OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 18 September 1990 *

Mr President,
Members of the Court,

1. Under Article 1 of Codified Danish Law No 13 of 16 January 1985 on registration duties on motor vehicles, duty is charged on motor vehicles when they are first registered in Denmark.

2. The rate of duty is based on the dutiable value of the vehicle. For private cars, the rate of duty is 105% of the value up to DKR 19 750 and 180% of the value in excess of that amount (Article 4). The dutiable value of a new vehicle is the current price, including value-added tax, at which it is sold to the user in Denmark at the date of registration (Article 8).

3. No further duty is charged when a vehicle already registered in Denmark is sold. On the other hand, duty is charged when a used vehicle is imported. In that case, the dutiable value is equal either to the initial price of the vehicle when new or to 90% of that price if it is more than six months old (Article 11).

4. The Commission considers that those rules are contrary to Article 95 of the EEC Treaty. With regard to new cars, it contests the rate of duty, which is so high as to restrict the free movement of goods within the Community and falls outside the framework of the general Danish tax system. With regard to used cars, it contests the fact that the duty is based on an estimated value which is generally higher than the real value of the vehicle.

I — Taxation of new vehicles

5. The parties agree that the Danish registration duty is internal taxation falling under Article 95. In the terms of that article:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind *in excess of that imposed* directly or indirectly *on similar domestic products.*

Furthermore, no Member State shall impose on the products of other Member States any internal taxation *of such a nature as to afford indirect protection to other products'.*

6. It is common ground that in Denmark there is not only no domestic motor car production, that is to say no 'similar domestic product', but also no other production such as to be protected by the tax. The Danish Government concludes that the registration duty

* Original language: French.

'constitutes internal taxation which has no discriminatory or protectionist effect. It is therefore not contrary to Article 95 of the Treaty' (conclusion of the defence and the rejoinder).

7. The Commission, for its part,[1] does not deny that in this case,

'the express prohibitions in that article [Article 95] — which guarantee normal competition with domestic products — are not applicable'.

It also accepts that, in accordance with the case-law of the Court,[2]

'the same charge cannot within the system of the Treaty fall simultaneously under Article 95 *and* Articles 9 and 12 or Article 30'.

However, the Commission considers that

'the purpose of Article 95, like that of Article 30 (and Articles 9 and 12), is to guarantee in *all circumstances*[3] the free movement of goods within the Community'.

Therefore,

'the fundamental principles of the Treaty must be taken as the basis for the interpretation of Article 95, even where the express prohibitions in that article . . . are not applicable'.

8. It is true that the Court stated in its judgment in Case 15/81 *Schul* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, at p. 1431, paragraph 33 ('*Schul I*'), and repeated in its judgment in Case 299/86 *Rainer Drexl* [1986] ECR 1213, at p. 1235, that

'The interpretation of Article 95 must take account of the objectives of the Treaty as laid down in Articles 2 and 3, which include, in the first place, the establishment of a common market involving the elimination of all obstacles to trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'.

9. However, in the Court's case-law there is only one judgment concerning the rate of an internal tax charged only on imported products in the absence of similar or competing domestic products. That case is Case 31/67 *Stier* v *Hauptzollamt Hamburg-Ericus* [1968] ECR 235, in which the Court held as follows:

'Article 95 does not prohibit Member States from imposing internal taxation on imported products when there is no similar domestic product or other domestic product capable of being protected;

1 — The following extracts are taken from p. 14 of the Commission's reply.

2 — See the judgments in Case 78/76 *Steinike* v *Germany* [1977] ECR 595, at p. 614, and in Case 27/67 *Fink-Frucht* v *Hauptzollamt München-Landsberger Straße* [1968] ECR 223.

3 — Emphasized in the original.

... it would not be permissible for them to impose on products which, in the absence of comparable domestic production, would escape from the application of the prohibitions contained in Article 95, charges of such an amount that the free movement of goods within the common market would be impeded as far as those products were concerned;

Such a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part'.

10. It is not necessary to dwell on the first of those three points, which is considered in greater detail in the *Stier* judgment, since the Commission does not contest — in principle — Denmark's right to tax motor vehicles.

11. It follows from the second point taken from the judgment in *Stier* that the Court regarded as unacceptable

'charges of such an amount that the free movement of goods within the common market would be impeded as far as those products were concerned'.

12. It may certainly be deduced from that passage that an internal tax at a level which would in fact make all imports impossible would fall under Article 95. However, such cases are unlikely to arise because the purpose of indirect taxes is to provide funds for the budget of the State; no country therefore has an interest in levying such a tax at a prohibitive rate. Moreover, the Danish Government's Agent informed the Court at the hearing, and was not contradicted by the Commission's Agent, that registration duty brings in about DKR 10 000 000 000 per year, that is to say, about 4% of the State's total revenue. It is thus manifestly not prohibitive.

13. It remains to be determined whether the free movement of motor vehicles is compromised by a charge such as the Danish duty which does not make imports impossible but which undoubtedly restricts them to a certain degree. Beyond a certain threshold, the Danish tax system causes the final price of a car to be three times the price before taxes. For the same amount of money, a Danish family can buy only one car whereas a family resident in certain other Member States could buy two, and possibly even a third, smaller, one. Thus, some potential imports do not take place because of the rate of the Danish duty.

14. The Commission produced tables showing that the density of vehicles in Denmark is lower than in the other Member States of comparable *per capita* income.

15. However, in absolute terms, the number of vehicles is large and all have been imported. To conclude in those circumstances that imports into Denmark are compromised, amounts to arguing that the purpose of Article 95 is not merely to ensure that all the discriminatory or protective effects of indirect taxes are eliminated but also to ensure that imports are as high as possible, having regard to the available purchasing power. That would mean that the 'optimization' of trade flows would take

precedence over all other considerations, in particular those concerning the redistribution of wealth or the protection of the environment.

16. If that argument was correct, internal taxation could never exceed the marginal cost which the consumer is still prepared to pay in order to buy the desired goods; that, in this case, means, according to people's income level, the first, second or third car.

17. However, if it was possible to deduce from Article 95 of the Treaty an obligation on the part of the Member States to do nothing to prevent imports reaching their 'optimal economic level' that rule should also apply where there was domestic production of the same product.

18. If there is domestic production, Article 95 merely prohibits the imposition on imports of taxation in excess of that imposed on similar domestic products. If the tax is not discriminatory, the rate at which it is levied cannot be contested. I should add that if there was domestic production in Denmark of motor cars taxed at the present two rates, imports would be even less because consumers would have the choice of buying from the domestic manufacturers.

19. In my view, that shows that the framers of the Treaty did not intend Article 95 to be an instrument for ensuring that the level of trade in goods was as high as possible.

20. May I also remind the Court that in its judgment in Case 140/79 *Chemial Farmaceutici* v *DAF* [1981] ECR 1, at p. 15, it expressly recognized as lawful a rate of tax which prevented practically all imports into Italy of synthetic alcohol from other Member States on the basis that in applying that rate, the Member State was pursuing an economic policy objective which was compatible with the requirements of the Treaty and because the rate had an equivalent economic effect in the national territory in that it also hampered the establishment of profitable production of the same product by Italian industry.

21. Furthermore, in the judgment in Case C-132/88 *Commission* v *Greece* [1990] ECR I-1567, the Court was called on to rule on a very rigorous system of taxation of motor vehicles,[4] which involved, in particular, a steep increase in the tax at a point slightly above the level of cubic capacity at which domestic production ceased. The Court refused to regard that system as an infringement of Article 95 because it had not been proved that it favoured the sale of domestically produced cars, even though it practically impeded the importation of large-engined cars manufactured in other Member States.

22. Moreover, and most importantly, in the same judgment, the Court held that

'Article 95 of the Treaty does not provide a basis for censuring the excessiveness of the level of taxation which the Member States might adopt for particular products in the

4 — Vehicles of 1 000 cc: 88%; vehicles of 1 600 cc: 166%; vehicles of 1 800 cc: 187.2%; vehicles of 1 900 cc: 288.8%; vehicles of 2 632 cc: 400%.

light of considerations of social policy' (paragraph 17).

23. To my mind, that reasoning also applies to this case because the Danish duty is very similar to the Greek one. Whereas the Greek duty increases sharply beyond a certain cubic capacity of the vehicle, the Danish duty increases from 105 to 180% once the price exceeds DKR 19 750. It is therefore possible to regard it as being intended to redistribute income, that is to say, a social policy objective, particularly bearing in mind that in Denmark the social security system is entirely financed out of taxation.

24. For all those reasons, I conclude that the Danish registration duty on new cars is not incompatible with Article 95 of the Treaty.

25. In those circumstances, there is no need to attach much importance to the third point from the judgment in *Stier* in which the Court held that

'a restraint on the free movement of goods cannot however be presumed to exist when the rate of taxation remains within the general framework of the national system of taxation of which the tax in question is an integral part'.

To me, that passage means that in all cases in which the rate of a tax is not significantly above that of taxes levied on other products of the same kind (for example, food products, consumer durables) there can be no problem in regard to compatibility with Article 95. It is only where the rate of tax is significantly higher than any other internal tax levied by the same State that a more detailed examination is necessary, as I carried out in regard to the registration tax.

26. Moreover, since the judgment in *Stier*, the Court has had occasion more than once to rule on differential taxation systems and its consistent view has been:

'in its present stage of development Community law does not restrict the freedom of each Member State to lay down tax arrangements which differentiate between certain products on the basis of objective criteria. Such differentiation is compatible with Community law if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from other Member States or any form of protection of competing domestic products (judgment of 27 May 1981 in Joined Cases 142 and 143/80 *Amministrazione delle finanze dello Stato* v *Essevi and Salengo* [1981] ECR 1413, at p. 1434). Nor can it be denied that in the sphere of harmonized systems of value-added tax Member States have the right to tax some consumer goods, particularly those regarded as luxury products, more heavily'.[5]

27. Furthermore, the Court has expressly recognized that motor cars may properly be

5 — Judgment in Case 319/81 *Commission* v *Italy* [1983] ECR 601, at p. 620.

subject to a separate system of taxation in addition to value-added tax. In its judgment in Joined Cases 93 and 94/88 *Wisselink and Others* v *Staatssecretaris van Financiën* [1989] ECR 2671, the Court did not find fault with the 'special consumption tax on passenger cars' charged in the Netherlands in addition to value-added tax. Even though that tax is considerably lower than the Danish duty, it is similar to it in structure (18% up to a value of HFL 10 000 and 27.3% thereafter).

28. Finally, and most importantly, in its judgment of 5 April 1990, *Commission* v *Greece*, cited above, the Court did not call in question the system of taxation applying in Greece to the purchase and importation of motor vehicles. Laid down in a special law concerning tax provisions applying only to private cars, the system is completely separate from the other systems of indirect taxation in Greece. It levies higher taxes on private cars than are levied on other consumer durables. Moreover, the rates are, on average, higher than the Danish registration duty.

29. In that judgment, the Court reaffirmed a principle which it had already laid down in regard to a tax levied annually (judgment in Case 112/84 *Humblot* v *Directeur des services fiscaux* [1985] ECR 1367), namely that

'as Community law stands at present the Member States are at liberty to subject products such as cars to a system of tax which increases progressively in amount according to an objective criterion, such as cylinder capacity, provided that the system of taxation is free from any discriminatory or protective effect' (paragraph 17, judgment of 5 April 1990).

It seems to me that the Court has thereby accepted that 'the sky is the limit' as far as rates of motor taxation are concerned provided that the conditions indicated in the judgment have been fulfilled. Although the Danish registration duty increases not in accordance with the cubic capacity but with the value of the product and even though it consists of only two levels, there can be no doubt that it is based on an objective criterion. Moreover, as stated at the beginning of my Opinion, it has no discriminatory or protective effect.

30. Under those circumstances, I can only propose that the Court dismiss the application in so far as it concerns taxation of new cars.

II — The taxation of used cars

31. On the other hand, in regard to the taxation of used cars, I entirely share the Commission's view that the Kingdom of Denmark has infringed Article 95 of the Treaty 'because the calculation of the registration duty for imported used motor vehicles is in most cases made on the basis of an estimated value which is higher than the real value of the vehicle with the result that imported used motor vehicles are taxed more heavily than used motor vehicles which are sold on the domestic market after being registered in Denmark'.

32. No doubt the Danish Government is probably right in stating that by virtue of

the high tax on new cars, their value diminishes much more slowly on the Danish market than in countries where car tax is lower. It can scarcely be denied that in countries in which cars are liable only to value-added tax at 12 or 14%, the residual part of that tax in the value of a used car will be practically negligible after two or three years, whereas that could not possibly be the case in Denmark.

33. However, it is none the less true that vehicles bought new in Denmark also progressively lose their value and the fixing of an estimated taxable value of imported used cars at 100 or 90% (if the vehicle is more than six months old) of the initial price of the vehicle when new is a clear over-taxation of those vehicles as a result of which they bear a tax burden which is generally greater than the residual value of the tax initially paid when the vehicle was first registered when new, that is to say that part of the tax still included in the value of the vehicle on the national used-car market.

34. However, it follows from the Court's previous decisions that

'in order to apply Article 95 of the Treaty, not only the rate of direct and indirect internal taxation on domestic and imported products but also the *basis of assessment* and detailed rules for levying the tax must be taken into consideration' [6]

and that

'the first paragraph of Article 95 is infringed 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'. [7]

35. Furthermore, in order to assess the compatibility of a given tax with the second paragraph of Article 95, it is necessary to determine

'whether or not the tax is of such a kind as to have the effect, on the market in question, of reducing potential consumption of imported products to the advantage of competing domestic products'. [8]

However, for the second paragraph of Article 95 to apply, it is not necessary that that protective effect should be shown statistically; it is sufficient if it is shown

'that a given tax mechanism is *likely*, in view of its inherent characteristics, to bring about the protective effect referred to by the Treaty'. [9]

36. The argument that the judgment in Case 47/84 *Staatssecretaris van Financiën* v *Schul* [1985] ECR 1491 ('*Schul II*') is not

6 — See the judgment in Case 74/76 *Iannelli* v *Meroni* [1977] ECR 557, at p. 578, paragraph 21.

7 — See the judgment in Case 20/76 *Schöttle* v *Finanzamt Freudenstadt* [1977] ECR 247, at p. 260, paragraph 20.

8 — See the judgment in Case 356/85 *Commission* v *Belgium* [1987] ECR 3299, at p. 3325, paragraph 15.

9 — See the judgment in Case 170/78 *Commission* v *United Kingdom* [1980] ECR 417, at p. 433, paragraph 10.

applicable to this case does not call in question the existence of a failure to fulfil obligations. The Commission did not rely on that judgment as evidence of the failure to fulfil obligations. It merely referred to the method of calculation which the Court envisaged in that case for calculating the amount of value-added tax paid in the exporting Member State which is still contained in the value of the goods at the time of importation into another Member State in order to demonstrate the over-taxation of used vehicles imported into Denmark: as has been seen, they are taxed on the basis of an estimated value which is generally greater than their real value. However, if the formula in *Schul II* is applied, the point of reference would be the residual part of the registration duty still contained in the value of a Danish used car. That is equal to the amount of the duty paid at the time of registration of the car when new, reduced by an amount equal to the actual depreciation in the value of the car.

37. Different methods may be used to apply that principle. The estimated value of such vehicles could be progressively reduced, for example, or the value of the vehicle could be disregarded completely and registration duty charged at a fixed rate, based on the residual amount of duty still deemed to be contained in the price of a car of the same type and age offered for sale on the Danish used-car market.

38. I consider that the Commission is right in believing that such a market exists and that used cars imported into Denmark are similar to or compete with used cars bought in Denmark. It is true that even the used cars that can be bought in Denmark were manufactured abroad and were, when new, imported products. However, once imported and cleared through customs, they become domestic products and are at least potentially available on the domestic used-car market.

39. The Danish Government's objection that the real competition is between new, and therefore imported, cars and imported used cars leaves me unconvinced. The Danish Government argues that

'if it is to be able to maintain the high return from motor vehicle registration duty, it is of fundamental importance that the taxes on new cars are not compromised by imports of used cars. For that reason the Danish Government must be able to maintain a system of levying registration duties on imported used cars which does not contain an economic incentive — in regard to the amount of duty charged — to import used cars rather than to buy them in Denmark. Otherwise, the importation of new cars would to a large extent be replaced by the importation of used cars' (paragraph 6 of the rejoinder).

40. It is true that if the situation is viewed in that way, there is competition between new cars and imported used cars. But at the same time the Danish Government acknowledges that the purpose of its system of taxation is to encourage potential

used-car buyers to buy a car which has already been in circulation in Denmark for some time rather than to import a used car bought abroad. The tax system thus has the effect of protecting the Danish used-car market.

Conclusion

41. On the basis of the foregoing considerations, I propose that the Court should decide as follows:

'(1) The Kingdom of Denmark has failed to fulfil its obligations under Article 95 of the Treaty because the calculation of the registration duty for imported, used motor vehicles is made on the basis of an estimated value which is generally higher than the real value of the vehicle with the result that such motor vehicles bear a tax burden which is generally greater than the residual value of the tax still contained in the value of a vehicle of the same type and age sold in Denmark after being registered there when new;

(2) For the rest, the application is dismissed;

(3) Each party is to bear its own costs.'