OPINION OF ADVOCATE GENERAL STIX-HACKL

delivered on 6 December 2001 [1]

I — Subject-matter of the proceedings

1. The present action by the Commission against the Italian Republic concerns the compatibility with Community law of a provision of Italian road-traffic law, which prescribes different treatment for offenders according to the place of registration of vehicles. Whether this is disproportionate and thus incompatible with Article 12 EC is disputed.

II — Legal background: National law

2. The initial provisions of road-traffic law for the purposes of the present proceedings are contained in the *Codice della strada* (Highway Code), *Decreto Legislativo No 285* of 30 April 1992 (hereinafter 'the Codice').

3. Article 202 of the Codice, which provides for the possibility of payment of a lesser sum in the event of an infringement of road-traffic law, states:

'1. As regards offences for which the present code provides for the imposition of an administrative pecuniary penalty, subject to the application of any ancillary penalties, the offender shall be permitted to pay, no later than 60 days from the date of the recording or notification of the offence, a sum equal to the minimum prescribed by the particular provisions.

2. The offender may pay the amount due at the investigating officer's station by way of transfer to a post office giro account or, if provided by the administration, a bank giro account. If necessary, the payment details must be stated in the report issued to or served upon the offender, with reference to the provisions for transfer to a post office

1 — Original language: German.

giro account or, if applicable, to a bank giro account.

3. Payment of a reduced sum is not permitted if the offender fails to comply with an instruction to stop, or if the driver of the vehicle has refused to produce the vehicle registration document, driving licence or any other document which he is required to carry by law; in this case the report of the circumstances of the offence must be passed to the Prefect within 10 days of the booking.'

4. Article 203 governs the appeal to the Prefect:

'1. Within 60 days following the date on which the offence was officially recorded or notified, if the reduced payment has not been made in a case where it is permitted, the offender or other persons referred to in Article 196 may appeal to the Prefect of the area in which the offence was committed, by appearing in person at the office or station of the investigating officer, or by writing to him by registered post with advice of delivery. Documents considered appropriate may be submitted together with the appeal, and application may be made for a personal hearing.

2. The director of the office or station within the meaning of paragraph 1 is obliged to produce to the Prefect within 30 days of the oral or written submission of the appeal, evidence of the recording or notification and all other documents relevant to the decision, including those originating from the appellant.

3. If, within the prescribed time-limits, no appeal has been brought and the reduced payment has not been made, the police report, by way of exception to Article 17 of Law No 689 of 24 November 1981, shall constitute authority to levy execution for a sum equal to half of the maximum of the administrative penalty prescribed and for the costs of the proceedings.'

5. Article 204 governs the measures to be taken by the Prefect:

'1. If, after examining the police report and the files submitted by the investigating office or the investigating station, the appeal and accompanying documents, and after hearing the person who has applied for the appeal, the Prefect considers that the finding that an offence has been committed is well founded, he shall issue, within 180 days, a reasoned order requiring the payment of a fixed sum, in accordance with criteria laid down in Article 195(2),

which shall not be less than twice the minimum prescribed by law. The order imposing the administrative pecuniary penalty shall include the costs and shall be notified to the offender and other persons liable for payment according to the provisions of this title. Where, however, the Prefect does not consider the findings to be well founded, he shall, within the same period, issue a reasoned order as to the discontinuance of the proceedings, and convey the complete order to the office or station of the investigating officer, who shall inform the appellants of it.

2. The order imposing the administrative pecuniary penalty shall be notified in the forms specified in Article 201. Payment of the fixed sum and the related costs shall be made within 30 days of notification at the registry or another office specified in the order. The registry which has accepted payment must notify the Prefect and the investigating office or station within 30 days of payment.

3. After expiry of the period prescribed for payment of the administrative pecuniary penalty, the order imposing the penalty shall constitute authority to levy execution for the fixed sum and the related costs.'

6. Article 205 prescribes judicial redress:

'1. The parties concerned may bring an appeal against the order to pay within 30 days of service of the notice or, if the person concerned is resident abroad, within 60 days of such service.

2. According to Article 7(3) of the Codice di procedura civile, as amended by Article 17 of Law No 374 of 21 November 1991, a judicial appeal must be lodged at the Giudice di pace of the area in which the offence was committed. The jurisdiction of the Pretore remains unaffected where an administrative ancillary penalty has been imposed.

3. The appeal proceedings within the meaning of paragraph 2 are governed by Articles 22 to 23 of Law No 689 of 24 November 1981.'

7. Article 207 contains specific provision for vehicles registered abroad or which have an EE registration plate:

'1. Where a contravention of the present code, punishable by the imposition of an administrative pecuniary penalty, is committed with a vehicle registered abroad or bearing an EE registration plate, the offender may make immediate payment to the booking officer of the reduced payment prescribed in Article 202. The officer shall forward the report and the payment received to his station or office, and issue the offender with a receipt, having noted the payment on the copy of the report handed by him to the offender.

2. If, for any reason, the offender does not exercise the option of making a reduced payment, he shall be required to pay to the booking officer, by way of security, a sum equal to half of the maximum of the pecuniary penalty prescribed for the offence committed. Instead of paying the said security, the offender may provide an appropriate surety document guaranteeing payment of the sums due. The payment of the security or the provision of the surety document shall be mentioned in the police report recording the offence. The security or surety document shall be lodged at the police station or department to which the booking officer is attached.

3. In the absence of payment of the security or presentation of the guarantee referred to in paragraph 2, the booking officer shall, as a precautionary measure, immediately confiscate the offender's driving licence. In the absence of a driving licence, the vehicle shall be impounded until one of the conditions referred to in paragraph 2 is satisfied, and in any case for a period not exceeding 60 days.

4. The provisions of this Article shall not apply to vehicles owned by Italian nationals resident in the municipality of Campione d'Italia.'

8. The Italian system is characterised by the fact that the maximum fine payable is set at four times the minimum. One half of the maximum is, therefore, invariably double the minimum.

III — Pre-litigation and judicial procedure

9. The Commission, having taken the view that certain provisions of the Codice are incompatible with Article 12 EC, initiated a procedure under Article 226 EC for failure to fulfil an obligation.

10. In accordance with the procedure under Article 226(1) EC, the Commission

gave the Italian Republic the opportunity to make representations, and then, by letter of 2 October 1998, issued a reasoned opinion, requiring the Italian Republic, within two months following service of the said opinion, to adopt the necessary measures to comply with its obligations under Article 12 EC.

11. As the Commission remained of the view, following several written responses from the Italian Republic, that the Italian Republic had not fulfilled its obligations, it brought an action against the Italian Republic before the Court of Justice by application dated 23 May 2000, entered in the register of the Court of Justice on 31 May 2000.

12. The Commission is applying for:

— a declaration that the Italian Republic has failed to fulfil its obligations under Article 12 EC by maintaining in force legislation (Article 207 of the Highway Code) which prescribes different and disproportionate treatment for offenders according to the place of registration of their vehicles;

— the costs of the proceedings to be paid by the Italian Republic

IV — Summary of the submissions of the parties

13. In the *Commission*'s view, Article 207 of the Codice gives rise to the following: Where a provision of the Codice is infringed with a vehicle registered abroad, the offender must pay, directly to the investigating officer and without the possibility of appeal to the Prefect responsible for the area in which the offence was committed, a fine equal to the minimum amount fixed for the particular type of offence, lodge a security or produce a surety document covering an amount equal to half the maximum penalty fixed for the offence committed. If no security is lodged or surety document produced, the driving licence may be confiscated. There is no express provision for lodging an appeal with the Prefect.

14. On the other hand, according to Article 202 of the Codice, in the case of an infringement of the Codice involving a vehicle registered in Italy, the offender may, within 60 days of notification, pay an amount equal to the minimum amount fixed for the particular type of offence. He may pay the amount due at the office of the investigating officer, or by means of a transfer from his post office giro or bank giro account. Finally, he is entitled to lodge

an appeal with the Prefect within 60 days of notification of the order imposing the penalty.

15. The Commission takes the view that the abovementioned rules constitute discrimination by reason of the place of registration of the vehicle and thus leads, de facto, to the same result as discrimination by reason of nationality. Whilst it may be concluded from the judgment in the *Pastoors* case [2] that a distinction may be made according to the offender's residence, the Italian legislation is disproportionate. It therefore constitutes an infringement of Article 12 EC.

16. Furthermore, the Commission proposes a solution which, in its view, serves the objective pursued by Italy and is in conformity at the same time with Community law. This would entail requiring immediate payment of a security equal to the minimum amount, in other words: the amount necessary for payment of the reduced sum under Article 202 of the Codice. In this way, payment would be secured without depriving the person concerned of the right to time for reflection.

17. The *Italian Government* recognises that the Italian legislation indirectly differentiates according to nationality. Referring to paragraphs 22 and 24 of the judgment in *Pastoors*, and pointing to the absence of corresponding Community legislation or bilateral conventions to ensure the enforcement of penalties abroad, the Italian Government nevertheless takes the view that the differentiation in question is necessary in order to secure payment by offenders not resident in the country.

18. The solution proposed by the Commission is inadequate because it does not overcome the most significant aspect of the legislation: the obligation to make immediate payment. In addition, the Commission's proposal would benefit an offender not resident in Italy who wishes to make an appeal which is then rejected, because, in such cases, a security equal to the minimum fine would not cover the penalty provided by the legislation, which could amount to double the minimum amount.

V — Assessment

19. The first step is to inquire whether, and in which respect, the Codice provides for different treatment, and whether this legislation is objectively justified. The second is then to examine whether this legislation 'is

2 — Case C-29/95 *Pastoors* [1997] ECR I-285.

proportionate to the legitimate aim of the national provisions'. [3]

A — *Different treatment*

20. First, it should be noted that, as regards the penalty of a fine, the Codice distinguishes two regimes for infringements. Whereas one regime applies to offenders whose vehicles are registered in Italy (hereinafter 'the first group') the other applies to offenders whose vehicles are registered abroad or which bear an EE registration number (hereinafter 'the second group'). Both regimes differ from one another in several respects.

21. Further, it should be noted that the contentious provisions of the Codice differ in several respects from the legislation at issue in the *Pastoors* case, to which both parties have referred.

22. The first difference consists of the fact that the legislation at issue in the *Pastoors* case essentially provided both groups, resident and non-resident, with the same options: immediate settlement of the fine or commencement of criminal proceedings. Only the second alternative included a special provision for non-residents, namely the lodgment of a security equal to one and a half times the amount of the fine.

23. The provisions of the Codice at issue in these proceedings, on the other hand, differ in considerably more respects. Thus the first group has 60 days in which to pay a reduced sum, whereas the second group can only do so immediately, which means it has no time to deliberate.

24. Furthermore, as a review of the provisions of the Codice relevant to this point reveals, the second group, in contrast to the first, only has the option of an appeal on payment of a security or production of a surety document.

25. Finally, if the reduced sum is not paid immediately, a security provided, or a surety document produced, the second group is subject to a penalty which cannot be imposed upon the first: confiscation of the driving licence or, secondly, impounding of the vehicle.

3 — Case C-274/96 *Bickel and Franz* [1998] ECR I-7637, paragraph 27.

26. The second distinction with respect to the *Pastoors* case is that Article 207 of the Codice does not distinguish according to domicile or permanent residence, but according to place of registration of the vehicle.

27. It must, therefore, be considered whether, as with provisions connected with residence, legislation which is connected with the place of registration is also to be characterised as a covert form of discrimination on grounds of nationality.

28. If we take as a starting point the ideas underlying the Court's case-law [4] on covert forms of discrimination, prohibited (covert) discrimination will be presumed where national legislation does not affect, or affects only very rarely, nationals of the relevant Member State.

29. Article 207 of the Codice constitutes such legislation, as it will, as a rule, affect nationals of other Member States. This is because probably only a minority of vehicles registered abroad are driven by Italian nationals, or rather, only a minority of vehicles registered in Italy are driven by nationals of other Member States.

30. Thus, the Codice lays down rules the effect of which is to distinguish according to nationality.

31. According to the Court's case-law, however, not every instance of different treatment is an infringement of the prohibition on discrimination in Article 12 EC, as different provisions are permissible if they are justified by objective circumstances. [5]

32. With a view to the possible objective justification of Article 207 of the Codice, the Italian Government has, rightly, drawn attention to the difficulties which may arise in the punishment of offences committed under the Codice with vehicles which are not registered in Italy.

33. A significant aspect in the assessment of legislation concerning the amenability of offences to prosecution and enforceability of public acts, such as judgments or

4 — Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 28 and 29, and Case C-29/95, cited in footnote 2, paragraphs 17 and 18.

5 — Case C-398/92 *Mund & Fester* [1994] ECR I-467, paragraphs 16 and 17, and Case C-156/98 *Commission* v *Germany* [2000] ECR I-6857, paragraphs 86 and 87.

administrative acts, is the question whether international conventions or acts under Community, or rather, Union law exist to ensure enforceability.

34. Where such conventions or acts do exist, it follows from the judgment in the *Mund & Fester* case that in such cases, special provisions for non-residents or, as in these proceedings, for offences committed with vehicles registered abroad, are not necessary to guarantee enforceability. [6]

35. By reason of the absence of conventions, however, as the Court stated in the *Pastoors* case, there is 'a real risk that enforcement of a judgment against a non-resident would be impossible or, at least, considerably more difficult and onerous'. [7] The risk is particularly great in the area of road traffic.

36. Prosecution of offences committed using vehicles registered abroad necessarily involves significantly more complex procedures, which require more time and manpower, and thus give rise to greater costs. Jurisdictional difficulties and additional costs are, however, implicitly recognised by the Court [8] as grounds for justifying legislation which provides for objectively different treatment.

37. The present proceedings concern national legislation which provides for the deposit of a sum of money by way of security. This is to prevent offenders with a vehicle registered abroad from 'avoiding an effective penalty simply by declaring that they do not consent to the immediate levying of the fine, and opting for the continuation' [9] of the procedure, which — when transposed to the legal position under the Codice — means that they wish to lodge an appeal.

38. The need for inter-State legislation is moreover apparent from an initiative recently undertaken in the context of police and judicial cooperation in criminal cases (Title VI EU), namely in a framework agreement on the application of the principle of mutual recognition of fines and financial penalties. [10]

39. Accordingly, it follows that legislation which, in relation to punishment of offences under the Codice, differentiates according to whether the vehicle is regis-

6 — So too Advocate General Tesauro in his Opinion in Case C-29/95, cited in footnote 2, point 11.

7 — Case C-29/95, cited in footnote 2, paragraph 21.

8 — Compare Case C-274/96, cited in footnote 3, paragraph 30.

9 — Case C-29/95, cited in footnote 2, paragraph 22.

10 — Council document 11178/01, COPEN 40.

tered in the country or abroad, is fundamentally justified. That does not mean, however, that Article 207 of the Codice thereby fulfils the conditions of Article 12 EC.

B — *Proportionality*

40. In order for national legislation to be compatible with Article 12 EC, it must not only be objectively justified, but must furthermore also be in conformity with the principle of proportionality. Article 207 of the Codice must, therefore, be examined against the individual aspects of this principle. At issue, firstly, is the obligation to pay a security, as well as the amount payable, and second, the measures which may be taken in the event of non-payment of a security or provision of a surety document.

41. This must be examined generally, not by reference to specific cases, the principle of proportionality being infringed even where a class of typical cases is affected.

1. Suitability

42. As regards the suitability of the provisions of Article 207 of the Codice, it should be borne in mind that they were brought into force for the purpose — also recognised in case-law [11] — of safeguarding the amenability of the offence to prosecution.

43. As the Italian Government rightly argues, the measures provided in the said article are fundamentally suited to this purpose. This applies particularly to the payment of a security, by which the actual payment of the corresponding levy is intended to be guaranteed. [12]

2. Necessity

44. In terms of necessity, it is necessary to examine whether the standardised measures in Article 207 of the Codice involve the slightest interference with the rights of the individual, or, conversely, whether there are other equally effective measures which would be less onerous.

45. A comparison with corresponding legislation in the other Member States shows that not only are there theoretically less onerous measures, but in some Member States such measures are even in force. Thus, several Member States dis-

11 — As to the purpose of prosecution, see Case C-262/99 *Louloudakis* [2001] ECR I-5547, paragraph 69.

12 — Compare Case C-213/99 *de Andrade* [2000] ECR I-11083, paragraph 23.

pense altogether with a distinction between offences committed by persons resident in the country, or rather, with a vehicle registered in the relevant country, and those committed by persons resident abroad or with a vehicle registered abroad. [13]

46. However, even those Member States which do recognise such distinctions apply much less restrictive measures than Italy. [14] This is true primarily of the amount of the security and the measures which may be imposed. Thus, the amount of the security is limited, for example, to the amount of the fine and — in part — the costs of the proceedings. Under the system of the Codice, the reduced sum under Article 202 would be consistent with the first aspect.

47. Although there are, therefore, measures which work in practice, and which are equally effective but less onerous, the mere existence of such other legislation in other Member States — at least according to one branch of the case-law [15] — is not in itself an argument for the disproportionality of national legislation.

13 — This applies, at least according to the statutory provisions relating to fines, to Finland, France, Greece, Ireland, Austria and the United Kingdom.

14 — Belgium, Germany and Spain.

15 — Case C-124/97 *Läärä* [1999] ECR I-6067, paragraph 36.

48. It follows from this that Member States are not obliged to choose the lowest level of protection at the outset.

49. The conformity of the legislation (Article 207 of the Codice) must also, therefore, be examined in the light of proportionality in the narrower sense.

3. Appropriateness, proportionality in the narrower sense

50. Lastly, it is therefore necessary to examine the appropriateness of the interference associated with this legislation (Article 207 of the Codice) to the aim of this provision.

51. In this connection, the first point to consider is the effect of the regime of the Codice on offenders with vehicles registered abroad.

52. For, as with the national legislation which formed the basis of the *Pastoors*

case, Article 207 of the Codice has a dissuasive effect on offenders with vehicles registered abroad, so far as their legal remedies are concerned.

53. The dissuasive effect arises firstly from the amount of the security. This amounts to double the reduced sum due on immediate payment. Added to this are the conditions governing forfeiture of the security. This is forfeited even if no appeal is lodged. The offender only recovers the security if he wins the case.

54. Furthermore, a certain amount of pressure is applied through the secondary measures which may be taken, such as confiscation of the driving licence and impounding of the vehicle.

55. It is immaterial in this respect that, according to Italian law — as opposed to the national legislation which was at issue in the *Pastoors* case [16] — the vehicle is not impounded where payment is not immediate, but only in the absence of a driving licence. The Court of Justice even described the legislation in the *Pastoors* case as 'manifestly disproportionate'. [17] However, legislation which is not *manifestly* disproportionate also infringes Article 12 EC.

56. By putting offenders with a vehicle registered abroad under pressure to waive their right of appeal, and to pay the reduced sum immediately, the regime restricts the access of this category of persons to legal redress. [18]

57. But the right to an effective judicial remedy constitutes a general principle of Community law, which flows from the constitutional traditions of Member States, and is embodied in Articles 6 and 13 of the European Convention on Human Rights and Fundamental Freedoms. [19]

58. Furthermore, it should be noted that Article 41 of the — legally non-binding — Charter of Fundamental Rights of the European Union incorporates a right to good administration, in particular the right to a hearing.

16 — Case C-29/95, cited in footnote 2, paragraphs 25 and 26.

17 — Case C-29/95, cited in footnote 2, paragraph 28.

18 — Compare the statements of Advocate General Tesauro in Case C-29/95, cited in footnote 2, points 19 and 20.

19 — Case C-1/99 *Kofisa* [2001] ECR I-207, paragraph 46, and Case C-226/99 *Siples* [2001] ECR I-277, paragraph 17; compare Case 222/86 *Heylens* [1987] ECR 4097, paragraph 14.

59. Thus, the system set up by Article 207 of the Codice, in particular the fact that offenders with vehicles registered abroad do not have true freedom of choice between paying a reduced sum or lodging an appeal, [20] restricts the right to a hearing for offenders whose vehicles are registered abroad and 'in practice significantly curtails their options for access to legal redress'. Thus the legislation is disproportionate even if one does not take an even stricter view, according to which the fashion of a security as a type of advance payment of the maximum amount [21] is not permissible in any event.

60. For the sake of completeness, consideration should also be given to the Court's case-law which established the principle that the decisive factor is whether the alternative measures proposed by the Commission appear sufficiently effective to achieve the intended aim. [22] On applying the principle developed by that case-law, the system of standardised penalties in Article 207 of the Codice proves to be disproportionate nevertheless. In other words, the sanctions are disproportionate to the seriousness of the offence. [23] As the standardised penalties in Article 207 of the Codice are penalties for road traffic offences, this regime must be considered excessively stringent.

61. It is clear from the fact that the majority of Member States which recognise the obligation to pay a security demand significantly lower securities from the person concerned [24] that the legislation (Article 207 of the Codice) is inappropriate.

62. It is not clear, therefore, that Italy's aims could not be equally effectively safeguarded by less onerous legislation, such as a security equal to the reduced amount plus procedural costs.

63. It follows from the foregoing considerations that the legislation (Article 207 of the Codice) cannot be considered appropriate. It thus infringes the prohibition on discrimination in Article 12 EC.

20 — As to the fundamental difference between the systems which apply to residents and non-residents, see Case C-29/95, cited in footnote 2, paragraph 27.

21 — Against such a security structure, Advocate General Tesauro in Case C-29/95, cited in footnote 2, point 17.

22 — Case C-394/97 *Heinonen* [1999] ECR I-3599, paragraph 44.

23 — Compare Case C-265/88 *Messner* [1989] ECR 4209, paragraph 9.

24 — For a review of legislation in other Member States, see Case C-265/88, cited in footnote 24, paragraph 11.

VI — Conclusion

64. Accordingly, it is proposed that the Court should declare as follows:

(1) The Italian Republic has failed to fulfil its obligations under Article 12 EC by maintaining in force legislation (Article 207 of the Codice della strada) which prescribes different and disproportionate treatment for offenders according to the place of registration of their vehicles.

(2) The Italian Republic shall pay the costs of the proceedings.