JUDGMENT OF THE COURT (Sixth Chamber)
28 October 1999 *

In Case C-193/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberlandesgericht Köln, Germany, for a preliminary ruling in an appeal against an administrative fine brought before that court by

Alois Pfennigmann

on the interpretation of Article 2(1) of the Agreement of 9 February 1994 between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of Denmark, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning the levying of charges for the use of certain roads by heavy goods vehicles (*Bundesgesetzblatt* 1994 II, p. 1768) and 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 (OJ 1993 L 279, p. 32),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: P.J.G. Kapteyn (Rapporteur), acting as President of the Sixth Chamber, G. Hirsch and H. Ragnemalm, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the German Government, by E. Röder, Ministerialrat at the Federal Ministry of the Economy, and C.-D. Quassowski, Regierungsdirektor at the same ministry, acting as Agents,

— the Belgian Government, by J. Devadder, Director of Administration in the Legal Service of the Ministry of Foreign Affairs, External Trade and Development Cooperation, acting as Agent,

— the Swedish Government, by E. Brattgård, Departementsråd at the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by L. Pignataro and M. Niejahr, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Alois Pfennigmann, represented by H.-G. Herrmann, Rechtsanwalt, Neutraubling, of the German Government, repre-

sented by C.-D. Quassowski, of the Swedish Government, represented by A. Kruse, Departementsråd at the Ministry of Foreign Affairs, acting as Agent, and of the Commission, represented by K.-D. Borchardt, of its Legal Service, acting as Agent, at the hearing on 19 May 1999,

after hearing the Opinion of the Advocate General at the sitting on 10 June 1999,

gives the following

Judgment

1 By order of 8 May 1998, received at the Court on 20 May 1998, the Oberlandesgericht Köln (Higher Regional Court, Cologne) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Article 2(1) of the Agreement of 9 February 1994 between the Governments of the Federal Republic of Germany, the Kingdom of Belgium, the Kingdom of Denmark, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands concerning the levying of charges for the use of certain roads by heavy goods vehicles (*Bundesgesetzblatt* 1994 II, p. 1768, hereinafter 'the Agreement') and 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 (OJ 1993 L 279, p. 32, hereinafter 'the Directive').

2 This question has arisen in connection with the objection lodged by Alois Pfennigmann against a fine imposed on him for an offence against the Autobahngebührengesetz (Law relating to motorway user charges).

Law

A — *The Directive*

3 The first and second recitals of the Directive state that its objective is to eliminate distortions of competition between transport undertakings in the Member States through the harmonisation of levy systems and to establish fair mechanisms for charging infrastructure costs to hauliers. To this end, the Directive provides for a limited harmonisation of the taxes levied by the Member States on vehicles (Articles 3 to 6) and lays down minimum rules for the levying of tolls and user charges (Articles 7 to 9).

4 The fourth indent of Article 2 of the Directive 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.'

5 The second indent of Article 6(3) provides:

'The Member States may apply reduced rates or exemptions for:

— ...

— vehicles which travel only occasionally on the public roads of the Member State of registration and which are used by natural or legal persons whose main occupation is not the carriage of goods, provided that the transport operations do not cause distortions of competition and subject to the Commission's Agreement.'

6 Under the terms of Article 8(1) of the Directive:

'Two or more Member States may cooperate in introducing a common system for user charges applicable to their territories as a whole. In that case, these Member States shall ensure that the Commission is closely involved therein and in the system's subsequent operation and possible amendment.'

7 In its judgment in Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827 the Court annulled the Directive for infringement of essential procedural requirements, but retained all its effects until the Council had adopted a new directive. To that end, on 13 November 1996, the Commission adopted a proposal for a Council Directive concerning the taxation of heavy goods vehicles for using certain infrastructures (OJ 1997 C 59, p. 9). The new directive has not yet been adopted.

B — *The Agreement*

8 The Agreement was concluded on the basis of Article 8(1) of the Directive.

9 Article 1 of the Agreement states as follows:

'The objective of this Agreement is to levy a common user charge on certain vehicles using certain roads in the territories of the Contracting Parties, and to lay down the terms and conditions for allocating the proceeds of the said charge.'

10 Under Article 2(1) of the Agreement, the definitions contained in Article 2 of the Directive apply to the Agreement. Consequently, the scope of application of the Agreement, in respect of vehicles, is limited to those which fall within the definition contained in the fourth indent of Article 2 of the Directive.

11 It is stipulated in Article 4(1) and (2) of the Agreement that:

'1. Exemption from payment of the user charge referred to in Article 3 is granted 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.

2. In their respective territories, the Contracting Parties may exempt the vehicles listed in the second indent of Article 6(3) of the Directive from payment of the user charge referred to in Article 3.'

The main proceedings

12 By an administrative order of 8 July 1997 the Bundesamt für Güterverkehr (Federal Office for the Carriage of Goods) imposed a fine of DEM 100 on Mr Pfennigmann, under the Autobahngebührengesetz, for driving along two federal motorways with his tractor (with a maximum permissible gross laden weight of 7 490 kg) coupled to a trailer (with a maximum permissible gross laden weight of 8 500 kg) without having paid the motorway user charge. The purpose of the journey was to deliver vegetables to a company to which Mr Pfennigmann, who is a farmer, supplied products under contract.

13 Mr Pfennigmann lodged an appeal against that order before the Amtsgericht Köln (Local Court, Cologne). He argued that the articulated vehicle combination (tractor and trailer) driven by him at the time in question was not intended exclusively for the carriage of goods by road but was primarily used in the operation of his agricultural business. He considered that he was therefore not required to pay any motorway charges.

14 By judgment of 17 November 1997 the Amtsgericht rejected the appeal. That court held that, in order to establish whether a person was required to pay the user charges, it was only necessary to ascertain whether, at the time of being used on the motorway, the vehicle or articulated vehicle combination was intended exclusively for the carriage of goods. Any other uses for which it was intended, when not using the motorway, were irrelevant. The Amtsgericht based its decision, in particular, on the second indent of Article 6(3) of the Directive and Article 4(1) and (2) of the Agreement. The power which those provisions confer on the Member States to apply reduced rates or exemptions for certain vehicles

which travel only occasionally on the public roads and are used by persons whose main occupation is not the carriage of goods meant, *a contrario*, that the carriage of goods did not have to be the permanent and sole purpose for which the vehicle was used.

15 Mr Pfennigmann brought an appeal against the judgment before the Oberlandesgericht Köln which decided to stay the proceedings and 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?'

The question referred for a preliminary ruling

16 The national court has asked the Court of Justice, on several previous occasions, to interpret provisions of the Agreement (orders in Case C-162/98 *Hartmann* [1998] ECR I-7083; Case C-194/98 *Pörschke*, not published in the ECR, and Case C-313/98 *Claasen*, not published in the ECR).

17 In those cases, the Court made an order stating that it manifestly lacked jurisdiction to reply to the reference for a preliminary ruling made by the Oberlandesgericht Köln.

18 The Court pointed out that it has jurisdiction under Article 177 of the Treaty to give preliminary rulings on the interpretation of the Treaty and of acts of the Community institutions.

19 However, the mere fact that the Directive, to which the preamble of the Agreement refers, authorises, in Article 8, two or more Member States to cooperate in introducing a common system for user charges is not enough to justify the view that an agreement concluded for that purpose forms an integral part of Community law, whose interpretation falls within the jurisdiction of the Court (*Hartmann*, paragraphs 10 and 11).

20 It is only the fact that the provisions of such an agreement are adopted jointly that distinguishes them from other legislation which Member States may enact individually pursuant to the Directive and the interpretation of which falls outside the Court's jurisdiction to give rulings under Article 177 of the Treaty (*Hartmann*, paragraph 12).

21 In this case, however, unlike in *Hartmann*, *Pörschke* and *Claasen*, the national court is not only seeking an interpretation of a provision of the Agreement — in this case Article 2(1) — but is also requesting the Court to give a ruling on the interpretation of the fourth indent of Article 2 of the Directive, to which Article 2(1) of the Agreement expressly refers.

22 The Court therefore has jurisdiction to reply to the reference for a preliminary ruling made by the Oberlandesgericht, to the extent that it relates to the interpretation of the fourth indent of Article 2 of the Directive.

23 The question referred for a preliminary ruling should therefore be understood as asking essentially whether, 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 the fourth indent of Article 2 of the Directive, the criterion to apply should be the time and manner of each use of the vehicle or the general intended use of the vehicle, irrespective of its use in the particular instance.

24 The Directive draws a distinction between vehicle taxes (Articles 3 to 6), on the one hand, and tolls and user charges (Articles 7 to 9), on the other.

25 Article 3 lists, for each Member State, the taxes which may be levied on vehicles intended exclusively for the carriage of goods by road. Article 5 of the Directive stipulates that they may be charged only by the Member State of registration.

26 Under Article 6(3) of the Directive, Member States may apply reduced rates or exemptions to the taxes listed in Article 3 for vehicles used for public services purposes and, in certain circumstances, 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.

27 The tolls and user charges system differs from the taxation system in so far as payment of taxes 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. Furthermore, the tolls and user charges for the use of those infrastructures 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.

28 The Commission and the Belgian and Swedish Governments maintain that, in order to ascertain whether a motor vehicle or articulated vehicle combination is intended exclusively for the carriage of goods by road within the meaning of the fourth indent of Article 2 of the Directive, it is necessary to examine whether it is generally intended for the carriage of goods by road, irrespective of the purpose for which it is used in a particular instance.

29 The German Government, on the other hand, maintains that the criterion to apply is not the primary use of the vehicle in general, but only whether or not the vehicle is carrying goods at the time it is using roads as referred to in the Directive. It submits that this is the interpretation which results from a reading of the second indent of Article 6(3) of the Directive in conjunction with Article 4(2) of the Agreement. Under those provisions, a Member State may apply reduced rates or exemptions for certain vehicles which travel only occasionally on the public roads and are used by persons whose main occupation is not the carriage of goods. The Community legislature was clearly referring here to vehicles intended to carry items other than goods. If such vehicles were already excluded from payment of user charges because of the use of the term 'intended exclusively', the derogation provided in the second indent of Article 6(3) would not have been necessary.

30 It should be pointed out first of all that the first recital of the Directive states that its objective is to eliminate distortions of competition between transport undertakings in the Member States through the gradual harmonisation of levy systems and the establishment of fair mechanisms for charging infrastructure costs to hauliers.

31 It is stated in the second and fourth recitals that this objective can be achieved only in stages and that, under present circumstances, the adjustment of the

various national levy systems is confined to commercial vehicles of more than a certain gross laden weight.

32 Therefore, the first stage applies only to vehicles which, because of their characteristics, are intended to be used regularly and permanently, not just occasionally, in the competitive haulage sector.

33 It should be stressed that this conclusion is corroborated by a textual analysis of the fourth indent of Article 2 of the Directive; all the different language versions use the same term to refer to the vehicles intended exclusively for the carriage of goods by road, as the Advocate General observes in point 25 of his Opinion.

34 It is only these vehicles 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 of the Directive, and which may have to pay tolls and user charges in a certain Member State for using certain infrastructures in that Member State.

35 Nor does reference to the second indent of Article 6(3) of the Directive justify interpreting the fourth indent of Article 2 of the Directive to mean that the purpose for which the motor vehicle is used in each specific instance should be taken into account.

36 Contrary to what the German Government contends, the second indent Article 6(3) is not redundant, even though vehicles which are occasionally used

for the carriage of goods by road do not fall within the scope of application of the Directive.

37 Natural or legal persons whose main occupation is not the carriage of goods may qualify for the derogation established in this provision for vehicles which, although intended exclusively for the carriage of goods by road, travel only occasionally on the public roads of the Member State of registration. As the Advocate General observes in point 24 of his Opinion, this is the position of lorries used in enclosed industrial installations, such as mines or quarries.

38 Consequently, the reply to be given to the question referred for a preliminary ruling must be that, 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 the Directive, reference must be made to the general purpose for which the vehicle is intended, irrespective of the use to which it may be put in a particular instance.

Costs

39 The costs incurred by the German, Belgian and Swedish Governments and the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the question referred to it by the Oberlandesgericht Köln by order of 8 May 1998, hereby rules:

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, reference must be made to the general purpose for which the vehicle is intended, irrespective of the use to which it may be put in a particular instance.

Kapteyn Hirsch Ragnemalm

Delivered in open court in Luxembourg on 28 October 1999.

R. Grass

Registrar

J.C. Moitinho de Almeida

President of the Sixth Chamber