OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 10 June 1999 *

1. The Oberlandesgericht Köln (Higher Regional Court, Cologne), Germany, has referred a question for a preliminary ruling, under Article 177 of the EC Treaty (now Article 234 EC). In essence it is asking this Court to interpret the term 'vehicle' which appears in the fourth indent of Article 2 of Directive 93/89/EEC concerning the application by Member States of taxes on certain vehicles used for the carriage of goods by road, and also tolls and charges for the use of certain infrastructures [1] (hereinafter 'Directive 93/89').

I. Facts

2. According to the order for reference, on 14 November 1996 Mr Pfennigmann, who is the proprietor of an agricultural business in Germany, drove a tractor (with a maximum permissible gross laden weight of 7 490 kg) and a trailer (with a maximum permissible gross laden weight of 8 500 kg) along federal motorways A 93 and A 9 from the Alteglofsheim junction to the Schwandorf junction and back without having paid the motorway user charge. The purpose of the journey was to deliver vegetables (white and red cabbages and onions) to Messrs G. in Schwandorf, to whom he supplied products under contract.

By administrative order of 8 July 1997 the Bundesamt für Güterverkehr (Federal Office for the Carriage of Goods) imposed on Mr Pfennigmann a fine of DEM 100. The defendant lodged an appeal against that order within the time and in the form prescribed, but the appeal was dismissed by judgment of the Amtsgericht Köln (Local Court, Cologne) on 17 November 1997.

The Amtsgericht did not accept the defendant's submission that he was not required to pay any motorway charges because the articulated vehicle combination (tractor and trailer) driven by him at the time in question was not intended exclusively for the carriage of goods but was primarily used in the operation of his agricultural business. Instead, the court took the view that the sole decisive factor was whether, at the time of being used on the motorway, the motor vehicle or articulated vehicle combination was intended solely for the carriage

* Original language: Spanish.

1 — Council Directive 93/89/EEC of 25 October 1993 (OJ 1993 L 279, p. 32).

of goods. It held that any other uses for which it was intended, when not using the motorway, were irrelevant.

II. The question referred for a preliminary ruling

3. Mr Pfennigmann lodged an appeal against the judgment. In the appeal proceedings, the Oberlandesgericht Köln, First Chamber dealing with administrative fine matters, decided to refer the following question to the Court for a preliminary ruling:

'In order to determine whether a motor vehicle or articulated vehicle combination is intended *exclusively* for the carriage of goods by road, within the meaning of Article 2(1) of the Agreement in conjunction with the fourth indent of Article 2 of Council Directive 93/89/EEC, must reference be made to the time at which, and the manner in which, it is used on each occasion, or does the answer to that question depend on whether the general purpose for which the use of that vehicle or combination is intended is the carriage of goods by road, irrespective of the purpose for which such a motor vehicle or articulated vehicle combination is used in an individual case?'

III. Community law

4. The Community provision of which the national court making the reference is seeking an interpretation is the fourth indent of Article 2 of Directive 93/89, which states:

'For the purposes of this Directive:

...

— "vehicle" means a motor vehicle or articulated vehicle combination intended exclusively for the carriage of goods by road and having a maximum permissible gross laden weight of not less than 12 tons.'

IV. Observations submitted during the preliminary ruling proceedings

5. The German, Belgian and Swedish Governments and the Commission submitted written observations within the period prescribed for that purpose by Article 20 of the EC Statute of the Court of Justice.

At the hearing on 19 May 1999, Mr Pfennigmann's representative, the representative of the German Government, the representative of the Swedish Government and the representative of the Commission submitted their oral observations.

6. Mr Pfennigmann argues that, in interpreting the meaning of the term 'vehicle' which appears in the fourth indent of Article 2 of Directive 93/89, it is not a specific isolated use which should be taken into account but the long-term use for which it is intended, which must necessarily be the carriage of goods by road.

7. The German Government maintains that the definitions given in Article 2 of Directive 93/89 must be interpreted in the light of the objectives of the Directive which are, on the one hand, to levy a tax on certain motor vehicles intended for the carriage of goods and, on the other, to charge tolls and charges for using certain infrastructures. A vehicle cannot be classified as a motor vehicle intended exclusively for the carriage of goods if it does not use motorways within the meaning of the first indent of Article 2 of the Directive, since the purposes for which it is used on other roads have to be excluded from the definition.

According to the German Government, this interpretation is corroborated by Article 6(3) of the Directive, which allows Member States to apply reduced rates or exemptions for vehicles which travel only occasionally on the public roads of the Member State of registration and are used by natural or legal persons whose main occupation is not the carriage of goods. If such vehicles were already excluded from payment of user charges because the definition in Article 2 used the term 'exclusively', it would not have been necessary to provide for the option of introducing exemptions. In any event, the Federal Republic of Germany has not availed itself of that option and, consequently, even vehicles which carry goods only occasionally are subject to payment of user charges if they use a motorway within the meaning of the Directive, provided that they are designed to carry goods. Otherwise, the same motor vehicle could be subject to, or exempt from, payment of road charges depending on the subjective use to which it was put at any particular time by its owner. This would make it difficult to achieve one of the fundamental objectives of the Directive, which is to distribute road infrastructure costs fairly. The German Government concludes by saying that if an articulated vehicle, like a tractor and trailer, has a maximum permissible gross laden weight of not less than 12 tons, it must be considered a vehicle within the meaning of Directive 93/89 whether, at a given moment, it is not carrying goods, or whether the goods it is carrying belong to the driver, and it is irrelevant for this purpose whether or not the owner of the vehicle uses it primarily in his agricultural business.

8. The Belgian Government maintains, on the other hand, that, in order to ascertain whether a motor vehicle is subject to payment of user charges, it must be established whether it is generally intended for the carriage of goods, irrespective of the purpose for which it is used in a particular situation. The national court should base this decision on the nature of the vehicle.

9. The Swedish Government, favouring a literal interpretation of the provision, considers that only vehicles intended to be used exclusively for the carriage of goods should be subject to payment of user charges, and that vehicles used for other purposes should be exempt. It believes that the underlying intention of the provisions of the Directive, which is that the infrastructure costs should be borne by the user, supports the interpretation that the definition of the vehicle which is subject to payment of user charges applies to traditional heavy goods vehicles, not vehicles intended for agricultural use, in spite of the fact that they are sometimes used for the carriage of goods by road.

10. The Commission contends that the terms of the fourth indent of Article 2 of Directive 93/89 do not permit an interpretation based on the actual purpose for which the vehicle is used. It believes that, in order to ascertain whether a 'vehicle' is intended exclusively for the carriage of goods by road, irrespective of the purpose for which it is used in a particular instance, it is necessary to establish whether it is generally assigned to that type of transportation. It must be possible to ascertain this intended use objectively, from the vehicle's technical characteristics.

V. Examination of the question referred for a preliminary ruling

A — *The request that the Court of Justice interpret Article 2(1) of the Agreement concluded between some Member States relating to the levying of user charges for the use of certain road infrastructures by heavy goods vehicles*

11. Article 8 of Directive 93/89 provides that two or more Member States may cooperate in introducing a common system for user charges applicable to their territories as a whole, and that other Member States may join the common system. On the basis of that provision, on 9 February 1994 the German, Belgian, Danish, Luxembourg and Netherlands Governments concluded the Agreement relating to the levying of user charges for the use of certain roads by heavy goods vehicles[2] (hereinafter 'the Agreement').

2 — The Swedish Government, in the observations it has submitted in these proceedings, states that, by a Protocol signed in Brussels in September 1997, it was granted the option of joining the Agreement. In December of that year, the Swedish Government approved the Protocol and the user charge imposed in the Agreement came into force in Sweden on 1 February 1998.

The Oberlandesgericht Köln is seeking an interpretation of Article 2(1) of the Agreement in connection with the fourth indent of Article 2 of Directive 93/89.

12. This is not the first time that the Oberlandesgericht has requested the Court of Justice to interpret provisions of the Agreement. It raised the matter of Article 8(1) in *Pörschke* [3] and *Claasen* [4] and of Article 4(1) in *Hartmann.* [5] In all three cases the Court made an order stating that it manifestly did not have jurisdiction to reply to the questions referred to it for a preliminary ruling.

13. Article 177 of the Treaty grants the Court jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of measures adopted by the Community. Although Article 8 of the Directive enables the Member States to cooperate in introducing a common system for user charges, that does not mean that an agreement concluded between them on the basis of the Directive becomes part of Community law, which this Court has jurisdiction to interpret.

3 — Order of the Court of 12 November 1998 in Case C-194/98 *Pörschke* (not published in the ECR).

4 — Order of the Court of 11 February 1999 in Case C-313/98 *Claasen* (not published in the ECR).

5 — Order of the Court of 12 November 1998 in Case C-162/98 *Hartmann* [1998] ECR I-7083.

14. In paragraph 12 of the three aforementioned orders, the Court stated that the fact that the provisions of the Agreement had been adopted jointly by several Member States was all that distinguished them from other provisions laid down by law which those Member States may adopt individually under the Directive.

As the Court does not have jurisdiction to interpret those provisions, it is also not competent to specify the meaning and scope of the provisions of the Agreement.

15. It is true that Article 2(1) of the Agreement provides that the definitions in Article 2 of Directive 93/89 apply to the Agreement, that the Oberlandesgericht is specifically seeking an interpretation of one of those definitions and that the interpretation given by the Court in its judgment will be applicable to it. However, the interpretation of a provision of Directive 93/89 — such as the fourth indent of Article 2 — will be binding not only on the States which have signed the Agreement but also on all the other States required to apply the provision.

16. It must therefore be made clear that the reply to the question referred for a preliminary ruling will refer, solely and exclusively, to the interpretation to be given to the fourth indent of Article 2 of Directive 93/89.

B — *The reply to the question referred for a preliminary ruling*

17. By the question it has referred, the national court wishes to know whether, in order to determine whether a vehicle is intended exclusively for the carriage of goods, the criterion to apply should be the time and manner of use of the vehicle in the particular instance, or the general intended use of the vehicle, irrespective of its use in the particular instance.

18. This will be the first time that the Court has examined one of the provisions of Directive 93/89 in preliminary ruling proceedings. That does not mean, however, that it has never had the opportunity to give a ruling concerning the Directive. In fact, in its judgment of 5 July 1995 in *Parliament* v *Council*,[6] it annulled the Directive for infringement of an essential procedural requirement, because the Council had failed to consult the Parliament again after introducing significant amendments to the draft. In the same judgment the Court decided, in order to avoid a lack of continuity in the transport tax harmonisation programme, to retain all the effects of the annulled Directive until the Council had adopted a new directive. The new directive has not yet been adopted.[7]

Furthermore, in its judgment of 5 March 1998 in *Commission* v *France*,[8] the Court gave judgment against the French Republic for failing to comply with its obligations under the Treaty by not adopting in its national law, within the prescribed period, the laws, regulations or administrative provisions required to implement Directive 93/89. The prescribed period had ended on 1 January 1995. Finally, in Case C-205/98, which is pending before the Court, the Commission has brought an action against the Republic of Austria for infringement of Article 7(b) and (h) of the same Directive.[9]

19. According to the explanatory statement, the main objective of the Directive is to eliminate distortions of competition between transport undertakings in the Member States. This calls for the simultaneous harmonisation of levy systems and the establishment of fair mechanisms for charging infrastructure costs to hauliers, which will be achieved in stages. Specifically, the Directive confines the adjustment of national levy systems to commercial vehicles of more than a certain gross laden weight.

20. Article 2 contains the definitions, for the purpose of applying the Directive, of the terms 'motorway', 'toll', 'user charges', and 'vehicle', the last of which is the subject of the question referred for a preliminary

6 — Case C-21/94 [1995] ECR I-1827.

7 — On 13 November 1996 the Commission submitted to the Council the proposal for the Directive concerning the application of taxes on commercial vehicles for the use of certain infrastructures (COM (96) 331 final — SYN 96/0182 (OJ 1997 C 59, p. 9). Point 7 of the explanatory statement specifies that the objective of the new directive is to replace Directive 93/89.

8 — Case C-175/97 *Commission* v *France* [1998] ECR I-963.

9 — OJ 1998 C 234, p. 20.

ruling. The Directive goes on to draw a clear distinction between taxes on the one hand and tolls and user charges on the other.

21. Article 3 lists, for each Member State, the taxes which may be levied on vehicles intended for the carriage of goods. They are characterised by the fact that they may be charged only by the Member State of registration (Article 5). Under the provisions of Article 6(3), Member States may apply reduced rates or exemptions to the taxes listed in Article 3 for vehicles used for national or civil defence purposes, by fire and other emergency services, and by the police, and vehicles used for road maintenance, and also to vehicles which travel only occasionally on the public roads of the Member State of registration and are used by natural or legal persons whose main occupation is not the carriage of goods.

22. The tolls and user charges system differs from the taxation system in so far as payment of the tax does not provide exemption from payment of tolls and user charges when vehicles intended exclusively for the carriage of goods travel on motorways, other similar roads, bridges, tunnels and mountain passes. The tolls and user charges must be imposed by the Member States without discriminating, either directly or indirectly, on the grounds of the nationality of the haulier or of the origin or destination of the vehicle. The powers of the Member States in this regard are governed by Articles 7 to 9.

23. The German Government argues that vehicles which carry goods only occasionally must also be subject to payment of user charges because it has not availed itself of the option, granted in Article 6(3) of the Directive, to apply reduced rates or exemptions.

24. I cannot agree with this interpretation, for two reasons. Firstly, because the vehicles for which the Member States may apply reduced rates or exemptions are listed in the provision and are divided into two categories: one the one hand, vehicles used for national and civil defence purposes, by fire and other emergency services, and by the police, and vehicles used for road maintenance, and on the other hand, vehicles which travel only occasionally on the public roads of the Member State of registration and are used by natural or legal persons whose main occupation is not the carriage of goods. I believe that the latter

category will, basically, comprise lorries used in enclosed industrial installations, such as mines or quarries.

Secondly, because, as it emerges from the study I have just made of the structure of the Directive, the option granted to the Member States to apply reduced rates or exemptions refers only to the taxes on vehicles and not to tolls and user charges, and Mr Pfennigmann was fined for driving along a motorway without having paid the user charges.

25. If I interpret the fourth indent of Article 2 of Directive 93/89 literally, I notice that the different language versions all agree that the motor vehicle or articulated vehicle combination, within the meaning of the Directive, are those which, in Spanish, are: 'destinados *únicamente* al transporte de mercancías por carretera'; in French, 'destinés *exclusivement* au transport de marchandises par route'; in Italian, 'adibiti *esclusivamente* al trasporto di merci su strada'; in Portuguese, '*exclusivamente* destinados ao transporte rodoviário de mercadorias'; in English, 'intended *exclusively* for the carriage of goods by road'; in German, 'die *ausschließlich* für den Güterkraftverkehr bestimmt sind'; in Dutch, '*uitsluitend* bestemd is voor het goederenvervoer over de weg'; in Danish, 'som *udelukkende* er beregnet til vejgodstranspot'; in Greek, 'που προοριζονται *αποκλειστικά* για οδικές εμπορευματικές μεταφορές'; in Swedish, '*uteslutande* für godstransporter på väg'; and, in Finnish, 'joka on tarkoitettu *ainoastaan* maanteidentavarakuljetukseen'. The terms used in all the official languages indicate, therefore, that these must be vehicles used exclusively for the carriage of goods by road.

It is these vehicles, and no others, which, under the rules of the Directive, must be subject to payment, in the Member State of registration, of the taxes listed in Article 3, and which may have to pay tolls and user charges for using certain road infrastructures in all the Member States.

26. Having regard to the objectives of Directive 93/89 and after systematically studying its provisions and comparing the versions of the fourth indent of Article 2 in the different languages, I have to conclude that, in order to determine whether a vehicle is intended exclusively for the carriage of goods by road, the general intended use of the vehicle must be taken into account, not the purpose for which it is used in the particular instance.

VI. Conclusion

27. In view of the foregoing, I suggest that the Court should give the following reply to the question referred to it by the Oberlandesgericht Köln:

In order to determine whether a motor vehicle or an articulated vehicle combination is intended exclusively for the carriage of goods by road within the meaning of the fourth indent of Article 2 of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road, and tolls and charges for the use of certain infrastructures, the general intended use of the vehicle must be taken into account, not the purpose for which it is used in a particular instance.