OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 February 1990 *

Mr President,
Members of the Court,

1 The Commission asks the Court to find that

'by establishing and maintaining, in the form of a special consumption tax and the single supplementary special tax, a system of taxation which discriminates against new and used cars with a cylinder capacity of more than 1 800 cc imported from other Member States, the Hellenic Republic has failed to fulfil its obligations under the first paragraph of Article 95 of the EEC Treaty'

2 Details of the legislation in question are given in the Report for the Hearing and accordingly I shall refer to them here only to the extent necessary for my reasoning to be followed

3 In support of its application, the Commission relies principally on the judgment of 9 May 1985 in Case 112/84 *Humblot* [1985] ECR 1367, which was concerned with a special tax in France levied each year on cars which exceeded a given fiscal power rating, which was nearly five times higher than the highest amount of the progressive tax payable in respect of cars of a lower rating

4 In that judgment the Court first emphasized that

'as Community law stands at present the Member States are at liberty to subject certain products such as cars to a system of road tax which increases progressively in amount depending on an objective criterion, such as the power rating for tax purposes, which may be determined in various ways Such a system of domestic taxation is, however, compatible with Article 95 only in so far as it is free of any discriminatory or protective effect' (paragraphs 12 and 13)

The Court then went on to say:

'in the absence of considerations relating to the amount of the special tax, consumers seeking comparable cars as regards such matters as size, comfort, actual power, maintenance costs, durability, fuel consumption and price would naturally choose from among cars above and below the critical power rating laid down by French law However, liability to the special tax entails a much larger increase in taxation than passing from one category of car to another in a system of progressive taxation embodying balanced differentials

* Original language: French

like the system on which the differential tax is based' (paragraph 15)

5 The Court concluded that Article 95 prohibited the charging of such a tax where, as in that case, the only cars on which it was levied were imported, particularly from other Member States

6 In its judgment of 17 September 1987 in Case 433/85 *Feldain* [1987] ECR 3521, the Court held that rules which, by providing for a particular system of tax bands, resulted in domestically manufactured top-of-the-range cars being protected from the normal progression of the tax had a discriminatory or protective effect within the meaning of Article 95 of the Treaty, which favoured such cars

7 In both cases the national court had submitted a question as to the compatibility of the tax systems in question with Article 95 in its entirety and the Court answered accordingly In the present case, however, the Commission asks you to establish an infringement of *the first paragraph* of Article 95 It maintains in particular that

'the cars in question, regardless of their cylinder capacity, are similar products' (letter prior to action, cited in paragraph I 2 of the application)

8 I cannot share that view The Court has held that similar products are those that

'have similar characteristics and meet the same needs from the point of view of consumers' [1]

1 — See in the first place, the judgment of 17 February 1976 in Case 45/75 *Rewe* v *Hauptzollamt Landau* [1976] ECR 181 paragraph 12

However, it cannot in my view be asserted that that is so in the case of very small cars (for example, those shorter than 3 7 m, with an engine of less than 1 000 cc), on the one hand, and top-of-the-range cars (longer than 4 7 m and with a cylinder capacity of 2 500 cc or more), on the other

9 On the other hand, there may well exist, on either side of a given cylinder-capacity threshold, for example 1 800 cc as in the present case, cars which, despite a fairly considerable difference of cylinder capacity, are sufficiently close 'as regards size, comfort, actual power' and so on (see *Humblot*) for it to be possible to regard them as satisfying the criterion which I have referred to It is possible, in particular, that, despite the difference in cylinder capacity, the pre-tax price of such cars might be almost the same The Commission was therefore fully entitled to base its action on the first paragraph of Article 95 in so far as its complaint relates to the taxation of cars whose cylinder capacity is around 1 800 cc

10 Let us now consider what conclusions must be drawn regarding the differentiation which the Greek taxation system operates at the 1 800 cc threshold The Greek Government contends that it is justified because cars with a larger cylinder capacity are 'luxury cars'

11 In that respect it can rely on the judgment of 16 December 1986 in Case 200/85 *Commission* v *Italy* [1986] ECR 3953, which indicates that it is neither arbitrary nor unreasonable to treat cars in excess of a given cylinder capacity as luxury products and to subject them to the higher rate of VAT levied on such products within

the tax system of a Member State I am therefore astonished that the Commission should claim, even in its rejoinder (paragraph II 7), that

'to classify an 1 800 cc car as a luxury car, in comparison with a car of 1 799 cc — which is not so classified — is arbitrary'

In making that claim, it is challenging not only the threshold chosen by the Hellenic Republic but also, in general, the *very principle* of taxation differentiated on the basis of a given threshold linked to cylinder capacity The same reasoning could be applied to any threshold, for example 2 000 or 2 500 cc

12 The Court stated in Case 200/85 *Commission* v *Italy* that

'reference to a particular cubic capacity as the differential threshold between two rates of taxation is an objective criterion that takes no account of the origin of products' (paragraph 10)

Because of the very general nature of that statement, it seems to me to be of scant importance that cars which are above a given threshold are, or are not, classified as luxury products

13 It should also be noted that there does not seem to be any need to confine the scope of the judgment in Case 200/85 to the particular area with which it was concerned, and specifically the matter of VAT, as the Commission wishes to do (see paragraph 16 of its application), especially since, in relative terms, the increase of the rate of VAT in the Italian case, at the thresholds of 2 000 and 2 500 cc, was much higher than that exhibited by the two Greek taxes at the threshold of 1 800 cc

14 If Italy was thus entitled to take a cylinder capacity of 2 000 cc (or 2 500 cc in the case of diesel engines) as the point for moving into the higher tax classification, there is no apparent reason why Greece should not be fully entitled to adopt a cylinder capacity of 1 800 cc for that purpose That threshold does not mark the exact point at which domestic manufacture ceases, since no vehicle with a capacity of between 1 600 and 1 800 cc is assembled in Greece The lower tax rate is still enjoyed, in so far as they are exported to Greece, by cars as comfortable as the Audi 100 with an engine of 1 781 cc, the BMW 518i (1 795 cc), the Opel Omega 1 8l (1 796 cc), the Peugeot 505 SX 1 8 (1 796 cc), the Renault 21 GTS (1 721 cc) or the Volkswagen Passat (1 781 cc)

15 The choice of the second threshold seems to me to be even less arbitrary or unreasonable since it is consistent with the relevant Greek tax system as a whole, which already places a tax differential threshold at the level of 1 200 cc The Greek Government explained that the two thresholds in question are regarded as reflecting

'the social circumstances prevailing in Greece and, to some extent, in Europe: cars with a cylinder capacity of 1 200 cc or less are intended for people with low income, those with a cylinder capacity of 1 201 to 1 800 cc are bought by people whose income is in the middle range; and those of above 1 800 cc are, above all in Greece, only for people with very substantial incomes' (see p I-1574 of the Report for the Hearing)

16 Since the Commission has not denied that the threshold of 1 200 cc makes it possible to separate cars intended for people with low incomes from those designed for people in the middle-income range, it is difficult to see why it objects to the threshold of 1 800 cc as the boundary line between the latter and cars intended for those with high incomes

17 It is true that, by contrast with cars exceeding 1 800 cc, cars exceeding 1 200 cc are produced in Greece However, that factor alone cannot be decisive As the Court has consistently held [2]

'at its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products, *even products which are similar within the meaning of the first paragraph of Article 95*, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products'

18 It is apparent from the previous decisions of the Court that such differentiation is also permissible if the tax benefits granted, in the form of exemptions from or reductions of duty, serve legitimate social purposes [3]

19 To concede that such objective differentiation becomes incompatible with Article 95 merely because the heavier taxation in fact only affects imported products would be to deny the Member States that freedom

20 In that connection, it is significant that in the great majority of the cases in which the Court has considered differentiated taxation to be contrary to Article 95, it found that the criterion on which the differentiation was based was such that *in advance* it excluded imported products from the favourable tax regime or else it excluded domestic products from the more onerous tax regime [4]

21 I consider therefore that tax differentiation based on a criterion recognized as objective does not — suddenly — cease to be objective and become incompatible with Article 95 solely because there are no domestic products which meet the conditions for the higher tax rate, provided that the imported products are not 'by definition', '*ex hypothesi*' or 'inherently' the only ones which could meet those conditions

22 The Court expressly applied the foregoing principle in its judgments of 14

2 — See in particular the judgments of 4 March 1986 in Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 20 and of 7 April 1987 in Case 196/85 *Commission* v *France* [1987] ECR 1597 paragraph 6

3 — See in addition to *Commission* v *France* *supra* paragraph 7 in particular the judgment of 10 October 1978 in Case 148/77 *Hansen and Balle* v *Hauptzollamt Flensburg* [1978] ECR 1787 paragraph 16

4 — See judgments of 7 May 1981 in Case 153/80 *Rumhaus Hansen* v *Hauptzollamt Flensburg* [1981] ECR 1165 of 27 May 1981 in Joined Cases 142 and 143/80 *Ammini strazione delle finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413 of 15 March 1983 in Case 319/81 *Commission* v *Italy* [1983] ECR 601 (taxation of spirits), of 11 July 1985 in Case 278/83 *Commission* v *Italy* [1985] ECR 2503 (VAT — taxation of sparkling wines) of 4 March 1986 in Case 106/84 *Commission* v *Denmark* [1986] ECR 833, and of 7 April 1987 in Case 196/85 *Commission* v *France* [1986] ECR 1597

January 1981 in Case 140/79 *Chemial Farmaceutici* v *DAF* [1981] ECR 1, and in Case 46/80 *Vinal* v *Orbat* [1981] ECR 77 (taxation of denatured alcohol) when it held that:

'The application of such tax arrangements [which impose heavier charges on synthetic denatured alcohol than on denatured alcohol obtained by fermentation] cannot be considered as constituting indirect protection of national production of alcohol obtained by fermentation within the meaning of the second paragraph of Article 95 of the EEC Treaty on the sole ground that their consequence is that the product subject to the heavier taxation is in fact a product which is exclusively imported from other Member States of the Community'

23 In the same context, one may also point out, as does Professor Everling,[5] that it also follows from the judgment of 3 March 1988 in Case 252/86 *Bergandi* [1988] ECR 1343, that a system of differentiated taxation for various categories of games machines, which pursues legitimate social objectives, is not discriminatory or protective merely because almost all the most heavily taxed products are imported

24 If that had in fact been the case, the court, in reply to a preliminary question as to whether the fact that a Member State levied on automatic gaming machines for the most part originating abroad a tax three times higher than that applied to similar machines mostly produced domestically was prohibited under Article 95 of the Treaty, could have confined itself to referring to its judgment of 27 February 1980 in Case 171/78 *Commission* v *Denmark* [1980] ECR 447 (tax arrangements applicable to spirits), in particular paragraph 36, according to which a tax system of that kind contains incontestable discriminatory or protective characteristics, even if a very small fraction of imported products benefits from the most favourable rate of tax and a certain proportion of domestic production comes within the same tax category as imported products However, it did not only refer to that judgment (paragraph 28), but it also expressly contrasted with it its 'differentiated taxation' case-law, pointing out that

'*however* at the present stage of its development and in the absence of any unification or harmonization of the relevant provisions, Community law does not prohibit Member States from establishing a system of taxation differentiated according to various categories of products provided that the tax benefits granted serve legitimate economic or social purposes' (paragraph 29)

The Court went on to add (paragraph 31) that:

'the Member States are in principle at liberty to subject products to a system of taxation which increases progressively in amount according to an objective criterion, provided that the system is free from any discriminatory or protective effects'

5 — Professor Dr Ulrich Everling: Aktuelle Fragen der europäischen Steuergerichtsbarkeit in *Die Steuerberatung* Bonn September 1988 p 281 at p 286

25 At this stage we can therefore conclude that the Greek system of taxing cars, in so far as it is based on cylinder capacity as a basis for differential tax rates, with a threshold of 1 800 cc as from which the higher rate of tax is applicable, is not in principle incompatible with the first paragraph of Article 95 of the Treaty even if, in fact, only imported cars fall within the most heavily taxed category of cars

26 But for such a system of taxation to be truly lawful under Article 95, it must be 'free from any discriminatory or protective effect' [6] It is apparent from *Humblot* and *Feldain*, cited earlier, that that is not the case where a 'special tax'

'entails a much larger increase in taxation than [that which arises on] passing from one category of car to another in a system of progressive taxation embodying balanced differentials' [7]

In other words, as I pointed out in my Opinion in Case 200/85, a differentiated taxation system in which the highest tax affects only products imported from other Member States is not discriminatory (or protective) unless the latter is of a markedly higher rate and

'marks a break or a discontinuity with regard to the general taxation system to which the category of products concerned is subject' [8]

6 — See *Humblot* [1985] ECR 1378, paragraph 13 *Feldain* [1987] ECR 3540 paragraph 11 and *Bergandi* [1988] ECR 1375 paragraph 31

7 — See *Humblot* [1985] ECR 1379, paragraph 15 and *Feldain* [1987] ECR 3540 paragraph 11

8 — [1986] ECR 3966 (right hand column)

27 In order to check whether that is the case as far as the contested Greek system is concerned, it is necessary to examine separately the two taxes in question

A — The special consumption tax

28 The special consumption tax comprises two components The first relates solely to the car's cylinder capacity It is calculated as follows: DR 20 per cc for cars of 600 to 1 200 cc; DR 26 per cc for cars of 1 201 to 1 800 cc; DR 38 per cc for cars of more than 1 800 cc The first component is subject to a ceiling of DR 100 000

29 The second component of the tax is obtained by the following calculation:

$$\frac{\text{first component} \times 4 \times V}{100\,000}$$

where V is the pre-tax price of the car less DR 25 000

30 The sum of those two components gives amounts which correspond to a percentage of the pre-tax price of the car Because of the incidence of the first component of the tax, that percentage varies for each additional cubic centimetre The minimum tax is 48% for a car of 600 cc, and the maximum is 400% for cars of 2 632 cc and above

31 To simplify its exposition of the problem, the Commission makes a separate comparison for each band of 100 cc According to the Commission, the progression of the special consumption tax is not balanced Up to 1 800 cc it increases on average by only 11 6 percentage points per band of 100 cc; at 1 801 cc it first

makes a sudden jump of 86 5 points, thereafter growing at the average rate of 15 2 points per band of 100 cc

32 That presentation of the progression of the tax does not, however, seem to me to be acceptable as it stands since it overlooks the fact that the Greek system also has a differential threshold at 1 200 cc If account is taken of the three categories of cars thus created, the progression of the tax is as follows:

(i) as from 48% for a car of 600 cc, it increases 8 points per band of 100 cc, reaching 96% at 1 200 cc;

(ii) at that first differential threshold, it jumps suddenly by 28 9 points at 1 201 cc, rising to 135 2% at 1 300 cc, then growing regularly by 10 4 points per band of 100 cc and reaching 187 2% at 1 800 cc;

(iii) at that second differential threshold, it makes the sudden jump mentioned by the Commission (86 5 points); it reaches 288 8% at 1 900 cc, before progressing by 15 2 points per band of 100 cc, finally reaching a maximum rate of 400% at 2 632 cc

33 The explanation for this large increase at the thresholds of 1 200 and 1 800 cc lies in the fact (which the Commission mentioned for the first time only in its rejoinder — paragraph II 3) that the respective weightings of 26 and 38 apply to the entire cylinder capacity of the car, that is to say also to the part of the capacity corresponding to one or both of the lower categories In the Commission's view, that constitutes a 'break in the progression', which would not exist in a system in which the upper weightings applied only to the part of the cylinder capacity above the differential thresholds in question and in which the bands below those thresholds continued to be subject to the lower rates normally applicable to them

34 The following table illustrates the foregoing by comparing the rates calculated according to the other more 'balanced' method advocated by the Commission with those applicable in the present system

Cylinder capacity (in cc)	Present system	*	Other system	*
1 100	88 %		88 %	
1 200	96 %	+ 8	96 %	+ 8
1 300	135,2 %	+ *39,2*	106,4 %	+10,4
1 400	145,6 %	+ 10,4	116,8 %	+10,4
1 500	156 %	+ 10,4	127,2 %	+10,4
1 600	166,4 %	+ 10,4	137,6 %	+10,4
1 700	176,8 %	+ 10,4	148 %	+10,4
1 800	187,2 %	+ 10,4	158,4 %	+10,4
1 900	288,8 %	+ *101,6*	173,6 %	+15,2
2 000	304 %	+ 15,2	188,8 %	+15,2
2 100	319,2 %	+ 15,2	204 %	+15,2
2 200	334,4 %	+ 15,2	219,2 %	+15,2
2 300	349,6 %	+ 15,2	234,4 %	+15,2
2 400	364,8 %	+ 15,2	249,6 %	+15,2
2 500	380 %	+ 15,2	264,8 %	+15,2
2 600	395,2 %	/	280 %	/
2 632	400 %		284,8 %	

35 A comparison of the two columns marked with an asterisk, which show the increase in rate per 100 cc band, reveals that the increase is identical in the two systems, except when the transition is made from 1 200 to 1 300 cc and from 1 800 to 1 900 cc: in the system advocated by the

Commission, it would be, at those two thresholds, of exactly the same order of magnitude as that applicable to the other 100 cc bands in the category in question It is immediately noticeable that the progression, as a whole, would thus be more balanced

36 Must a system which involves a sharp increase in taxation at two different levels necessarily be regarded as inherently incompatible with the first paragraph of Article 95 of the Treaty?

37 It will be recalled, in the first place, that *Humblot* was concerned with a 'special tax' and it was the subjection to that tax which gave rise to a 'break' from the taxation system that was otherwise applicable As I said in my Opinion in Case 200/85,

'the French tax [which affected only imported cars] was, so to speak, outside the normal system for the taxation of cars, which consisted of a tax which increased progressively with the fiscal horsepower' ([1986] ECR 3966, last paragraph)

In the present case the increase in the Greek tax at the threshold of 1 800 cc, beyond which it affects only imported cars, is in conformity with the logic of the Greek system which already involves a similar increase at the threshold of 1 200 cc, which affects Greek cars as well

38 It is also true, as has been emphasized by the Greek Government, that the ratio between the averages of the third (337%) and the second (156%) categories, namely 2 16, is the same as the ratio between the averages of the second and first (72%) categories

39 Finally, allow me to remind the Court once again that the differentiation of the taxation at the threshold of 1 800 cc is beneficial not only to Greek cars with a smaller cylinder capacity but also to imported cars, in particular those of a capacity exceeding 1 600 cc but less than 1 801 cc, of which none is produced in Greece at the present time

40 I therefore consider that the actual existence of the two taxation thresholds cannot be criticized Moreover, by contrast with the position in *Feldain*, the location of the two thresholds is not such as to permit the inference that they were chosen in order to favour domestically produced cars

41 The question remains whether the same can be said of the percentages of tax which affect the three categories of cars On this point, the system at issue in *Feldain* did not attract any criticism But in the present case certain points call for comment The tax on 1 200 cc cars is 96% and the tax on cars of 1 201 cc is 124 9%, giving a ratio of 1: 1 30 The tax on 1 800 cc cars is 187 2% and the tax on cars of 1 801 cc is 273 7% In the latter case, the ratio is 1: 1 46 The difference derives from the progression of the amounts, expressed in drachmas per cubic centimetre, which apply to the three categories of cars (the first component of the tax) I would remind the Court that, for

cars of up to 1 200 cc, the figure is DR 20 per cc For cars up to 1 800 cc the amount is DR 26 per cc, and for cars of 1 801 cc and above the figure is DR 38 per cc The ratios between those figures are the same as those determined for the tax as a whole, namely 1: 1 46 (38/26) and 1: 1 30 (26/20) If a ratio of 1: 1 30 were also applied as between the second and third categories, the figure for the third category should be DR 33 8 instead of DR 38 In this case, the 'jump' at the 1 800 cc threshold would no longer be 86 5 points but only 56 2 points, and the tax would then progress by 13 52 points for each additional 100 cc, instead of 15 2 points

42 I consider that a system involving two thresholds at which the taxation increases sharply is permissible only if, at the second threshold, which affects only imported cars, the progression is not greater than the one that affects both imported and domestic products Indeed, if a ratio of 1: 1 46 were to be acceptable, why not a ratio of 1: 2 or 1: 3 or 1: 5, like the one at issue in *Humblot*?

43 A system of that kind must be consistent from start to finish, in other words it must display an internal logic which cannot be faulted at any level of taxation

44 Since in the present case the rate or percentage of increase in the applicable tax at the 1 800 cc threshold is not the same as that which applies to the 1 200 cc threshold, I propose that the Court hold that the special consumption tax is incompatible with the first paragraph of Article 95 of the Treaty

B — The single supplementary special tax

45 Let us now consider the situation regarding the single supplementary special tax payable on first registration of the car

46 For cars with a cylinder capacity of less than 1 200 cc, this tax is DR 100 per cc, so that it progresses by DR 10 000 per band of 100 cc and reaches DR 120 000 at the 1 200 cc threshold For cars with a cylinder capacity of 1 201 to 1 800 cc, it is DR 100 per cc for the first band of 1 200 cc and DR 200 per cc for the band from 1 201 to 1 800 cc; it is thus DR 140 000 at 1 300 cc and increases by DR 20 000 per band of 100 cc, so as to attain DR 240 000 at the 1 800 cc threshold On each side of the 1 200 cc threshold, the single supplementary special tax thus increases regularly, by DR 100 and DR 200 per cc respectively Moreover, it is apparent from the foregoing that that differentiation in rates, in so far as it is based on an objective criterion, that of cylinder capacity, would be perfectly lawful under the first paragraph of Article 95 of the Treaty even if Greece did not produce cars taxed at the higher rate

47 But, as in the case of the special consumption tax, the Hellenic Republic applies a second differentiation of the single

supplementary special tax at the 1 800 cc threshold: for cars with a cylinder capacity exceeding 1 800 cc, the single supplementary special tax is in fact DR 150 per cc for the first tranche of 1 200 cc and is DR 300 per cc above 1 200 cc From DR 240 000 at 1 800 cc it thus rises to DR 360 300 at 1 801 cc and then increases by DR 300 per cc

48. On the one hand, therefore, following the pattern below 1 200 cc, the progression above 1 800 cc is perfectly regular Moreover, the fact that it is DR 300 per cc and is thus greater than the increase applicable to the bands below 1 800 cc constitutes a differentiation based on an objective criterion which, in itself, is not objectionable, particularly since the increase in the rate per cc above the 1 800 cc threshold, after which point all the cars concerned are imported, is exactly the same as that applied at the 1 200 cc threshold, above which there are also Greek cars, and the progression in the rate per cc at the 1 800 cc threshold is even lower (1: 1 5) than that which operates at the 1 200 cc threshold (1: 2)

49 One the other hand, however, the fact cannot be overlooked that for cars with a cylinder capacity of more than 1 800 cc the procedure for calculating the tax is no longer the same as that applicable above the 1 200 cc threshold Whereas, for a car of a cylinder capacity exceeding 1 200 cc (but less than or equal to 1 800 cc), the highest rate of the tax, namely DR 200 per cc, applies only to the part of the cylinder capacity which exceeds 1 800 cc, for a car of a cylinder capacity of over 1 800 cc the rate of DR 300 per cc applies not only to the part of the cylinder capacity in excess of 1 800 cc but also to the part between 1 200 and 1 800 cc Furthermore, for the part of the cylinder capacity below 1 200 cc, the rate is not DR 100 per cc, as it is for cars of a cylinder capacity of less than 1 800 cc (irrespective of whether their total cylinder capacity is below or above 1 200 cc) but DR 150 per cc

50 The consequence of such divergences between the calculation methods is as follows: whereas, for a car of a cylinder capacity of 1 800 cc or less the tax increases by DR 200 per cc as from the 1 200 cc threshold, for a car with a cylinder capacity of over 1 800 cc it does not increase by DR 300 per cc until it has leapt drastically from DR 240 000 to DR 360 000 actually at the 1 800 cc threshold In other words, whilst a 1 201 cc car is subject to a tax of DR 120 200, which is only DR 200 more than that payable on a car of 1 200 cc, a car of 1 801 cc is subject to a tax of DR 360 000 which, for its part, is DR 120 000 + DR 300 more than the tax on a car of 1 800 cc

51 The single supplementary special tax too thus suffers a 'break in progression' at the 1 800 cc threshold, in so far as the calculation procedures applicable as from that threshold are such that they entail an increase in taxation which is much greater than that which would result from the application to that threshold, above which there are only imported cars, of the calculation procedures applicable to the 1 200 cc

threshold, above which there are also Greek cars Indeed, if the same calculation method were applied, namely DR 100 for the first 1 200 cc, DR 200 for the band between 1 201 and 1 800 cc, and DR 300 above that figure, a 1 801 cc car would be subject to a tax of DR 240 000 instead of DR 360 300 This sharp 'jump' in the level of taxation, which does not occur at the 1 200 cc threshold, thus marks a break or discontinuity with respect to the system of taxation normally applied Since the higher tax affects only cars imported from other Member States, that system of taxation cannot be regarded as 'free of any discriminatory or protective effect' within the meaning of *Humblot* and *Feldain* and is therefore unlawful under Article 95 of the Treaty

C — The taxation of second-hand cars

52 In its application, the Commission asks the Court to find that the Greek system of taxation is discriminatory as regards both new cars and *second-hand cars* Does that mean that, with respect to the taxation of second-hand cars, the Commission relies on the arguments relating to new cars which I have examined here?

53 The least that can be said is that the Commission's claims in that respect are far from clear

54 In paragraph 22 of the application, the Commission asserts in a very laconic manner that

'the foregoing considerations also apply, *mutatis mutandis*, to second-hand cars'

It would be desirable to know whether, in the Commission's view, it is new cars of domestic manufacture or the same cars at the second-hand stage or both which are placed at an advantage over imported second-hand cars However, it must be concluded that, since both systems of tax have an inherent defect, namely excessive increase in tax as from the 1 800 cc threshold, that defect has an impact on all imported cars

55 It must then be stated that, during the pre-litigation phase, the Commission also criticized the detailed rules for determining the *taxable amount* for calculation of the *special consumption tax* which is charged on second-hand cars upon importation That tax is determined by reducing the price of corresponding new cars by 5% for each year of the car's age, but without any deduction beyond four years, so that the total reduction cannot exceed 20% The Commission considers that as a result of those rules the taxable amount for imported second-hand cars

'is always higher than the net value of the corresponding domestically produced vehicle on which the special consumption tax was paid when it was new' (reasoned opinion, paragraph 2 3)

The result is higher taxation for imported cars

56 The Commission did not expressly reiterate that complaint, either in its application or in its reply It confined itself to making, at paragraph 22 of its application, the statement which I have just cited At the hearing, the Commission's agent referred to that phrase, claiming that the Commission had thus mentioned that complaint

57 But 'the foregoing considerations' are in no way related to the question of determination of the taxable basis for cars, only to the procedures for calculation of the two taxes Therefore, in my view, the Hellenic Republic, which, in the pre-litigation phase, contended that the complaint concerning the taxable basis was unfounded, was entitled to conclude that the Commission had abandoned it, which, furthermore, explains the fact that, in its defence and rejoinder, it expressed no views on the matter That complaint must therefore be regarded as inadmissible because it was made only at the pre-litigation stage

Conclusion

58 For all the foregoing reasons, I propose that the Court find that by applying, in the form of the special consumption tax and the single supplementary special tax, a system of taxation which discriminates against cars with a cylinder capacity of more than 1 800 cc imported from other Member States, the Hellenic Republic has failed to fulfil its obligations under the first paragraph of Article 95 of the Treaty

59 Even though the Commission contended, wrongly, at the hearing that its action also related to the method of evaluation of the taxable amount for imported second-hand vehicles, I do not consider that that should have any repercussions concerning costs I propose that the Court order the Hellenic Republic to pay the costs