OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER

delivered on 27 November 2001 [1]

1. The Finanzgericht Münster (Germany) asks the Court, pursuant to Article 234 EC, whether a company for the transport of goods by road, established in Luxembourg and carrying out cabotage operations [2] in Germany, may be obliged to pay motor vehicle tax in Germany for vehicles registered in Luxembourg.

In particular, the German court seeks an interpretation of Article 6 of Regulation (EEC) No 3118/93 [3] and of Article 5 of Directive 93/89/EEC. [4]

I — Facts of the case in the main proceedings

2. The plaintiff in the main proceedings is Andreas Hoves Internationaler Transport-Service Sàrl, incorporated in Luxembourg in June 1989, of which Mr Hoves became the sole shareholder in 1993. Initially Mr Hoves was sole manager and from March 1998 he was assisted by Mrs Bettina Jansen-Weber. Mr Hoves is also manager of Hoves Speditionsgesellschaft mbH, which is established in Germany.

3. The object of the plaintiff company is national and international carriage of goods. Until the end of 1995, the plaintiff operated solely as a carrier for Hoves Speditionsgesellschaft mbH in accordance with a contract signed in January 1993. Under that contract, Hoves Speditionsgesellschaft mbH drew up route plans for vehicles and drivers and, after carriage was completed, settled the account with the plaintiff by way of a credit entry. As from 1996 it has also operated as a fleet carrier engaged in international carriage for various customers. It employs eight drivers, all resident in Germany who, it appears, take

1 — Original language: Spanish.

2 — Footnote not applicable to English version.

3 — Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State (OJ 1993 L 279, p. 1).

4 — Council Directive No 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for carriage of goods by road and tolls and charges for the use of certain infrastructures (OJ 1993 L 279, p. 32).

the vehicles home. Most of the vehicle maintenance and repairs are carried out by Hoves Speditionsgesellschaft. Commercial decisions of secondary importance and the daily running of the business are handled by an employee in Luxembourg, where Mr Hoves travels at least twice a month, remaining for several days at a time.

4. There is a total of fifteen vehicles registered in the plaintiff's name in Luxembourg, where it pays motor vehicle tax. It obtained cabotage authorisations for all the vehicles from the Luxembourg authorities pursuant to Article 5 of Regulation (EEC) No 4059/89. [5]

5. The plaintiff unsuccessfully claimed input tax reimbursements from the Bundesamt für Finanzen (Federal Finance Office) for January 1993 to December 1994. In those proceedings before the Finanzgericht Köln, the Bundesamt für Finanzen made a request for judicial and administrative assistance to the Luxembourg authorities in order to determine the plaintiff's seat of management, on the basis of Council Directive 77/799/EEC. [6]

In July 1996, those authorities alleged that the plaintiff did not have its own garage or parking spaces for lorries in Luxembourg. In their opinion, the company's seat of management, within the meaning of Article 3(6) of the Luxembourg/Germany Double Taxation Convention, [7] was not in Luxembourg, but in Germany, since the activity in Luxembourg was essentially restricted to administration of haulage operations and the most important decisions relating to the plaintiff were taken by Mr Hoves, who was domiciled in Germany and, for the most part, resided there. They went on to state that it was doubtful whether the offices in Remich and Esch/Alzette could be regarded as centres of activity within the meaning of the abovementioned Convention, although an establishment existed in Bertrange as from 9 February 1996.

6. The Bundesamt für Finanzen and the Finanzamt Borken, which is the defendant in the main proceedings, concurred with the view of the Luxembourg authorities and decided that the seat of management of Andreas Hoves Internationaler Transport-Service Sàrl was in Germany. The Finanzamt Borken assessed the basis of taxation

5 — 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).

6 — Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation.

7 — Luxembourg/Germany Double Taxation Convention of 23 August 1958 and 15 July 1973 (BGBl. II 1959, p. 1270; BGBl. II 1978, p. 111).

for corporation tax and turnover tax for 1989-1995, capital tax for 1992 and wages tax for 1989-1994. The appeals lodged against those assessments had not been decided at the time the questions for preliminary ruling were drafted.

7. The defendant also assessed the basis of taxation in respect of motor vehicle tax, for the years 1991 to 1996, on the lorries registered to the plaintiff in Luxembourg. It amounted to a total of DEM 309 909, which amount was reduced to DEM 166 420 in the light of technical data provided by the plaintiff.

8. The appeals by Andreas Hoves Internationaler Transport-Service Sàrl were unsuccessful because the defendant argued that, in the given circumstances, irrespective of the fact that the vehicles were registered in Luxembourg, where the necessary cabotage authorisations had been issued, there was an unlawful use of the of the vehicles in Germany within the meaning of Paragraph 1(1)(3) and Paragraph 2(5) of the Law on Motor Vehicle Tax (Kraftfahrzeugsteuergesetz), where the plaintiff had its regular base, and the vehicles were not registered as required under Paragraph 23 of the Road Transport Registration Code (Straßenverkehrs-Zulassungs-Ordnung). It also held that the plaintiff could not rely on Article 5 of Council Directive 93/89 and that the cabotage authorisations issued in Luxembourg were irrelevant.

9. The plaintiff requested the Finanzgericht Münster to set aside the decisions it had delivered on the appeals and the notices of motor vehicle tax assessment, whilst the defendant claimed that the court should dismiss the action.

II — Questions for a preliminary ruling

10. In order to resolve the dispute, the German court stayed the proceedings and referred to the Court of Justice the following questions for a preliminary ruling:

'1. Does Article 6 of Council Regulation (EEC) No 3118/93 of 25 October 1993 (OJ 1993 L 279, p. 1) preclude national rules which result in motor vehicle tax being charged for the use of commercial goods vehicles which are registered in another Member State of the European Union, for which a cabotage authorisation has been issued

in that Member State, which carry out cabotage operations in the Federal Republic of Germany and which have their regular base there?

2. Does Article 5 of Council Directive 93/89/EEC of 25 October 1993 (OJ 1993 L 279, p. 32), in cases like that mentioned in Question 1, preclude national rules such as the second half of the second sentence of Paragraph 1(1)(2) of the Kraftfahrzeugsteuergesetz in conjunction with Paragraph 1(1)(3) of the KraftStG?'

III — National legislation

11. According to the Finanzgericht Münster, the national legislation in force at the time the facts occurred was as follows:

A — *Law on motor vehicle taxation*

Paragraph 1 (in the version in force before 1 January 1995)

(1) The following shall be subject to motor vehicle tax:

1. ...

2. the keeping of foreign motor vehicles for use on the public highway, if the vehicles are in the Federal Republic of Germany;

3. unlawful use of motor vehicles;...

Paragraph 1 (in the version in force after 31 December 1994)

(1) The following shall be subject to motor vehicle tax:

1. ...

2. the keeping of foreign motor vehicles for use on the public highway, if the vehicles are in the Federal

Republic of Germany. Exemptions shall apply to motor vehicles and articulated vehicle combinations intended exclusively for the carriage of goods by road and with a maximum permissible laden weight under road transport law of not less than 12 000 kg, which are registered in another Member State of the European Community in accordance with Article 5 of Council Directive 93/89/EEC of 25 October 1993; this shall not apply to cases under section 3; [8]

3. unlawful use of motor vehicles;...

Paragraph 2. Definition of terms, participation by transport authorities

...

4. A motor vehicle is a foreign motor vehicle where it is registered under the registration procedure of another State.

5. Unlawful use within the meaning of this Law exists where a motor vehicle is used on public roads in the Federal Republic of Germany without the registration required under road transport law...

B — *Road Transport Registration Code*

Paragraph 18. Obligation to register

Motor vehicles with a maximum speed determined by their type of more than 6 km/h and their trailers (vehicles carried behind motor vehicles with the exception of non-operational vehicles which are being towed and towing axles) may be operated on public roads only if they have been registered to operate through the issue of an operating permit or an EC type approval and through the allocation of a registration number for motor vehicles or trailers by the administrative authority (registration office).

Paragraph 23. Allocation of registration number

1. The person enjoying the right of disposal shall apply for the allocation of the registration number for a motor

8 — According to the Commission, this provision was introduced by the Gesetz zur Änderung des Umsatzsteuergesetzes und anderer Gesetze (Law amending the Law on turnover tax and other taxes) of 9 August 1994 (BGBl. I, p. 2058). The court stated in its referral that the German legislator's intention in applying that provision was to incorporate the rules of Directive 93/89 into domestic law.

vehicle or a motor vehicle trailer to the administrative authority (registration office) in whose district the vehicle has its regular base.

C — *Regulation on International Motor Vehicle Traffic (Verordnung über internationalen Kraftfahrzeugverkehr)* [9]

1. Foreign motor vehicles and motor vehicle trailers shall be registered to operate temporarily within the area of application of this Regulation where a competent authority has issued for it a valid

(a) ...

(b) foreign registration certificate

and a regular base has not been established within the area of application of this Regulation.

9 — RGBl. I, p. 1137.

12. The national court states in its referral that the regular base is the place from which the vehicle is used directly for public road transport and at which it rests after its use is completed. In trans-regional haulage services, it is the place where decisions are made concerning the operation of the vehicle, including rest periods. [10]

IV — Community legislation

13. In December 1989, the Council introduced, by virtue of Regulation No 4059/89, a transitional cabotage system whereby, as from 1 July 1990, carriers established in a Member State and authorised to carry on business as international road hauliers were entitled, under certain conditions, to operate on a temporary basis national road haulage services in another Member State, without having a seat or other establishment therein. Cabotage could be carried out within a quota of 15 000 cabotage authorisations valid for two months. The Regulation was applicable until 31 December 1992 and the Council was to adopt before 1 July 1992 a regulation laying down the definitive cabotage system.

10 — Judgment of the Bundesfinanzhof of 21 November 1989, VII R 59/87, BFH/NV 1990, p. 602).

The Court of Justice annulled this Regulation on the grounds that the Council infringed essential procedural requirements by failing to consult the Parliament a second time, despite the fact that the provision adopted differed from the proposed text. Nevertheless, it held that the provisions of the Regulation should continue to have effect until the Council, after due consultation of the Parliament, had adopted fresh rules on the subject. [11]

14. In October 1993, the Council adopted Regulation No 3118/93 introducing a transitional cabotage system between January 1994 and June 1998 within a Community quota of 30 000 cabotage authorisations valid for two months, increasing annually by 30% as from January 1995. [12] In Luxembourg that corresponded to 1 207 authorisations in 1994, 1 570 in 1995, 2 041 in 1996, 2 654 in 1997 and 1 726 for the first half of 1998. As from 1 July 1998, any non-resident carrier meeting the required conditions was entitled to operate, on a temporary basis and without quantitative restrictions, national road haulage services in another Member State, without having a registered office or other establishment in that State.

15. The provisions of Regulation No 3118/93 relevant to the resolution of the dispute are paragraphs 1 to 3 of Article 6 which provide, respectively:

'1. The performance of cabotage transport operations shall be subject, save as otherwise provided in Community regulations, to the laws, regulations and administrative provisions in force in the host Member State in the following areas:

(a) rates and conditions governing the transport contract;

(b) weights and dimensions of road vehicles; such weights and dimensions may, where appropriate, exceed those applicable in the carrier's Member State of establishment, but they may under no circumstances exceed the technical standards certified by the proof of compliance referred to in Article 1(1) of Council Directive 86/364/EEC;

(c) requirements relating to the carriage of certain categories of goods, in particular dangerous goods, perishable foodstuffs, live animals;

11 — Case C-65/90 *Parliament* v *Council* [1992] ECR I-4593, paragraphs 21 and 24.

12 — This Regulation was amended slightly with the adoption of Council Regulation (EC) No 3315/94 of 22 December 1994 (OJ L 350, p. 9).

(d) driving and rest time;

(e) value added tax (VAT) on transport services.

...'

'3. The provisions referred to in paragraph 1 shall be applied to non-resident transport operators on the same conditions as those which that Member State imposes on its own nationals, so as to prevent any open or hidden discrimination on grounds of nationality or place of establishment.'

16. The same day on which the Council adopted Regulation No 3118/93, it also adopted Directive 93/89 requiring Member States to adjust their tax systems on road haulage vehicles on the basis of the minimum taxes applicable according to the number of axles and maximum authorised weight. The time-limit was fixed at 1 January 1995.

The name of the taxes in each Member State is listed in Article 3; for Luxembourg it is the 'taxe sur les véhicules automoteurs' and for Germany the 'Kraftfahrzeugsteuer'.

Pursuant to Article 5,

'As regards vehicles registered in the Member States, the taxes referred to in Article 3 shall be charged solely by the Member State of registration.'

The Court of Justice annulled this Directive on the grounds that the Council infringed essential procedural regulations by failing to consult the Parliament a second time after introducing amendments to the Commission's proposal. Nevertheless, it held that the provisions of the Directive should continue to have provisional effect until the Council adopted a new directive, [13] which did not happen until June 1999. [14] It fixed the time-limit as 1 July 2000 for Member States to adapt national laws. Neither Article 3, which refers to the names of the vehicle taxes in Luxembourg and Germany, nor Article 5, as interpreted by the Finanzgericht Münster, have been amended by Directive 1999/62/EC.

13 — Case C-21/94 *Parliament* v *Council* [1995] ECR I-1827, paragraphs 28 and 32.

14 — Directive No 1999/62/EC of the European Parliament and of the Council of 17 June 1999 on the charging of heavy goods vehicles for the use of certain infrastructures.

V — The proceedings before the Court of Justice

17. The plaintiff, the French Government and the Commission submitted written observations in these proceedings within the time-limit laid down in Article 20 of the Statute of the Court of Justice.

At the hearing held on 16 October 2001, the defendant's representative, the United Kingdom's agent and the Commission's agent appeared to present their oral arguments.

VI — The questions raised

A — *Question 1*

18. By this question, the referring court asks whether Article 6 of Council Regulation No 3118/93 precludes a Member State's rules which result in motor vehicle tax being charged for the use of commercial goods vehicles in its territory, where they have their regular base, which are registered in another Member State of the European Union, where a cabotage authorisation has been issued.

19. The plaintiff in the main proceedings contends that this question should be answered in the affirmative because the motor vehicle tax was paid in the Member State of registration, namely Luxembourg. The plaintiff was granted Community licences and cabotage authorisations in Luxembourg for the vehicles in question after the Luxembourg authorities carried out annual checks that the necessary requirements were met including, in particular, checks to determine the company seat, the vehicles' place of connection, and compliance with the technical and financial rules. The plaintiff contends that it has neither its own garage nor parking spaces for the vehicles in Luxembourg, but considers that, had it been necessary to have those facilities in order to operate a transport business, the Luxembourg authorities would not have allowed it to do so without such facilities.

The plaintiff also claims that, in order to determine the company's operational centre, various objective factors must be taken into account, such as: for the most part, the vehicles operate abroad; rest periods in Luxembourg are at least as long as those in Germany; the vehicles are registered in Luxembourg and motor vehicle tax on them is paid there; technical controls are carried out every two years in Luxembourg; fuel is also purchased there and the vehicles are insured there; the drivers are registered and insured in Lux-

embourg; the company uses Luxembourg transport licences, renewed annually; the rules in force in Luxembourg concerning the conditions regulating access to the profession are complied with; the company is subject to regular controls by the Luxembourg authorities; and the company's corporation tax is paid in Luxembourg.

20. The Finanzamt Borken presented oral arguments contesting the interpretation which the Commission proposes be given to the Community rules. It contends that Regulation No 3118/93, which applies directly as from 1 January 1994, did not preclude, before 1 January 1995, the date by which domestic legislation was to be amended to comply with Directive 93/89, Member States from applying their rules concerning vehicle registration.

21. The French Government acknowledges that no express reference is made to motor vehicle tax in the list provided in Article 6 of Regulation No 3118/93, establishing the conditions under which cabotage is subject to the law of the host State, whilst nevertheless noting that the provision applies without prejudice to Community law. Further, the charging of tax by Member States on motor vehicles used for the carriage of goods is regulated by Article 5 of Directive 93/89, which provides that taxes are to be charged solely by the Member State of registration, irrespective of whether they carry out cabotage or other types of operation.

22. At the oral hearings, the United Kingdom's agent argued that cabotage operations constitute an exception to the general rule that motor vehicle tax should be charged by the State on whose territory they are carried out. In the light of the purpose of Regulation No 3118/93, bearing in mind that vehicle registration and vehicle taxation go hand in hand, it is contended that Article 6 precludes Germany from taxing vehicles registered in Luxembourg belonging to the plaintiff in the main proceedings.

23. The Commission maintains that Article 6 of Regulation No 3118/93 does not permit the host State to tax motor vehicles whilst a cabotage authorisation issued by the State of establishment is in force, irrespective of the vehicle's regular base during this period.

24. In reply to the question, I would point out that, pursuant to Article 92(1) of the *arrêté grand-ducal* of 23 November 1955

regulating traffic on the public highway, [15] any vehicle belonging to a legal person whose seat is in that State must be registered in Luxembourg. Thus, Andreas Hoves Internationaler Transport-Service Sàrl, incorporated and having its seat in Luxembourg, is obliged to register its vehicles in that State.

The Court of Justice has recently confirmed that companies are entitled to carry on their business in another Member State through an agency, branch or subsidiary. The location of their registered office, general or central administration or principal place of business serves as the connecting factor with the legal system of a Member State in the same way as does nationality in the case of a natural person. [16]

25. Article 72 EC requires the Council to lay down the conditions under which non-resident carriers may operate transport services within a Member State. This provision implies the removal of all restrictions against the person providing the services in question on the grounds of his nationality or the fact that he is established in a different Member State from the one in which the service is to be provided.

The Council complied with that obligation by adopting in 1989 Regulation No 4059/89 and, after that regulation was annulled by the Court of Justice, Regulation No 3118/93, which entered into force on 1 January 1994. From that date, road hauliers, as defined in Article 1, were authorised to operate national road haulage services in another State on a temporary basis, referred to as cabotage, without having a registered office or other establishment therein.

26. Pursuant to Article 3, the Commission granted cabotage authorisations to Member States of establishment which, in turn, issued them to hauliers who requested them.

27. Once cabotage authorisation is obtained, performance of cabotage operations is subject to Community law, save that, as provided for in Article 6, the haulier must also comply with the regulations of the host State in a number of specific areas as follows: (a) rates and conditions governing the transport contract; (b) weights and dimensions of road vehicles; (c) requirements relating to the carriage of certain categories of goods, in particular dangerous goods, perishable foodstuffs, live animals; (d) driving and rest time; and (e) value added tax on transport services.

15 — Mém. 1955, p. 1413 and 1462.

16 — Cases C-79/85 *Sergers* [1986] ECR 2375, paragraph 13; C-270/83 *Commission* v *France* [1986] ECR 273, paragraph 18; C-330/91 *Commerzbank* [1993] ECR I-4017, paragraph 13; C-264/96 *ICI* [1998] ECR I-4695, paragraph 20; and C-212/97 *Centros* [1999] ECR I-1459, paragraph 20.

28. It is acknowledged that, during the contested period, the plaintiff in the main proceedings possessed cabotage authorisations, issued by the Luxembourg authorities to operate transport services in Germany, for another party, as a result of which Regulation No 3118/93 is applicable to the plaintiff. It has also been shown that Article 6, in enumerating the legal obligations with which a carrier operating cabotage services must comply in the host State, does not contain any rules on vehicle registration or motor vehicle tax.

29. Accordingly, I consider that Germany, as a host country for cabotage services operated by the plaintiff in the main proceedings, is not entitled to require the plaintiff to comply with its legislation on vehicle registration and motor vehicle tax.

30. This solution, in addition to complying with Community law, would appear to be the most appropriate since cabotage, by definition, is temporary in character in that there is no requirement that the carrier have its seat or an establishment in the host State. Cabotage, by its very nature, is an activity limited in time, involving the provision of services lacking any degree of permanency associated with the possession of a seat. It would be counterproductive and, above all, hardly profitable if companies were obliged to pay motor vehicle tax in the host State each time they wished to operate cabotage services.

The Court of Justice has held that the temporary nature of cabotage activities has to be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodicity or continuity. [17]

31. In its reference, the Finanzgericht Münster states that the case-law of the Bundesfinanzhof stipulates that a vehicle's regular base is the place from which the vehicle is used directly for public road transport and at which it is parked at the end of the journey and, in the event of inter-regional transport, the operational centre where decisions are taken about the vehicle's route, including rest time.

I would raise various objections to that case-law being applied to the case of Andreas Hoves Internationaler Transport-Service Sàrl: first, that it dates from before the adoption of Regulation No 4059/89, Article 5 of which was the same as Article 6 of Regulation No 3118/93 and therefore could not take into account the

17 — Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 27.

fact that carriers established in other Member States would be allowed to operate national transport services without needing to change their seat or open an establishment; second, given that cabotage is national transport, while such operations are being carried out in Germany it is more logical for the vehicles to be used and parked in that State; finally, in a business as small as Mr Hoves' business in Luxembourg would appear to be, in which one or two persons take the decisions concerning the use of the vehicles, especially at a time where communications have undergone such radical development, the idea of a fixed operational centre seems outdated.

32. There is agreement between the parties that throughout the contested period Andreas Hoves Internationaler Transport-Service Sàrl was in possession of authorisations to operate cabotage services in Germany, issued by the Luxembourg authorities, and that the plaintiff did not have any establishment in Germany.

I do not deny that there are doubts as to whether the plaintiff in the main proceedings possessed cabotage authorisations of two months' duration, during various subsequent years, bearing in mind that, pursuant to Article 3(3) of Regulation No 3118/93, each authorisation may be used by only one vehicle at a time. I am also somewhat sceptical about the fact that the plaintiff, which has fifteen vehicles registered in its name in Luxembourg, is able to make full use of them with eight drivers. Further, if there are only those eight drivers resident in Germany, who take their vehicles home, why is the Finanzamt Borken seeking to tax the fifteen vehicles owned by the plaintiff?

33. According to the Court's case-law, a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law. [18]

34. However, Germany does not appear to have taken advantage of the opportunities

18 — See, in particular, as regards the freedom to provide services, Cases C-33/74 *Van Binsbergen* [1974] ECR 1299, paragraph 13; C-148/91 *Veronica Omroep Organisatie* [1993] ECR I-487, paragraph 12; and C-23/93 *TV10* [1994] ECR I-4795, paragraph 21; as regards the freedom of establishment, C-115/78 *Knoors* [1979] ECR 399, paragraph 25; C-61/89 *Bouchoucha* [1990] ECR I-3551, paragraph 14; and *Centros*, cited above, paragraph 24; as regards the free movement of goods, C-229/83 *Leclerc and Others* [1985] ECR 1, paragraph 27; as regards social security, C-206/94 *Paletta* [1996] ECR I-2357, paragraph 24; as regards the free movement of workers, C-39/86 *Lair* [1988] ECR 3161, paragraph 43; as regards the CAP, C-8/92 *General Milk Products* [1993] ECR I-779, paragraph 21; and as regards company law, C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20.

for verification that Regulation No 3118/93 confers on the authorities of each host State, whereby the cabotage authorisation must accompany the vehicle and must be produced whenever requested by inspecting officers.

On the other hand, Article 8 requires Member States to assist one another in applying the Regulation and confers on the authorities of the host State, without prejudice to any criminal proceedings, the power to impose penalties, on a non-discriminatory basis, on a non-resident carrier who has committed infringements of this Regulation or of Community or national transport legislation in their territory during a cabotage operation. Such penalties may range from a simple fine up to a temporary ban on operating transport services of that type in its territory, requiring the offences and penalties to be notified to the State of establishment which, subject to consultation with the authorities of the host State, may withdraw the authorisation to operate as a carrier.

If the German public authorities considered that Andreas Hoves Internationaler Transport-Service Sàrl was infringing the cabotage authorisations issued by Luxembourg, they should have taken action within the scope afforded them by Regulation No 3118/93, instead of seeking to impose on the plaintiff the obligation to pay motor vehicle tax on fifteen lorries, on which tax had already been paid in Luxembourg since, rather than an established legal obligation of general application, that has the appearance of a hidden penalty not provided for by Community law.

35. Accordingly, I consider that Article 6 of Regulation No 3118/93 precludes a Member State's rules which result in motor vehicle tax being charged for the use of commercial goods vehicles in its territory, where they have their regular base, which are registered in another EU State, where a cabotage authorisation has been issued.

B — *Question 2*

36. This question to the Court of Justice refers to the express provisions of the German law on motor vehicle tax, without stating what they are. Those provisions, on the one hand, exempt from motor vehicle tax vehicles registered in another Member State and, on the other, deny that advantage to vehicles used unlawfully. The definition of unlawful use is given in Article 2(5) of the Law and entails the vehicle being used in Germany without being registered in that State when the legislation in force requires it.

However, the national court states that the second half of the second sentence of Paragraph 1(1)(2) of that Law establishes, in the light of the case-law of the highest courts concerning a vehicle's regular base, domestic tax liability despite foreign registration. It adds that the explanatory memorandum clearly shows that, by making a vehicle's regular base rather than its registration the decisive factor, the German legislature, in order to avert possible tax avoidance, intentionally created rules not dependent on registration for cases such as that of Andreas Hoves Internationaler Transport-Service Sàrl.

In my opinion, the national court is concerned not so much by the possibility that vehicles may be obliged to register in Germany, which would apply to the plaintiff in the main proceedings, as by the possibility that tax must be paid in more than one State, when the host State applies legislation that favours the vehicle's regular base, as construed by German case-law.

37. Consequently, with this question the Finanzgericht Münster asks whether, in cases like that mentioned in the first question, Article 5 of Council Directive 93/89 precludes national rules which, after excluding payment of motor vehicle tax on vehicles registered in another Member State, in which tax has already been paid for that purpose, rule out that technical exemption in the event of unlawful use, such use taking place where the foreign vehicle has its regular base in its territory.

38. The plaintiff in the main proceedings seeks a positive reply to the question.

39. The Finanzamt Borken maintains that Article 5 of Directive 93/89 covers only those vehicles legally registered in a Member State and it is not applicable to the plaintiff in the main proceedings.

40. The reply which the French Government proposes be given to this question is that Directive 93/89 allows tax to be charged on motor vehicles solely by the State where they are legally registered.

41. The United Kingdom's agent concurs with the position adopted by France and

the Commission. It maintains that Article 5 of Directive 93/89 is clear and the position of Germany, seeking to separate the registration of a vehicle in a Member State from the right to tax it, is contrary to the abovementioned Community law.

42. For the Commission, Article 5 of Directive 93/89 does not allow a national provision, whilst a vehicle is registered in another Member State, to link the collection of the tax laid down in Article 3 to unlawful use of the vehicle, consisting is its use on the public highway without having been previously registered in compliance with the law of the host State.

43. The Court of Justice has stated that the objective of Directive 93/89 is to eliminate distortions of competition between transport undertakings in the various Member States through the gradual harmonisation of levy systems and the establishment of fair mechanisms for charging infrastructure costs to hauliers. [19] To that end, Article 3 contains the prescribed list of taxes; Article 5 provides that, for vehicles registered in the Community, taxes, which may not be less than the minimum given in the annex, may be charged solely by the State of registration; and Article 7 allows Member States to maintain or introduce tolls or user charges, under certain conditions. It is clear that the Directive links the right to levy motor vehicle tax inseparably to registration, and provides that the vehicle may be registered in one State only where it must be taxed accordingly.

44. Directive 93/89 fixed 1 January 1995 as the time-limit for adapting domestic legislation. Germany fulfilled its obligation to amend its law and, as from that date, foreign vehicles, registered in another Member State and used on German territory, intended solely for the carriage of goods with a total authorised weight equal to or greater than 12 tonnes (which are the vehicles to which the Directive applies), were precluded from motor vehicle tax.

However, the German legislature went further and provided that vehicles used unlawfully, defined as vehicles used on the public highway in Germany without being

19 — Case C-193/98 *Pfennigmann* [1999] ECR I-7747, paragraph 30.

registered in compliance with the legislation in force, could not benefit from the technical exemption. Moreover, a foreign vehicle cannot be authorised for use in Germany, even on a temporary basis, if its regular base is in that State. [20]

45. I concur with the Commission that the intention of Article 5 of Directive 93/89 is not to prevent a Member State, in the absence of any harmonisation of the criteria governing the registration of road haulage vehicles, from imposing its own requirements as regards compliance with and the application of conditions governing registration laid down by its transport legislation. However, any conflicts arising as a result of such measures must be resolved in compliance with Community law and not by creating a new tax which, in any event, is contrary to the letter of Article 5 and the purpose of the Directive.

46. If the argument advanced by the German authorities in the main proceedings were to be upheld, a company such as Andreas Hoves Internationaler Transport-Service Sàrl, incorporated and established in Luxembourg, where it is obliged by law to register its vehicles and where, by application of the Directive, it must pay motor vehicle tax, could be obliged to pay an identical tax in another Member State for the same vehicles when carrying out cabotage operations.

Such a situation is contrary to Article 5 of Directive 93/89 and constitutes a discriminatory measure against foreign providers of transport services, as those providers established in Germany, who have registered their vehicles in that State, pay tax only once.

47. Given that only the Member State of registration is authorised to tax motor vehicles registered on its territory, I must conclude that Article 5 of Directive 93/89 precludes a national rule which, after excluding the payment of tax on vehicles registered in another Member State, in which tax has already been paid for the same purpose, refuses to apply that technical exemption to those suspected of unlawful use, in the sense that the foreign vehicle's regular base is in its territory.

20 — That is my interpretation, *contrario sensu*, of Article 1(1)(b) of the Regulation on the international movement of vehicles.

VII — Conclusion

48. In the light of the above reasoning, I propose that the Court of Justice should reply to the Finanzgericht Münster as follows:

(1) Article 6 of Council Regulation (EEC) No 3118/93 of 25 October 1993 laying down the conditions under which non-resident carriers may operate national road haulage services within a Member State precludes a national rule which imposes motor vehicle tax on lorries used on its territory, in which they have their regular base, where these lorries are registered in another Member State in which they have been issued with a cabotage authorisation.

(2) Article 5 of Council Directive 93/89/EEC of 25 October 1993 on the application by Member States of taxes on certain vehicles used for the carriage of goods by road and tolls and charges for the use of certain infrastructures precludes a national rule which, after excluding payment of motor vehicle tax on vehicles registered in another Member State, in which tax has already been paid for the same purpose, refuses to apply that technical exemption to those suspected of unlawful use, in the sense that the foreign vehicle's regular base is in its territory.