REPORT FOR THE HEARING
delivered in Case 127/86 *

I — Facts and procedure

1. As can be seen from the order for reference and the file in the case, Mr Ledoux, the defendant in the main proceedings, a technician, domiciled and residing in Belgium and employed since 1982 by a company established in France, used a motor vehicle acquired on the French market, registered in the name of that company in France and placed at his disposal by his employer to visit customers, to travel between his workplace in France and his residence in Belgium and for leisure purposes.

Since VAT had not been paid in Belgium, Mr Ledoux was stopped on 22 February 1983 as he crossed the frontier with the vehicle away from the normal route from his home to his workplace. He was subsequently prosecuted before the tribunal correctionnel (Criminal Court), Neufchâteau, which acquitted him after finding that his case was not covered by specific rules. The Minister for Finance of the Kingdom of Belgium brought an appeal against that judgment.

The cour d'appel (Court of Appeal), Liège, decided that the dispute raised a problem concerning the interpretation of Community law.

Therefore, by judgment of 12 March 1986, received at the Court Registry on 26 May 1986, the cour d'appel, Liège, stayed the proceedings and referred the following question to the Court for a preliminary ruling under Article 177 of the EEC Treaty:

'Do the Community rules concerning taxation, and in particular the rules concerning value-added tax, permit the Belgian State, under the Law of 3 July 1969 establishing the Value-Added Tax Code and the decrees implementing that Law and in accordance with the interpretation of its provisions by the Minister of Finance of the Kingdom of Belgium, in proceedings brought against Yves Ledoux, residing at 32 rue Leroy, Marcinelle, to levy value-added tax on a motor vehicle which is owned by a company incorporated under French law with its registered office in France and is subject to value-added tax in France, where the tax has been paid, in so far as the vehicle is used by an employee of the company, who is resident in Belgium, for the performance of his duties under his contract of employment and for leisure purposes, taking account of the fact that the vehicle remains the property of the French employer and that the importation into Belgium is only temporary and of a provisional nature?'

2. The written procedure followed the normal course. Pursuant to Article 20 of the Protocol of the Court of Justice of the EEC, written observations were submitted by the Danish Government, represented by L. Mikaelsen, Legal Adviser, and the Commission of the European Communities, represented by H. Étienne, Principal Legal Adviser, acting as Agent.

* Language of the Case: French.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court (Fourth Chamber) decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

1. The Danish Government observes that the Community rules applicable are those contained in Council Directive 83/182 of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another (Official Journal L 105, p. 59).

According to the Danish Government, it can be seen from Article 3 (a) (aa) and Article 4 (1) (a) (aa) read together with Article 1 of that directive that the condition on which a vehicle may be imported into a Member State without being liable to VAT is that the person importing the vehicle should have his normal residence in a Member State other than the Member State of temporary importation.

With regard to the residence criterion, the Danish Government refers to the second subparagraph of Article 7 (1) of the directive which provides that a person whose occupational ties are in a different place from his personal ties is to be regarded as being resident in the place of his personal ties.

Finally, the Danish Government emphasizes that, as provided by Articles 3 and 4 (1) (b) of the directive, the vehicle may not be disposed of, hired out or lent in the Member State of temporary importation.

The Danish Government concludes that where those conditions for temporary tax-free importation are not fulfilled, the Member State of importation may require payment of VAT on the vehicle concerned.

The Danish Government emphasizes that that interpretation has already been confirmed by the judgments in a series of similar cases (Case 823/79 *Carciati* [1980] ECR 2773, and Case 134/83 *Abbink* [1984] ECR 4097) in which the Court decided that Community law is not infringed by national provisions imposing criminal sanctions on persons residing in a Member State who use motor vehicles temporarily imported under those circumstances. According to the Danish Government, if a Member State is entitled in this case to bring a criminal prosecution, it is all the more entitled to require payment of VAT.

The Danish Government thus proposes that the reply to the question referred to the Court should be that Community law does not prevent the Belgian State from requiring payment of VAT in this case on the vehicle concerned.

2. The Commission considers that, in any event, the temporary uses which are required to be permitted and the conditions for the exercise of the right to temporary use as laid down in Directive 83/182 do not meet the requirements of a single market and it intends to make new proposals on that subject shortly.

It considers that the temporary uses provided for by the Community legislature in Directive 83/182, which does not permit the use of the vehicle by persons resident in

the country of temporary importation, are, however, the minimum to which citizens are entitled and do not prevent the Member States from going further, in accordance with Article 9 (1) of the directive, which provides that 'Member States may maintain and/or introduce more liberal arrangements than those provided for in this directive'. It observes in that regard that Belgium has maintained temporary rules for persons residing near frontiers who use, for the journey from their home to their work, a vehicle placed at their disposal by an employer established in another Member State (Circular of 1 May 1984).

The Commission observes that the application by the Member States of their national rules for temporary importation, in accordance with Article 14 of Council Directive 77/388 (Sixth VAT Directive) for the purpose of ensuring the correct and straightforward application of the temporary importation system and of preventing any possible evasion, avoidance or abuse must, on the one hand, take account of the applicable Community law and of the degree of liberalization already achieved and, on the other, consist of measures which comply with the principle of proportionality in regard to the objective to be achieved.

With regard, first of all, to compliance with Community law, in particular the right of free movement, the Commission emphasizes that the use by an employee of an undertaking of a motor vehicle belonging to that undertaking for the journey from his place of work to his home and for leisure purposes constitutes part of that employee's remuneration. Consequently, prohibiting the use of the vehicle in such circumstances under the rules of the country of residence has the effect, in that country, of denying the employee the benefit of that part of his remuneration and thereby removing the equality of remuneration existing in the country of employment between residents and non-residents which is required by Article 48 of the EEC Treaty and Article 7 of Regulation No 1612/68 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475). The Commission also considers that when the Member States apply their legislation on temporary importation for the legitimate purpose of preventing tax evasion, avoidance or abuse, they must, in compliance with Article 5 of the Treaty, ensure fulfilment of the obligations arising therefrom, abstain from any measure which jeopardizes the attainment of the objectives of the Treaty, such as the exercise of the right of free movement, and lastly not render ineffective Community action in regard to employment in regions in which there is structural unemployment, where, as in this case, the exercise of workers' right to free movement, by the conclusion of contracts of employment across frontiers, contributes to reducing unemployment.

With regard to the fact that the measures adopted by Member States under Article 14 of Directive 77/388 must be proportional to the objectives which those measures are designed to achieve, the Commission emphasizes that, according to the Court's previous decisions (Case 823/79 *Carciati* and Case 134/83 *Abbink*), the temporary uses prohibited by national legislation may be punished by criminal and administrative sanctions, on condition that the national measures concerned are not excessive.

According to the Commission, the discretion left to the Member States in that regard must be used in a way which complies with the principle of proportionality by taking into account, in the light of the general purpose of the common system of VAT and the specific

requirements of Article 14 of the Sixth Directive, first the importance of the public interest to be protected and secondly the degree to which the measures adopted by the Member States could hinder the exercise of rights flowing from the Treaty. It emphasizes that in this case, the limitation in the public interest by national legislation of the right to make temporary use of a vehicle, that is to say, the requirement to pay VAT upon importation, must be put into effect without infringing the prohibition of double taxation in that regard, as the Court indicated in its judgment in *Abbink*. Consequently, the application of that rule prohibiting double taxation in regard to VAT in cases in which, as in the main proceedings, the rate of VAT in the country in which the vehicle is registered is higher than the rate applied in the country of residence (33.33% in France, as against 25% in Belgium, with the possibility of a deduction of 50% if the vehicle is used for private and business purposes) should, according to the Commission, lead to the conclusion that no VAT may be demanded in the country of residence. In that case, in so far as there has been no tax evasion, no fine for non-payment, at least of VAT, may be imposed by the Member State of temporary importation.

The same is true in regard to the sanctions, such as the confiscation of the vehicle or the payment of its value, to which the defendant is liable in the main proceedings, which the Commission regards as disproportionate by reason of the absence or insignificance of the public interest to be protected, since there has been no evasion of tax.

According to the Commission, where there is a conflict of laws concerning the place in which the vehicle is registered, as is the case in the main proceedings, such measures may be adopted by the Member States only after consultations between the national administrations concerned have been held in order to take, by mutual agreement, the decisions necessary to resolve the difficulties to which the practical application of the Community directives has given rise, as is provided for in Article 10 (2) of Directive 83/182.

On the basis of the foregoing considerations, the Commission proposes that the reply to the question referred to the Court by the cour d'appel, Liège, should be as follows:

'In so far as under the Community law applicable at the material time no value-added tax was payable on the definitive importation of the vehicle, the temporary use of the vehicle in the circumstances of the case did not entail evasion of value-added tax and does not justify a fine on that basis. A penalty such as the confiscation of the vehicle or, in the alternative, payment of its value, infringes the principle of proportionality. Any fine intended to ensure compliance with national rules concerning the determination of the place in which vehicles must be registered or to protect other tax revenue must be applied in such a way as to take account of the circumstances proper to conflicts of laws the source of which is the exercise of rights under the Treaty which Member States have an obligation not to hinder.'

C. Kakouris
Judge-Rapporteur