81 *Becker* v *Finanzamt Münster-Innenstadt* [1982] ECR 53, paragraph 25.

35. A somewhat different line of argument — here again I am at one with the Commission — must be followed with regard to Article 9. Three options are reserved for the Member States under Article 9(1), namely the right to 'maintain and/or introduce more liberal arrangements than those provided for in the directive'; to 'permit temporary importation for a period longer (...)' than those referred to in Articles 3 and 4(2); to 'permit the (...) vehicles (...) to be re-hired to a resident of the Member State of importation with a view to their re-exportation'. These powers of the Member States are expressly recognized and in the text of the Directive there are no rights to be found upon which individuals may directly rely. Their legal situation is, let us say, an expectation which may be transformed into a right only when the Member State has recognized it as such in provisions implementing the directive.

36. Article 9(2) is quite a different case: it expressly prohibits the Member States from applying tax exemptions which are less favourable than those which they would grant in respect of means of transport originating in a third country. That provision must be deemed to be directly applicable in accordance with the case-law referred to above.

Questions 3 and 4

37. By the two remaining questions, the national court is asking the Court to rule on the lawfulness of the system provided for by Article 10(7) of the Greek legislation for penalizing various infringements other than re-exporting the vehicle after the expiry date. The aspects most relevant here are: (a) the lawfulness of the individual elements of the financial penalty; (b) the lawfulness of treating temporary importation in the same way as permanent importation under the system of penalties; (c) the compatibility of the 100% surcharge levied under that legislation with the principle of proportionality as defined in Community law. Specifically, questions (b) and (c) call upon the Court to assess whether the penalties are reasonable inasmuch as different situations, such as unlawful temporary importation and permanent importation, are treated in the same way and, more generally, whether they are proportionate to the offence committed.

38. Before I consider the substance of the question I must recall, first, the principles established by the Court concerning penalties and, second, the constituent elements of the administrative penalty provided for by Article 10(7) of the Greek legislation.

39. First of all, as the Court has stated, 'in the absence of harmonization of Community legislation in the field of customs offences, the Member States are competent to adopt such penalties as appear to them to be appropriate'. [26] The laying down of penalties in the field of taxation is therefore, *within certain*

26 — Case C-210/91 *Commission* v *Greece* [1992] ECR I-6735, paragraph 19.

limits, a matter which falls within the competence of the Member States. [27] Furthermore, this competence was recognized in the specific area in question in *Carciati*, where the Court held that 'Member States (...) retain broad powers to take action in respect of temporary importation, specifically for the purpose of preventing tax frauds'. [28]

The *limits* referred to in the case-law are contained in various decisions given by the Court concerning the domain within which the penal powers of the Member States may and must be exercised. [29] The Court has ruled that in exercising that power the Member States must not only comply with the principles of equal treatment as between infringements of Community law and infringements of similar national law, but they must also not impose any penalty which is contrary to the principle that it should be appropriate, effective and proportionate or which creates obstacles to freedoms guaranteed by the Treaty, in particular freedom of movement for persons: [30] penalties must be appropriate and necessary to achieve the aim pursued. [31]

40. The penalty under consideration is, as was stated at the hearing, connected with Article 8, and in fact with all the provisions of that article, including Article 8(1) which lays down the obligation to re-export the vehicle at the end of the period of exemption.

Infringement of those rules gives rise to two consequences. First, the customs duties and other taxes become payable immediately; second, a surcharge is levied, calculated on the total amount of those duties and taxes. There is a qualitative difference between the two legal consequences of infringement of the rules: the first is a restitutory (or compensatory) penalty, that is to say, one intended to re-establish a situation of material legality by restoring an interest — in this case, the State's interest in receiving tax revenue — damaged by the individual's actions; the second, on the other hand, has the character of an administrative penalty in the strict sense: a penalty, then, which is purely punitive, if I may so express it, since its purpose is not to protect or restore substantive interests damaged by the infringement. [32] More particularly, this second penalty must be placed in the category of proportional penalties. The legislature fixed the coefficient (100%), and then left the basis on which the

27 — Case 299/86 *Drexl* [1988] ECR 1213, paragraph 17.

28 — *Carciati*, cited above, paragraph 9.

29 — Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; Joined Cases 286/82 and 26/83 *Luisi and Carbone* [1984] ECR 377.

30 — Case C-7/90 *Vandevenne* [1991] ECR I-4371, *Drexl*, paragraph 18, and Case C-265/88 *Messner* [1989] ECR 4209, paragraph 14.

31 — See most recently Case C-29/95 *Pastoors and Trans-Cap* v *Belgian State* [1997] ECR I-285, paragraph 24. In connection with this point also, I think it necessary to observe that, according to the Commission's statements in the document COM (87) 14 final, Article 11(3) had to be amended by inserting an express reference to the requirement that sanctions applied at national level should be compatible with the principle of proportionality. That is a reminder which the Commission associated with the findings in *Carciati*; see pp. 10, 11 and 14 of the document cited.

32 — A 'punishment, technically speaking', therefore, according to the definition given by V. Zanobini in *Le Sanzioni Amministrative*, Turin, 1924, p. 2.

calculation is to be made to be determined according to the actual circumstances of the case. [33]

Assessment of the individual elements

41. According to statements made at the hearing, Article 10(7) is the provision on the basis of which the Greek administrative authorities adopted the measure in respect of Mr Klattner. It clearly states the individual elements which make up the penalty, including customs duties. However, it is only means of transport from outside the Community which are subject to payment of customs duties on being imported into Greek territory. Those from within the Community are, on the other hand, exempted from that tax by virtue of the express provision of Article 9(1) of the Treaty. Furthermore, as the Commission rightly observes, the relevant international conventions permit a derogatory system for extra-Community means of transport as well, where they are temporarily imported. [34]

42. The rule on which the sanction laid down in this case depends is therefore contrary to an unambiguous prohibition imposed by Community law. Vehicles originating within the Community are not subject to the payment of customs duties. The penalty calculated on those duties is consequently illegal, [35] and the fact that its quantitative effect is less in amount than the other elements of the penalty, as the representative of the Greek Government pointed out at the hearing, is of no importance.

Assimilation of temporary and permanent importation

43. The second question to be dealt with is whether it is lawful to treat temporary and permanent importation in substantially the same way, as the provision under consideration does. The penalties for which Article 10(7) provides automatically require payment of the taxes from which Article 1 of the directive provides exemption, namely value added tax, circulation tax and consumer tax. As a result, for the purposes of imposing penalties, an offence consisting of unlawful temporary importation — on grounds other

33 — In addition to proportional penalties we may identify types of administrative sanction which impose a minimum and a maximum and those which impose fixed financial penalties. For a study of the theory in this field, see C. E. Paliero, A. Travi, *Sanzioni Amministrative* in *EdD*, Milan, p. 345.

34 — See Council Regulation (EEC) No 1855/89 of 14 June 1989 on the temporary importation of means of transport (OJ 1989 L 186, p. 8).

35 — Moreover, this conclusion also follows, to my mind, from the partly compensatory function that the penalty must be considered to perform. It does not seem to me to be legitimate to employ the machinery of the law for responding to illegal actions to impose those duties on such vehicles. That argument may be based on the decision in Case 118/75 *Watson and Belmann* [1976] ECR 1185, in which the Court held that an order for the deportation of persons protected by Community law was incompatible with Community rules 'since (...) such a measure negates the very right conferred and guaranteed by the Treaty' (paragraphs 20 and 21).

than mere delay in re-exporting — is in substance treated in the same way as permanent importation.

Does such treatment satisfy the criteria of reasonableness by which the national authorities must be guided in their choice of penal measures and in the assessment of the appropriateness of those measures to the offence committed?

44. Taking the view that the establishment of offences and the choice of the penalties relating thereto are matters falling within the exclusive competence of the Member States, the Hellenic Republic does not consider it necessary to draw any significant distinction between the system of penalties imposed for infringements of the rules on temporary importation and those in respect of permanent importation.

45. According to Mr Klattner, treating temporary and permanent importation in the same way entails in fact double taxation, first in the vehicle's country of origin, and then in Greece.

46. To my mind, assimilation will be lawful only where the infringement of the temporary importation rules is so serious and manifest as to demonstrate that the person concerned intended instead to import the vehicle permanently. In that case, treating permanent and temporary importation in the same way does satisfy the condition that the penalty should be appropriate: the compensatory element will be capable of making good the damage to the administration's interest; by contrast, the purpose of the surcharge is dissuasive, in accordance with its own more clearly punitive character.

47. However, the case I have discussed is, plainly, a borderline case. As a matter of principle, the similar treatment under consideration cannot hold. The Court's case-law bears this out. The judgment given most recently in *Skanavi* stated that 'treating a person who has failed to have a licence exchanged as if he were a person driving without a licence, thereby causing criminal penalties, even if only financial in nature (...), to be applied, would also be disproportionate to the gravity of that infringement in view of the ensuing consequences'. [36]

48. The Greek legislation is disproportionate, in the manner considered unlawful by the Court, precisely inasmuch as cases in which it is unarguable that the importation is temporary are penalized in the same manner as permanent importation, so that the same rules apply to situations which are not comparable. [37]

36 — Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 37.

37 — *Drexl*, cited above.

49. Moreover, in *Ledoux*, the Court ruled that importation must be regarded as temporary where it may be concluded from the evidence that the goods will subsequently be re-exported and that there is no fraudulent intention. [38] Similarly, in *Profant*, the Court ruled that importation was to be regarded as temporary or permanent depending on the residence of the person concerned, recognizing that it was definitive where the person settled in the Member State in such a way as to manifest the intention of not returning to the Member State of origin. [39] That is not all. One of the Commission's proposed amendments to the directive was the introduction of a new Article 11(1) under which Member States would not be able to deem irregular temporary imports to have been imported permanently for the purposes of sanctions: in any event individuals must be given the chance to defend actions they have undertaken in good faith. [40]

In conclusion, both the case-law and the proposed amendments to the legislation clearly show that one type of importation may not be treated in the same way as the other, as they are under the inflexible and automatic criterion laid down by the Greek legislation. The national legislature will have to accept that the importer's actual intention should be looked at, case by case.

38 — *Ledoux*, paragraph 15.
39 — *Profant*, paragraph 27.
40 — See COM (87) 14 final, pp. 10 and 17.

The principle of proportionality

50. I shall now turn to the fourth question referred by the court at Thessaloniki: the Court is asked to determine whether the 100% surcharge provided for by Article 10(7) of the legislation is compatible with the principle of proportionality.

51. The parties' assessments are at variance, not only in their conclusions, but also in the legal arguments adduced.

According to the Greek Government, the obligation to pay a surcharge equal to the customs duties and other taxes applicable where the national legislation on tax-free importation of means of transport has been infringed, regardless of the period of time for which the means of transport in question has been imported, is not contrary to the principle of proportionality. It claims that the penalty has the same nature as the offence it is designed to sanction, and it is necessary in order to ensure that the market operates normally and to prevent the risk of fraud.

On the other hand, the applicant argues that the surcharge imposed on him because he slightly overran the exemption period (by 16 days) was the same as that imposed for

smuggling and was therefore disproportionate to the offence committed. [41]

52. The Commission's view is quite different. It says that a 100% surcharge is not *in itself* contrary to the principle of proportionality. It becomes so, however, if the rules for calculating the penalty — in this case, the multiplier applied to the taxable amount — entail different treatment for imported vehicles in comparison with those from the domestic market. That is the case in this instance. The rates of taxation applied to Greek used vehicles differ markedly from those applied to foreign used vehicles. As a consequence, the effect of the surcharge provided for by the Greek rules differs sharply according to the type of vehicle. Apart from that, where heavy rates of tax are levied, a surcharge of 100% generally results — as we can see in this case — in the confiscation of the vehicle, which as a solution is manifestly contrary to the Court's ruling in *Drexl*. [42]

Legal assessment

53. Before I turn to the substance of the question, I would point out that the question raised by the Commission is at present being considered by the Court in another case (Case C-375/95), [43] concerning alleged discrimination in the treatment for tax purposes of used cars on the Greek market, which depends on whether they are imported or of domestic origin, the former being penalized in favour of the latter. I do not think that I need deal with the matter here and now. I shall formulate my conclusions in the course of the proceedings in that other case.

54. I shall now go on to consider the question in the terms in which the national court has set it out, that is to say, with direct reference to the compatibility of the 100% surcharge provided for by Article 10(7) with the principle of proportionality.

55. What guidance can we find in the Court's judgments on the matter?

In *Drexl*, where the penalties laid down by Italian law for offences concerning value added tax ('VAT') payable on domestic transactions were compared with the penalties for offences concerning VAT payable on importation, the Court ruled that even though the offences were distinguished by different circumstances, those differences could not justify a manifest disproportion in the severity of the penalties laid down. [44]

41 — On this point, I think it necessary to state that Mr Klattner's observations are based on a misconception: he believes that the penalty was imposed because he exceeded the exemption period by 16 days. That statement seems to me to be incorrect in that, as stated at the hearing, the penalty was ordered by the Greek administrative authorities exclusively pursuant to Article 10(7) which, as I have already had occasion to say, concerns infringements other than mere delay, which is covered by Article 10(1).

42 — *Drexl*, cited above.

43 — *Commission* v *Greece*; the application was lodged on 10 November 1995.

44 — *Drexl*, paragraph 23; see also Case C-276/91 *Commission* v *France* ('*Patron*') [1993] ECR I-4413. In that case also the issue was the system of penalties laid down in French law for offences relating to the VAT payable on domestic transactions and for offences concerning the VAT payable on importation.

In *Skanavi*, the Court ruled that the penalty provided for by German law was not proportionate, since two profoundly different situations — driving without a licence and driving with a foreign licence which had not been exchanged — were treated in the same way. [45]

Last, in *Pastoors*, the Court found that in the circumstances of the case the penalty was disproportionate. The authorities had imposed the obligation to pay a fixed sum, justifying it as security for costs in contested cases. Where there were multiple offences, the sum was payable in respect of each of them. On the ground that multiple offences give rise to only one set of criminal proceedings, the Court considered that payment was not objectively justified and was accordingly contrary to the principle of proportionality. [46]

56. As regards the penalty laid down by the Greek provisions — leaving aside the case, examined above, of 'minor' infringements of the prohibition on temporary importation — it does not seem to me that it can be criticized as being contrary to the principle of proportionality. Even a surcharge of 100% may well, as the Commission itself acknowledges, be a penalty proportionate to the offence committed. [47]

57. On this point I can only repeat what Advocate General Trabucchi said in his Opinion in *Watson and Belmann* and the questions then raised by that illustrious lawyer. On that occasion he stated that in a matter 'in which the degree of discretion accorded to the national legislature is necessarily very wide, the greatest care must be exercised in making any judgment on the scheme of penal sanctions fixed by the legislation except in cases where they are manifestly disproportionate (...) On the basis of a wholly subjective judgment and reaction, it might perhaps even be possible to hold that the penalties appeared severe, even very severe, but would this suffice to establish the illegality of national legislation providing for them? On what basis could we lay down acceptable limits?' [48]

58. If, therefore, the penalty laid down is not *in itself* incompatible with the principle of proportionality, one important matter remains to be clarified. [49] It is necessary to establish whether the tax system applied to Greek used vehicles differs from the system for imported used vehicles in a manner for

45 — *Skanavi*, cited above, paragraph 37.

46 — *Pastoors*, cited above, paragraphs 24 to 26.

47 — Commission's observations, p. 20.

48 — Opinion in Case 118/75, section 6, at p. 1210.

49 — A further aspect: Mr Klattner has claimed that a mechanism for calculating penalties such as that used in the Greek legislation leads to double taxation. It should be borne in mind that, in accordance with the judgments in *Schul I* and *Schul II* (Case 15/81 *Schul* v *Inspecteur der Inverroechten en Accijnzen* [1982] ECR 1409 and Case 47/84 *Staatssecretaris van Financien* v *Schul* [1985] ECR 1491), the Member State of importation must take account of the VAT paid in the State of origin in order to prevent the goods in question from being taxed twice. To my mind, it follows that the States are to take account of the VAT paid in the country of origin when they set the amount of fine to be paid, where that amount depends on the VAT to be paid in the Member State of importation. If it were otherwise, the system of penalties would go beyond its compensatory and punitive objectives and would be an unacceptable barrier to imports.

which no objective justification can be found. If such indeed is the case, the differences in the basis on which the proportional financial penalty is calculated would entail discrimination against vehicles imported into Greece, and its compatibility with Community law would have to be examined in the light of the principle of equal treatment.

In that situation the principles laid down by the Court in *Drexl* and *Patron* are of assistance. [50] If the penalties for offences concerning VAT on domestic transactions were calculated in the same way as the penalties provided for in respect of offences concerning VAT payable on importation, there would be a different system of penalties attaching to the two offences which might be considered disproportionate, on the basis of the criteria laid down in those judgments, especially as the surcharge, in the circumstances of the present case, calculated as it must be on the extremely high rates of tax applicable to imported cars, inevitably entailed the confiscation of the vehicle with immediate consequences for the freedoms conferred by the Treaty and the principles laid down therein concerning fiscal neutrality.

However, the Court will have to deal with this line of inquiry in Case C-375/95, which is now pending before it.

Conclusion

For the reasons set out above I consider that the questions referred by the national court should be answered as follows:

(1) It is contrary to Articles 3 and 4 of Council Directive 83/182 for national rules to limit the right to temporary exemption from tax to one vehicle only — whether for business or private use — for each driver.

50 — *Drexl*, paragraphs 22 and 23; *Patron*, cited above.

(2) It is not contrary to the letter and spirit of the Directive for a provision of national penal law to impose in respect of offences under the tax-free temporary importation system financial penalties comparable to the fiscal charges provided for on permanent importation where the consequences of those offences are comparable to those produced by permanent importation. Community law does, however, preclude a penalty requiring the immediate payment of customs duties on the importation of vehicles from within the Community.

(3) It is compatible with the principle of proportionality for a provision of national law to impose in respect of offences under the tax-free temporary importation system a surcharge of 100% calculated on the amount of consumer tax and other equivalent taxes. Where, however, the treatment for tax purposes of imported used cars and used cars of domestic origin is different, it is necessary to ascertain whether that difference entails as a result the imposition of manifestly disproportionate penalties for the offences found to have been committed with regard to vehicles belonging to the two categories.