OPINION OF ADVOCATE GENERAL FENNELLY

delivered on 21 September 2000 [1]

1. Does the fact that the Commission has initiated infringement proceedings concerning national legislative provisions, but subsequently discontinued those proceedings in the light of modifications to the legislation, affect the duty of a court against whose decisions there is no judicial remedy under national law to refer to the Court a question arising on the compatibility with the Treaty of those later provisions? Does Article 95 of the EC Treaty (now, after amendment, Article 90 EC; hereinafter 'Article 95') require a Member State to take account of the actual depreciation in the market value of individual imported second-hand cars for the purposes of assessing them for a vehicle registration tax, or may it take account of depreciation in accordance with a scale based solely on the cylinder capacity and age of the vehicle? These are the principal issues which arise in the request for a preliminary ruling submitted by the Supremo Tribunal Adminstrativo (Supreme Administrative Court), Portugal on 7 October 1998.

I — Facts and procedural background

2. Following the Court's judgment in *Commission* v *Denmark*, [2] the Commission initiated the procedure under Article 169 of the EC Treaty (now Article 226 EC, hereinafter 'Article 169') against Portugal in respect of its arrangements for taxing imported used cars. This legislation was amended in 1994 to allow a progressive reduction in the amount of tax due for the first registration of imported used cars according to a scheme which was similar to that in force at the material time in the present case (see paragraph 6, below). In the light of this modification, the Commission discontinued the proceedings; however, following complaints it had received in the meantime, the Commission commenced new infringement proceedings by sending a letter of formal notice to the Portuguese authorities on 15 May 1998.

3. In the operative part of its judgment in Case C-345/93 *Nunes Tadeu*, [3] which referred to the legislation in force before the 1994 amendments, the Court held that:

'[it] is incompatible with Article 95 of the EEC Treaty for a Member State to levy on second-hand cars from other Member States a tax which, calculated without taking the vehicle's actual depreciation into

1 — Original language: English.

2 — Case C-47/88 [1990] ECR I-4509.

3 — Case C-345/93 [1995] ECR I-479.

account, exceeds the residual tax incorporated in the value of similar second-hand motor vehicles already registered in the national territory.'

4. On importing into Portugal from France a used BMW 325 TD, with a cylinder capacity of 2 497 cm^3, the applicant in the main proceedings was required to pay vehicle registration tax in the amount of PTE 1 856 994, in accordance with an assessment made on 16 September 1996. According to the Supremo Tribunal Administrativo, the date of first registration of the vehicle was 2 February 1991, and it was therefore assessed as a vehicle having been in use for between five and six years. It appears from the case-file that the vehicle in question was in fact first registered on 2 December 1991, and that, at the time of importation, it could not have been in use for more than five years. This discrepancy is not material to the questions which the Court must address in answering the present reference.

5. In accordance with Article 1(4) of Decree-Law No 40/93 of 18 February 1993, as amended by Law No 10-B/96 of 23 March 1996, new light passenger vehicles imported into Portugal from other Member States of the Community were subject to a vehicle tax based on the cylinder capacity of the engine. The tax was also imposed on imported used cars, with a reduction on the amount being granted in accordance with the following table:

Years of Use	Tax Reduction
From 1 to 2 years	18%
From 2 to 3 years	24%
From 3 to 4 years	32%
From 4 to 5 years	41%
From 5 to 6 years	49%
From 6 to 7 years	55%
From 7 to 8 years	61%
More than 8 years	67%

6. The applicant's appeal against the assessment on the grounds that the national provisions were incompatible with Article 95 of the Treaty failed at first instance. On appeal, the Supremo Tribunal Adminstrativo adopted as its own the following questions proposed to it by the applicant:

'[1.] Does legislation, like the Portuguese legislation, which imposes a fixed-rate levy on imported used light passenger vehicles taking account only of the cylinder capacity of the vehicle, subject to deduction from the levy of a percentage of 18, 24, 32, 41, 49, 55, 61 or 67% (depending whether the imported vehicle has been in use for between one and two, two and three, three and four, four and five, five and six, six and seven or seven and eight years) of what would be payable on a new vehicle (imported or bought on

the domestic market) and where for a vehicle which has been used for more than eight years 33% of the car tax which would be payable on a new vehicle (imported or bought on the domestic market) has to be paid without, in either of such situations, account being taken of all the other factors which influence the value of a car, such as kilometrage, state of upkeep and the model, among others, guarantee perfect neutrality of domestic taxation as regards competition between domestic and imported products (in this case cars) and is it compatible with the first paragraph of Article 95 of the Treaty?

[2.] Is it compatible with the first paragraph of Article 95 of the Treaty for national legislation to provide that the tax levied on an imported product and the tax levied on a similar national product are to be calculated differently and according to different procedures: the car tax on the imported used vehicle is calculated on the basis of its cylinder capacity, subject to a deduction based solely on its years of use whereas in transactions on the national market involving a similar used vehicle no car tax is paid (since, being a single-stage tax, it is paid only once when the vehicle is put into circulation, in new condition), when the fact is that its price may still incorporate a residual portion of that tax if it has not been in use for more than about four to five years, that portion always being of uncertain amount, and not being separate from the purchase price, or separable from it, because, amongst other possible reasons, the purchase of a used vehicle in Portugal is not subject to car tax?

[3.] In the light of the first paragraph of Article 95 of the Treaty, may it be considered that such a system cannot, not even in only a few cases, lead to higher taxation of the imported product and that the system is regulated in such a way that the possibility is always excluded of an imported vehicle being taxed at a higher level than a similar national vehicle?

[4.] May, in the light of Community law, such a system be regarded as transparent to the requisite extent so as to make it possible to determine objectively whether the fiscal charge on an imported car exceeds that levied on a similar national car?

[5.] In the light of Community law, may such a system be applied in a fair way to products from the domestic market and to imported products?'

7. The Supremo Tribunal Adminstrativo therefore referred the following ques-

tions to the Court by order of 7 October 1998:

'[1.] Are the questions raised in these proceedings by the appellant and set out above relevant? What is the answer to those questions under Community law?

[2.] Does depreciation of the real value of used vehicles, referred to in the judgment of the European Court of Justice in Case C-345/93 *Nunes Tadeu* necessarily imply that a valuation or expert assessment must be carried out on every vehicle or may the calculation be made in general and abstract terms by reference to a legal criterion?

[3.] If the European Commission discontinues infringement proceedings against a Member State on the understanding that the new national legislation is now in conformity with Community law, may a national supreme court, relying on the interpretation of Community law and of national law adopted by the Commission, be relieved of the obligation imposed on it by Article 177 of the Treaty to request a preliminary ruling from the European Court of Justice and decide the case in accordance with the interpretation adopted by the European Commission?'

8. Written observations were submitted by the applicant in the main proceedings, Finland, the Netherlands, Portugal and the Commission; only the latter two were represented at the hearing.

II — Analysis

(a) The obligations of the Supremo Tribunal Administrativo under Article 177 of the EC Treaty (now Article 234 EC)

9. The third question posed by the Supremo Tribunal Administrativo concerns the extent of the duty of a national court against whose decisions there is no judicial remedy under national law to refer to the Court a question concerning the compatibility with Community law of certain national provisions, and whether that duty is affected by the fact that the Commission had discontinued infringement proceedings it had previously initiated concerning those same provisions. The Supremo Tribunal Administrativo has explained that when a question arose in a previous case regarding the same legislation, it had not referred this to the Court because of its understanding that the 1994 Portuguese provisions were compatible with Article 95. It therefore reasoned that '[if] a Commission decision can relieve a supreme court of the obliga-

tion of seeking a preliminary ruling... this Supremo Tribunal Administrativo followed the proper course in its judgment in Case No 22 396. If not, it has infringed Article 177 of the EC Treaty. In any event, it is important for the point to be cleared up so that this Supremo Tribunal Administrativo may in future discharge its obligations under Article 177 of the Treaty'.

10. By its question, the referring court is requesting guidance on the interpretation of Article 177 of the EC Treaty (now Article 234 EC, hereinafter 'Article 177'), and on the significance of a decision of the Commission not to pursue infringement proceedings under Article 169. It seems logical to address this question first, before any of the substantive questions on the interpretation of Article 95. It is true that the request concerning the substantive issues is not expressed to be in any way conditional on a negative response to the third question, and that it might therefore seem that no answer is necessary. The referring court has indicated that the answer to the third question will allow it to evaluate its own judgment in a past case, and to properly apply Article 177 in the future, which, in my view, is legitimate. In this regard, it should be recalled that, where a question of Community law, as defined in the first paragraph of Article 177, is raised before a court of last instance, that court does not enjoy a discretion not to request a preliminary ruling, but is under an obligation to 'bring the matter before the Court of Justice'.

11. According to the Court's ruling in *Fornasar* 'it is settled case-law that it is solely for the national courts before which actions are brought, and which must bear responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which it submits to the Court. Dismissal of a request from a national court is possible only where it is clear that the interpretation of Community law or the consideration of the validity of a Community rule requested by that court has no bearing on the real situation or on the subject-matter of the case'. [4]

12. In the present case, none of the parties submitting observations has suggested that the Article 177 question is inadmissible. Furthermore, it cannot, in my view, be maintained that the interpretation of Article 177 manifestly 'has no bearing on the real situation or on the subject-matter of the case'. The referring court has here based its decision to refer the substantive questions to the Court on an interpretation of its duties under that provision, which differs from that which it had adopted in an earlier case. In putting the Article 177 question in the present proceedings, the referring court seeks to know whether the view it adopted in the present case was correct, and it is not for this Court to inquire into its reasons for seeking such

4 — Case C-318/98 *Criminal Proceedings against Giancarlo Fornasar and Others* [2000] ECR I-4785, paragraph 27.

guidance. The question cannot be said to be hypothetical either, merely because it was referred to the Court in the same order for reference as the substantive questions; the question of the extent of the duty of the Supremo Tribunal Administrativo to make a reference arose normally in the course of genuine litigation. The course of action adopted by the referring court could in any case be justified by reasons of procedural economy. The alternative course of action would have been for the national court first to refer the question of its duties under Article 177 separately, and only in the case of a negative answer subsequently to refer the substantive questions, with all the delays this would inevitably entail.

13. In these circumstances, the Court should therefore answer the third question. The answer is in any case relatively simple. A Commission decision not to continue with infringement proceedings, even if based on a finding that a particular set of legislative provisions is now in conformity with the Treaty, does not in any way affect the obligation of a national court of final instance under the third paragraph of Article 177 to refer to the Court a question of Community law which may arise. It is clear from Article 169 that 'the Commission is not bound to commence proceedings provided for in that provision but in this regard has a discretion'. [5] While a finding that a Member State is in breach of its obligations is a necessary precondition for initiating such proceedings, their discontinuation is not dependent on a finding that the obligations are being complied with; such a decision may be coloured by political or practical considerations which remain outside the jurisdiction of the Court. The decisive consideration is, in any event, that the opinion of the Commission that the legal situation in a Member State is in conformity with the Treaty is in no way determinative of the issue which can only be finally decided by the Court, whether directly in subsequent infringement proceedings or indirectly in answering a request for a preliminary ruling.

14. A complete answer to this question can be found in the Court's judgment in *Essevi and Salengo*, [6] cited by Finland. There, in the context of an ongoing infringement procedure, the Commission had indicated to Italy that it could provisionally maintain its system for taxing alcohol production. The Court held that 'the Commission is not empowered to determine conclusively, by opinions formulated pursuant to Article 169 or by other statements of attitude under that procedure, the rights and duties of a Member State, or to afford that State guarantees concerning the compatibility of a given line of conduct with the Treaty ... the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court'. [7] The Commission's 'statement of attitude' in the present proceedings concerning the com-

5 — Case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, paragraph 11.

6 — Joined Cases 142/80 and 143/80 *Amministrazione delle Finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413. See also Joined Cases 15/76 and 16/76 *France* v *Commission*, where the Court held that the 'discontinuance [of infringement proceedings] does not constitute recognition that the contested conduct is lawful', [1979] ECR 321, paragraph 27.

7 — Ibid., paragraph 16.

patibility with Article 95 of the revised Portuguese taxation scheme cannot therefore affect the referring court's obligations under Article 177.

15. For the avoidance of doubt, I would add that I can see no foundation in the Treaty or in the relevant case-law for the view expressed by the Netherlands that the withdrawal of an infringement proceeding by the Commission constitutes a factor which can be taken into account in a lower court's appreciation of the 'necessity' for a ruling on a point of Community law. In accordance with the second paragraph of Article 177, the desirability or otherwise of a reference is a function of whether the Community law question is pertinent to the solution of the dispute before it, and the discontinuance by the Commission of infringement proceedings can have no bearing on this matter.

(b) The compatibility with Article 95 of the applicable Portuguese legislation

16. The object of the five questions proposed by the applicant in the main proceedings, which the referring court took over in its first question, and of the second question formulated by that court, is to seek guidance on the proper application of Article 95 in circumstances such as those of the main proceedings. It seems to me that it was for this reason that the Supremo Tribunal Administrativo asked whether the applicant's questions, some of which go well beyond the facts of the present case, were relevant, when the relevance of the questions referred is exclusively a matter for the referring court. I would therefore propose to the Court that it only answer those questions to the extent that an answer would be useful in the resolution of the national proceedings.

17. The questions posed by the Supremo Tribunal Administrativo raise two distinct but related issues. The first, which corresponds to the referring court's second question, is whether a Member State may adopt general criteria for the imposition of registration tax on imported used cars, as Portugal has, or whether they are obliged to proceed on the basis of an individual evaluation of each vehicle. If the former is permitted, the second issue is whether the scale applied in the present case is in conformity with the requirements of Article 95.

18. The first paragraph of Article 95 prohibits the imposition 'on the products of other Member States [of] any internal taxation of any kind in excess of that imposed ... on similar domestic products'. That '[imported] used cars and those bought locally constitute similar or competing products' to which Article 95 applies was clearly established in *Commission* v *Denmark*.[8] The Court has consistently held that this provision is infringed

8 — Case C-47/88, cited in footnote 2 above, paragraph 17.

'where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product'. [9] It follows that 'a system of taxation can be considered compatible with Article 95 of the Treaty only if it is proved to be so structured as to exclude any possibility of imported products being taxed more heavily than domestic products, so that it cannot in any event have discriminatory effect'. [10]

19. The correct test for verifying compliance with Article 95 in circumstances such as those in the main proceedings appears from *Commission* v *Greece*, where the Court expressly approved the comparison made by the Commission between 'the amount of the ... tax borne by imported used cars with the residual portion of the tax still incorporated in vehicles put into circulation in [the Member State of importation] when new before being resold in that country'. [11]

20. To date, the Court has not had to examine the method of calculating the residual tax incorporated in the value of used cars. However, in his Opinion in *Nunes Tadeu*, Advocate General Jacobs suggested that '[in] order to calculate the residual tax incorporated in the value of a domestic used car it is necessary to look at its market value, the assumption being that the amount of residual tax declines in direct proportion to the value of the car'. [12] Moreover, he continued, 'the importing State is not required to base the tax on the price paid for the car by the importer or on its value in the exporting State; it is entitled to take into account the value in the importing State. That follows from the requirement that the tax charged in the importing State must not exceed the residual amount of tax incorporated in the value of a domestic used car of the same characteristics. If the importing State were required to base the tax on the lower value in the exporting State, that would not merely preserve any competitive advantage arising from that lower value but would in addition give the importer a fiscal advantage which would be inconsistent with fiscal neutrality'. [13]

21. I would adopt that analysis. The residual tax incorporated in a domestic used car can be expressed as the product of two factors: the percentage of its retail price when new which represents car tax, and its value on the domestic market at the time of importation of a comparable imported vehicle. The applicant and Portugal disagree on the value of the car at issue when new; according to the applicant this was PTE 8 450 000, while Portugal contends

9 — Case C-213/96 *Outokumpu Oy* [1998] ECR I-1777, paragraph 34.

10 — Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 29.

11 — Ibid., paragraph 18.

12 — Case C-345/93, cited in footnote 3 above, paragraph 14.

13 — Ibid., paragraph 18.

that the correct value was PTE 10 478 000. They also disagree as to its 1996 value: according to Portugal, the car was worth PTE 4 600 000, while the applicant suggested it was worth PTE 3 330 000.

22. The duty of a Member State of importation to take account of the depreciation in the value of used cars in assessing car tax has also been established by the case-law. In *Commission* v *Denmark*, the defendant Member State was condemned for applying to imported used cars an assessment rate of 90%, thereby limiting depreciation to 10% 'whatever their age or condition'. [14] Similarly, in *Nunes Tadeu*, the Court found that the Portuguese legislation in force at the material time was 'calculated without taking the vehicle's actual depreciation into account'. [15] In neither of these judgments, nor in *Commission* v *Greece*, [16] however, did the Court rule that the national authorities were obliged to assess imported used cars individually, rather than in accordance with general criteria, as in none of these cases did the impugned national legislation seek to take account of depreciation in other than a token manner. Instead, the Court compared imported used cars as a category of products with domestically sold used cars as a category, and had no difficulty in the circumstances of each case in holding that the discrimination against the former was 'manifest'.

23. It does not follow from those judgments, in my opinion, that Article 95 requires that Member States proceed on the basis of an individual assessment of the value of imported used cars and hence the residual tax element which determines the maximum car tax which can be imposed on importation. It should be borne in mind that the tax, whether on importation or on first registration, of new cars is here calculated on the basis of the single element of cylinder capacity without taking account of other features such as levels of equipment and the reputations of different brands. Furthermore, it is notorious that certain brands depreciate more rapidly than others. In practice, there may be no exact identifiable comparator for the individual imported used car; as the applicant has argued, the make and model of the car, its state of conservation and working order and its mileage are all factors which affect the market value of a used car, as well as its age. Because of these differences, the market value of individual used cars sold on the domestic market, and hence the residual tax element in this value, are, strictly speaking, infinitely variable. Even if the importer could find an identical vehicle on the domestic market, there is no reliable means of ascertaining its precise value, which is in practice equal to the amount the buyer is willing to pay and the vendor to accept as consideration. While the point was not fully canvassed in these proceed-

14 — Case C-47/88, cited in footnote 2 above, paragraph 20.
15 — Case C-345/93, cited in footnote 3 above, paragraph 20.
16 — Case C-375/95, cited in footnote 10 above.

ings, the Netherlands' suggestion that even individual assessments would, in practice, be effected using some sort of table seems to me to be eminently plausible.

24. I am therefore of the opinion that, as a matter of principle, Member States may adopt general criteria for assessing the amount of car tax due on the importation of used vehicles, on condition that these are such as to guarantee that this amount does not exceed, even if only in certain cases, the residual tax in comparable vehicles on the domestic market. It is inherent in the recognition by the Court of the direct effect of the first paragraph of Article 95 [17] that an individual should be able to challenge the scale for the assessment for tax on his imported used car. I should add that the practical difficulties of determining precisely the value of an individual used car do not preclude Member State authorities' relying as a guideline on average values of used cars recognised as such in the domestic market, subject to the requirements of Article 95 referred to above. Indeed, as also noted above, both the applicant and Portugal in the present case were able to produce figures, albeit that they differed, for the average value on the Portuguese market in 1996 of a car similar to that of the applicant.

25. In so far as the Court should answer them, the object of the five questions formulated by the applicant in the main proceedings, and hence of the first question of the national court, is essentially to determine whether in the concrete case the scheme applied by the Portuguese authorities is in conformity with Article 95 of the Treaty. Portugal has explained that the tax reduction allowed for imported used cars is not directly related to actual depreciation; instead, the reduction is determined by a formula which takes account of a variety of factors, including inflation and a figure for depreciation. The depreciation element is in turn made up of a weighted average of factors which affect the market value of a notional used car, presumed to be in good working condition, and with a mileage corresponding to not more than 15 000 km per annum. While in the application of the table only the age of the car and its cylinder capacity are relevant, some account of depreciation is therefore taken in the establishment of the table.

26. Portugal claimed that the application of the tables in force at the material time resulted in a depreciation value close to real depreciation. Likewise, the Commission, at least in its written observations, took the view that the percentage figures for tax reduction seemed to correspond to the depreciation in the real value of used cars. Finland and the Netherlands submitted that a Member State can apply a scale providing for annual depreciation so that the value assigned to a used car declines with age by reference to reliable data on average market prices.

17 — Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205.

27. The applicant in the main proceedings contended that, 'according to the rules of experience', the account taken of depreciation in the Portuguese rules was 'manifestly insufficient'.

28. As interpreted in the case-law cited above, Article 95 clearly requires that the amount of tax payable on importation, however described, should not exceed the residual tax incorporated in the value of similar vehicles on the domestic market. It is common ground that the residual tax incorporated in a domestic used car at a given moment is a function of its value, which in turn depends very closely on depreciation. Under the Portuguese legislation at issue in the main proceedings, however, the tax payable is a function of the value of the car when new, reduced in accordance with a sliding scale which, as Portugal admits, does not fully reflect actual depreciation. In such circumstances, the Portuguese scheme does not guarantee that the amount of tax payable on an imported car does not exceed the residual tax on a corresponding domestic vehicle, and the scheme is therefore not such as 'to exclude any possibility of imported products being taxed more heavily than domestic products', as Article 95 requires. [18]

29. On the contrary, the figures provided by Portugal in answer to questions put by the Court appear to show that the application of the table did not exclude discrimination in the factual situation which gave rise to the main proceedings. In 1996 (at the time of importation of the applicant's car), the average value on the Portuguese market of a comparable 1991 vehicle was, according to these figures, PTE 4 600 000. As was pointed out at the oral hearing, this represents a depreciation of 56% in the value of the car, while the reduction in the car tax was only 41%. While it is not in itself determinative, the agent for Portugal stated unequivocally at the hearing that the car tax sought to ensure that the value of the imported car is similar to that of a car on the domestic market on which the tax has already been paid. However, as the Court held in *Nunes Tadeu*, '[a] national tax system which is liable to eliminate a competitive advantage held by imported products over domestic products would be manifestly incompatible with Article 95, which seeks to guarantee that internal charges have no effect on competition between domestic and imported products'. [19]

30. In view of the foregoing, I am of the opinion that, while a Member State is not obliged to assess the value of imported used cars individually, it may not apply a scheme which could result, if only in certain cases, in the imposition of a tax on importation which exceeds the residual tax incorporated in the value of similar used cars on the domestic market.

18 — Case C-375/95 *Commission* v *Greece*, cited in footnote 10 above, paragraph 29.

19 — Case C-345/93, cited in footnote 3 above, paragraph 18.

III — Conclusion

31. In the light of the foregoing, I would propose that the Court answer the questions referred by the Supremo Tribunal Administrativo as follows:

(1) A Commission decision not to continue with infringement proceedings does not affect the obligation which the third paragraph of Article 177 of the EC Treaty imposes on a court against whose decisions there is no judicial remedy under national law to refer to the Court a question of Community law which arises in proceedings before it;

(2) Member States may adopt general criteria for assessing the amount of car tax due on the importation of used vehicles, on condition that these are such as to guarantee that this amount does not exceed, even if only in certain cases, the residual tax in comparable vehicles on the domestic market.