OPINION OF ADVOCATE GENERAL JACOBS
delivered on 26 May 2005 [1]

1. In the present cases, the Tribunal de police (Local Criminal Court), Neufchâteau (Belgium), has asked the Court to rule on whether Community law permits national legislation requiring a resident to register a vehicle made available to him by the undertaking which employs him and which is established in another Member State, where the employee is also a shareholder in or director or manager of that undertaking and where the vehicle is used by him in the course of his employment.

The national legislation

2. Article 3(2)(2) of the Belgian Royal Decree of 20 July 2001 concerning vehicle registration [2] provides that, by way of exception to the general rule that residents must register vehicles they wish to use in Belgium, it is not compulsory to register a vehicle used by a person in the course of his employment where the vehicle is registered abroad in the name of a foreign owner to whom that person is linked by an employment contract; in such a case a certificate issued by the Belgian VAT authorities must be carried in the vehicle.

3. Article 14 of Circular No 1/2000 of 3 May 2000, [3] which appears to be an indication of administrative practice, sets out the conditions for benefiting from that exception. The effect of Article 14(f) is that that certificate will not be issued where the employer is a company and the employee is also a director or manager of that company unless the employee can show that he is in a genuine relationship of subordination to the company. That entails proving that he is subject to the authority of another person represent-

1 — Original language: English.

2 — *Moniteur Belge*, 8 August 2001, p. 27022

3 — www.fisconet.fgov.be.

ing the company or of an organ of the company (board of directors, management committee etc.) and that that person or organ is in a position of authority and not subject to significant influence by the employee/director. Persons running a single-member company, the founder members of a company and principal shareholders are in no circumstances entitled to a certificate.

Facts

4. Case C-151/04 concerns Mr Nadin, who lives in Belgium and is an employee and managing director of Nadin-Lux SA, a company established in Luxembourg. Case C-152/04 concerns Mr Durré, who also lives in Belgium and is an employee and director of SA Delisalade Lux, also established in Luxembourg. I shall refer to Mr Nadin and Mr Durré jointly as 'the defendants'.

5. On separate occasions in March 2002 the defendants were stopped in Belgium for a police check. Mr Nadin was driving a car registered in Luxembourg and owned by Credit Lease SA of Luxembourg, which had leased it to Nadin-Lux SA. Mr Durré was driving a car registered in the name of Delisalade Lux SA. Neither defendant was carrying the requisite VAT certificate in the vehicle; each stated that the Belgian VAT authorities had refused to issue him with such a certificate. The defendants were charged with infringing Article 3(2)(2) of the Royal Decree of 20 July 2001. Before the Tribunal de police the defendants argued that they were to be regarded as workers for the purposes of Community law and that the Royal Decree was incompatible with the principle of the freedom of movement of workers. The Tribunal de police has referred to the Court the following question for a preliminary ruling:

'Do Articles 10, 39, 43 and 49 [EC] preclude a Member State from adopting a measure requiring a worker who is resident within its territory to register his vehicle there even when that vehicle belongs to his employer, a company established in another Member State and to which that worker is linked by an employment contract but in which at the same time he occupies a position of shareholder, director, day-to-day manager or similar?'

6. The question referred is identical in the two cases despite the difference in ownership of the vehicle concerned. I accordingly consider that, as the Belgian Government suggests, the question should be slightly reformulated so as to ask whether Community law permits national legislation requiring a resident to register a vehicle made available to him by the undertaking which employs him and which is established in another Member State, where the employee is also a shareholder in or director or manager of that undertaking.

7. The national legislation at issue, moreover, applies only to vehicles 'used by a person in the course of his employment'. Neither the national court nor the defendants nor the Belgian Government raises the issue of private use. I accordingly take the referring court's question to incorporate the qualification that the employees/directors concerned are so using the vehicles made available to them.

8. Written observations have been lodged by each defendant, the Belgian, Finnish and United Kingdom Governments and the Commission, all of whom with the exception of Mr Nadin were represented at the hearing.

Assessment

9. The defendants and the Commission submit that the question referred should be answered in the affirmative, while the three governments which have submitted observations take the contrary view.

10. The defendants submit that they should be regarded as 'workers' within the meaning of Article 39 EC in accordance with *Lawrie-Blum*.[4] On that basis, it follows from *Ledoux*[5] and *van Lent*[6] that the national legislation is contrary to Community law. Even if the defendants were not regarded as workers, the legislation would be contrary to Article 43 EC. Moreover the Belgian Council of State was of the view that the legislation is contrary to Articles 39 and 43 EC.[7]

11. The Belgian Government submits first that the national measures at issue must be

4 — Case 66/85 [1986] ECR 2121.

5 — Case 127/86 [1988] ECR 3741.

6 — Case C-232/01 [2003] ECR I-11525.

7 — Avis 31.530/4 of the legislative committee, *Moniteur belge*, 8 August 2001.

read in conjunction with Articles 12a and 25c of the Belgian Value Added Tax Code, which implement Article 28a(5) to (7) of the Sixth VAT Directive. [8] Those provisions treat as a supply of goods effected for consideration the 'transfer by a taxable person of goods from his undertaking to another Member State' but exclude from the scope of the deemed supply transfers to other Member States made in connection with inter alia 'temporary use of the goods, for a period of up to 24 months, in another Member State in which the import of the same goods from a third country would qualify under the arrangements for temporary importation for full exemption from import duties'. It is moreover clear from Article 561(2) of Regulation No 2454/93 implementing the Community Customs Code [9] that the benefit of the temporary importation regime is subject to the condition that the person using the vehicle concerned is employed by its owner. In Belgian law, that condition is reflected in Article 14(f) of Circular No 1/2000.

12. Belgium next submits that, since the national legislation does not require persons to whom it applies to register the vehicle in Belgium where there is an employment relationship as defined by the case-law of the Court, [10] and since in other cases the undertaking which provides the vehicle may register it in Belgium, there is no restriction of the free movement of workers or of freedom of establishment or freedom to provide services within the meaning of Articles 39, 43 and 49 EC. If however the Court were to take the contrary view, the Belgian Government submits that the restrictions are fully justified on the grounds that Member States are competent to legislate in the area of vehicle registration [11] and that the measures seek to prevent tax avoidance; the measures are moreover proportionate.

13. The Finnish and United Kingdom Governments submit that the State of permanent residence of the person who uses the vehicle has the right to require its registration. That principle precludes tax avoidance, facilitates traffic control and road safety and may be used as part of an environmental strategy; [12] the United Kingdom Government adds that it is also a means of raising revenue.

8 — Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of Value Added Tax: uniform basis of assessment (OJ 1977 L 145, p. 1) as amended in particular by Council Directive 91/680/EEC (OJ 1991 L 376, p. 1).

9 — Commission Regulation (EEC) of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1), as amended in particular by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1).

10 — Case C-85/96 *Martinez Sala* [1998] ECR I-2691 and *Lawrie-Blum*, cited in footnote 4.

11 — Case C-451/99 *Cura Anlagen* [2002] ECR I-3193

12 — *Cura Anlagen*, paragraph 59.

14. The Commission submits that the question whether the defendants fall within Article 39 or Article 43 EC is for the national court. The essential characteristic of an employment relationship is whether a person is under the direction of another [13] or in a relationship of subordination, [14] in which case he will fall under Article 39. In any event Articles 39 and 43 offer the same protection to persons within their scope. [15] In the present case it is clear from *van Lent* [16] that there is a restriction; that restriction cannot be justified by reference to road safety and the erosion of the tax revenues. It is moreover clear from the Report to the King annexed to the draft of the Royal Decree that the explicit objective of that decree was to ensure that residents of Belgium could not avoid paying Belgian road tax rather than to promote road safety.

15. I would mention at the outset that all three governments submitting observations note that the Commission has acknowledged [17] that total freedom of choice with regard to the Member State of registration of a vehicle would not be acceptable since it would have the result that all vehicles would be registered in the Member State with the lowest level of vehicle taxation, a situation which the representative of the Belgian Government described at the hearing as 'fiscal forum-shopping'. That consideration does not however seem to me to be relevant to the question which arises in the present cases. It has not been argued that there should be freedom to register in any Member State vehicles such as those at issue in these cases; the question is simply whether an undertaking which owns or leases a vehicle which it makes available to an employee/director to be used in the course of that person's employment should be free to register that vehicle in the Member State where it is genuinely established.

16. The effect of the national legislation at issue is essentially that Belgian residents who are employees of a company established in another Member State in which they also occupy a position of corporate responsibility are required to register in Belgium vehicles provided for them by the company and used in the course of their employment. I agree with the Commission that in order to decide whether that situation is compatible with the Treaty it is not necessary to determine whether in the present cases the defendants are employed or self-employed for the

13 — *Lawrie-Blum*, cited in footnote 4, paragraph 17, and Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 25.

14 — Case C-268/99 *Jany* [2001] ECR I-8615, paragraph 34.

15 — Case C-363/89 *Roux* [1991] ECR I-273, paragraph 23.

16 — Cited in footnote 6.

17 — Commission interpretative communication on procedures for the type-approval and registration of vehicles previously registered in another Member State (OJ 1996 C 143, p. 4). Reference is also made to the statement to similar effect in point 45 of my Opinion in *Cura Anlagen*, cited in footnote 11.

purposes of Community law, since it is settled case-law that Articles 39 and 43 EC afford the same legal protection and that therefore the classification of an economic activity is without significance. [18] If such a determination were to be carried out, it would of course in any event be a matter for the national court.

17. It is also settled case-law that national provisions which preclude or deter a national of a Member State from leaving his country of origin to exercise his right of freedom of movement constitute an obstacle to that freedom. [19] In the context of restrictions (arising through the application of legislation on value added tax) on the private use of a car provided to an employee in similar circumstances to those of the present cases, the Court has moreover ruled that the effect of such restrictions is that 'frontier workers would be effectively prevented from benefiting from certain advantages granted to them by their employers merely because they resided in the Member State into which the vehicle was temporarily imported [and] would thereby be placed at a disadvantage in regard to working conditions compared to their colleagues residing in the country of their employer, which would have a direct effect on the exercise of their right to free movement within the Community'. [20]

18. That proposition appears to me to apply a fortiori in the present case, where the obligation to re-register in Belgium a vehicle provided by an employer established in another Member State and used in the course of the employment of the employee/director is liable to deter Belgian residents from exercising their rights of freedom of movement, whether that right is correctly analysed as deriving from Article 39 or Article 43 EC. The principle moreover is all the more likely to be relevant in the context of a Member State such as Belgium which has land borders with four other Member States and hence a significant number of frontier workers.

19. I do not see how that conclusion can be affected by the Belgian Government's argument based on the temporary importation provisions of Community and national value added tax and customs legislation. Those regimes are distinct from national vehicle registration systems. Their application

18 — *Roux*, cited in footnote 15, paragraph 23

19 — *Van Lent*, paragraph 16.

20 — *Ledoux*, cited in footnote 5, paragraph 18.

depends on a number of factors such as the scope of the notions of taxable person and temporary importation. [21] I do not therefore consider that they have any bearing on the question referred. It may be noted that none of the other parties who have submitted observations to the Court have dealt with those arguments.

20. With regard to the question of justification, none of the grounds invoked by the governments presenting observations seems to me to be tenable.

21. Belgium relies first on the fiscal competence of Member States in the area of vehicle taxation and registration, referring to the Court's recognition of that principle in *Cura Anlagen*. [22]

22. In that case, the Court stated that since in general the taxation of motor vehicles had not been harmonised, Member States were free to exercise their powers of taxation in that area. However the Court added the proviso that those powers must be exercised 'in compliance with Community law'. If national measures governing the registration of vehicles are contrary to Articles 39 and 43 EC, those measures are manifestly not in compliance with Community law and Member States are not therefore free to exercise them in that way.

23. All three governments refer to the need to combat tax avoidance as a ground of justification.

24. It is true that Member States may deny the benefit of the free movement provisions to persons guilty of abuse or fraud. That may however be done only on a case-by-case basis where there is evidence of such conduct. The mere risk of abuse or fraud cannot justify a general restriction, which would prevent the bona fide exercise of Community rights. [23] Such restrictions are necessarily disproportionate, since they

21 — Article 561(2) of Regulation No 2454/93, invoked by the Belgian Government, in fact applies where the employer of the person using the vehicle is established outside the customs territory of the Community.

22 — Cited in footnote 11.

23 — See for example Case C-28/95 *Leur-Bloem* [1997] ECR I-4161, paragraphs 39 to 44, Case C-478/98 *Commission* v *Belgium* [2000] ECR I-7587, paragraph 45, and Case C-436/00 *X and Y* [2002] ECR I-10829, paragraph 62.

make impossible the legitimate exercise of Community rights.

25. More specifically, it is settled case-law that while the aim of preventing tax avoidance may justify restrictive measures which are specifically designed to exclude from a tax advantage purely artificial arrangements aimed at circumventing national tax law, it cannot justify legislation aimed generally at transactions which may be undertaken by taxpayers for any reason. [24] It may be noted in this context that the representative of the Belgian Government stated at the hearing that there are probably cases where registration in Luxembourg of a vehicle provided in circumstances such as those at issue is perfectly proper.

26. With regard to the argument that the measure is justified for reasons relating to road safety, I do not share the view of the governments submitting observations that only national registration, and hence reliance on national roadworthiness tests, is appropriate to achieve that aim. As the Commission points out, Article 3(2) of Council Directive 96/96 [25] provides for mutual recognition of proof of roadworthiness tests.

27. In any event, with regard to the national measure at issue it appears from the Report to the King annexed to the draft of the Royal Decree that the explicit objective of that decree was to ensure that residents of Belgium could not avoid paying Belgian road tax rather than to promote road safety.

28. Moreover it is difficult to square the argument that the measure is necessary in the interests of road safety with the fact that it exempts from the requirement of registration vehicles made available by a company established in another Member State to employees who are not managers or majority shareholders.

29. Nor do I accept the argument, invoked by the Finnish and United Kingdom Governments, that national registration alone per-

24 — See for a recent example Case C-9/02 *de Lasteyrie du Saillant*, judgment of 11 March 2004, paragraph 50.

25 — Directive 96/96/EC of 20 December 1996 on the approximation of the laws of the Member States relating to roadworthiness tests for motor vehicles and their trailers (OJ 1997 L 46, p. 1).

mits the reliable identification of vehicle owners. Given that all Member States have a vehicle registration system, it should be possible to trace the owner of a vehicle wherever in the Community it is registered. That presumably is what happens when a vehicle driven by a tourist or temporary visitor is involved in a road accident.

30. The argument that the national measure may be justified on the ground of raising revenue may be dealt with summarily. It is settled case-law that a loss of tax revenue can never be relied upon to justify a restriction on the exercise of a fundamental freedom. [26]

31. Finally I refer to the argument put forward by the Finnish and United Kingdom Governments that registration may be used as part of an environmental strategy, presumably by some device such as imposing different rates of tax to reflect the environmental impact of the type of vehicle. That may of course be so, and it is clear that the objective of protecting the environment may in principle justify national measures which would otherwise contravene a fundamental freedom guaranteed by the Treaty. [27] However the present case concerns the lawfulness of a requirement to register in a given Member State. The level of the vehicle tax payable has not been called in question, nor has there been any suggestion that that tax is staggered so as to encourage environmentally friendly vehicles. I do not therefore consider that there is scope in the present case for relying on protection of the environment as a justification for restrictions on Treaty freedoms arising from that requirement.

32. In the light of the foregoing analysis it does not appear necessary to consider Articles 10 or 49 EC, both mentioned in the question referred, since the interpretation of Articles 39 and 43 EC is sufficient to provide the referring court with the reply that it needs. [28] It may be noted that none of the observations received by the Court includes submissions on either Article 10 or Article 49.

26 — Case C-385/00 *De Groot* [2002] ECR I-11819, paragraph 103 and the cases there cited, and *X and Y*, cited in footnote 23, paragraph 50

27 — Case C-302/86 *Commission* v *Denmark* [1988] ECR 4607; Case C-2/90 *Commission* v *Belgium* [1992] ECR I-4431 and Case C-379/98 *PreussenElektra* [2001] ECR I-2099.

28 — Case C-31/00 *Dreessen* [2002] ECR I-663, paragraph 30.

Conclusion

33. I accordingly conclude that the questions referred by the Tribunal de police, Neufchâteau, should be answered as follows:

Articles 39 and 43 EC preclude national legislation requiring a resident to register a vehicle made available to him by the undertaking which employs him and which is genuinely established in another Member State, where the employee is also a shareholder in or director or manager of that undertaking.