Council to implement a common policy in that sector, and is intended to contribute to the protection of the environment, one of the essential objectives of the Community, conflicts with Article 76 of the Treaty by encouraging, by the increase in the contribution from heavy goods vehicles to the costs of road infrastructure, a switch from carriage by road to other modes of transport. In order to avoid increasing the difficulties to be overcome in establishing a common transport policy, 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 the 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, and must, having regard to its objective, be construed as also prohibiting a Member State from withdrawing from carriers from other Member States the benefits of certain measures that may have been adopted with a view to rendering their situation more favourable in relation to that of national carriers.

2. Since Article 76 of the Treaty constitutes, in the sphere of transport, the concrete expression of the general obligation, imposed on Member States by Article 5 of the Treaty, to abstain from any measures which could jeopardize the attainment of the objectives of the Treaty, the effect of a declaration that a Member State has failed to fulfil its obligations under Article 76 is that there is no need for the Court to find a specific failure by that Member State of Article 5.

REPORT FOR THE HEARING
in Case C-195/90 *

I — Facts and Procedure

A — *The national legislation in question*

On 30 April 1990 the Federal Republic of Germany adopted the Gesetz über Gebühren für die Benutzung von Bundesfernstraen mit schweren Lastfahrzeugen (BGBl I, p. 826, hereinafter 'the 1990 Law').

(a) The statement of the reasons for the bill presented to the Bundestag (Deutscher Bundestag — 11. Wahlperiode, Drucksache 11/6336, p. 10) indicated that the Law had two objectives: first, a reduction in

* Language of the case: German.

the motor vehicle tax (Kraftfahrzeugsteuer), the harmonization of the conditions of competition between road transport undertakings in the Federal Republic of Germany and those of other countries and, secondly, by the introduction of the road tax (Straenbenutzungsgebühr), the maintenance at the present level of the contribution by German heavy goods vehicles to the costs of the road infrastructure and an increase in the contribution, considered inadequate, from foreign goods vehicles to the same costs.

(b) Paragraph 1 of the 1990 Law, which is divided into 17 subparagraphs and headed 'Law on charges for the use of federal roads and motorways by heavy goods vehicles' provides in subparagraphs 1 and 2 that the tax is payable, with certain exceptions, on all heavy goods vehicles whose permissible total weight exceeds 18 tonnes, regardless of their place of registration, which use Federal roads and motorways outside built-up areas. Crossing such roads by the shortest route is not regarded as use.

The tax may be paid for a period which may be determined in days, weeks or months, but may not exceed a year (subparagraph 5). It is generally paid in respect of a specific vehicle (vehicle-related tax), but the person who possesses heavy goods vehicles for which there are road certificates may also pay the charge for a period of three months or more in respect of an unspecified vehicle (person-related tax) (subparagraph 6).

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 1/10, 1/35 and 1/150, of the annual amount but may not be less than DM 10 (subparagraph 7).

A certificate of payment of the tax is issued and must accompany the vehicle (subparagraph 8). The necessary inspections are carried out, *inter alia*, by the police and customs, albeit inspections at frontiers with Member States may be made only by random checks as part of other checks (subparagraph 11).

(c) Paragraph 2 headed 'Amendment of the law on road tax' provides for the period from 1 July 1990 to 31 December 1993 a special rate of motor vehicle tax payable which varies according to the total weight of the vehicle but not exceeding where the tax is paid on an annual basis, DM 3 500 for heavy goods vehicles and DM 300 for trailers. The 1990 Law thus entails a reduction in motor vehicle tax for heavy goods vehicles whose total weight exceeds 16 tonnes and for trailers whose weight exceeds 2.6 tonnes.

(d) Under Paragraph 5 the 1990 Law was to enter into force on 1 July 1990 and to cease to produce its effects at the end of 1993.

B — *The pre-litigation procedure*

(a) By letter dated 21 March 1989 the German Minister for Transport sent a draft of the law to the Commission for consultation pursuant to 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).

In the Opinion which it delivered on 15 June 1989 in accordance with the said Decision the Commission concluded that the introduction of a tax for the use of roads in the Federal Republic of Germany in conjunction with a corresponding reduction in the motor vehicle tax 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 obligations in the matter of Community cooperation and as provided for by 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 in the road transport sector.

(b) Upon learning in March 1990 that the bill had been adopted by the Bundestag, the Commission on 11 April 1990 sent the German Government formal notice under Article 169 of the Treaty requesting it to submit, within a period of three weeks, its observations on the alleged infringements of the aforementioned provisions of the Treaty. Since, in its reply of 30 April 1990, the German Government denied the alleged infringements, the Commission, on 1 June 1990, issued the reasoned opinion provided for in Article 169 of the Treaty and requested the Federal Republic of Germany to take the requisite measures to comply with that opinion no later than noon on 22 June.

In its reply of 22 June 1990 the German Government maintained its position and declared that the Federal Republic of Germany could not waive the 1990 Law. Since it considered that the German Government's reply contained nothing new, the Commission brought the present action.

C — *Procedure before the Court*

(a) The Commission's application was registered at the Court Registry on 23 June 1990.

(b) By a separate document lodged at the Court Registry on the same day the Commission sought interim relief under Article 186 of the EEC Treaty in the form of an order that the Federal Republic of Germany take the necessary measures to suspend the operation of the 1990 Law until the Court had given a decision on the main.

By order of 28 June 1990 the President of the Court, pursuant to Article 84(2) of the Rules of Procedure, made the following order upon the Commission's application for interim measures, even before the defendant's observations had been submitted.

'1. As a protective measure, the Federal Republic of Germany shall suspend the charging of the road tax provided for in the Gesetz über Gebühren für die Benutzung von Bundesfernstraen mit schweren Lastfahrzeugen of 30 April 1990 in respect of vehicles registered in other Member States

pending delivery of the final order in these proceedings for interim measures.

2. Costs are reserved.'

By decision of 27 June 1990, taking effect on 29 June 1990, the President of the Court, pursuant to the first paragraph of Article 85 of the Rules of Procedure, referred the decision terminating the interim relief proceedings to the Court.

By order of 12 July 1990 the Court granted the Commission's application for interim measures and made the following order:

'1. The Federal Republic of Germany shall suspend the charging of the road tax provided for in the Gesetz über Gebühren für die Benutzung von Bundesfernstraen mit schweren Lastfahrzeugen of 30 April 1990 in respect of vehicles registered in other Member States pending delivery of the judgment in the main proceedings.

2. Costs are reserved.'

(c) 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 given leave to intervene in support of the Commission.

(d) Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open oral procedure without any preparatory enquiry.

II — Forms of order sought by the parties

The *Commission*, the applicant, claims that the Court should:

(i) declare that, by failing to adopt the measures necessary to make the Gesetz über Gebühren für die Benutzung von Bundesfernstraen mit schweren Lastfahrzeugen of 30 April 1990 compatible with Article 76, 95 and 5 of the EEC Treaty, the Federal Republic of Germany has failed to fulfil its obligations under the said provisions of the EEC Treaty;

(ii) order the Federal Republic to pay the costs.

The *Federal Republic of Germany*, the defendant, contends that the Court should:

(i) dismiss the application;

(ii) order the Commission to pay the costs.

The *Kingdom of Belgium*, intervener, claims that the Court should:

(i) take account of the reasons put forward in support of the applicant's claims;

(ii) order the defendant to pay the costs of the intervention.

The *Kingdom of Denmark*, intervener, has not submitted written observations to the Court.

The *French Republic*, intervener, claims that the Court should.

(i) declare, as claimed by the Commission, that, by failing to adopt the measures necessary to make the Gesetz über Gebühren für die Benutzung von Bundesfernstraen mit schweren Lastfahrzeugen of 30 April 1990 compatible with Article 76, 95 and 5 of the EEC Treaty, the Federal Republic of Germany has failed to fulfil its obligations under the said provisions of the EEC Treaty;

(ii) order the Federal Republic to pay the costs.

The *Grand Duchy of Luxembourg*, intervener, supports the Commission's claims.

The *Kingdom of the Netherlands*, intervener, claims that the Court should:

(i) grant the declaration sought by the Commission that the Federal Republic of Germany had failed to fulfil its obligations under the Treaty by adopting the law of Law of 30 April 1990 on tax for the use of roads;

(ii) order the Federal Republic of Germany to pay the costs.

III — Pleas in law and arguments of the parties

A — *Article 76 of the Treaty*

1. (a) The *Commission* considers that the effect of the introduction of a tax on the use of roads payable by all users without distinction of nationality and the simultaneous reduction in the tax on vehicles which in fact is payable only by transport undertakings established in the Federal Republic of Germany is to create discrimination between national carriers and those of other Member States. On the one hand the economic burden on German carriers is not affected by the introduction of a new tax for the use of roads since by reason of the reduction of the tax on vehicles they will continue to pay a total amount equivalent to that which they would have previously paid under the vehicle tax alone. On the other hand carriers from other Member States would have to pay the new road tax without the benefit of a reduction in the vehicle tax from which they would in any event be exempt under bilateral agreements made between the Federal Republic of Germany and the State where they are established. The consequence of the 1990 Law, which must be appraised as a whole, is to

'make the various provisions governing the matter 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 national of that State',

contrary to Article 76 of the Treaty. No argument to the contrary is to be derived

from the fact that that situation is due to taxation agreements between the Federal Republic of Germany and other Member States, since German carriers do not pay a vehicle tax when they drive in other Member States and the carriers from other Member States do not have any reduction in the vehicle tax they have to pay in their country of origin.

The Commission adds that the 1990 Law gives rise to discrimination even if the vehicle tax and the road tax were to be considered separately. First, the reduction in vehicle tax on German heavy goods vehicles is expressly designed to improve the competitive conditions of German carriers vis-à-vis carriers from other countries and benefits carriers from non-member countries but not carriers from other Member States. Secondly, the detailed conditions governing payment of the road tax are such that in practice the tax is not neutral. German carriers have every interest in opting for the more favourable annual rate whereas carriers from other Member States who always return to their place of origin even if they regularly go to Germany normally opt for the daily, weekly or monthly rates, which are far less advantageous, unless they are induced to opt for the annual rate precisely because a daily, weekly or monthly rate is so unfavourable. Furthermore, whereas foreign carriers, who in order to enter German territory have to take the motorways or Federal roads, in practice always have to pay the tax, German carriers escape it by not using those roads or crossing them by the shortest route.

(b) The Commission also considers that the adoption of the 1990 Law infringes 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 that at issue in the present case. That 'standstill' obligation will be in force until freedom to provide services in the field of transport is fully established and a common policy is adopted and is intended to prevent the adoption of that common policy from being impeded by diverging developments in the transport policies of the Member States. At present there is no common policy in relation to the harmonization of taxes on vehicles and the measure adopted unilaterally by the Federal Republic of Germany risks jeopardizing the proposal for a Council Directive on the charging of transport infrastructure costs to heavy goods vehicles submitted by the Commission on 15 January 1988 (OJ 1988 C 79 p. 8).

(c) In its reply the Commission states that it was only in its defence that the German Government for the first time alleged that the 1990 Law was intended to promote the protection of the environment and the harmonization of the conditions of competition, according equal importance to

each of those directives. Protection of the environment is moreover referred to in the statement of grounds for the Law only in a quite incidental manner, so that the Court had good reason to declare in paragraph 29 of its order of 12 July 1990 in Case C-195/90 *Commission* v *Germany* [1990] ECR I-3351 that

'the Gesetz über Gebühren is mainly intended to harmonize the conditions of competition for German carriers while the relief of road congestion and the protection of the environment are merely subsidiary aims'.

The Commission notes that the Court also held in that order that

'A Member State' may not 'by invoking that objective', that is, environmental protection, 'evade its obligations under Article 76 of the EEC Treaty' (paragraph 29).

In reference to paragraph 45 of the same order the Commission observes that the German Government has still

'failed to substantiate its contention that imposition of the contested tax on carriers of other Member States would lead to a transfer of road traffic to the railways and inland waterways rather than the transfer of the market share of carriers of other Member States to German carriers'.

The Commission also contests the German Government's argument that Article 76, which constitutes a special provision in relation to the general rules of Articles 101 and 102 of the Treaty, should be interpreted strictly. The Commission considers that, as a provision giving concrete form to the general obligation under Article 5 of the Treaty on Member States to abstain from any measure which could jeopardize the attainment of the objectives of the Treaty, Article 76 should on the contrary be given a broad interpretation.

The Commission rejects the German Government's argument that 'measures' relating to a convention between States, such as a conclusion of an agreement to exempt vehicle tax, do not fall within the 'various provisions governing the subject when this Treaty enters into force' within the meaning of Article 76. In the Commission's view the term 'provisions' must be understood in a broad sense so that to determine whether the 'standstill' clause in Article 76 has been observed it is also necessary to take account of the legal position resulting from such agreements, all the more so since their conclusion is required by Article 1(a) of 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).

As regards the German Government's argument that the 1990 law is intended to introduce greater equality of opportunity between German transport undertakings and those of other Member States, the Commission observes that although such an objective is perfectly legitimate in itself it must nevertheless be achieved within the scope of the rules in force, which include Article 76.

2. (a) The *German Government* states that the objectives pursued by the 1990 Law, simultaneous and of equal importance, are to harmonize the conditions of competition and

to ensure protection of the environment and prevent a fresh increase in road traffic.

As regards the first objective, the German Government points out that in reducing the vehicle tax the 1990 Law merely lowered the German tax to the level corresponding to the European average. In nine Member States the vehicle tax is still appreciably lower than the reduced German rate. Furthermore, charges for the use of the road network have for a long time been levied in France, Italy, Spain, Portugal and Greece in the form of toll charges. During recent years such charges have continually been introduced for new sections of motorways and increased on existing sections. Fuel taxes vary considerably among the Member States without it being possible to know when and to what extent harmonization of such taxes can take place. The distortion in competition resulting from the different levels of all the taxes connected with transport in the Member State is felt all the more acutely in that the transport sector has recently experienced a certain liberalization as a result of Council Regulation (EEC) No 1841/88 of 21 June 1988 amending Regulation (EEC) No 3164/76 on the Community quota for the carriage of goods by road between Member States (OJ 1988 L 163, p. 1) and Council Regulation (EEC) No 4059/89 of 21 December 1989 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1989 L 390, p. 3). In spite of that, all the Commission's attempts to harmonize the conditions of competition at the Community level have failed and even if the aforementioned proposal for a Directive on the charging of transport infrastructure costs to heavy goods vehicles were to be adopted by the Council it would represent only a preliminary stage on the way to harmonization.

As regards the protection of the environment, the German Government states that it had already mentioned that objective in its letter of 21 March 1989 forwarding the draft law to the Commission and in the context of the pre-litigation procedure. Improvement in the protection of the environment is a necessary and desirable consequence of measures intended to avoid additional overburdening of the road network, such as the imposition of a tax for the use of roads. The charging of road infrastructure costs by the introduction of a tax related to the intensity of use and the degree of harm to the environment is an economic encouragement to use modes of transport less harmful to the environment such as rail and waterway and is the only adequate means to stem a fresh increase in road transport. Since the growth in transfrontier goods traffic has not benefited the railways but almost exclusively road transport, and mainly heavy goods vehicles from other Member States which were not taxed in the Federal Republic of Germany, it is apparent that the objective of protecting the environment would be impossible to achieve without also requiring carriers from other Member States to make a proper contribution to the road infrastructure costs.

(b) According to the German Government, in contrast to the general rules of the

Treaty, such as Articles 101 and 102, which are intended to prevent a Member State from distorting competition in the Common Market, Article 76, as a special provision, should be interpreted strictly. Under Article 76 a Member State is prevented only from adopting certain kinds of 'provisions' but remains free to adopt other measures, for example the conclusion or revocation of agreements granting exemption from tax on vehicles, even if such measures were to lead to an advantage for national carriers or a disadvantage to carriers from other Member States. Furthermore it is a mistake to consider any improvement of the competitive position of national carriers as automatically less favourable in their indirect effect on carriers of other Member States for the purposes of Article 76. There is a prohibition under Article 76 only within very precise limits arising on the one hand from the national provisions in force on 1 January 1958 when the EEC Treaty entered into force and on the other from the new national provision. In considering whether a provision of a Member State complies with Article 76 no account may be taken of advantages and charges which other Member States grant or impose on their own transport undertakings or on the transport undertakings of the other Member State. In consequence, Article 76 prohibits the less favourable treatment of the transport undertakings of other Member States only in relation to the German costs of the road infrastructure and in so far as they arise from provisions and not from agreements, such as, for example, agreements granting exemption from the vehicle tax.

Moreover, the object of the 1990 Law is to ensure improved equality of opportunity between German transport undertakings and those of other Member States in relation to transport by heavy goods vehicles. It is clear from the judgment in Case 91/78 *Hansen* v *Hauptzollamt Flensburg* [1979] ECR 935 that measures adopted by a Member State which, after the entry into force of the standstill requirement under Article 37(2) of the Treaty, improve the competitive position of national undertakings do not constitute an infringement if their object is to improve the equality of opportunity of national undertakings in relation to those from other Member States.

The German Government also contends that for Article 76 to apply there must be a causal link between the provision adopted and the unfavourable effects on carriers of other Member States. There are no such effects either from the reduction in the vehicle tax or the charging of a road tax or for a combination of the two measures. The sole reason for a deterioration in the competitive position of foreign transport undertakings are the agreements against double taxation concluded between the Federal Republic of Germany and all the other Member States. They alone prevent the reduction in the vehicle tax from applying to transport undertakings of other Member State in the same way as to German undertakings. According to the German Government, apart from those concluded with Denmark, the Netherlands and Luxembourg, the agreements against double taxation concluded between the Federal Republic of Germany and the other Member States are subsequent to 1 January 1958 so that the competitive position of carriers from those Member States in relation to that which obtained prior to the entry into force of the Treaty has not deteriorated but, on the contrary, improved. As regards Denmark,

the Netherlands and Luxembourg, the introduction of the road tax is equivalent in its economic effects to a partial revocation of the agreements against double taxation which is not covered by the prohibition in Article 76 of the Treaty. Nor, the German Government adds, does Decision 65/271 of the Council imply a prohibition on the revocation of agreements against double taxation. The Decision does not require the Member States to conclude such bilateral agreements, but, by a legal act of the Community (Article 14), provides for the elimination of double taxation. No such act, however, has ever been adopted by the Council as regards heavy goods vehicles.

(c) The German Government opposes any assimilation between the introduction of the road tax and the reduction in the vehicle tax. First, as regards German transport undertakings, the effect of the road tax is not the same as the former vehicle tax and many German carriers will see a considerable increase in taxation. Secondly, the road tax differs fundamentally from the vehicle tax as regards its structure, organization and objective.

Furthermore it considers that neither the introduction of the road tax or the reduction in the vehicle tax are in themselves measures contrary to Article 76.

As regards the road tax, it states first of all that its reduced rate for longer periods is justified on the ground that taxes covering a longer period automatically include payments for holidays and other days during which the vehicle is not used and the collection of taxes for short periods causes greater administrative costs. A system based on road kilometrage would require the setting-up of a large number of check points or toll gates and would risk paralysing the German motorway network and have adverse effects on the environment.

As regards the vehicle tax, the German Government states that the fact that the reduction under the 1990 Law does not benefit carriers from other Member State although it does benefit carriers from certain non-member States is not due to the Law itself but solely to tax exemption agreements which the Federal Republic of Germany has concluded with other Member States and not with the aforesaid non-member States. In its rejoinder the German Government adds that the reduction in the German vehicle tax does not make the tax less advantageous for carriers from other Member States. All that happens is that the more favourable treatment which they enjoy by reason of exemption from the tax is simply reduced, although in principle maintained. Furthermore, the Commission's argument that a reduction in the vehicle tax benefits undertakings from non-member countries and not those of Member States is valid in respect of every Member State so that it would mean, in short, regarding any reduction in the tax on

vehicles in a Member State as contrary to Article 76.

In its rejoinder the German Government also states that the Commission has not convincingly shown why unlawful conduct must inevitably arise from the combination of two measures which are lawful in themselves. Even where the reduction in the vehicle tax is combined with the introduction of the road tax the deterioration of the competitive position of undertakings from other Member States is solely due to the reduction in the vehicle tax. In consequence, if the reduction in the vehicle tax is in principle compatible with Article 76, the question whether or not it coincides with the introduction of road taxes is irrelevant from the point of view of Article 76, is all the more so since any reduction in the vehicle tax necessarily involves an improvement in the competitive position of national undertakings and the introduction of a road tax at an appreciably lower rate has not made the competitive position of undertakings from other Member States 'less advantageous'.

3. (a) In its statement in intervention the *Belgian Government* states the introduction of the road tax and the reduction in the vehicle tax cannot be considered separately from the point of view of their objective. In its view, although the objective of protecting the environment may be pursued by the introduction of a road tax, that is not so as regards the intended increase in competitiveness of German carriers: without compensation for the road tax by the reduction in the valid tax on vehicles for their benefit their situation would remain unchanged from what it was before the introduction of the road tax. It is not possible, in order to justify the reduction in the German vehicle tax, to liken it to the case of a unilateral revocation of the conventions on double taxation, for since it would involve the payment in one way or another of several taxes on vehicles, such revocation would undermine the 1990 Law's objective of harmonizing conditions of competition. Apart from the fact that the objective of protecting the environment is ancillary to that of harmonizing conditions of competition, it is not served by a reduction on the vehicle tax which, on the introduction of the road tax, will have an indirectly anti-Community impact, since such a reduction is likely to encourage the use of roads.

The Belgian Government then refers to a study by the Institut du Transport Routier Belge (Belgian Road Transport Institution) which shows that an inescapable consequence of the introduction of the 1990 Law will be to deflect transport orders from Belgian carriers to German carriers and a partitioning of the German market in road transport services.

Finally the Belgian Government invokes a general principle, closely related to the notion of 'common market', to the effect that Member States may not give their national industries an advantage by creating a direct disadvantage for the industries of other Member States. That principle should dictate the interpretation of the concept of non-discrimination contained both in Article 76 and Article 95 of the Treaty. A Member

State may not unilaterally equate the conditions of competition between its own industry and those of other Member States, that is to say, outside the procedure laid down in Articles 101 and 170 of the Treaty. The German Government's argument based on the judgment of 13 March 1979 in the *Hansen* Case must be rejected, for any improvement of equality of opportunity must be made with due respect for the Treaty and the object of the standstill obligation in Article 37(2) of the Treaty which was at issue in that judgment is to ensure greater equality of opportunity for products imported from other Member States and not for domestic products.

(b) As regards the objectives of the 1990 Law the *French Government* denies that a reduction, by one half, of the German vehicle tax which is intended to improve the conditions of competition of German road carriers, is likely to encourage the transfer of some of the goods transported by road to rail, which is regarded as less harmful to the environment.

Article 76 of the Treaty constitutes a standstill clause which, like the other standstill clauses of Articles 12, 31, 32, 37(2) and 53 of the Treaty, seeks to prevent the objective pursued from being prejudiced or impeded by previous changes in national laws. The need to observe the standstill clause in Article 76 is all the greater since Article 75, which provides for the establishment of common rules applicable in the transport sector, does not have direct effect even after the expiry of the transitional period (judgment in Case 4/88 *Lambregts Transportbedrijf* v *Belgian State* [1989] ECR 2583). Furthermore, according to the case-law of the Court the absence of common rules or harmonizing directives cannot justify derogations from Article 30 (judgment in Case 193/80 *Commission* v *Italy* [1981] ECR 3019) and Article 95 (judgment in Case 171/78 *Commission* v *Denmark* [1980] ECR 447 and Case 20/76 *Schöttle* v *Finanzamt Freudenstadt* [1977] ECR 247). The same rule must apply with respect to Article 76 of the Treaty for the application of which may also not be impeded as a result of a difference between legislative provisions, as contemplated in Article 100 et seq. of the Treaty.

The French Government goes on to argue that double taxation agreements, even those concluded subsequent to the entry into force of the Treaty, must be regarded as covered by the standstill clause of Article 76. In interpreting Article 76 account must be taken not only of its terms but also of its context and objectives. Since its *raison d'être* is to prevent the establishment of a common transport policy from being impeded by previous alterations in national laws, its effectiveness would be jeopardized if it were to be interpreted as authorizing a Member State to resile from advantages conceded since the entry into force of the Treaty. The French Government adds that in any event the termination by the Federal Republic of Germany of double taxation agreements required an amendment of Decision 65/271, Article 1(a) of which provides:

'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'.

While in favour of considering the two taxes together from the point of view of Community law, the French Government shares the Commission's opinion that even considered separately each of the two taxes is contrary to Article 76 of the Treaty. A reduction in the vehicle tax benefits only German carriers, since as a result of the conclusion of bilateral agreements for mutual exemption only the German carriers are subject to the German vehicle tax. As for the road tax, because it is not based on kilometrage but is payable on a flat-rate basis for a particular period, irrespective of the actual use of the roads, it in fact penalizes carriers from other Member States and in particular carriers from frontier areas of other Member States close to the Federal Republic of Germany who often make only short trips across German territory and must nevertheless pay the same tax as a vehicle which travels several hundred kilometres a day.

(c) According to the *Netherlands Government* Article 76 of the Treaty seeks to prevent unilateral measures of Member States from having an adverse effect upon the existing conditions of competition. The nature of the national measure and the causes which give rise to it are not particularly relevant. All that is relevant is the effect on the competitive position of foreign carriers in relation to national carriers. The effect of the reduction in the vehicle tax, the establishment of a road tax, taken together, is to alter the existing conditions of competition to the detriment of carriers of other Member States, for German carriers would be the sole beneficiaries in the Community from the new situation. Since the effect on competition is the decisive criterion under Article 76, bilateral agreements may also be regarded as 'provisions' within the meaning of that article. The question whether and to what extent the German vehicle tax is now reduced to the Community average or whether and to what extent the use of roads is subject to tolls in other Member States are both irrelevant for the purposes of Article 76. Similarly, since any alteration in the existing competitive position to the detriment of foreign carriers is prohibited by Article 76, no argument may be derived from the fact that the 1990 Law aims to ensure greater equality of opportunity between German transport undertakings and those of other Member States.

Finally the Netherlands Government, while doubting whether the application of the 1990 Law can contribute effectively and appropriately to the protection of the environment observes that in any event that objective can be attained only if the rules of the Treaty are observed.

B — *Article 95 of the Treaty*

1. The *Commission* considers that the 1990 Law is also contrary to Article 95 of the Treaty because it subjects carriers from other Member States to a heavier charge than German carriers and that that charge, which

will involve an increase in the price of transport, will inevitably have repercussions on the price of imported products which will, as a general rule, carried by foreign heavy goods vehicles. Referring to the Court's judgment in *Schöttle*, cited above, the Commission states that the purpose of Article 95 is to remove disguised restrictions on the free movement of goods which may result from the tax provisions of a Member State (paragraph 12), that the concept of tax on a product 'must be interpreted in a wide sense' (paragraph 13), that 'such restrictions may result from a tax which in fact compensates for taxes which are imposed on the activity of the undertaking and not on the products as such' (paragraph 14) and that therefore indirect taxation on products for the purposes of Article 95 must be interpreted as 'including a charge imposed on international transport of goods by road according to the distance covered on the national territory and the weight of the goods in question' (paragraph 16).

In the Commission's view the fact that the road tax does not affect freight from other Member States is irrelevant since, like the vehicle tax, it is calculated on the total permissible weight of the vehicles and consequently in relation to the payload. Furthermore the road tax is also determined by the distance covered since, while the German carriers pay the tax annually at a lower rate, carriers from other Member States pay the tax for short periods at higher rates according to the journeys they make.

While conceding that it is not possible, in the strict sense, to speak of a tax on freight in the case of an unloaded vehicle, the Commission considers that for the purpose of proving that the 1990 Law is incompatible with Article 95 it is sufficient that this should be so in the case of loaded vehicles.

2. The *German Government* observes, as a preliminary point, that there is no need for any special consideration of the position with regard to Article 95 of the Treaty, since it was apparent, in the context of Article 76, that the 1990 Law does not impose a higher fiscal charge on carriers from other Member States transporting their goods in the Federal Republic of Germany than on German carriers transporting the same goods.

The German Government denies that the principles established in the *Schöttle* judgment can be applied in the present case because the tax for the use of roads is not a charge levied on goods from other Member States and has no connection with the goods transported but depends on a quite different criterion, namely the use of the road. Taxes which do not relate to the taxation of goods do not constitute taxation within the meaning of Article 95, even where they are incorporated in the price of the goods, but indirect taxation which must be harmonized under Article 99 of the Treaty. In that respect the German Government refers to the judgment of the Court in relation to the German tax on the road transport of goods

(*Straßengüterverkehrssteuer*) and in particular the judgment in Case 9/70 *Grad* v *Finanzamt Transtein* [1970] ECR 825.

3. In its statement in observation the *French Government* rejects the arguments put forward by the German Government during the pre-litigation procedure and maintains that the *Schöttle* judgment is irrelevant to the present issue. It states that the Court has always construed the concept of internal taxation to the term internal taxation within the meaning of Article 95 of the Treaty widely so as to include 'internal taxation of any kind' (judgment in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557). It points out that even if the tax for the use of roads applies also to short distances, unlike the tax which was the subject of the *Schöttle* case, it spares the non-Federal road network on which, it may be supposed, that mainly German vehicles travel.

C — *Article 5 of the EEC Treaty*

1. In the *Commission's* view, by adopting the 1990 Law, the Federal Republic of Germany has also infringed Article 5 of the Treaty which requires it to abstain from any measure which could jeopardize the common policy in relation to the taxation of the means of transport, namely the use of the German road infrastructure by heavy goods vehicles, and has thereby created obstacles to the establishment of an area without internal frontiers, as provided for in Article 8a of the Treaty. The fact that attempts undertaken at a Community level to approximate the conditions of competition of a fiscal nature in the road traffic sector have not been successful is no valid excuse from the point of view of Community law, for adopting unilateral measures, especially if such measures have discriminatory effects contrary to the Treaty, if they are liable to provoke a series of similar measures on the part of the other Member States and if they make Community agreement on the subject more difficult. Moreover, in the area of approximation of the conditions of competition any unilateral measure is by its nature discriminatory: it is not possible to improve the conditions of competition of national carriers in relation to the carriers of other Member States without creating for the latter conditions less favourable in relation to those of national carriers.

In the Commission's view the 1990 Law sets up new systems of control which in practice must still be operated at the frontier, contrary to Council Regulation (EEC) No 406/89 of 21 December 1989 on the elimination of controls performed at the frontier of Member States in the field of road and inland waterway transport (OJ 1989 L 390, p. 18). Furthermore, the German law will make the negotiations on Community transit across Austrian and Swiss territory more difficult.

In its reply the Commission acknowledges that Article 76 may be regarded as the specific expression in the field of transport of the general obligation laid down in Article 5 but it considers that that does not prevent Article 5 in certain circumstances from having an immediate blocking effect. Such circumstances consist in the fact that since January 1988 the Council has had before it a

proposal for a directive on the charging of the costs of transport infrastructure to certain commercial vehicles and the fact that the competent Community authorities now take the view that the questions still pending should be resolved at the Community level.

2. The *German Government* considers that in the field of transport Article 76 of the Treaty, from the substantive point of view, and Article 2 of the Council Decision of 21 March 1962, as amended, from the procedural point of view, define how Member States must conduct themselves pursuant to Article 5 of the Treaty. The two articles constitute special provisions in relation to exclude the application of Article 5. The German Government adds that the Commission wrongly referred in the procedure prior to action to Case 804/79 *Commission* v *United Kingdom* [1981] ECR 1045 which according to Article 5 of the Treaty 'imposes on Member States special duties of action and abstention in a situation in which the Commission ... has submitted to the Council proposals which, although they have not been adopted by the Council, represent the point of departure for concerted Community action' (paragraph 28). That case was concerned with the fisheries sector, in which the Community has exclusive powers, whereas in the field of transport the Member States remain responsible so long as the programme under Article 74 and 75 of the Treaty has not been implemented, albeit that they must exercise their powers within the limits laid down by Article 76 et seq.

In its rejoinder the German Government denies that Article 5 of the Treaty may in certain circumstances operate as a prohibition on its own account and states that in any event neither the submissions of a proposal for a directive on the subject nor the 'conviction' that the harmonization of the conditions of competition should take place at the Community level constitute circumstances justifying such an effect.

3. In its statement in intervention, the *Netherlands Government* supports the Commission's position, namely that the adoption of the 1990 Law is not only contrary to Article 76 of the Treaty but at the same time constitutes a separate infringement of the general obligation of Community solidarity contained in Article 5 of the Treaty. In that respect, it is particularly significant that the Federal Republic of Germany took not a shred of notice of the Commission's adverse opinion delivered on 15 June 1989 under the aforementioned Council Decision of 21 March 1962, as amended.

F. A. Schockweiler
Judge-Rapporteur