JUDGMENT OF THE COURT (First Chamber)

7 June 2007 *

In Case C-156/04,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 26 March 2004,

Commission of the European Communities, represented by M. Patakia and D. Triantafyllou, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Hellenic Republic, represented by P. Mylonopoulos and I. Pouli, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: Greek.

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, E. Juhász (Rapporteur), J.N. Cunha Rodrigues, M. Ilešič and E. Levits, Judges,

Advocate General: L.A. Geelhoed,
Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 22 June 2006,

after hearing the Opinion of the Advocate General at the sitting on 14 September 2006,

gives the following

Judgment

1 By its application, the Commission of the European Communities requests that the Court declare that the Hellenic Republic:

— by applying, in respect of the temporary use in its territory of vehicles registered in other Member States, the provisions of the customs arrangements for

temporary importation applicable to vehicles from non-member countries instead of the provisions of Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (OJ 1983 L 105, p. 59) ('the Directive');

— by applying a system of penalties for offences relating to the declaration of vehicles temporarily imported into its territory which, in conjunction with the administrative authorities' practice of systematically deciding that the individual importing the vehicle has his normal residence in Greece, are clearly disproportionate;

— by systematically levying the taxes provided for in respect of the permanent import of vehicles in the event of theft from the same individual of a second temporarily imported vehicle,

has failed to fulfil its obligations under Article 90 EC and Directive 83/182, in particular Article 1 thereof.

Legal context

Community legislation

2 According to the first and second recitals in the preamble thereto, the Directive seeks to eliminate the obstacles to freedom of movement of persons and to the establishing of the internal market which result from the taxation arrangements of Member States concerning the temporary importation of certain means of transport.

3 It is stated in the third recital in the preamble to the Directive that '... it must be possible in certain cases to establish definitely whether or not a person is in fact resident in a given Member State'.

4 Article 1(1) of the Directive provides that Member States are, under the conditions laid down by the Directive, to exempt temporary imports from another Member State of motor-driven road vehicles from, inter alia, turnover tax, excise duties and any other consumption tax. Article 1(3) of the Directive excludes commercial vehicles from the exemption.

5 As regards private vehicles, under Article 3 of the Directive, the exemption applies — for a period, continuous or otherwise, of not more than six months in any 12 months — to their temporary importation for private use and, under Article 4 of the Directive, the exemption applies — for a period, whether continuous or not, of six or seven months in any 12 months — to their temporary importation for business use.

6 Both Article 3 and Article 4 of the Directive make the exemption subject to the condition that the individual importing the vehicle has 'his normal residence in a Member State other than the Member State of temporary importation'. In the case of individuals who import vehicles for business use, the exemption is also subject to compliance with a number of additional conditions.

7 As regards 'normal residence', Article 7 of the Directive, entitled 'General rules for determining residence', states:

'1. For the purposes of this Directive, "normal residence" means the place where a person usually lives, that is for at least 185 days in each calendar year, because of

personal and occupational ties, or, in the case of a person with no occupational ties because of personal ties which show close links between that person and the place where he is living.

However, the normal residence of a person whose occupational ties are in a different place from his personal ties and who consequently lives in turn in different places situated in two or more Member States shall be regarded as being the place of his personal ties, provided that such person returns there regularly. This last condition need not be met where the person is living in a Member State in order to carry out a task of a definite duration. Attendance at a university or school shall not imply transfer of normal residence.

2. Individuals shall give proof of their place of normal residence by any appropriate means, such as their identity card or any other valid document.

3. Where the competent authorities of the Member State of importation have doubts as to the validity of a statement as to normal residence made in accordance with paragraph 2, or for the purpose of certain specific controls, they may request additional information or evidence.'

8 Article 9(1) of the Directive provides that Member States may, in particular, permit temporary importation, at the request of the importer, for a period longer than those referred to in Articles 3 and 4 thereof.

9 Article 9(2) of the Directive provides:

'Member States may under no circumstances apply, in pursuance of this Directive, tax exemptions within the Community which are less favourable than those which they would grant in respect of means of transport originating in a third country.'

10 Lastly, Article 10(2) of the Directive provides:

'Where the practical application of this Directive gives rise to difficulties, the competent authorities of the Member States concerned shall take the necessary decisions by mutual agreement, particularly in the light of the Conventions and Community Directives on mutual assistance.'

National legislation

11 Article 1 of Order No D 247/13 of the Minister for Finance of 1 March 1988, amended by Law No 2187/94 ('the Order of 1 March 1988'), by which the Directive was transposed into national law, permits the temporary importation, exempt from the corresponding customs duties and other taxes, of means of transport for private use, commercial vehicles being excluded from those arrangements.

12 Article 3 of the Order of 1 March 1988 defines the concept of 'normal residence' of the person importing the vehicle in terms substantially identical to those of Article 7(1) of the Directive.

13 Article 4 of that order, relating to temporary importation for private use of a means of transport other than a commercial vehicle, sets at six months — whether continuous or not — in a 12-month period, the period during which that means of transport may remain in the country. It provides that that period may be extended by an additional nine months, unless the person importing the vehicle engages in business activity in Greece, in which case such extension is limited to a maximum of three months.

14 Article 5 of the Order of 1 March 1988, relating to the temporary importation of a private vehicle for business use, sets in principle at six months — whether continuous or not — the period for temporary importation of a private vehicle for business use, during which time such a vehicle may remain in Greece. That provision excludes application of the exemption if the vehicle is used to transport persons or for the industrial or commercial transport of goods, whether for payment or not.

15 Both Article 4 and Article 5 of that order make the granting of the exemption subject to the condition that the person concerned has his normal residence outside Greece.

16 The third and fourth paragraphs of Article 15 of the Order of 1 March 1988 reproduce — either verbatim or in substantially identical terms — the provisions of Article 7(2) and (3) of the Directive, relating to proof of normal residence.

17 Article 133(2) of Law No 1165/1918 relating to the Customs Code (FEK A' 73), in the version applicable at the time of the pre-litigation procedure in this case, provides:

'Community vehicles may remain in the country temporarily without payment of the registration fee or value added tax (VAT) being required. For the award of that temporary exemption ..., the terms and conditions laid down in the provisions of the customs arrangements for the temporary importation of vehicles from non-member countries shall apply mutatis mutandis, on condition that those vehicles are re-exported.'

18 Article 18 of Law No 2682/1999, in the version applicable at the time of the pre-litigation procedure in this case, provides under the heading 'Named Offences and Penalties':

'A. Community vehicles

1. The possession or use of Community vehicles by persons resident in Greece without one of the formalities referred to in Articles 10 and 11 of this Law having been observed shall constitute a smuggling offence and the provisions of the Customs Code relating to smuggling shall be applicable (Law No 1165/1918, ...). In those circumstances, no criminal proceedings shall be brought if the persons concerned pay the increased fee charged, set at a minimum amount, which is referred to in the provisions in question, and if they refrain from seeking the remedies at law provided for against the act leading to the imposition of that fee. In the cases referred to in this paragraph, the fines provided for in paragraph A4 of this article shall not be imposed.

...

4. The aforementioned offences shall be classed as simple customs offences and shall be punishable, depending on the circumstances, by the following fines:

...

(d) For ... the late ... exportation of the vehicle, a fine for each day of delay determined as follows: passenger cars and Jeep-type vehicles: — up to 1 600 cc, EUR 29; — from 1 601 cc, EUR 59. Lorries regardless of cylinder capacity: EUR 29. Motorcycles regardless of cylinder capacity: EUR 14.

...

(f) If the vehicle used in the country ... is driven by another, unauthorised person, a fine of EUR 733, if the authorised person was in the country at the time when the offence was committed. Use of the aforementioned vehicle by another, unauthorised, person shall give rise to the annulment of the scheme referred to in Article 14(2) of this Law if, at the time when the offence is committed, the authorised person is not in the country, and the provisions of paragraph A.1 of this article shall apply to the unauthorised person.'

19 Article 18(C) of Law No 2682/1999, entitled 'Community vehicles and vehicles from non-member countries', provides:

'1. In addition to the fines referred to in paragraphs A(4), ... vehicles shall also be subject to temporary immobilisation by the customs authority detecting the offence. Vehicles shall be released on payment of the fines and any other charges owed ...

...'

20 Under Article 10(5) of Law No 2682/1999:

'Community vehicles may be re-exported to other Member States of the European Union or be exported to non-member countries before a declaration as to the registration fee due.'

21 Lastly, Article 12(1)(d) of the Order of 1 March 1988, under the heading 'Theft of vehicles', provides:

'1. Where the interested party reports the theft of a vehicle which he has received under the temporary importation arrangements, ... he shall not be required to pay the customs duties or other charges relating to the stolen vehicle ..., on condition that the interested party does not subsequently participate in the unlawful use of the vehicle in Greece and provided that all the following conditions are satisfied:

...

(d) the interested party has not in the past reported the theft of another private vehicle which he had received under the temporary importation arrangements.'

The pre-litigation procedure

22 Following a number of complaints brought before it according to which the rules applied to the temporary import of certain means of transport in Greece constitute a

significant obstacle to the freedom of movement of Community residents in that Member State, the Commission sent a letter of formal notice to the Greek authorities on 17 May 1999, drawing their attention to the incompatibility of the relevant national legislation with the provisions of the Directive and of Article 90 EC.

23 After examining the observations made by the Hellenic Republic in its reply of 1 September 1999 to that letter of formal notice, the Commission sent that Member State a reasoned opinion on 29 November 2000, setting out nine complaints in which it found that the legislation in question was incompatible with the aforementioned Community legislation.

24 On the view that the explanations given by the Hellenic Republic in its reply of 21 February 2001 to that reasoned opinion were not satisfactory, the Commission brought this action, maintaining however only some of the complaints made in the reasoned opinion.

The action

The first complaint

Arguments of the parties

25 The Commission alleges that the Hellenic Republic applies, in respect of the temporary use in its territory of vehicles registered in other Member States, the

customs arrangements for temporary importation applicable to vehicles from non-member countries instead of the provisions of the Directive, which is based on the need for the closer integration of the Member States.

26 In the same context, the Commission alleges that the Greek authorities took the view that, as from 1 January 1993 — the date on which the principle of taxation of imports in relations between Member States was abolished — the Directive, which grants tax exemptions on 'imports', ceased to have effect and became redundant.

27 The Greek Government contends that the Commission's complaints are inaccurate in so far as the Directive has been correctly transposed into national law for a long time and it continues to be applied. The Commission does not refer to infringements of specific obligations arising from the Directive and has instead embarked on a theoretical discussion, whilst the intention of the Greek authorities is to encourage the Commission to take the legislative initiative to bring the Directive into line with the legal situation which has existed since 1 January 1993, when the notion of 'imports' as between Member States ceased to exist.

28 The Greek Government maintains that, in any event, it applies the Directive in intra-Community relations.

Findings of the Court

29 By this complaint, the Commission alleges that the Hellenic Republic does not apply the Directive as such.

30 The Greek Government states in that regard that the dispute with the Commission has its origins in the observations made by the Greek authorities, in the course of regular contacts with the Commission, on the need to bring the Directive — which contains the notion of 'imports' — into line with the situation established with effect from 1 January 1993, since when that concept has been abolished in relations between Member States. According to the Greek Government, that dispute does not affect the Hellenic Republic's application of the Directive.

31 It should be pointed out that in Case C-262/99 *Louloudakis* [2001] ECR I-5547 (in particular, paragraphs 20 to 25), the Court referred to the Greek legislation which permits the temporary importation, exempt from customs duties and other taxes, of means of transport for private use. That legislation is set out in paragraphs 11 to 16 of this judgment. It is apparent, inter alia, from that legislation that it defines the concept of 'normal residence' in terms substantially identical to those of Article 7(1) of the Directive; that the exemption is granted, as provided for in the Directive, for six months in a 12-month period; and that that legislation reproduces — either verbatim or in substantially identical terms — the provisions of Article 7(2) and (3) of the Directive, relating to proof of normal residence.

32 It should also be observed that the judgment in *Louloudakis* was given in response to a reference for a preliminary ruling from a Greek court, which had referred questions to the Court regarding the interpretation of the Directive in order to dispose of a case before it, thus demonstrating the fact that the Directive is applied.

33 Furthermore, the Commission itself states, in the third subparagraph of paragraph 21 of its application, that the Greek legislation reproduces the criteria laid down in the relevant provision of the Directive as regards the determination of normal residence.

34 Lastly, it should be pointed out that Member States are free to apply to the temporary use of vehicles from non-member countries the same arrangements as those provided for in the Directive for vehicles from other Member States. The only proviso in that regard is set out in Article 9(2) of the Directive, under which Member States may not apply tax exemptions within the Community which are less favourable than those which they would grant in respect of means of transport originating in a third country.

35 Admittedly, the Commission has expressed specific criticism concerning certain areas in which the Directive applies, but it has not submitted any evidence which shows that the Hellenic Republic does not apply the Directive as such.

36 Neither theoretical assessments nor disputes concerning the need to bring the Directive into line with the legal situation which has existed since 1 January 1993 — which take place in the course of regular contact between national authorities and the Commission — can constitute the basis for a finding by the Court that a Member State has failed to fulfil its obligations.

37 The first complaint is therefore unfounded.

The second complaint

38 By this complaint, the Commission calls in question the system of penalties applied by the Greek authorities.

39 This complaint contains two parts. Firstly, the Commission alleges that the Hellenic Republic has an administrative practice whereby, in cases where the elements to be used as a basis for determining normal residence are divided between Greece and another Member State, the Greek authorities systematically fix the normal residence of the individuals concerned as being in Greece, by imposing on them otherwise a heavier burden of proof. Secondly, the Commission criticises the fact that where Greece is thus determined to be the place of normal residence, disproportionate penalties ensue.

The administrative practice

Arguments of the parties

40 The Commission submits that, although the Greek legislation reproduces the criteria laid down in the Directive for determining the country of normal residence, the Greek administrative authorities systematically fix Greece as the normal residence of individuals with personal and occupational ties in both Greece and other Member States, by almost automatically giving precedence to personal ties and by introducing in practice a presumption of residence in Greece where the individuals concerned have Greek nationality.

41 The Commission maintains in that connection that the administrative authorities either reverse the burden of proof as regards the place of normal residence or force those concerned to produce stronger evidence — a practice which is incompatible with the rules for determining residence as laid down in the Directive. The Commission refers to certain individual cases which, in its opinion, are sufficient on their own to prove non-compliance with the Directive. Furthermore, the attitude of the courts lends authority to that consistent administrative practice.

42 The Greek Government maintains that, in practice, it is normal for difficulties to arise as regards determination of the normal residence of Greek nationals whose occupational and personal ties are divided between Greece and another Member State. The individual cases to which the Commission refers simply illustrate that point.

43 In such cases, the administrative authorities apply the criteria set out in Article 7(1) of the Directive, which gives priority to personal ties. Where doubts arise, the authorities make justified use of Article 7(3) of the Directive, which allows them to request additional information or evidence from the individuals concerned. Lastly, the Greek Government points out that, currently, the majority of vehicles being driven in Greece under the temporary importation arrangements belong to Greek nationals who use their normal residence abroad as a legal basis for tax exemptions.

Findings of the Court

44 The Court has pointed out that the criteria for determining normal residence laid down in Article 7(1) of the Directive refer to a person's occupational and personal ties with a particular place and to the duration of those ties, and has defined normal residence as the place where a person has established his permanent centre of interests (*Louloudakis*, paragraph 51, and the case-law cited).

45 Thus, for the purposes of determining the place of normal residence, both the occupational and personal ties of the person concerned to a given place, as well as the duration of those ties, must be taken into consideration and, where those ties are not concentrated in a single Member State, the second subparagraph of Article 7(1) of the Directive gives primacy to personal ties over occupational ties. In assessing the

personal and occupational ties of the person concerned, all the relevant facts must be taken into consideration, such as, in particular, his actual presence and that of the members of his family, availability of accommodation, the place where business is conducted and the place where his property interests are situated (see, to that effect, *Louloudakis*, paragraphs 52, 53 and 55).

46 In the first place, it is for the competent administrative authorities of the Member States to assess and weigh all the relevant facts which characterise each case, in the light of the criteria devolving from the case-law of the Court, and it falls within the jurisdiction of the Court to find that a particular Member State has failed to fulfil its obligations on account of a consistent administrative practice which is incorrect or unlawful.

47 In the present case, the Commission seeks to prove, on the basis of certain individual cases, that there is a consistent administrative practice on the part of the Greek administrative authorities which is incorrect and unlawful, and thereby to obtain a finding that the defendant Member State has generally failed to fulfil its obligations. In point of fact, however, although the Commission mentions 'a number of complaints', it actually refers in its applications — somewhat laconically and in no detail — only to two individual cases, and, in its reply — again in no great detail — only to six other cases.

48 Irrespective of whether the submission for the first time in the reply of six individual cases as supporting evidence is admissible in the light of the requirements of Article 42(1) of the Rules of Procedure, it is apparent from the documents before the Court that, in the eight cases to which the Commission refers, four of the persons involved had Greek nationality and undeniable personal and occupational ties in Greece (one of them had no ties whatsoever outside Greece), two had dual nationality and personal or occupational ties in Greece, and another person was a national of

another Member State, but with well-established personal and occupational ties in Greece. It is not possible, on the basis of the documents before the Court, to establish clearly the situation as regards the eighth case.

49 In all the individual situations set out above, except for the last one, the explanations provided by the Greek authorities do not appear to be unfounded. In any event, those authorities do not appear to have exceeded the discretion which they enjoy for the purposes of determining the place of normal residence of those concerned.

50 So far as concerns the possibility of finding that there has been a failure to fulfil obligations on the basis of the administrative practice followed in a Member State, the Court has already established the applicable criteria. In those circumstances, the failure to fulfil obligations can be established only by means of sufficiently documented and detailed proof of the alleged practice; that administrative practice must be, to some degree, of a consistent and general nature; and, in order to find that there has been a general and consistent practice, the Commission may not rely on any presumption (Case C-441/02 *Commission* v *Germany* [2006] ECR I-3449, paragraphs 49, 50 and 99, and the case-law cited).

51 On the basis of the evidence submitted by the Commission, the conditions cited in the previous paragraph cannot be found to have been fulfilled in the present case. In any event, given the very large number of Community nationals and Greek nationals established in other Member States who go to Greece by car each year, the eight individual cases to which the Commission refers — even if its allegations were sufficiently established in each case — constitute a substantially inadequate percentage, in the light of the requirements set by the case-law of the Court, for the purposes of proving the existence of a consistent administrative practice amounting to a failure to fulfil obligations.

52 Furthermore, the Commission alleges that the Greek courts lend authority to the administrative authorities' practice, but it does not put forward any conclusive evidence in that regard. If the Commission intends to prove a failure to fulfil obligations on account of a judicial practice, the criteria established by the case-law of the Court and set out in paragraph 50 of this judgment apply all the more and with particular stringency.

53 In the present case, the criteria established by the Court cannot be found to have been fulfilled.

54 It must also be pointed out that the Court has taken into account the discretion which the competent national authorities have in that sensitive area which affects national powers concerning taxation, by holding that the duty of cooperation incumbent upon those authorities pursuant to Article 10(2) of the Directive does not require them to cooperate in each individual case in which the application of that directive raises difficulties (*Louloudakis*, paragraph 59, and the case-law cited).

55 Lastly, the Commission alleges that the Greek authorities force the individuals concerned to produce stronger evidence in order to prove the place of normal residence and that they thus reverse the burden of proof, whereas responsibility for that burden normally lies with the national authorities. It suffices to point out in that regard that, pursuant to Article 7(2) and (3) of the Directive, proof of normal residence is in principle the responsibility of the individuals concerned. The competent national authorities, for their part, have the option of carrying out specific controls and, in cases of doubt, of requesting additional information or evidence.

56 Consequently, the first part of the second complaint cannot be upheld.

The disproportionate nature of the penalties

Arguments of the parties

57 The Commission refers, in particular, to the penalties provided for by Greek legislation for cases where the competent authorities find that the owner of a vehicle being driven in Greece and bearing the registration plates of another Member State has his normal residence in Greece. The national legislation in force at the material time categorises such an act as smuggling, which gives rise to criminal penalties — a prison sentence for the owner of the vehicle and seizure of the vehicle — and also administrative penalties in the form of fines. Furthermore, the person concerned must pay the registration fee payable on the permanent importation of a vehicle, unless he agrees to re-export the vehicle from the national territory.

58 The Commission considers that those penalties, in conjunction with the Greek administrative authorities' practice as regards the determination of the place of normal residence and the failure to take into account the possible good faith of the person concerned, are disproportionate. Furthermore, the fact that payment of the registration fee is required even though a similar fee has already been paid in another Member State runs counter to Article 90 EC.

59 Also disproportionate, according to the Commission, are the penalties provided for where the period of six months during which a Community vehicle may be driven under the temporary importation arrangements is exceeded.

60 The Greek Government contends that, in so far as the Directive does not provide for penalties for contravention of the temporary importation arrangements for Community vehicles, it is for the Member States to adopt the provisions which they consider necessary to suppress tax evasion. However, the penalties provided for have to be necessary and appropriate in relation to the objective pursued.

61 In the present case, the Commission's allegations concern the penalties imposed where persons who have their normal residence in Greece drive in that territory under the temporary importation arrangements with vehicles registered in another Member State. In such cases, in view of the fact that registration fees are very high in Greece, which induces some individuals to try to circumvent them, and having regard to the many cases of tax evasion recorded so far, the penalties provided for are not disproportionate in relation to the objective pursued, namely the deterrence and suppression of tax evasion.

62 The Greek Government submits lastly that the penalties for non-payment of the registration fees are imposed on both domestic and imported goods. In substantive terms, therefore, it would be impossible to find that Article 90 EC was infringed.

Findings of the Court

63 It should be noted at the outset that the second part of the Commission's second complaint also relates (pages 9 to 12 of the application) to the penalties provided for in Law No 2960/2001 of 22 November 2001 on the Customs Code (FEK A 265), which contains amendments to the penalties provided for in Article 18 of Law No 2682/1999. However, Law No 2960/2001 was adopted after the expiry of the two-month period laid down in the reasoned opinion of 22 November 2000 and is not covered by the pre-litigation procedure set out in Article 226 EC. Moreover, it

does not appear from the documents before the Court that that new legislation has maintained, in every respect, the system established by the legislation contested in the pre-litigation procedure or that the provisions of those two pieces of legislation are substantially identical (see, to that effect, Case C-98/03 *Commission* v *Germany* [2006] ECR I-53, paragraphs 27 and 28, and the case-law cited).

64 In accordance with its settled case-law, the Court may examine of its own motion whether the conditions imposed by Article 226 EC for the bringing of an action for failure to fulfil obligations are satisfied (Case C-199/04 *Commission* v *United Kingdom* [2007] ECR I-1221, paragraph 20, and the case-law cited).

65 In that regard, the Court has always drawn a distinction between the pre-litigation and litigation stages of the procedure set out in Article 226 EC and has held that the purpose of the pre-litigation procedure is, inter alia, to define the subject-matter of the dispute with a view to the bringing of an action before the Court and to ensure that the contentious procedure will have as its subject-matter a clearly defined dispute (see, to that effect, Case C-230/99 *Commission* v *France* [2001] ECR I-1169, paragraph 31; Case C-1/00 *Commission* v *France* [2001] ECR I-9989, paragraphs 53 and 54; Case C-362/01 *Commission* v *Ireland* [2002] ECR I-11433, paragraphs 17 and 18; and Case C-145/01 *Commission* v *Italy* [2003] ECR I-5581, paragraph 17).

66 By the same token, it is also established case-law that the subject-matter of the proceedings thus defined at the pre-litigation stage can no longer be extended or altered by the form of order sought in the application at the litigation stage (see, to that effect, Case C-191/95 *Commission* v *Germany* [1998] ECR I-5449, paragraph 56; Case C-365/97 *Commission* v *Italy* [1999] ECR I-7773, paragraph 25; and Case C-105/02 *Commission* v *Germany* [2006] ECR I-9659, paragraphs 47 and 48). Lastly, whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period

laid down in the reasoned opinion, and the Court cannot take account of any subsequent changes (see Case C-104/06 *Commission* v *Sweden* [2007] ECR I-671, paragraph 28).

67 If the Court were to extend its review to legislation of the Member State concerned which was not covered by the pre-litigation procedure and was referred to for the first time in the form of order sought in the application — for the reasons of ease put forward by the Commission at the hearing — the procedure laid down by the authors of the Treaty in Article 226 EC would be rendered meaningless, which would constitute an abuse of that procedure. The Court's examination will thus relate, in the present case, only to the provisions of the legislation in question which were in force at the time when the period laid down in the reasoned opinion expired and to the extent that they are set out in the application in a sufficiently clear manner to permit review by the Court (see, to that effect, *Commission* v *United Kingdom*, paragraph 21).

68 First, the Commission's complaints relate to Article 18(A)(1) of Law No 2682/1999, which provides that the possession or use on Greek territory of a vehicle registered in another Member State by a person who has his normal residence in Greece constitutes a smuggling offence which gives rise, inter alia, to criminal penalties such as the imprisonment of the holder of the vehicle and the seizure of that vehicle.

69 It should be pointed out in that regard that the legislation in question subjects to criminal penalties behaviour consisting in the evasion of national customs and tax provisions concerning the movement of motor vehicles.

70 The penalties at issue are provided for in respect of cases where individuals who have their normal residence in Greece use vehicles registered in another Member

State — that is to say, cases which fall outside the scope of the Directive — and are intended to protect the fiscal interests of the relevant Member State.

71 Criminal punishment for particular behaviour, which is intended by the national legislature, is linked to the economic and social situation of the relevant Member State, and, in the present case, to the specific situation regarding the taxation of motor vehicles. It is common ground in this respect that registration fees in Greece are very high, which may induce some individuals to drive in that territory with cars registered in another Member State, while notionally seeking to establish any tie whatsoever in that other Member State. The requirements of enforcement and prevention, as well as the requirement that the fiscal interests of the relevant Member State be protected, make it justifiable for that Member State to provide for appropriate penalties (see, to that effect, *Louloudakis*, paragraph 70).

72 The mere fact that an abstract national rule categorises as a criminal offence conduct which consists in the evasion of the customs and tax provisions normally applicable cannot therefore constitute per se failure by a Member State to fulfil its obligations. The Court has held, as is clear from *Louloudakis*, paragraphs 69 and 70, that the requirements of enforcement and prevention may justify a Member State in setting penalties at a certain level of severity, but that it is nevertheless possible that those penalties may, in certain circumstances, prove to be disproportionate. Consequently, the question whether the penalties applied are proportionate or disproportionate has to be assessed on the basis of the level of the penalties actually applied in the individual case. An examination of the cases referred to in paragraph 48 of this judgment does not support the conclusion that the penalties actually imposed are disproportionate and the Commission has not put forward other evidence supporting a different conclusion.

73 Those complaints are therefore unfounded.

74 Secondly, the Commission submits that, in cases covered by Article 18(A)(1) of Law No 2682/1999, no criminal proceedings are brought if the persons concerned pay the fee charged and refrain from seeking, in relation to the act leading to the imposition of that fee, the legal remedies provided for under national law.

75 It should be pointed out in that regard that the Directive confers, under certain conditions, on individuals who have their normal residence in a Member State the right to drive a private vehicle for a certain period of time, under the temporary tax exemption arrangements, on the territory of other Member States.

76 According to settled case-law, the principle of effective judicial protection is a general principle of Community law and it is for the courts of the Member States to ensure judicial protection of an individual's rights under Community law (see, to that effect, Case C-432/05 *Unibet* [2007] ECR I-2271, paragraphs 37 and 38, and the case-law cited). It is by applying that principle that the Court has acknowledged that it falls within the jurisdiction of the national courts to ensure that the Directive is applied and that the rights which individuals derive from it are protected by deciding upon, inter alia, the place of normal residence (see, to that effect, *Louloudakis*, paragraphs 57 and 70).

77 The provision of national law at issue may deprive individuals of the effective judicial protection intended by Community law by inducing them, for the purposes of avoiding criminal proceedings, to refrain from seeking the legal remedies provided for as a matter of course by national law. Consequently, the Commission's complaints are well founded on that point.

78 Thirdly, the Commission criticises the financial penalties provided for in Article 18(A)(4)(d) of Law No 2682/1999 for cases where the six-month period for which the tax exemption in question is granted is exceeded.

79 It should be held in that regard that the six-month period for which the tax exemption is granted is sufficiently long and that the Greek Government has submitted, without being contradicted by the Commission, that facilitations and extensions are granted in certain circumstances. The Greek Government has also maintained without being contradicted that compliance with the six-month limit cannot be monitored very closely because the date of entry of vehicles into the national territory is no longer registered and that an increase in preventative measures is thus necessary, which justifies the fines provided for as an adequate means of deterrence. The fines in question are not therefore disproportionate and cannot constitute an obstacle to the freedoms enshrined in the Treaty.

80 It should be held, fourthly, that the financial penalty provided for in Article 18(A)(4)(f) of Law No 2682/1999, for cases where a vehicle covered by the temporary tax exemption is driven on Greek territory by a person other than the beneficiary of the exemption, falls outside of the scope of the Directive.

81 Nor does the Directive cover the case, provided for in the abovementioned provision — and invoked fifthly by the Commission — where the vehicle in question is driven by a person other than the beneficiary of the tax exemption but, at the time when the offence is committed, the beneficiary is not in Greek territory.

82 Sixthly, the Commission's complaints relate to Article 18(C)(1) of Law No 2682/1999, which provides that, in addition to fines, vehicles are also to be temporarily immobilised, and released on payment of the fines and any other charges owed.

83 That measure may deny the beneficiary the use of his vehicle for a period of time which may be lengthy, in particular where the fines imposed are disputed in legal proceedings. The Court has already pointed out the importance which the right to drive a vehicle has on the actual exercise of the rights relating to the free movement of persons (Case C-193/94 *Skanavi and Chryssanthakopoulos* [1996] ECR I-929, paragraph 36). That measure is therefore disproportionate in relation to the objective pursued, which is the collection of fines, an objective which can be attained by means more consistent with Community legislation, for example by the provision of a security. Those complaints are thus well founded.

84 By contrast, the seventh set of criticisms raised by the Commission against Article 10(5) of Law No 2682/1999, which provides that, where the owner of a vehicle imported under the temporary importation arrangements has his normal residence in Greece, he can avoid payment of the registration fee payable by re-exporting his vehicle from Greek territory, are unfounded. That measure grants the person concerned an option — an advantage, even — and cannot be considered to be contrary to the Directive.

85 Lastly, the Commission alleges infringement of Article 90 EC. The first paragraph of that provision prohibits the taxing of products imported from other Member States more heavily than similar domestic products. However, the Court has held that it is in accordance with the Community rules for a Member State, on determining that the normal residence of the individual concerned is within its territory, to require payment of a vehicle registration charge, irrespective of whether a similar registration charge has already been paid in another Member State (see, to that effect, judgment of 16 June 2005 in Case C-138/04 *Commission* v *Denmark*, not published in the ECR, paragraph 13, and the case-law cited).

86 The second paragraph of Article 90 EC prohibits Member States from imposing on products of other Member States taxes which indirectly protect domestic products. It should be pointed out in that regard that, on the basis of the criteria established by

the case-law of the Court (Case C-313/05 *Brzeziński* [2007] ECR I-513, paragraph 27, and the case-law cited), the Commission has not shown that the national legislation in question is such as to afford indirect protection to domestic products.

The third complaint

Arguments of the parties

87 The Commission's third complaint relates to Article 12(1)(d) of the Order of 1 March 1988, which provides that persons who are the victims of the theft of a second vehicle covered by the temporary importation arrangements in Greece are required to pay the registration fee. The Commission submits that that provision raises a general presumption of tax evasion in so far as it is presumed, without there being any evidence to that effect, that the stolen vehicle remains in Greece. The Commission maintains that where there is a possibility of tax evasion, the circumstances have to be examined on a case by case basis. The measure in question is disproportionate in relation to the envisaged objective, namely the prevention of tax evasion, and introduces treatment which is indirectly discriminatory against vehicles registered in another Member State, contrary to Article 90 EC.

88 The Greek Government contends that, under Community law, where products covered by tax exemption arrangements and for which tax has not been paid are stolen, no exemption from that tax is provided for. It refers in that regard to Article 14 of Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of

such products (OJ 1992 L 76, p. 1), under which, in the event of losses, the excise duty in respect of products under suspension arrangements may go unpaid only where the losses of those products are attributable to fortuitous events or force majeure and where the competent authorities can establish that those products are permanently lost. In all other cases, and in particular in the event of theft, the excise duty must be paid.

89 In the present case, the stolen vehicle is not irreparably lost, but being used by someone else. Consequently, the registration fee is payable. Indeed, the Directive does not provide for any permanent exemption in the event of theft.

90 Lastly, the Greek Government submits that, firstly, the fact that payment of the registration fee is required, not on the first occasion of theft, but only where the same individual suffers the theft of a second vehicle covered by a temporary tax exemption is an expression of favour with regard to that victim and that, secondly, the risk of theft is common and has to be covered by insurance companies, not by the State.

Findings of the Court

91 It should be pointed out that the Directive requires Member States under certain conditions to grant a tax exemption — for a well-defined period of time — in respect of the temporary use of a means of transport registered in another Member State, by an individual who also has his normal residence in a Member State other than the relevant Member State.

92 The grant of that exemption is subject, inter alia, to the condition, framed in Article 3(a) and (b) of the Directive in terms which leave no room for any ambiguity at all, that the beneficiary of the exemption employs the means of transport covered by the exemption for his private use and that that means of transport cannot be disposed of or hired out in the Member State of temporary importation or lent to a resident of that State. Thus the Directive emphasises the close link between the individual who is the beneficiary of the temporary exemption and the vehicle covered by that exemption.

93 The Directive is silent as regards the theft of a vehicle covered by the exemption and the consequences of such a theft.

94 There is no evidence in the Directive, moreover, to justify the conclusion that the Directive sought to extend the exemption and thus restrict the tax jurisdiction of Member States in circumstances where the link between the beneficiary of the exemption and the vehicle covered by that exemption is broken, in particular in the event of theft where it is very likely that the vehicle will remain in use in the territory of the Member State concerned whilst being driven by a person who has no connection with the beneficiary of the exemption. Such a case is not addressed by the Directive and falls within the legislative power of the Member States.

95 Accordingly, and having regard to the fact that the Commission does not invoke any other Community provisions, it cannot be found that there has been a failure to fulfil obligations.

96 The national measure at issue does not contravene Article 90 EC either, in the light of the considerations set out by the Court in paragraphs 85 and 86 of this judgment.

97 In the light of the foregoing, it must be held that, in providing:

— in Article 18(A)(1) of Law No 2682/1999 that, in the event of possession or use in Greek territory of a vehicle registered in another Member State by an individual who has his normal residence in Greece, the criminal proceedings provided for as a matter of course will not be brought if the person concerned pays the registration fee charged and at the same time refrains from seeking, in relation to the act leading to the imposition of that fee, the legal remedies provided for under national law, and

— in Article 18(C)(1) of Law No 2682/1999 that, where fines are imposed, vehicles are also to be temporarily immobilised, and released on payment of the fines and any other charges owed,

the Hellenic Republic has failed to fulfil its obligations under the Directive.

98 The remainder of the action is dismissed.

Costs

99 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. Under the first subparagraph of Article 69(3) of those rules, the Court may nevertheless order that the costs be shared or that the parties bear their own costs where each party succeeds on some and fails on other heads, or where the circumstances are exceptional. Since the Commission and the Hellenic Republic have each been partially unsuccessful in their pleadings, they should bear their own costs.

On those grounds, the Court (First Chamber) hereby:

1. Declares that in laying down:

— **in Article 18(A)(1) of Law No 2682/1999 that, in the event of possession or use in Greek territory of a vehicle registered in another Member State by an individual who has his normal residence in Greece, the criminal proceedings provided for as a matter of course will not be brought if the person concerned pays the registration fee charged and at the same time refrains from seeking, in relation to the act leading to the imposition of that fee, the legal remedies provided for under national law, and**

— **in Article 18(C)(1) of Law No 2682/1999 that, where fines are imposed, vehicles are also to be temporarily immobilised, and released on payment of the fines and any other charges owed,**

the Hellenic Republic has failed to fulfil its obligations under Council Directive 83/182/EEC of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another;

2. Dismisses the remainder of the action;

3. Orders the Commission of the European Communities and the Hellenic Republic to bear their own costs.

[Signatures]