JUDGMENT OF THE COURT
19 May 1992 *

In Case C-195/90,

Commission of the European Communities, represented by Rolf Wägenbaur, Legal Adviser, and Ricardo Gosalbo Bono, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, of the Legal Service, Wagner Centre, Kirchberg,

applicant,

supported by

Kingdom of Belgium, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Lucy Dupong, 14A Rue des Bains,

Kingdom of Denmark, represent ed by Jørgen Molde, Legal Adviser in the Ministry for Foreign Affairs, acting as Agent, with an address for service in Luxembourg at the Danish Embassy, 11B Boulevard Joseph II,

French Republic, represented by Jean-Pierre Puissochet, Director of Legal Matters in the Ministry for Foreign Affairs, and Géraud de Bergues, Deputy Principal Secretary in the Ministry for Foreign Affairs, acting as Agents, with an address for service in Luxembourg, at the French Embassy, 9 Boulevard Prince-Henri,

Grand Duchy of Luxembourg, represented by Fernand Kessler, Principal Government Adviser in the Ministry for Transport, acting as Agent, with an address for service in Luxembourg at the Ministry for Transport, 19-21 Boulevard Royal,

* Language of the case: German.

Kingdom of the Netherlands, represented by A. Bos, Legal Adviser in the Ministry for Foreign Affairs, and J. W. De Zwaan, Deputy Legal Adviser in the Ministry for Foreign Affairs, acting as Agents, with an address for service in Luxembourg at the Netherlands Embassy, 5 Rue M. Spoo,

interveners,

v

Federal Republic of Germany, represented by Ernst Röder, Ministerialrat in the Federal Ministry for the Economy, and Joachim Karl, Regierungsdirektor in the Federal Ministry for the German Economy, together with Joachim Sedemund, Rechtsanwalt, Cologne, acting as Agents, with an address for service in Luxembourg at the German Embassy, 20-22 Avenue Emile Reuter,

defendant,

APPLICATION for a declaration that, by adopting the Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahrzeugen (Law on charges for the use of federal roads and motorways by heavy goods vehicles) of 30 April 1990 (Bundesgesetzblatt I, p. 826), the Federal Republic of Germany has failed to fulfil its obligations under Articles 76, 95 and 5 of the EEC Treaty,

THE COURT,

composed of: O. Due, President, R. Joliet, F. A. Schockweiler, F. Grévisse and P. J. G. Kapteyn (Presidents of Chambers), G. F. Manicini, C. N. Kakouris, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Diez de Velasco and M. Zuleeg, Judges,

Advocate General: F. G. Jacobs,
Registrar: J.-G. Giraud,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 15 January 1992 at which the Federal Republic of Germany was represented by Joachim Sedemund and Wilhelm Knittel, Secretary of State in the Federal Ministry for Transport, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 13 March 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 23 June 1990 the Commission of the European Communities brought an action under Article 169 of the EEC Treaty for a declaration that, by adopting the Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahrzeugen (Law on charges for the use of federal roads and motorways by heavy goods vehicles) of 30 April 1990 (*Bundesgesetzblatt* I, p. 826, hereinafter 'the 1990 Law'), the Federal Republic of Germany had failed to fulfil its obligations under Articles 76, 95 and 5 of the Treaty.

2 Paragraph 1 of the 1990 Law introduced a tax on the use of roads ('Straßebenutzungsgebühr', hereinafter 'road tax') payable, with certain exceptions, on all heavy goods vehicles whose licensed fully loaded weight exceeds 18 tonnes, regardless of their place of registration, and which use federal roads and motorways outside built-up areas.

3 The road tax may be paid for a period which may be determined in days, weeks or months, but must not exceed a year. The annual amount of the tax varies, according to the total loaded weight of the vehicle, from DM 1 000 to DM 9 000. The amount payable for a month, week or day is equivalent respectively to 1/10th, 1/35th and 1/150th of the annual amount but may not be less than DM 10.

4 A certificate of payment of the tax is issued and must accompany the vehicle. The necessary inspections are carried out by, amongst others, the police and customs.

However, inspections at frontiers with Member States can be made only by random checks as part of other checks.

5 Paragraph 2 of the 1990 Law amends the Law on Motor Vehicle Tax ('Kraftffahrzeugsteuer', hereinafter 'vehicle tax') and introduces for the period from 1 July 1990 to 31 December 1993 a special rate of the tax which varies according to the total weight of the vehicle but may not exceed, when it is paid on an annual basis, DM 3 500 for heavy vehicles and DM 300 for trailers. As a result of that limitation the 1990 Law entails a reduction in the tax for heavy goods vehicles the total weight of which exceeds 16 tonnes and for trailers whose total weight exceeds 2.6 tonnes.

6 Paragraph 5 of the 1990 Law provided that the Law was to enter into force on 1 July 1990 and to cease to produce its effects at the end of 1993.

7 According to its statement of reasons (Drucksache 11/6336, Deutscher Bundestag — 11. Wahlperiode, p. 10), the 1990 Law had two objectives: first, the reduction in vehicle tax should enable the conditions of competition between road transport undertakings established in Germany and those established in other countries to be harmonized; secondly the introduction of the road tax is intended to ensure that the contribution by German heavy goods vehicles to the costs of the road infrastructure is maintained at the current level and that the contribution, regarded as inadequate, from foreign goods vehicles to the same costs is increased. The 1990 Law is to cease to have effect on 31 December 1993 on the basis that, at Community level, of a Council Directive relating to the charging of the costs of road infrastructure will, before that date, be adopted and transposed into national law.

8 It is apparent from the documents before the Court that on 21 March 1989 the draft law in question was sent for consultation to the Commission pursuant to the Council Decision of 21 March 1962 instituting a procedure for prior examination

and consultation in respect of certain laws, regulations and administrative provisions concerning transport proposed in Member States (OJ, English Special Edition, 1959-1962, p. 96), as amended by Council Decision 73/402/EEC of 22 November 1973 (OJ 1973 L 347, p. 48).

9 In the Opinion which it delivered on 15 June 1989 in accordance with the aforesaid decision the Commission concluded that the introduction of a road tax in Germany in conjunction with a corresponding reduction in the vehicle tax, which, by reason of the bilateral agreements intended to avoid double taxation on vehicles (hereinafter 'bilateral agreements') concluded between the Federal Republic of Germany and the other Member States, would benefit only German carriers, would not be compatible with Articles 76 and 95 of the EEC Treaty, and the Federal Republic of Germany would thereby be failing to fulfil its obligation of cooperation with and loyalty to the Community, as laid down in Article 5 of the Treaty in so far as it would seriously hamper the Commission's proposals designed to attain the objectives of the Treaty in relation to the common transport policy.

10 Upon learning in March 1990 that the bill had been adopted by the Bundestag, the Commission initiated the procedure provided for under Article 169 of the Treaty against the Federal Republic of Germany and brought the present action before the Court.

11 By order of the Court of 4 July 1990 the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands were granted leave to intervene in support of the form of order sought by the Commission.

12 By order of 12 July 1990 the Court upheld the Commission's application for interim measures under Article 186 of the Treaty and ordered the Federal Republic of Germany to suspend 'the charging of the road tax provided for in the Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahr-

zeugen of 30 April 1990 in respect of vehicles registered in other Member States pending delivery of the judgment in the main proceedings'.

13 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Article 76 of the Treaty

14 The Commission, supported by the Belgian, French and Netherlands Governments, considers that the effect of the introduction of the road tax payable by all road users without distinction of nationality and the simultaneous reduction in the vehicle tax which, by reason of the bilateral agreements concluded between the Federal Republic of Germany and the other Member States, is in fact payable only by transport undertakings established in Germany is to create discrimination, contrary to Article 76 of the Treaty, between national carriers and those of other Member States, since for the latter the road tax is not compensated for by a reduction in the vehicle tax.

15 The Commission also considers that the Federal Republic of Germany has infringed the 'standstill' clause in Article 76 of the Treaty under which 'until the provisions referred to in Article 75(1) have been laid down, no Member State may, without the unanimous approval of the Council', adopt a measure such as the 1990 Law.

16 The German Government contends that Article 76 does not prohibit the adoption of any national measure the effect of which is to grant a benefit to national carriers or impose a disadvantage on the carriers of other Member States but only the

adoption of 'provisions', the effect of which is to render the situation of the carriers of other Member States under the national provisions applicable on the entry into force of the Treaty less favourable than that of national carriers.

17 In the view of the German Government the deterioration in the situation of carriers from other Member States is caused not by the 1990 Law but by the bilateral agreements concluded between the Federal Republic of Germany and all the other Member States. In that respect, the German Government argues that those agreements do not constitute 'provisions' within the meaning of Article 76 of the Treaty and that, since some of them were subsequent to the entry into force of the Treaty, the situation of carriers of the Member States concerned has not deteriorated in relation to the situation on that date, but has, on the contrary, improved. Furthermore, as regards the agreements concluded prior to the entry into force of the Treaty, the 1990 Law amounts, from the point of view of its economic effects, merely to a partial revocation, a measure which, like the conclusion of the agreements, is not prohibited by Article 76.

18 For the purpose of assessing the merits of the Commission's complaint, it is necessary to bear in mind that under Article 74 the objectives of the Treaty in matters of transport are to be pursued by the Member States 'within the framework of a common transport policy'. In order to achieve that common policy the Council has to adopt a number of measures provided for in Article 75(1).

19 Article 76 provides that 'until the provisions referred to in Article 75(1) have been laid down, no Member State may, without the unanimous approval of the Council, make the various provisions governing the subject when this Treaty enters into force less favourable in their direct or indirect effect on carriers of other Member States as compared with carriers who are nationals of that State.'

20 That provision is intended to prevent the introduction by the Council of a common transport policy from being rendered more difficult, or from being obstructed, by the adoption, without the Council's agreement, of national measures the direct or indirect effect of which is to alter unfavourably the situation in a Member State of carriers from other Member States in relation to national carriers.

21 In contrast, Article 76 does not preclude a Member State from adopting measures which have the same unfavourable effects for national carriers as for carriers of other Member States.

22 In the present case it is common ground that when the 1990 Law was adopted no rules on taxation for the use of roads by heavy goods vehicles had been established by the Council under Article 75(1).

23 Furthermore, it must be observed that by substantially compensating for the new charge constituted by the road tax payable by all carriers by a reduction in the vehicle tax, which benefits only national carriers, the effect of the 1990 Law is to alter unfavourably the situation of carriers from other Member States in relation to that of national carriers.

24 As regards the German Government's arguments based on the bilateral agreements which the Federal Republic of Germany had concluded with the other Member States, it is to be observed that the direct cause of the deterioration in the situation of carriers of other Member States in relation to that of national carriers is not to be found in those agreements but in the 1990 Law, without which the existing situation would not have been altered.

25 It should be noted, furthermore, that the wording of Article 76 does not preclude bilateral agreements concluded by a Member State from falling under 'various provisions governing the subject when this Treaty enters into force'. On the contrary, in so far as such agreements contribute to determining the situation existing at that date, they must be taken into account in determining whether that situation has been altered.

26 Finally, the objective of facilitating the introduction by the Council of the common transport policy, pursued by Article 76, would be in danger of being compromised if Article 76 were to enable a Member State to withdraw from carriers of other Member States the benefit of certain measures which may have been adopted in order to make their situation in relation to that of national carriers more favourable. There is therefore no ground for distinguishing between bilateral agreements according to whether they were adopted prior or subsequent to the entry into force of the Treaty.

27 It should also be noted that Council Decision 65/271/EEC of 13 May 1965 on the harmonization of certain provisions affecting competition in transport by rail, road and inland waterway (OJ, English Special Edition 1965-1966, p. 67), which was adopted on the basis, in particular, of Article 75 of the Treaty and which is intended, according to the first recital in its preamble, 'to eliminate disparities liable to cause substantial distortion in competition in the transport sector' expressly provides in Article 1(a) that 'with effect from 1 January 1967, double taxation of motor vehicles when such vehicles are being used for carriage in a Member State other than that in which they are registered shall be abolished.'

28 The German Government also contends that the 1990 Law is justified by the fact that its objective is not only the harmonization of the conditions of competition between German carriers and those of other Member States but also, and to the same extent, protection of the environment, in that it is intended to encourage the

a switch from carriage by road to carriage by rail and inland waterway, which is less harmful to the environment.

29 As the Court has held, protection of the environment constitutes one of the Community's essential objectives, the importance of which has moreover been confirmed by the Single European Act (see judgment in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607).

30 It is clear from paragraph 21 of this judgment that Article 76 does not prohibit national measures which, by increasing the contribution of heavy goods vehicles to the cost of road infrastructure, aim to attain such an objective, but only measures such as the 1990 Law, the effect of which is to alter unfavourably the situation of carriers from the other Member States in relation to national carriers.

31 According to its statement of reasons, the 1990 Law is intended both to maintain the current level of the contribution of German heavy goods vehicles to the costs of road infrastructure and to increase the contribution, considered insufficient, from foreign heavy goods vehicles to those costs. In those circumstances, it is not established that the said Law is likely to lead to a switch from carriage by road to carriage by rail and inland waterway rather than to an increase in the share of the market of German carriers to the detriment of carriers from other Member States.

32 Finally, the German Government argued at the hearing that the 1990 Law was justified from the point of view of the rules of the Treaty relating to transport in that it is limited in time, pending action by the Community legislature to implement a common policy in that sector.

33 That argument cannot be accepted. The fact that a common transport policy has not yet been achieved does not empower the Member States to adopt national legislation, even limited in time, which is incompatible with the requirements of Article 76 of the Treaty. Unilateral alteration of the existing situation to the detriment of carriers from other Member States must, on the contrary, be regarded as creating obstacles to implementation of the common transport policy provided for by the Treaty, which must take into consideration the economic, social and ecological problems and ensure the quality and the conditions of competition (see judgment in Case C-17/90 *Pinaud Wieger* v *Bundesanstalt für den Güterfernverkehr* [1991] ECR I-5253, paragraph 11).

34 It follows from the foregoing considerations that the complaint based on infringement of Article 76 of the Treaty is well founded.

Article 95 of the Treaty

35 As regards the complaint based on infringement of Article 95 of the Treaty, it need only be observed that the discriminatory effects which the 1990 Law may have on imported products would in any event only be the direct consequence of the fact that in breach of Article 76 of the Treaty it affects carriers from other Member States more severely than national carriers. There is therefore no need to consider whether it is also contrary to Article 95 of the Treaty.

Article 5 of the Treaty

36 As regards the complaint based on infringement of Article 5 of the Treaty, it should first be observed that in so far as Article 76 of the Treaty seeks to prevent unilateral action by the Member States from making it more difficult for the Council to introduce the common transport policy, which constitutes one of the objectives of the Treaty listed in Article 3, it constitutes the concrete expression in the

sphere of transport of the general obligation, imposed on Member States by Article 5 of the Treaty, to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty.

37 Secondly, the various Community actions which the Commission charges the Federal Republic of Germany with having obstructed by adopting the 1990 Law all relate to the sphere of transport.

38 Accordingly, since it is established that, by adopting the 1990 Law, the Federal Republic of Germany has failed to fulfil its obligations under Article 76 of the Treaty, there is no need to find a specific failure by that Member State to comply with Article 5 of the Treaty.

39 It follows that, in adopting the Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahrzeugen of 30 April 1990, the Federal Republic of Germany has failed to fulfil its obligations under Article 76 of the Treaty.

Costs

40 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany in all essential respects has been unsuccessful, it must be ordered to pay the costs, including those relating to the proceedings for interim relief. The interveners, the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, must bear their own costs pursuant to Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT

hereby:

1. **Declares that, by adopting the Gesetz über Gebühren für die Benutzung von Bundesfernstraßen mit schweren Lastfahrzeugen (Law on charges for the use of Federal roads and motorways by heavy goods vehicles) of 30 April 1990, the Federal Republic of Germany has failed to fulfil its obligations under Article 76 of the EEC Treaty;**

2. **Orders the Federal Republic of Germany to pay the costs, including those relating to the proceedings for interim relief;**

3. **Orders the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, interveners, to bear their own costs.**

Due Joliet Schockweiler Grévisse

Kapteyn Mancini Kakouris Moitinho de Almeida

Rodríguez Iglesias Diez de Velasco Zuleeg

Delivered in open court in Luxembourg on 19 May 1992.

J.-G. Giraud
Registrar

O. Due
President