OPINION OF ADVOCATE GENERAL ALBER

delivered on 26 October 2000 [1]

I — Introduction

1. In the present case the Court is again required to decide, on this occasion by way of Treaty infringement proceedings, on the compatibility with Community law of certain methods of calculation used in the French system of motor vehicle taxation. [2] What is at issue is whether the method used to calculate the engine rating for administrative purposes, which ultimately determines the level of taxation — in the present case calculated primarily according to the number of gears — has discriminatory or protectionist effects in the case of vehicles manufactured in other Member States compared with similar vehicles produced in France. The Commission considers that to be the case because, in its view, vehicles with a six-speed manual gearbox or five-speed automatic transmission are assessed under the 1956 system and thus at a higher rate of tax than technically comparable vehicles taxed under the 1977 system. Since most vehicles with a six-speed manual gearbox or five-speed automatic transmission are imported and only a small number of such vehicles are produced in France, the Commission alleges that the French provisions on motor vehicle tax infringe Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

2. The Commission had initially also considered that the French authorities had infringed the Community law in force as regards the calculation of the engine rating for administrative purposes of vehicles developing over 100 kW. It had therefore brought two separate sets of proceedings. Those were then combined in the present action since both complaints related to the calculation of the engine rating for administrative purposes on the basis of the same French statutory provisions.

3. However, since the Commission withdrew the second complaint during the oral procedure, only the first plea in law need be examined below. It is likewise unnecessary to examine the legal situation after 1 July 1998, since the Commission accepted dur-

1 — Original language: German.

2 — For previous cases involving references for preliminary rulings, see the judgments in Case 112/84 *Humblot* [1985] ECR 1367, Case 433/85 *Feldain* [1987] ECR 3521, Joined Cases 76/87, 86/87 to 89/87 and 149/87 *Seguela* [1988] ECR 2397, Case 240/87 *Deville* [1988] ECR 3513, Case C-113/94 *Casarin* [1995] ECR I-4203, Case C-284/96 *Taboullot* [1997] ECR I-7471 and Case C-421/97 *Tarantik* [1999] ECR I-3633, and the orders in Case C-257/95 *Bresle* [1996] ECR I-233, Joined Cases C-231/98 and C-232/98 *Lamboley and Bouctot* (1999, not published in the Reports), Joined Cases C-28/98 and C-29/98 *Charreire and Hirtsmann* [1999] ECR I-1963 and Case-325/98 *Anssens* [1999] ECR I-2969.

ing the oral procedure that the French provisions in force from that date onwards were compatible with Community law.

II — National provisions concerning the calculation of the engine rating for administrative purposes

4. A graduated tax on motor vehicles was introduced in France by Articles 1599 C to 1599 J of the Code général des impôts (General Tax Code). The legislation established tax bands which — originally calculated by reference to cylinder capacity alone — cover several engine rating bands; there is one coefficient for each of those tax bands. The level of the graduated tax, which is paid to the Départements, is calculated by multiplying a basic rate — which is set annually by the members of the individual Conseils généraux (Département Councils) — by the coefficients corresponding to the tax band concerned.

5. The French system of motor vehicle taxation is thus based on the determination of the engine rating for administrative purposes of passenger cars, and it should be noted that the amendments made by the Law of 2 July 1998, which lays down provisions governing the calculation of the engine rating for administrative purposes of new cars registered on or after 1 July 1998, are not, according to the Commission, *a priori* in breach of Community law.

6. At the material time, namely the period before 1 July 1998, the calculation of the engine rating for administrative purposes was essentially regulated by the Circular of 28 December 1956 (JORF of 22 January 1957, p. 910) and by Circular No 77-191 of 23 December 1977 (JORF of 8 February 1978, p. 1052) in the version as amended by Circulars No 87-56 of 24 June 1987 and No 88-04 of 12 January 1988 (hereinafter 'the 1977 Circular').

7. The formula for calculating the engine rating for administrative purposes under the 1956 Circular is based solely on the cylinder capacity of the vehicle.

8. However, the 1977 Circular introduced, as from 1 January 1978, a new formula for calculating the engine rating for administrative purposes of motor vehicles, which, in the light of new technologies, includes several parameters in addition to cylinder capacity, such as tyre circumference and gear ratio (the number of gears), that is, technical criteria which result in better performance in terms of fuel consumption and pollutant emissions.

9. The method of approval of the vehicles — the type approval — is one of the criteria which determine the applicable rules.

10. Thus, the 1956 Circular applies in general to all motor vehicles which were type-approved or individually approved before 1 January 1978. It also applies to private cars whose characteristics (seats, engine type, type of transmission) are not among those listed in the 1977 Circular. That category includes the vehicles relevant to this case, which have a six-speed manual gearbox or five-speed automatic transmission.

The formula in the 1956 Circular also covers private cars which have been individually approved since 24 June 1987 and which, from the point of view of their engine rating for administrative purposes, do not correspond to a type-approved model whose engine rating for administrative purposes has been calculated in accordance with the 1977 Circular, and are not regarded as equivalent to such a model.

That formula also applies to a number of other vehicles, depending on the method and date of approval. However, since that is not relevant to this case, no detailed description need be given.

11. The 1977 Circular, on the other hand, applies in principle to passenger cars which were type-approved from 1 January 1978 onwards and to passenger cars which were individually approved from 24 June 1987 onwards and which conform to an approved type or, from the point of view of the engine rating for administrative purposes, are regarded as equivalent to an approved type whose engine rating for administrative purposes is calculated in accordance with the 1977 Circular.

12. During the material period, namely from 1 January 1978 onwards, two — or even, since 1998, three — different methods for calculating the engine rating were in force simultaneously in France. The majority of vehicles registered in France during the material period were obviously covered by the formula laid down in the 1977 Circular. The vehicles under consideration in this case, however, are covered by the formula in the 1956 Circular.

13. For the sake of completeness, it should also be pointed out that the Law of 2 July 1998 mentioned in point 5 is applicable as regards the determination of the engine rating for administrative purposes of new vehicles registered on or after 1 July 1998. The new calculation is based on two variables: engine power in kilowatts and carbon dioxide emissions in grams/kilometre. It therefore takes no account of cylinder capacity, transmission or fuel type.

III — Pre-litigation procedure

14. The Commission considers that motor vehicles from other Member States which incorporate an 'innovative technology' —

that is, are fitted with a six-speed manual gearbox or five-speed automatic transmission — are taxed, 'on account of small differences in the design of the gearbox', at a higher rate than comparable vehicles manufactured in France. Moreover, the engine rating for administrative purposes also forms the basis of the calculation of the motor vehicle insurance premium, which represents an additional charge for the owner of such a vehicle.

15. According to the Commission, the 'higher taxation' results from the systematic application of the formula for calculating the engine rating for administrative purposes pursuant to the 1956 Circular. Until 1994 no vehicle manufactured in France was equipped industrially with that technology which represents a refinement of known technologies. Nevertheless, that technology was known and could therefore have been taken into consideration in the calculation of the engine rating for administrative purposes in the 1977 Circular.

16. By letters of 25 May 1993 and 19 September 1994, the Commission informed the French authorities that that situation was contrary to Article 95 of the EC Treaty.

17. The French authorities replied by letters of 6 August 1993 and 13 March 1995. In the former they acknowledged that those vehicles which had a six-speed manual gearbox or five-speed automatic transmission were subject to the provisions of the 1956 Circular. That was also true of vehicles equipped with technologies which were not yet known in 1977 and could not therefore have been incorporated as standard.

18. It is apparent from the second letter that the application of different methods of calculation depending on the type of gearbox fitted in the vehicle may result in the determination of different engine ratings for administrative purposes for comparable models. An initial detailed study based on the models sold on the French market in 1993 showed the following:

(1) By comparison with similar models with a five-speed manual gearbox, models with a six-speed manual gearbox could have an engine rating for administrative purposes increased by two to three HP;

(2) By comparison with similar models with a four-speed automatic transmission, those models with a five-speed transmission could have the same engine rating for administrative purposes or a rating increased by one HP or a rating reduced by four to seven HP.

(3) For many other models, no comparison was possible since there were no models with comparable technical equip-

ment with a conventional gearshift on the market.

19. The conclusions regarding the technical feasibility of amending the 1977 Circular were due to be available by the end of 1995 and would then be communicated to the Commission.

20. The Commission took those two letters from the French authorities as an admission that the method of calculation had a discriminatory effect and that it resulted in a higher tax burden as compared with similar vehicles manufactured in France, although that higher taxation did not necessarily arise in all cases.

By letter of 13 March 1996, the Commission called on the French authorities to communicate to it the results of the study on the amendment of the 1977 Circular. However, it received no reply.

21. A letter of formal notice in connection with Treaty infringement proceedings was served on the French Republic on 2 February 1997, but the French authorities did not reply to that letter either.

22. The Commission sent the reasoned opinion to France by letter of 22 December 1997. By letter of 2 March 1998, the French authorities set out their views on the matter.

23. In that reply, the French authorities observe that application of the various methods of calculation depending on the type of transmission fitted in the vehicle may, in some circumstances, result in similar models having different engine ratings for administrative purposes. Comparative studies carried out on the basis of the vehicles available on the domestic market in 1993 had shown that:

— by comparison with similar models with a five-speed manual transmission or four-speed automatic transmission, a higher, equal or lower engine rating for administrative purposes was calculated in the case of models with a six-speed manual gearbox or five-speed automatic transmission.

— for many vehicles there were no similar models fitted with conventional gearboxes.

24. The French authorities add that, of all the new cars in question which were registered in 1993, only 0.002% (3 500

vehicles) were equipped with the innovative transmission technologies. Nevertheless, studies had been carried out with a view to revising the method of calculation laid down in the 1977 Circular. In the event of such a revision, however, there would be no departure from the objective of basing the calculation of the engine rating for administrative purposes partly on fuel consumption. The new method of calculation would therefore retain its validity irrespective of technical developments in engines and gearboxes. Those studies had been completed by autumn 1997. They had led to a new method of calculation based essentially on the overall performance of the vehicle measured in accordance with the Community directives in force.

IV — Action and form of order sought

25. Since the Commission continued to allege infringement of Article 95 of the EC Treaty, it brought the present action which was received at the Court Registry on 16 July 1999.

26. During the oral procedure the Commission withdrew the second plea in law; it now claims that the Court should:

(1) declare that, by retaining and applying rules providing for the application of a formula for calculating the engine rating for administrative purposes which is unfavourable to vehicles fitted with a six-speed manual gearbox or five-speed automatic transmission, which has discriminatory or protectionist effects in the case of vehicles manufactured in other Member States compared with similar or competing domestic vehicles, the French Republic has failed to fulfil its obligations under Article 95 of the EC Treaty;

(2) order the French Republic to pay the costs.

V — Arguments of the parties

27. In addition to the arguments already put forward in the pre-litigation procedure, the parties submitted the following observations on the remaining plea in law:

The Commission observes that the 1977 Circular was intended to introduce a new method for calculating the engine rating for administrative purposes, which, in addition to cylinder capacity, would also take account of other factors such as fuel consumption and reduced pollutant emissions. It complains that the French authorities did not amend the 1977 Circular so as to include within its scope vehicles equipped with a technology conforming to the parameters of the 1977 Circular, in parti-

cular as regards fuel consumption. By reason of a small technical difference in the design of the gearbox, such vehicles, which are mainly manufactured in other Member States, are made subject to a different method of calculation, namely, that contained in the 1956 Circular. Under that method, no account is taken of the special characteristics of such vehicles, which results in a higher level of taxation as compared with similar domestic vehicles. That constitutes a breach of the prohibition of discrimination contained in Article 95 of the EC Treaty.

28. The Commission further criticises the complexity and lack of transparency of the French system of motor vehicle taxation and refers in this connection to the Court's existing case-law on that system of taxation. [3]

29. Finally, the Commission concludes that the onus is on the French Government to prove that the tax system does not in any circumstances have a discriminatory effect in the case of imported vehicles, which in the present case it has failed to do.

30. The French Government argues that there is no other method of calculation which would take account of the provenance of the vehicle in the case of vehicles equipped with the innovative technology. The decisive criterion in the present case is the number of gears in the various types of transmission. The vehicles concerned, most of which are, admittedly, imported, also include several French types, namely two models of the Peugeot 306 and two versions of the Hommel.

31. The Court's case-law to the effect that there is an infringement of Article 95 of the EC Treaty if the duties to which imported and domestic goods are subject are calculated differently is not applicable here since the tax is, precisely, not calculated differently.

32. The French Government acknowledges that vehicles with the innovative technology are made subject to the provisions of the 1956 Circular, but denies that the application of the rating formula determined solely by reference to the cylinder capacity results in systematic discrimination against such vehicles as compared with taxation under the 1977 Circular. In individual cases, the tax calculated in accordance with the 1956 Circular may even be the same as or lower than that resulting from application of the 1977 Circular. However, even if the existence of systematic discrimination is accepted, the mere fact that imported vehicles are more highly taxed is not sufficient to prove an infringement of Article 95 of the Treaty. What is decisive is whether the system of taxation being challenged has the effect of dissuading consumers from purchasing imported

3 — See footnote 2 above.

cars. That is not the case here, however: consumers who may be deterred from buying vehicles equipped with an innovative technology by the fact that such vehicles are more highly taxed would logically direct their choice towards another vehicle of the same make, that is, another imported vehicle.

33. With regard to the burden of proof, the French Government is of the opinion that the Commission is required to prove the existence of a discriminatory effect. In this connection, its reply to the Commission's argument concerning the complexity and lack of transparency of the system of taxation is that the system was published in the *Journal officiel de la République française* and acquired force of law, which now precludes taxable persons from claiming a lack of transparency.

34. When asked during the oral procedure how many of the vehicles with a six-speed manual gearbox were of French manufacture, the French Government replied that the number was 200 to 300 units of the Peugeot 306 model. [4] No vehicle with a five-speed automatic transmission was manufactured in France. The exact number of the Hommel vehicles could not be given, but was probably correspondingly small.

4 — It is not clear to what the other figure given of 1 383 vehicles relates: all (annually) registered vehicles of this type or only the imported ones. Elsewhere a total of 2 000 to 2 500 vehicles was mentioned.

35. I shall return to the arguments of the parties, as necessary, in the course of the assessment.

VI — Assessment

36. A point which should be made at the outset is that Article 95 of the EC Treaty (now, after amendment, Article 90 EC) is a specific formulation of the general prohibition of discrimination laid down in Article 6 of the EC Treaty (now, after amendment, Article 12 EC) with regard to domestic taxes on goods. The Court has held in this regard that Article 95 of the EC Treaty is intended to ensure the complete neutrality of domestic taxation from the point of view of competition between domestic products and imported products. [5]

37. As I said (see the judgments and orders cited in footnote 2), the Court has already been requested on a number of occasions in the past to give preliminary rulings on the French system of motor vehicle taxation. In those cases it has held — in so far as it was asked to rule on this point by the national court concerned — that Article 95 of the EC Treaty also applies to the French system of motor vehicle taxation.

5 — Case 168/78 *Commission* v *France* [1980] ECR 347.

38. Thus the Court has already held, in *Feldain*,[6] that a system of progressive taxation based on the engine rating for administrative purposes could have a discriminatory or protectionist effect within the meaning of Article 95 of the EC Treaty. The Court stated in paragraph 19 of its judgment in that case that:

'... a system of road tax in which one tax band comprises more power ratings for tax purposes than the others, with the result that the normal progression of the tax is restricted in such a way as to afford an advantage to top-of-the-range cars of domestic manufacture, and in which the power rating for tax purposes is calculated in a manner which places vehicles imported from other Member States at a disadvantage has a discriminatory or protective effect within the meaning of Article 95 of the Treaty.'

39. The Court was required to give a preliminary ruling on the interpretation of Article 95 of the EC Treaty with regard to the French system of motor vehicle taxation likewise in *Casarin*.[7] It stated that, in order to determine whether certain provisions in that system had a discriminatory or protectionist effect, it had to be examined whether an increase in the motor vehicle tax affecting certain vehicles might deter consumers from purchasing vehicles with a higher engine rating for administrative purposes, which were all of foreign manufacture, in favour of vehicles of domestic manufacture.[8]

40. The Court eventually held in that case that Article 95 of the EC Treaty did not preclude the application of national rules on motor vehicle taxation which provide for an increase in the progression coefficient of the kind arising from the relevant French provisions, in so far as that increase did not have the effect of favouring the sale of vehicles of domestic manufacture over the sale of vehicles imported from other Member States.

41. It can be inferred from that case-law on the French system of motor vehicle taxation that, for the purpose of interpreting Article 95 of the EC Treaty, the decisive criterion adopted by the Court is that of comparability between the domestic and imported products concerned, so as to be able to examine on that basis whether those products are taxed according to the same methods of calculation and rules.

42. Thus, in its most recent judgment on the French system of motor vehicle taxation, given in *Tarantik*[9] — a reference for a preliminary ruling —, the Court held that, 'in order to determine whether the tax system at issue in the main proceedings is

6 — See footnote 2 above.
7 — See footnote 2 above.
8 — *Casarin*, cited above, paragraph 22.
9 — See footnote 2 above.

discriminatory or protective in nature in the sense contemplated by Article 95 of the Treaty, it is for the national court to determine which vehicles... may be considered similar, for the purposes of the first paragraph of Article 95 of the Treaty, to vehicles imported from other Member States...'. [10]

43. Referring to its judgment and the Advocate General's Opinion in *Casarin*, the Court points out that '... products such as cars are similar for the purposes of the first paragraph of Article 95 of the Treaty if their characteristics and the needs which they serve place them in a competitive relationship'. The degree of competition 'between two models depends on the extent to which they meet various requirements regarding price, size, comfort, performance, fuel consumption, durability, reliability and other matters'. [11]

44. Likewise in the present case, the decisive criterion is that of comparability of the products, in this instance vehicles. Since Article 95 of the EC Treaty is intended to ensure the complete neutrality of national taxation systems from the point of view of competition, there is discrimination prohibited by the first paragraph thereof if it is found, by means of a comparison between the taxation of imported vehicles and that of similar domestic vehicles, that the imported vehicles are subject to higher taxation than similar domestic vehicles.

45. If similarity cannot be established, it must be examined, in the light of the second paragraph of Article 95, whether the tax is capable of protecting national products as against imported products, in other words of having a protectionist effect.

46. The Court has also interpreted the first paragraph of Article 95 of the EC Treaty widely so as to cover all taxation procedures which conflict with the principle of the equal treatment of domestic products and imported products. [12] According to the Court, in order to assess the similarity on which the prohibition in the first paragraph of Article 95 is based, it must be examined whether the products have similar characteristics and meet the same needs from the point of view of consumers. [13]

47. In this case, the Commission, in contrast to the French Government, considers that vehicles which are equipped with technology described as innovative and

10 — *Tarantik*, cited in footnote 2, paragraph 27.

11 — *Tarantik*, cited in footnote 2, paragraph 28.

12 — See, to that effect, the judgment in Case 216/81 *Cogis* [1982] ECR 2701.

13 — Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 15.

which, at least in most instances, are imported from other Member States are the subject of a different method of calculating the engine rating for administrative purposes from vehicles of French manufacture which, although not equipped with technology, are none the less similar in the eyes of consumers.

48. As I have already stated in point 43, the decisive criteria when considering whether vehicles are similar for the purposes of the first paragraph of Article 95 of the Treaty are price, size, comfort, performance, fuel consumption, durability and reliability.

49. If the concept of similarity is based on that flexible interpretation, the French Government's argument that only different vehicles of the same make should be compared with one another cannot be accepted. That would, in the end, unduly restrict the test of similarity and confine the consumer's choice to a willingness to purchase a vehicle of a particular make, the other criteria mentioned by the Court becoming secondary in importance.

50. It should therefore be assumed, in this case, that vehicles of different makes must be compared. The examples cited by the Commission and the French Government, both in their written pleadings and during the oral procedure, show that, compared with the number of vehicles of foreign manufacture which are equipped with innovative technology, French production of such vehicles is insignificant. Moreover, the latter is confined to two special models of the Peugeot 306 and to the Hommel Berlinette (also in two versions), only few units of which are produced. However, since, according to the examination criteria established by the case-law, a comparison may not be based solely on the technical equipment, in this case the gearbox, other characteristics must also be taken into account.

51. That comparison shows, however, that vehicles equipped with innovative technology are subject to the provisions of the 1956 Circular, whereas equivalent vehicles of French manufacture, which merely have a different gearbox fitted, are subject to the 1977 Circular.

52. The formula for calculating the engine rating for administrative purposes under the 1956 Circular is based on cylinder capacity alone. However, the calculation method laid down in the 1977 Circular includes other parameters (see point 8 above) and also distinguishes between the different methods of approval.

53. Consequently, 'two principal and distinct methods of calculating the fiscal horsepower ratings of private cars exist in parallel' under the French system of motor vehicle taxation. [14]

The net effect of that coexistence is that vehicles which (in the majority) are imported from other Member States are subject to a higher level of motor vehicle tax than comparable domestic vehicles which, although not fitted with the same gearbox, none the less meet the same consumer expectations in respect of other technical characteristics.

54. The fact that there are also vehicles of French manufacture which, because they are fitted with a six-speed manual gearbox, are taxable in the same way as the equivalent foreign vehicles does not in any way alter that finding. Moreover, it is clear from the comparison between the figures for imported vehicles and those for vehicles of French manufacture which are equipped with the identical types of gearshift — and thus for similar and not merely comparable vehicles — that the number of vehicles of French manufacture — even though it cannot be determined precisely (see point 34) — is relatively small, so that, despite equal tax treatment, the higher tax affects more imported vehicles than domestic vehicles, with the result that, in this respect also, there is indirect discrimination.

55. It follows from all the foregoing that comparable vehicles of domestic manufacture are subject to a different system of taxation from that applicable to imported vehicles, which, however, is not possible according to the first paragraph of Article 95 of the Treaty.

VII — Costs

56. Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the French Republic has been unsuccessful and the Commission has applied for costs, the French Republic must be ordered to pay them.

14 — As the Court also held in *Tarantik*, cited in footnote 2, paragraph 13. See point 42 above.

VIII — Conclusion

57. In view of the foregoing, I propose that the Court rule as follows:

(1) By retaining and applying rules providing for the application of an unfavourable formula for calculating the engine rating for administrative purposes to vehicles fitted with a six-speed manual gearbox or five-speed automatic transmission, which has discriminatory or protectionist effects in the case of vehicles manufactured in other Member States compared with similar or competing domestic vehicles, the French Republic has failed to fulfil its obligations under Article 95 of the EC Treaty (now, after amendment, Article 90 EC);

(2) The French Republic is ordered to pay the costs.