OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 26 SEPTEMBER 1984 [1]

Mr President,
Members of the Court,

1. The Carciati case

In all the written and oral submissions made in this case much attention is justifiably devoted to the Court's judgment of 9 October 1980 in *Carciati* (Case 823/79 [1980] ECR 2773). In that judgment the Court ruled that: "The rules of the EEC Treaty relating to the free movement of goods do not preclude the imposition by national rules on persons residing in the territory of a Member State of a prohibition, subject to criminal penalties, on the use of motor vehicles admitted under temporary importation arrangements and thus exempt from payment of value-added tax." If that ruling were to be considered of general validity and not restricted to the facts of the *Carciati* case, the answer to the question now before the Court would be simple. However, paragraph 9 of that judgment and the facts of the *Carciati* case raise doubt as to the general application of that judgment. Paragraph 9 reads as follows: "Member States thus retain broader powers to take action in respect of temporary importation, specifically for the purpose of preventing tax frauds. It follows that if the measures adopted to that end *are not excessive*, they are compatible with the principle of the free movement of goods" (my emphasis). It is clear from the national court's reference to the answer given by the Commission to a parliamentary question that the doubt expressed by the national court in this case as to the scope of the *Carciati* judgment is indirectly based on the paragraph quoted.

As regards the relevant facts of the *Carciati* case, the following can be deduced from the judgment. Mr Carciati lived in Italy. There is nothing in the judgment to indicate that he had a second residence in the Federal Republic of Germany, where his employer was apparently established. According to the judgment, he used the car, which was registered in Germany and apparently entrusted to him by his employer, for business trips in Italy. There is nothing in the judgment to indicate that his use of the car was limited in duration and it may certainly be presumed from the fact that Mr Carciati had his permanent residence in Italy that he used the car regularly and that therefore there was a serious evasion of the Italian turnover tax on imported cars. Finally, there was clearly no question of goods other than the car in question being imported or exported.

Both the operative part and paragraph 9 of that judgment must, in my view, be read against the background of those

1 — Translated from the Dutch.

facts. In particular, the entirely different facts of the Abbink case raise the question whether the Court's judgment in *Carciati* needs to be clarified in the case now in point.

2. The facts of the Abbink case and the question submitted

It appears from the documents before the Court that, unlike Mr Carciati, Mr Abbink, besides having his residence in Rijnsburg, also has a place of residence in the Federal Republic of Germany, where his employer is established and where, according to the documents, he spends more of the year than in the Netherlands. Twice a week he drives his employer's goods vehicle from Germany to the Netherlands to buy flowers in Aalsmeer, which he delivers the following day upon his return to Germany to the customers of his employer's wholesale flower business. According to the documents, he spends four nights, two full working days and four part-working days in Germany and three part-working days and three nights in the Netherlands. Once a week he drives back to Germany in his employer's car and during one of those journeys, on 7 December 1981, he was reported for contravening Article 25 of the Beschikking Vrijstellingen Tariefbesluit [Tariff (Exemptions) Order] 1960, because the "import duty payable" (which clearly means turnover tax) on the importation of the car had not been paid. Pursuant to that report the tax authorities demanded from him the sum of HFL 8 508 as import duty due (which clearly means turnover tax) and, after his objection to that demand had been rejected, he appealed to the Taxation Chamber of the Gerechtshof [Regional Court of Appeal], Arnhem. He was also prosecuted before the Politierechter [Magistrate] in Arnhem for contravening Netherlands legislation on the temporary importation of certain means of transport within the Community. The Politierechter, after citing the Commission's answer to written question No 22/82 put by Mr Rogalla, a Member of the European Parliament, (Official Journal 1982, C 262, p. 1), then submitted the question "whether, in view of the Commissions's answer, national legislation making it a criminal offence for persons resident in the territory of a Member State to use motor vehicles covered by temporary importation rules and consequently exempt from import duty (again, this clearly means turnover tax) is compatible with the provisions of the EEC Treaty on the free movement of goods if such temporary use is made without any intention of evading tax." For further details of the order for reference and annexes thereto, I refer to the summary set out in the Report for the Hearing.

3. Observations submitted

As regards the written observations submitted to the Court, I can largely refer to the Report for the Hearing again.

The *Netherlands Government* takes the view that the Court's judgment in *Carciati* contains a correct and clear answer for the present case and that view was adopted by the *Danish Government* in its oral observations at the hearing. The *defendant* in the main proceedings maintains in substance that the case involved the regular "trans-frontier" use of a car belonging to his German

employer in the pursuit of his usual business of selling Dutch flowers in Germany. In his opinion, there can be no question of fraudulent importation in the pursuit of such business, which by its very nature involves the crossing of frontiers. On the other hand, the fact that the motor vehicle concerned is taxed in the Netherlands as well as in Germany means that trading in flowers in the manner described is considerably hampered. The levying of taxes in the Netherlands is therefore, he contends, clearly in conflict with the Community provisions on the free movement of goods. In its written observations and in the oral explanations which it provided at the hearing, the *Commission* cited many practical examples indicating that the increasing number of trans-frontier relationships of a family and business nature are frustrated in various ways by legislation on turnover tax. All those practical problems may be attributed to the basic principle of tax legislation that a resident of Member State A may not drive in that State a car registered in Member State B, the aim being to prevent tax evasion. Since the existing exemptions provide no solution to most of those problems, that principle widely impedes not only the free movement of goods but also the free movement of persons and services. Furthermore, it is clear from the Commission's answers to questions which the Court put at the hearing that a supplement to Directive 83/182/EEC of 28 March 1983 to cover those problems cannot be expected in the near future. The essential problem arises from the original definition of "importation" contained in the Sixth Directive on the harmonization of the laws of the Member States relating to turnover taxes (Official Journal 1977, L 145, p. 1). As far as the facts of the present case are concerned, the Commission also points out that they are considerably different from the facts in *Carciati*. In particular, the free movement of goods other than cars, namely exports of flowers from the Netherlands to Germany, is also substantially impeded in this case. Finally, the Commission draws attention to the possible significance in this case of the Court's judgment in Case 15/81 *(Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409). Taking into account all the other relevant freedoms as well as the judgment of the Court in the *Cassis de Dijon* case (Case 120/78, *Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649), the Commission concludes by proposing that the question referred to the Court should be answered as follows:

"In the present state of Community law obstacles to the free movement of goods, the free movement of workers and the exercise of the right of establishment or the freedom to provide services must be accepted in so far as those provisions may be considered necessary for satisfying requirements relating in particular to effective fiscal control. However, an indiscriminate prohibition imposed on a resident of a State against driving in that State a vehicle registered in another State goes beyond what is necessary for that purpose and as such cannot override the fundamental freedoms conferred by the Treaty."

4. My opinion

I would not wish to follow the Commission in proposing such a broad answer and I suggest that the Court should strictly limit its answer to the

most relevant facts abstracted from the actual case, as they appear from the order for reference, the annexes thereto and the rest of the documents. In my view, the question of the national court can then be framed more preciseley as requiring an answer to the question "whether Article 38 (2), read in particular with Article 34 of the Treaty, allows exports from Member State A of an agricultural product subject to a common market organization (in this case flowers) to be indirectly impeded by the fact that, pursuant to fiscal control measures, an employee (with residences in Member States A and B) of a wholesale merchant dealing in that agricultural product and established in Member State B is forbidden to use in Member State A without paying turnover tax there a motor vehicle belonging to his employer which is registered and subject to turnover tax in Member State B when he can prove that the vehicle was used in connection with the regular exports of the agricultural product concerned from Member State A to Member State B."

So stated the question must, in my view, be answered in the negative for the following reasons.

According to the consistent line of decisions of the Court on the application of Article 34 of the EEC Treaty in the agricultural sector, the main rule laid down in the *Dassonville* case is applicable without restriction where a common market organization exists. Any direct or indirect obstacle to the export of agricultural products covered by a common market organization must therefore in principle be considered incompatible with Article 34. I refer in this regard *inter alia* to the judgments in Cases 190/73 (*Van Haaster* [1974] ECR 1123), 111/76 (*Van den Hazel* [1977] ECR 901), 83/78 (*Pigs Marketing Board* v *Redmond* [1978] ECR 2347), 177/78 (*Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161), 94/79 (*Vriend* [1980] ECR 327) and to the Court's more recent judgment of 7 February 1984 in Case 237/82 (*Jongeneel Kaas BV* [1984] ECR 483). In the *Groenveld* case referred to by the Commission (Case 15/79 [1979] ECR 3409), the product in question was not covered by a common market organization and for that reason a restrictive interpretation was given to Article 34. The present case, however, concerns the export of flowers, for which such a market organization does exist.

In the *Cassis de Dijon* case (Case 120/78 [1979] ECR 649), also referred to by the Commission, it is stated *inter alia* in paragraph 8 that: "Obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the products in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the effectiveness of fiscal supervision . . .." In principle I think that indirect obstacles to exports of products covered by a common market organization arising from fiscal controls on the temporary importation of vehicles may also be justified on the basis of that paragraph. However, according to the principle of proportionality laid down in the relevant body of established case-law of the Court, restrictions on intra-Community trade arising from such fiscal control measures or from other measures which are in principle permissible but which restrict trade are

not acceptable when the aim in view may be attained by measures which are less restrictive of trade. In that regard the reasonable means available to a normally functioning administration must be taken into account. On this point I refer *inter alia* to the Court's judgments in Cases 104/75 *(De Peijper* [1976] ECR 613), 2/78 *(Commission* v *Belgium* [1976] ECR 1761) and 120/78 *(Rewe-Zentral AG* v *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649). It seems to me clear that in cases such as this a declaration from a competent authority in the country in which the employer is established to the effect that the use of the vehicle is necessary in direct connection with the regular export of flowers from the Netherlands to Germany provides a sufficient guarantee against tax fraud. Nor can the substantive provisions on the taxation of temporarily imported motor vehicles lead to a different conclusion, in so far as those substantive provisions would result in turnover tax being levied twice on vehicles "imported" under such conditions for a few days at a time. On this point I refer to your judgment in *Schul* v *Inspecteur der Invoerrechten en Accijnzen* (Case 15/81 [1982] ECR 1409, in particular paragraphs 31 to 34 and paragraph 44).

Directive 83/182/EEC (Official Journal 1983 L 105, p. 59), referred to by the national court, cannot be raised in objection to those conclusions either. In the first place, that directive had not yet been adopted by the time of the offence with which Mr Abbink was charged. Secondly, it has already been held by the Court in Cases 104/75 *(De Peijper* [1976] ECR 613), 5/77 *(Tedeschi* v *Denkavit* [1977] ECR 1555) and 251/78 *(Denkavit Futtermittel GmbH* v *Minister für Ernährung, Landwirtschaft und Forsten* [1979] ECR 3369) that harmonization directives may not widen but only restrict the powers left to Member States by Article 36 which allow them to restrict trade. Thirdly, it is true that generally expressed exceptions to the liability to pay taxes on imports can only be laid down by the Community legislator. However, it seems clear to me that the widespread and varied cases mentioned by the Commission in these proceedings cannot be dealt with by the legislature or only after an unacceptably long delay, and that courts are more able to do this when disputes arise. That is particularly true where the interests of the tax administration in a specific case must be weighed against the binding provisions of the Treaty with regard to "the establishment of a common market with characteristics similar to those of a domestic market." That objective of the directives for harmonizing turnover taxes is referred to once again in the preamble to Directive 83/182/EEC. Indeed, it is mentioned in the First Council Directive of 11 April 1967 (Official Journal, English Special Edition 1967, p. 14). The mandatory provision of Article 8 (7) of the Treaty, which states that "the expiry of the transitional period shall constitute the latest date by which ... all the measures required for establishing the common market must be implemented" was also expressly recognized in Article 4 of the First Directive in so far as it required the Commission to submit all necessary proposals in the area of harmonization of turnover taxes before the end of 1968. However, some of the

information given by the Commission at the hearing in reply to questions put to it by the Court gives the impression that it has even excluded, from its new programme of action for the rapid completion of the establishment of a common market, the obligations to abolish internal frontiers arising from Article 8 (7) as regards the harmonization of turnover taxes on motor vehicles as well. In fact, the Commission could not indicate any date for the other liberalization directives on the temporary importation of motor vehicles anticipated in the last recital of the preamble to Directive 83/182/EEC.

5. Conclusion

To sum up, then, I am of the view that, on the basis of the principle of proportionality recognized in paragraph 9 of the Court's judgment in *Carciati,* that judgment requires clarification in the present case because of the entirely different circumstances of this case. In particular, the interest in preventing the evasion of tax on the importation of motor vehicles must be weighed in this case against the interest in ensuring that exports of agricultural products covered by a common market organization are not restricted. On the basis of my examination of the factual and legal points raised by the question referred to the Court, I therefore propose that the question should be answered as follows:

"Article 38 (2), read in particular with Article 34 of the EEC Treaty, does not allow exports from Member State A to Member State B of agricultural products subject to a common market organization to be indirectly impeded by the fact that, pursuant to fiscal control measures, an employee (with residences in Member States A and B) of a wholesale merchant dealing in those agricultural products and established in Member State B is forbidden to use in Member State A without paying turnover tax a motor vehicle belonging to his employer which is registered and subject to turnover tax in Member State B when he can prove that the vehicle was used in connection with regular exports of the agricultural product concerned from Member State A to Member State B."