OPINION OF ADVOCATE GENERAL LA PERGOLA

delivered on 26 June 1997 *

1. By this action, the Commission is asking the Court to declare that the Greek system of taxation as applied to used private motor vehicles imported from other Member States is contrary to Article 95 of the Treaty. [1]

2. For full understanding of the allegations made against the Hellenic Republic and of its arguments in its defence, it would be useful to recall the national legislation in dispute.

The Greek legislation subjects cars for private use to two separate taxes: special consumer tax and flat-rate added special duty. The special consumer tax was introduced by Law No 363/1976, [2] as subsequently amended by Law No 1676/1986. [3] It is payable when a car is first sold or when it is imported new; the rate of the duty varies, depending on the cubic capacity of the engine; the taxable value is calculated on the net sale price. When a vehicle already registered in Greece is sold second hand, the tax is no longer payable. By contrast, it is charged when a used vehicle is imported. In that case, the taxable value is equal to the original price of the new car, with a deduction of 5% for each year of use. [4] The maximum reduction allowed is 20%. [5]

Law No 1858/1989 [6] — entitled 'Rules governing the special consumer tax in respect of private vehicles and other provisions' — provided for the rate of tax to be reduced for 'new technology' or 'anti-pollution' cars which satisfied the conditions fixed by ministerial decree. However, imported used cars are not eligible for the reduction, even if they satisfy the conditions referred to.

* Original language: Italian.

1 — The Greek tax system applicable to new private cars has been the subject of various decisions of the Court. In its judgment in Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567, the Court recognized the lawfulness of a progressive taxation system which fixed the amount of tax in relation to the engine's cylinder capacity. In its judgment in Case C-327/90 *Commission* v *Greece* [1992] ECR I-3033, on the other hand, the Court declared it unlawful to lay down different rules for calculating the basis of assessment according to whether cars were imported into or produced in Greece. Finally, in Case C-105/91 *Commission* v *Greece* [1992] ECR I-5871, the Court declared that it was contrary to Article 95 of the Treaty to apply higher rates to private cars incorporating traditional technology imported from other Member States than to those, also incorporating traditional technology, produced or assembled in Greece.

2 — Greek Official Journal A 152.

3 — Greek Official Journal A 204.

4 — The Hellenic Republic has stated in its defence that, for the purposes of calculating the price of the imported used vehicle, account is taken not of the price of the corresponding new car at the time of importation but of the obviously lower price for the year in which it was manufactured.

5 — Under the Greek legislation, that limit may be raised to 25% if the vehicle is damaged or shows greater signs of wear than those due to normal use.

6 — Greek Official Journal A 148.

The flat-rate added special duty was altered during the pre-litigation procedure. In its original form, under Article 3 of Law No 363/1976, it was levied on the first registration of a vehicle and the amount was fixed solely in relation to engine capacity. Imported used cars were subject to the duty in the same way as new ones: that is to say, there was no provision for any reduction to allow for their being used vehicles. Following the issue of the Commission's reasoned opinion, Law No 2187/1994 [7] made amendments to the duty in dispute: the rate varies, depending on engine capacity, while the taxable value of imported used cars is calculated according to the same criteria as the special consumer tax, namely by taking into account the price of the new model, reduced by 5% per year, with a maximum allowance of 20%.

After initiating the pre-litigation procedure under Article 169 of the Treaty, the Commission applied to the Court of Justice for a declaration that the Hellenic Republic had failed to fulfil its obligations.

3. The Commission considers that that legislation is contrary to Article 95 of the Treaty, according to which:

'No Member State shall impose, directly or indirectly, on the products of other Member States, any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.

Furthermore, no Member State shall impose on the products of other Member States any internal taxation of such a nature as to afford indirect protection to other products.'

4. I shall dwell first of all on the special consumer tax. The Commission regards it as discriminatory, and hence as contrary to Article 95, in that it makes imported used cars bear a heavier tax burden than the corresponding domestic cars, namely those already registered in Greece — whether manufactured in Greece or imported new is immaterial — and later sold on that market. Specifically, the applicant objects to the detailed rules for calculating the basis of assessment of the duty which is estimated by reference to the price of the new car reduced by 5% for each year of use. On this point, the Commission adduces several arguments: actual annual depreciation of cars in Greece is patently greater than 5%; furthermore, the depreciation of the value of a used car is not linear, but much more marked in the early years; last, the Greek tax system arbitrarily limits depreciation of a vehicle to 20% since after four years no further decrease in the value of

7 — Greek Official Journal A 16.

the vehicle is allowed. The applicant criticizes the method of calculating the duty in respect of imported used cars on the ground that the vehicle's taxable value is higher than its actual value. Consequently, the vehicle is subject to a greater amount of duty than the residual amount incorporated in the price of a corresponding vehicle already on the Greek market.

The Greek Government contends, to the contrary, that its system of taxation does not have the effect of favouring Greek products at the expense of those imported from the other Member States. [8] In its view, the taxable value calculated in respect of imported used cars reflects the actual depreciation of those vehicles for two reasons: the average life of a car is longer in Greece than elsewhere, and the price taken into account in calculating the amount of the tax is the price for the year in which the vehicle was manufactured and not the price for the year in which it was imported. Moreover, it claims that the system is justified because it is intended to discourage vehicles from being put into circulation which are old, polluting and dangerous to traffic.

5. As the Commission rightly points out, the correct approach to the problem is to be found in the judgments in Case C-47/88 *Commission* v *Denmark* [9] and Case C-345/93 *Nunes Tadeu*, [10] in which the Court was specifically asked to rule on the compatibility with Article 95 of internal taxation arrangements for imported used vehicles. Those decisions clearly set out the principle that the fiscal neutrality required by that provision must be assessed with regard 'not only to the rate of direct or indirect internal taxation on domestic or imported products but also to *the basis of assessment* and the detailed rules for levying the tax'. [11] With specific reference to used cars, the Court has held that the amount of the tax charged must be determined having regard to the vehicle's 'actual depreciation'. [12] Consequently, as Advocate General Jacobs stated in his Opinion in *Nunes Tadeu*, the tax on a[n imported] used car must be 'determined on the basis of its actual value because the tax on the similar domestic product inevitably depends on its actual value'. [13]

On examining the Greek legislation in the light of the criteria referred to, I consider that it is beyond any doubt that the duty in issue is discriminatory. The basis of assessment in this instance leaves the actual value out of consideration and is calculated, on a

8 — Scarcely worthy of mention, save for the one purpose of dismissing it, is the argument of the Greek Government that there can be no protectionist effect because in Greece there is no longer any domestic car production. On this point it is sufficient to observe that, for the purposes of this case, the fiscal neutrality required by Article 95 must exist between used vehicles already present on the Greek market — leaving aside the place of manufacture — and used vehicles imported from other Member States. That principle was clearly stated in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 17, and any further words on the subject would be a waste of breath.

9 — Cited in the previous footnote.

10 — [1995] ECR I-479.

11 — *Nunes Tadeu*, cited above, paragraph 12 (emphasis added).

12 — *Nunes Tadeu*, cited above, paragraph 15.

13 — See Mr Jacobs's Opinion in *Nunes Tadeu*, cited above, at pages I-488 and I-489.

notional basis, by subtracting 5% for each year of use from the price of the car when new.

It is quite obvious that such a method of calculation leads to overvaluation of the imported used product: first, depreciation limited to an annual 5% is contrary to the evidence of common experience, which shows rather that used cars depreciate by a far greater proportion than the standard rate fixed by the Greek rules; second, limiting depreciation to a maximum of 20% is wholly unjustified and is based on the unlikely assumption that cars in Greece cease to depreciate once they are four years old. Thus, whilst the tax burden on a domestic used car decreases as the car depreciates, the duty is levied on imported used cars on the basis of a fictitious taxable amount which is clearly greater than the actual value of the vehicle. [14] The result — which the Court has explicitly held to be contrary to Article 95 of the Treaty — is that the amount levied exceeds 'the residual tax incorporated in the value of similar second-hand motor vehicles already registered in the national territory'. [15] In the light of the guidance given by that case-law — which seems to me to be a crucial key to interpretation in resolving this dispute — the duty in issue can definitely be regarded as contrary to Article 95 of the Treaty.

6. To my mind, that conclusion still remains valid when confronted by the arguments put forward by the Greek Government to justify its own system of taxation. It claims that the aim pursued by the contested provisions is to discourage old highly pollutant vehicles which are a threat to road safety from being put into circulation. However, I need scarcely point out that such a purpose cannot in any circumstances justify a breach of the principle of fiscal neutrality laid down by Article 95 of the Treaty: even on the assumption that the disputed legislation was inspired by the wish to protect the environment, the fact remains that, far from applying equally to domestic and imported products, it imposes a heavier burden of duty on imported products and is therefore discriminatory for the purposes of Article 95.

7. Equally contrary to Article 95 of the Treaty are the provisions of Law No 1858/1989, which provides for the rates of special consumer tax to be reduced for vehicles fitted with anti-pollution devices but does not extend this benefit to imported used cars in the same category. In this case, it is patently discriminatory that imported vehicles cannot be eligible for the reduced rates. Moreover, the Greek Government itself does not deny the infringement it is alleged to have committed, but simply

14 — Advocate General Jacobs in his Opinion in *Nunes Tadeu*, cited above, page I-488, rightly emphasized the importance of taking into account not only the age of the car but also 'all the other factors that may affect the value of an imported car, such as the mileage, the condition and the model (since some models depreciate faster than others)'. All those factors taken together affect the value of a domestic used vehicle and hence the residual amount of residual tax incorporated in that value. Moreover, it should be borne in mind that the Court has ruled that in no circumstances may higher taxes be imposed on an imported product than on the corresponding domestic product (Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraphs 20 and 21). Accordingly, legislation, such as that in issue here, which fixes taxable values on the basis of uninvestigated and unreliable criteria will inevitably lead to numerous occasions in which fiscal neutrality is flouted.

15 — *Nunes Tadeu*, cited above, paragraph 20.

observes that the discriminatory treatment is due to practical difficulties in setting up a control system to check whether the imported used vehicles satisfied the technical conditions for benefiting from the reduced rates; difficulties that plainly, according to the Court's case-law, [16] cannot be pleaded in justification in Treaty infringement proceedings.

8. I shall now turn to the legislation introducing the flat-rate added special duty which, as I have said, has been amended following the issuing of the reasoned opinion. In its application the Commission finds fault with both the old version and the new. As regards the former, the applicant institution refers in its application to the arguments set out in its reasoned opinion, in which, beginning with the observation that the duty consisted of a fixed sum varying in relation to the vehicle's engine capacity and increasing with the value of the vehicle, the Commission discerned discrimination in that the duty applied to imported used cars as though they were new, without taking their depreciation into account; by contrast, the amount of the duty incorporated in the price of domestic used cars decreased proportionately as their value diminished. Consequently, there was less advantage in buying imported used cars than used cars already present on the domestic market. With regard to the amendments made by Law No 2187/1994, the Commission points out that the amount of the duty in issue is calculated according to detailed rules similar to those laid down for the special consumer tax: the applicant institution therefore considers that the duty is open to the same reproach as the tax.

9. Before expressing my views on the substance of the matter, I think it necessary to dwell for a moment on a preliminary point, which is whether the grounds of complaint put forward by the applicant are admissible. With respect to the legislation in force before the amendments under Law No 2187/1994, the Commission states its complaints by a reference to the reasoned opinion. In other cases, however, the Court has held that to proceed in such a manner is contrary to Article 19 of the Protocol on the Statute of the Court of Justice of the EEC and Article 38(1)(c) and (d) of the Rules of Procedure, which require the application to indicate among other things the subject-matter of the dispute, the forms of order sought and a brief statement of the pleas in law on which the application is based. In particular, in its judgment in Case C-43/90 *Commission* v *Germany*, [17] it clearly stated that 'an application does not satisfy that requirement if the Commission's complaints are not accurately set out in it and simply appear by way of reference to "all the reasons set out in the letter of formal notice and in the reasoned opinion".'

Nor, moreover, may it be said that the reference in this case to the reasoned opinion is limited to a few marginal aspects of the question to be resolved, or that the intention is simply to clarify the scope of the applicant's complaints, circumstances in which Advo-

16 — See, *ex multis*, Case C-374/89 *Commission* v *Belgium* [1991] ECR I-367, paragraph 10.

17 — Case C-43/90 *Commission* v *Germany* [1992] ECR I-1909, paragraph 8. See also Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28, and Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17.

cate General Tesauro rightly considered, in his Opinion in *Commission* v *Greece*, [18] that it is possible to refer to the documents in the pre-litigation procedure. The reference here is general and covers, in its entirety, all the factual and legal reasons which are supposed to prove that the national legislation in dispute is, as alleged, contrary to the Treaty. Accordingly, with the intention of following the guidance of the case-law, I consider that the Commission's application is inadmissible in so far as it concerns the flat-rate added special duty in its previous form.

Nevertheless, I do not seek to conceal the fact that this solution is somewhat unsatisfactory from the point of view of substantive justice, particularly since, as regards the substance of the matter, it seems to me obvious that the Hellenic Republic has failed to fulfil its obligations; [19] moreover, compliance with the requirements laid down by the provisions referred to did not call for the applicant institution to strain its powers of draftsmanship. However, the meaning of the provisions is clear, and so is the Court's interpretation of them: consequently, it does not seem to me possible to rule on the substance without a reversal of the case-law which I have cited above.

10. It remains to be seen whether the Commission's complaint concerning the new Greek legislation is admissible. Law No 2187/1994 was adopted after the reasoned opinion was delivered and the complaints relating to it were not asserted during the pre-litigation procedure. Settled case-law of the Court requires that, with regard to the Commission's grounds of complaint, the application instituting proceedings and the reasoned opinion should match exactly; consequently, legislative amendments adopted subsequent to the reasoned opinion cannot be taken into account. [20]

In the light of that case-law, this part of the action could be perceived to be inadmissible. It does not, however, seem to me that the abovementioned decisions are to be understood in absolute terms. The Court itself has recognized that where a change in the legislation occurs between the pre-litigation procedure and the bringing of the action, it is sufficient, for the new charges to be admissible, 'that the system established by the legislation contested in the pre-litigation procedure has as a whole been maintained by the new measures which were adopted by the Member State after the issue of the reasoned opinion and have been challenged in the application'. [21] This is so inasmuch as — to my mind — the Court has intended to protect the interest of a Member State, so that no substantially new and different allegations are levelled against it on which it had no opportunity to put forward its own arguments. The interest protected is therefore that of the right to a fair hearing. In the light of this consideration it is my view that, in

18 — Cited in the preceding footnote (page I-4767 in the Opinion).

19 — It is not denied that it is possible to establish a taxation system based on engine capacity. What is objectionable is the fact that imported used cars must bear the tax as though they were new. In that way, the duty to which they are subject cannot help but be greater than the residual amount of the tax still incorporated in equivalent domestic cars.

20 — See, *ex multis*, Case C-61/94 *Commission* v *Germany* [1996] ECR I-3989, paragraph 42.

21 — Case C-105/91 *Commission* v *Greece*, paragraph 13.

the circumstances, the application can be declared admissible. It is true that Law No 2187/1994 brings in new criteria for determining the amount of the tax. However, from the substantive view, both the old and the new legislation raise the same question of incompatibility with Article 95: they each lay down detailed rules for calculating the amount of duty which do not take into account the actual value of the vehicle imported, and in particular its depreciation due to use. I would observe, moreover, that the new legislation introduced similar criteria to those already laid down for determining the special consumer tax. The defendant Government has had ample opportunity to state its arguments, in the pre-litigation procedure and before the Court. It is not by chance that, with regard to the duty under consideration, it referred, in putting forward its own arguments, to its observations concerning the special consumer tax. Which, to my mind, is evidence that the Hellenic Republic's right to a fair hearing has not been infringed in any substantial way. I therefore consider that the action is admissible in so far as it concerns Law No 2187/1994.

11. As to the substance, the Commission regards the rules for determining the amount of the disputed duty, in the form resulting from Law No 2187/1994, as contrary to Article 95 of the Treaty. In my view, that argument should be endorsed. These rules are similar to those laid down as regards the special consumer tax and are, therefore, discriminatory and contrary to the principle of fiscal neutrality for the same reasons as those I have set out in dealing with that duty.

Conclusion

In the light of the foregoing, I propose that the Court:

(1) declare the application inadmissible in so far as it relates to the ground of complaint concerning the flat-rate added special duty in the version in force under Article 3 of Law No 363/1976;

(2) allow the remainder of the action and order the defendant to pay the costs.