Conclusions
OPINION OF ADVOCATE GENERAL
TIZZANO
delivered on 3 July 2003(1)

Case C-387/01

Harald Weigel and Ingrid Weigel
v
Finanzlandesdirektion für Vorarlberg

(Reference for a preliminary ruling from the Verwaltungsgerichtshof (Austria))

(Free movement of workers – Importation of a private motor vehicle – Tax on the fuel consumption of motor vehicles – Customs duties and equivalent charges – Discriminatory tax charges – Turnover taxes – Sixth VAT Directive)

1. By order of 20 September 2001, the Austrian Verwaltungsgerichtshof (Administrative Court; 'the Verwaltungsgerichtshof') referred to the Court for a preliminary ruling under Article 234 EC three questions by which the referring court asks, in substance, whether Articles 12 EC, 23 EC, 25 EC, 39 EC and 90 EC or the Community VAT directives preclude national rules imposing a registration tax based on fuel consumption on a vehicle imported from another Member State if those rules are applied to the private vehicle of a taxable person moving residence from one Member State to another for reasons of work.

I – Legislative background

A – *Community law*

The Treaty provisions

2. Article 12 EC lays down a general prohibition of discrimination on grounds of nationality within the field of application of the Treaty. That principle is then given effect, inter alia, in Article 39 EC, according to which the free movement of workers within the Community requires the abolition of all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. Articles 23 and 25 EC, which regulate the operation of the customs union, prohibit the imposition, in trade between Member States, of customs duties on imports and of all charges having equivalent effect.

4. This prohibition is backed up by Article 90(1) EC, by virtue of which 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 on similar domestic products.

Secondary law

The VAT rules

5. According to Article 2 of Council Directive 77/388/EEC ('the Sixth VAT Directive'), (2) the following are subject to value added tax:

‘1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;
2. the importation of goods’.
6. Article 33(1) of the Sixth VAT Directive is in the following terms:
‘Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers’.
The exemption rules
7. Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (‘Directive 83/183’), (3) has as its purpose the elimination of tax obstacles that hinder the free movement of persons within the Community. Article 1 of the directive defines its scope as follows:
‘1. Every Member State shall, subject to the conditions and in the cases hereinafter set out, exempt personal property imported permanently from another Member State by private individuals from turnover tax, excise duty and other consumption taxes which normally apply to such property.
2. Specific and/or periodical duties and taxes connected with the use of such property within the country, such as for instance motor vehicle registration fees, road taxes and television licences, are not covered by this Directive’.
The national legislation
8. The Normverbrauchsabgabegesetz (Law imposing a Standard Fuel Consumption Tax, ‘the NoVAG’) (4) introduced the Normverbrauchsabgabe, a tax on the standard fuel consumption of motor vehicles (‘the NoVA’). The charge to the NoVA arises upon the supply of a motor vehicle that has not yet been registered in Austria (Paragraph 1(1) of the NoVAG), upon the commercial hiring out of such a vehicle (Paragraph 1(2) of the NoVAG) or, in all other cases, upon the first-time registration of a motor vehicle in Austria (Paragraph 1(3) of the NoVAG).
9. The party liable for the tax is the supplier or lessor respectively in the case of a supply or a commercial hiring out (Paragraph 4(1) of the NoVAG), while in the case of a first-time registration it is the person in whose name the motor vehicle has been registered (Paragraph 4(2) of the NoVAG).
10. The basis of assessment of the tax is set forth in Paragraph 5 of the NoVAG and is defined, in the case of a supply, as the value of the motor vehicle, calculated in accordance with Paragraph 4 of the Umsatzsteuergesetz (Turnover Tax Law).
11. In all other cases, the basis of assessment is the fair value of the vehicle, exclusive of VAT. In the case of an intra-Community import, that value is normally computed by reference to the national Eurotax valuations; (5) it is thus, in effect, the mean of the purchase and selling price (exclusive of VAT and the NoVA), corresponding, in general, to the price that could be obtained from a private sale in the country of origin of the imported vehicle.
12. The fair value of the motor vehicle, for NoVA purposes, may be greater or less than the Eurotax mean value to take into account the terms of the warranty and after-sales service, any repairs required, the vehicle’s features, and wear-and-tear.
13. The purchase price abroad may be deemed to be the fair value on which the NoVA is based if it does not differ from the Eurotax mean valuation by more than 20%. If it does, the taxpayer is required to explain in each case the difference of over 20% from the mean valuation.
14. Under Paragraph 6(2) of the NoVAG, the tax rate for motor vehicles varies according to fuel consumption and is equal to the fuel consumption rating, in litres, reduced by three litres (or two litres, in the case of diesel vehicles) and multiplied by two. Paragraph 6(3) of the NoVAG provides that the rate may not in any case exceed 16% of the basis of assessment.
15. Under Paragraph 6(6) of the NoVAG, where the chargeable event is not subject to VAT in

Austria and the VAT amount is thus not included in the basis of assessment of the NoVA, a surcharge of 20% of the base tax applies.

16. In substance, therefore, the NoVA comprises a base tax ('the NoVA base tax') and a potential surcharge ('the NoVA surcharge'), which is suffered where the chargeable event is not the supply of the vehicle but some other event not subject to VAT, including, in particular, the first-time registration of the vehicle in the country.

II – Facts and procedure

17. Mr and Mrs Weigel, who are German nationals originally resident in Germany, moved to the Vorarlberg region of Austria in 1996. Their move followed Mr Weigel's appointment as director of the Vorarlberger Landesbibliothek (Vorarlberg State Library).

18. On moving, the plaintiffs brought their respective cars with them and applied to have them registered in Austria. This resulted in a decision of the Finanzamt (Tax Office) Feldkirch of 2 October 1996, assessing Mr and Mrs Weigel to the NoVA in respect of both motor vehicles, on the basis that it was in each case a first-time registration in Austria (Paragraph 1(3) of the NoVAG).

19. The tax charged to Mr Weigel was in respect of a 1995 Mitsubishi Space Wagon GLXi. The taxable value was set at ATS 187 000 in accordance with the Eurotax fixed valuations. Applying a tax rate of 14%, a charge to the NoVA of ATS 26 180 was assessed. Under Paragraph 6(6) of the NoVAG, a surcharge of 20% of the base tax, amounting to ATS 5 236, was also assessed. The total charge to tax, comprising both base tax and surcharge, thus came to ATS 31 416.

20. The tax charged to Mrs Weigel was in respect of a 1993 Nissan Sunny Y10 L2. The taxable value was set at ATS 71 000, again in accordance with the Eurotax valuations. Applying a tax rate of 9%, a charge to the NoVA of ATS 6 390 was assessed, plus a surcharge of ATS 1 278, yielding a total of ATS 7 668.

21. The Weigels brought proceedings before the Verfassungsgerichtshof (Constitutional Court) which declined to hear the case and, upon the plaintiffs' application, remitted the case to the administrative court of competent jurisdiction, the Verwaltungsgerichtshof, before which the plaintiffs claimed that the aforementioned tax rules were incompatible with Community law.

22. Taking the view that the outcome of the dispute called for an interpretation of Community law, the Austrian court referred the following questions to the Court for a preliminary ruling:

'1. Is Article 39 EC (free movement of workers) or Article 12 EC (discrimination on the ground of nationality) to be interpreted as meaning that it is contrary to those provisions for a tax calculated on the basis of standard fuel consumption (*Normverbrauchsabgabe*, basic tax and surcharge) to be charged on a vehicle brought into the Republic of Austria from another Member State of the Community by a person moving residence in connection with a change of employment?

2. Do Article 90 EC (…) or Article 23 EC (…) and Article 25 EC (…) preclude the imposition of the standard fuel consumption tax (…) referred to in the first question (…)?

3. Is the surcharge payable on the *Normverbrauchsabgabe* referred to in the first question compatible with the Sixth Council Directive (77/388/EEC) of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes (…), as amended by Council Directive 91/680/EEC (…)?'

23. In the proceedings before the Court, written observations were submitted by Mr and Mrs Weigel, by the Austrian, Finnish and Danish Governments, and by the Commission.

III – Legal Analysis

The first question

24. By its first question, the referring court essentially asks whether the Treaty provisions on the free movement of workers, or the general prohibition of discrimination laid down in Article 12 EC, preclude the assessment of NoVA on persons moving residence within the common market for reasons of employment and bringing their own cars with them in so doing. But arguments raised in these proceedings bid the Court, as we shall see, not to restrict the analysis of the Austrian measure to the Treaty provisions expressly cited by the referring court but also to take into consideration various provisions of secondary law, contained in Directive 83/183, which pursue essentially the same objective.

25. Let me preface my analysis by saying that, strictly speaking, the answer to this question may require separate consideration of the NoVA base tax and the NoVA surcharge (above, paragraphs 15 and 16). However, I will deal with the latter, in relation to the specifically fiscal aspects, in my analysis of the second question, and I can therefore restrict the discussion here to the NoVA base tax. I will now examine, in turn, its compatibility with Article 39 EC and with Directive 83/183.

The NoVA and free movement of workers

26. In the Weigels' view, the legislation in question is incompatible with Article 39 EC because it gives rise to manifest discrimination against workers coming from other Member States. They alone are obliged to pay the NoVA on moving residence, whereas workers who change residence within the country in question are not required to pay the tax.

27. The intervening governments, for their part, are at one in urging a negative answer to the first question, relying on arguments that are also in large part identical.

28. They contend, first of all, that according to the case-law of the Court, non-discriminatory national rules which affect access to the labour market only indirectly are not an obstacle to the free movement of workers. (6) The tax in question does not have any direct effect on the ability of workers coming from other Member States to take up employment in Austria.

29. The NoVA should therefore be regarded as one of the many provisions of national law that emigrant workers taking up employment in another Member State have to reckon with and by which they are sometimes adversely affected due to the failure to harmonise national legislation at Community level.

30. In any event, the Austrian Government in particular points out, the imposition of the NoVA does not constitute a discriminatory measure as its application to situations such as the present is in reality intended to ensure the equal tax treatment of Austrian workers, who pay the NoVA at the time of purchasing their cars, and immigrant workers.

31. Since therefore the measure is in substance one applicable without distinction, the alleged obstacle to the free movement of persons, even if it existed, would be justified by overriding reasons of public interest, such as environmental protection, road safety and combating the erosion of the tax base. The measure in question could not therefore be regarded as contrary to Article 39 EC.

32. The Commission, for its part, concerns itself only secondarily with the conformity of the NoVA with Article 39 EC, because in its view the tax must be considered in the first instance in the light of Directive 83/183.

33. In the Commission's opinion, given that the NoVA is incompatible with that directive in respect of the part of it that exceeds the administrative cost of the vehicle registration formalities, there would be no point in also examining whether or not it is compatible with Article 39 EC, except – obviously – in respect of the part that does not exceed the cost of the service rendered and which is therefore not incompatible with the directive.

34. In the Commission's view, the NoVA is not, in any event, contrary to Article 39 EC in respect of this limited part. The Commission shares the view that any mischiefs arising as a result of the tax are not the result of discrimination between Austrian workers and those coming from other Member States but are the inevitable consequence of the absence of measures harmonising vehicle registration rules and, hence, of the disparities between national laws. (7)

35. Neither, the Commission lastly observes, can the Austrian tax – referring again to that part of it that does not infringe the directive – be regarded as contrary to Article 12 EC, given its non-discriminatory nature.

36. Turning to consider the arguments of the interveners, I would first observe that, according to settled case-law, 'by prohibiting every Member State from applying its law differently on the ground of nationality, within the field of application of the Treaty, Articles 7 and 48 [of the Treaty, now, after amendment, Articles 12 EC and 39 EC] are not concerned with any disparities in treatment which may result, between Member States, from divergences existing between the laws of the various Member States, so long as the latter affect all persons subject to them in

accordance with objective criteria and without regard to their nationality'. (8)

37. Like the Member States who intervened in these proceedings, I too take the view that this is precisely the situation here, as a result of the imposition in Austria, but not in other Member States and specifically not in Germany, of a tax on the fuel consumption of motor vehicles. That disparity unquestionably gives rise, albeit indirectly, to a handicap for persons moving, but that is – precisely – the inevitable consequence of the application to the migrant worker of the laws of the host country.

38. The key point for present purposes, however, is that those laws are applied on the basis of a criterion, that of first-time registration in the country, which can certainly be considered – to use the Court's words – objective and non-discriminatory.

39. It therefore follows directly from the case-law cited that taxation such as the NoVA base tax is not contrary to Article 39 EC.

The NoVA and Directive 83/183

40. I now turn to examine whether, as the plaintiffs in the main proceedings and the Commission maintain, the tax in issue is contrary to Directive 83/183 and specifically to Article 1(1) thereof, which requires Member States to exempt from turnover tax, excise duty and other consumption taxes personal property imported permanently from another Member State by private individuals.

41. That question is not in fact specifically raised by the national court, but it was at the centre of considerable discussion at the hearing and cannot therefore be disregarded, because, as will be recalled, '[i]t is the Court's duty to interpret all provisions of Community law which national courts need in order to decide the actions pending before them, even if those provisions are not expressly indicated in the questions referred'. (9)

42. In the Weigels' view, then, Article 1(1) of Directive 83/183 applies to the NoVA as well, since the NoVA is in reality a turnover tax.

43. The Commission reaches the same conclusion, at least in respect of the part by which the NoVA base tax exceeds the administrative cost of registering the vehicle. The provision in the directive prohibits not only taxes that directly hinder the importing of the property but also those that are imposed on transactions intimately bound up with the importation, as is precisely the case with the registration of a motor vehicle.

44. Nor is this contradicted, according to the Commission, by Article 1(2) of the directive, which excludes 'motor vehicle registration fees' from the exemption. The exemption from tax provided for by subparagraph (1) of the same article constitutes an application of the principle of free movement of persons, hence the exception in Article 1(2) must be strictly construed. The term 'registration fee', in particular, is subject to strict interpretation and should comprise only fees intended to cover the costs of registration.

45. This point is supported, moreover, by the French and English versions of the directive. The former uses the term 'droits' and not 'taxes'. The latter uses the term 'fees', which describes the charges paid in consideration of a service.

46. Let me say straight away that this literal interpretation does not convince me and I find more persuasive the opposite conclusion reached by the Member States that submitted observations in this case.

47. It seems to me, as it does to the Austrian, Danish and Finnish Governments, that taxes such as the NoVA base tax, which are charged upon the registration of a motor vehicle, do not constitute 'turnover tax, excise duty and other consumption taxes which normally apply to' 'personal property imported permanently from another Member State by private individuals' and that they must therefore be regarded as excluded from the scope of the exemption provided for in Article 1(1) of Directive 83/183.

48. First of all, I agree with the Austrian Government that the NoVA does not seem at all to fall within 'taxes which normally *apply to'* personal property '*imported* permanently' within the meaning of the provision, because the Austrian tax is in fact levied *as a consequence of registration*. To appreciate the different character of the NoVA compared to the taxes

contemplated by the directive one need only consider the case of the import of a collectors' vehicle or in general any vehicle not intended for use on the public road network. In such cases, no charge to tax would arise.

49. Furthermore, I agree with the Finnish Government when it points out that Article 1(2) of Directive 83/183 excludes from the tax exemption for personal property imported permanently all 'duties and taxes connected with the use of such property within the country'. It seems to me too that a tax such as the NoVA specifically concerns the *use* of a vehicle *within the country* and not its mere importation (suffice it to consider the exemption, mentioned above, for collectors' vehicles and vehicles in general not intended for road use).

50. In my view, therefore, taxes of this kind should rather be treated as '[s]pecific and/or periodical duties and taxes connected with the use of such property within the country, such as for instance motor vehicle registration fees, road taxes and television licences', which are expressly excluded from the exemption by Article 1(2) of the directive.

51. I would also observe, as do the Austrian and Finnish Governments, that an interpretation whereby Member States are not obliged to grant exemption from the NoVA in accordance with Article 1(1) of the directive on tax exemptions is entirely consistent with the proposal for a directive governing the tax treatment of private motor vehicles moved permanently to another Member State in connection with a transfer of residence. (10)

52. Under that proposal, the adoption of a directive to prohibit Member States from imposing 'registration taxes and/or other consumption taxes (…) on private motor vehicles registered in other Member States and brought into that Member State permanently in connection with the transfer of normal residence of a private individual' (Article 1) is necessary precisely because of the inadequacy of the rules laid down by Directive 83/183 (fourth, fifth and seventh recitals).

53. Furthermore, it seems to me that the Kingdom of Denmark is correct in observing that to maintain, as the Commission does, that the exclusion of 'motor vehicle registration fees' in Article 1(2) of Directive 83/183 applies only to charges intended to cover administrative costs, amounts to ascribing to that provision a purely pleonastic effect. It is well known that the recovery of expenses incurred in discharging an administrative formality that is not in itself contrary to Community law, such as, in this case, the registration of a vehicle for use within the state, is a measure that is compatible with the Treaty.

54. Lastly, the Commission's argument seems to me to be difficult to reconcile with what the Court itself had to say in the recent *Cura Anlagen* judgment – on the very subject, it should be noted, of the Austrian NoVA. There the Court confirmed that since the taxation of motor vehicles has not yet been harmonised at Community level, Member States are free to exercise their powers of taxation in that area, provided they do so in compliance with Community law. (11)

55. In conclusion, I take the view that the imposition of a tax such as the NoVA base tax on a migrant worker moving to Austria from another Member State to take up employment there and importing his or her own vehicle into that country is not incompatible with the rules on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals laid down by Directive 83/183 and, specifically, Article 1 thereof.

56. I therefore propose that the answer to be given to the first question is that a national measure imposing a tax such as the NoVA base tax – which is payable upon the first-time registration in the state of a motor vehicle and is calculated on the basis of the value of the vehicle and its fuel consumption – on a migrant worker moving to Austria from another Member State to take up employment there and importing his or her own vehicle into that country and registering it, is not contrary to Article 39 EC. Nor is the imposition of such a tax contrary to the rules on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals laid down by Directive 83/183 and, specifically, Article 1 thereof.

The second question

57. By its second question, the national court is actually asking the Court two distinct questions which need to be dealt with separately. In the first place, it asks whether the disputed tax constitutes a customs duty or a charge having equivalent effect for the purposes of Articles 23 EC

and 25 EC. In the second place, it asks essentially whether the relevant Austrian legislation gives rise to discriminatory internal taxation and is therefore contrary to Article 90 EC, and if so to what extent.

a) The NoVA and Articles 23 EC and 25 EC

Arguments of the parties

58. The Weigels argue, not without some ambiguity, that the question should be answered in the affirmative, since they believe that the Austrian measure falls foul of the prohibition of charges equivalent to customs duties.

59. In their view, since it is levied on a motor vehicle upon its first-time registration in the state, the NoVA bears directly on the import of a good. It is therefore equivalent to a customs duty and as such contrary to Articles 23 EC and 25 EC.

60. In any event, the NoVA should not apply in the present case, given that under Article 2 of Regulation No 918/83 on reliefs from customs duty granted when goods are put into free circulation in the Community, (12) 'personal property imported by natural persons transferring their normal place of residence … to the customs territory of the Community shall be admitted free of import duties'. Mr and Mrs Weigel argue that this system of reliefs should also apply in the case of a transfer of residence within the Community, since otherwise the result would be that intra-Community transfers of residence were treated less favourably, without justification, than those involving a crossing of the Community's customs frontier.

61. The Austrian and Finnish Governments, as well as the Commission, take the contrary view that the NoVA and the surcharge are not customs duties or charges having equivalent effect but form part of a general system of internal taxation. Both apply to all vehicles, whether purchased within the state or abroad, and they apply to them on the basis of objective and non-discriminatory criteria (in this case, registration in Austria). Both tax measures, therefore, fall outside the scope of the prohibition laid down in Articles 23 EC and 25 EC and should instead be considered in the light of Article 90 EC.

62. For my part, I must first say that Regulation No 918/83, which is relied upon by the plaintiffs in the main proceedings, does not appear to me to be a suitable yardstick for present purposes. That regulation applies in the context of imports of property from a non-Community country and is therefore entirely unsuitable for application in the different context of a transfer of property within the Community.

63. The point which does need to be considered, as I have said, is whether or not a tax such as the NoVA (base tax and surcharge) falls to be regarded as a customs duty or an equivalent charge for the purposes of Articles 23 EC and 25 EC and is therefore contrary, as such, to one of the fundamental principles of Community integration, that of the free movement of goods within the common market.

64. In this regard, I would recall that according to settled case-law, the prohibition of customs duties and equivalent charges extends to 'any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier'. (13)

65. In order to answer the first part of this question it is therefore necessary to establish whether or not the NoVA is a pecuniary charge which is imposed on goods *by reason of the fact that they cross a frontier*.

66. From the account of the Austrian tax provisions given in these proceedings it is quite clear that the NoVA, like similar charges that exist in other Member States, (14) is not levied *upon* the crossing of the frontier, but upon the sale, for on-road use, of a vehicle not yet registered in the state, upon the commercial hiring out of such a vehicle, or upon its first-time registration. It cannot therefore be regarded either as a customs duty or as a charge having equivalent effect prohibited under Articles 23 EC and 25 EC, but rather as a measure falling within a general system of internal taxation.

67. I therefore feel able to conclude on this point that taxes such as the NoVA base tax and the NoVA surcharge do not constitute customs duties or charges having equivalent effect within the

meaning of Articles 23 EC and 25 EC.

b) The Austrian system and Article 90 EC

68. With regard to this question, Mr and Mrs Weigel recall firstly that, according to Community case-law, '[a] national tax system which is liable to eliminate a competitive advantage held by imported products over domestic products would be manifestly incompatible with Article 95, which seeks to guarantee that internal charges have no effect on competition between domestic and imported products'. (15)

69. Now, according to the plaintiffs in the main proceedings, the disputed tax has just such an effect, because, by virtue of the fact that it is charged only on second-hand cars imported from other Member States, thereby increasing their price, the NoVA eliminates the competitive advantage on the Austrian market that those cars would otherwise hold. As a consequence, a tax such as the NoVA is manifestly incompatible with Article 90 EC.

70. According to the Austrian and Finnish Governments, on the other hand, the NoVA and the surcharge form part of a general system of internal taxation which is designed to ensure that every car registered in Austria is subject to the same taxation. Such a tax system is therefore not discriminatory either as regards the base tax or as regards the surcharge.

71. The former is charged on every vehicle registered for the first time in Austria, regardless of its origin and place of purchase, and so clearly cannot be regarded as discriminatory.

72. As for the surcharge, while it is true that this does not apply to all vehicles, since it is due only if liability for the base tax accrues otherwise than upon a supply, it nevertheless performs an equalising function in that it compensates for the fact that the NoVA basis of assessment is lower in those circumstances, being exclusive of VAT.

73. The Commission, for its part, having noted that in general a tax is incompatible with Article 90 EC if it bears more heavily on imported products than on similar domestic products, goes on to analyse the base tax and the surcharge separately in the light of that test. While the base tax, in its view, is in principle compatible with Article 90 EC, the surcharge, on the other hand, is prohibited by that provision, because of its intrinsically discriminatory character.

74. For my part, I fully agree with that view, for the reasons I now turn to illustrate.

The NoVA base tax

75. In order to ascertain whether or not the base tax is discriminatory for present purposes, it is necessary to compare the tax charged on imported used cars, such as those with which the main proceedings are concerned, with that charged on identical used cars already on the Austrian market.

76. In this regard, I too would observe – as the Commission does – that the NoVA is a single-stage tax, payable at the latest upon first-time registration. Consequently, while it is true that the purchaser of a used vehicle already registered in Austria does not pay the NoVA *directly*, the price he or she pays for the vehicle is still one that already includes a residual portion of the NoVA, which reduces in line with the depreciation for the use of the vehicle.

77. There is therefore no discrimination between domestic used vehicles and imported used vehicles if the NoVA charged on the latter does not exceed the amount of the residual NoVA incorporated in the price of a similar used vehicle available on the Austrian market.

78. In order for that condition to be met, it is therefore necessary that the imputed value of the imported used vehicle taken by the tax administration as the basis of assessment should faithfully reflect the value of a similar used vehicle on the Austrian market.

79. However, the plaintiffs in the main proceedings complain that the fixed scale applied by the Austrian tax administration to determine the value of their vehicles – in this instance by reference to the Eurotax value – did not satisfy the above test, since it produced an inflated reference value and, hence, an excessive and discriminatory charge to tax.

80. On this point, however, I would agree with the Commission, when it observes that the use of fixed scales to determine the value of an imported used vehicle does not in itself give rise to discrimination, provided that the fixed scales precisely reflect – as the Community case-law has clarified – the actual depreciation of the vehicle. Only if that is so will the tax charged on imported

vehicles not ‘in any case exceed the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory’ (16) and can the tax in question be regarded as compatible with Article 90 EC.

81. It is for the national court, however, to determine whether the method used by the Austrian authorities, based on the Eurotax valuations, complies in its practical application with the above requirements.

82. I therefore conclude that a tax such as the NoVA base tax, the amount of which is calculated using fixed scales to determine the value of an imported used vehicle, does not in itself give rise to discrimination prohibited by Article 90 EC provided the fixed scales precisely reflect the actual depreciation of the vehicle and the taxable value imputed to the vehicle thus corresponds exactly to the value of a similar used vehicle to be found on the domestic market. It is for the national court, however, to determine whether the fixed scale method used by the Austrian administration satisfies these conditions.

The NoVA surcharge

83. Turning to the surcharge provided for under Paragraph 6(6) of the NoVAG, I would first observe, as the Commission does, that it applies predominantly to private imports of new or used cars into Austria and only by way of exception to purely domestic transactions, such as, for example, the case of a car privately assembled by an enthusiast.

84. According to settled case-law, the fact that a charge is imposed on an extremely small volume of domestic production as well as on imported products does not preclude the application of Article 90 EC. (17)

85. What is more, as the Court has had occasion to explain, the laying down of tax arrangements which differentiate between certain products ‘is compatible with Community law … only if [such differentiation] 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’, (18) the Court also having held that ‘differential taxation is incompatible with [Article 90 EC] if the products most heavily taxed are, by their very nature, imported products’. (19)

86. There seems to me no doubt that the imposition of the surcharge provided for in Paragraph 6(6) of the NoVAG constitutes an instance of tax arrangements which differentiate between used cars, in such a way that the products most heavily taxed are indeed the imported ones. It emerged clearly at the hearing, besides, that the circumstances in which the surcharge affects non-imported products are entirely residual.

87. I therefore conclude that a tax such as the NoVA surcharge, which applies to imported products in ordinary circumstances and to domestic products only in exceptional circumstances, is a discriminatory charge and, as such, incompatible with Article 90 EC. I note, moreover, that the Commission stated at the hearing that it has already commenced infringement proceedings in that regard.

88. I therefore propose that the second question referred by the national court be answered as follows:

Since they do not constitute customs duties or charges having equivalent effect, taxes such as the NoVA are not contrary to Articles 23 EC and 25 EC.

Nor does a tax such as the NoVA base tax, the amount of which is calculated using fixed scales to determine the value of an imported used vehicle, in itself give rise to discrimination prohibited by Article 90 EC provided the fixed scales precisely reflect the actual depreciation of the vehicle and the taxable value imputed to the vehicle thus corresponds exactly to the value of a similar used vehicle to be found on the domestic market. It is for the national court, however, to determine whether the fixed scale method used by the Austrian administration satisfies these conditions. The NoVA surcharge, on the other hand, is discriminatory and hence incompatible with Article 90 EC in so far as it applies to imported products in ordinary circumstances and to domestic products only in exceptional circumstances.

The third question

89. By its third question, the referring court essentially asks whether the surcharge provided for by Paragraph 6(6) of the NoVAG is compatible with the harmonised rules on value added tax brought in by the Sixth VAT Directive.

90. Only Mr and Mrs Weigel propose that this question be answered in the negative. They argue that the surcharge in question is in the final analysis a disguised turnover tax and, as such, is incompatible with the Sixth VAT Directive, in particular Article 33 thereof, which prohibits the maintenance of national taxes other than VAT which have the characteristics of a turnover tax.

91. The Commission and the governments that submitted observations to the Court are of the contrary view that the surcharge is not a turnover tax and they therefore propose that the question be answered in the affirmative.

92. For my part, I could refrain from expressing any view on the question, given that I have proposed that the surcharge be considered a prohibited form of taxation under Article 90 EC.

93. In any event, I am unable to subscribe to the interpretation proposed by Mr and Mrs Weigel because it seems to me too that the surcharge does not meet the characteristics of a turnover tax.

94. The Court has consistently held that the purpose of Article 33 of the Sixth Directive ‘is to prevent the introduction of taxes, duties and charges which, through being levied on the movement of goods and services in a way comparable to VAT, would jeopardise the functioning of the common system of VAT. Taxes, duties and charges must in any event be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT’. (20)

95. In defining those characteristics, the Court has repeatedly made clear that ‘VAT applies generally to transactions relating to goods or services, it is proportional to the price of those goods or services, it is charged at each stage of the production and distribution process and finally it is imposed on the added value of goods and services, since the tax payable on a transaction is calculated after deduction of the tax paid on the previous transaction’. (21)

96. Now it does not appear to me that those characteristics are present in the surcharge in question.

97. In the first instance, it does not apply generally to transactions relating to goods or services nor does it apply at all stages of production and distribution, since it has to be paid only in respect of certain transactions concerning a particular class of products, motor vehicles, and within that class only those vehicles which have not previously been registered in the country.

98. Furthermore, the surcharge does not give rise to any possibility of deduction (which is entirely consistent, besides, because it is, as we have seen, a single-stage charge) and its basis of assessment is not the value of the goods but the amount of a tax paid on the goods, whence it cannot be regarded as being imposed on the added value.

99. All these considerations lead me to conclude that the NoVA surcharge does not satisfy the requirements of a turnover tax as referred to in the Sixth VAT Directive and cannot therefore be considered to be a parallel tax prohibited by Article 33.

IV – Conclusion

100. In the light of the foregoing considerations, I propose that the Court answer the questions referred by the Verwaltungsgerichtshof as follows:

1) A national measure imposing a tax such as the NoVA base tax – which is payable upon the first-time registration in the state of a motor vehicle and is calculated on the basis of the value of the vehicle and its fuel consumption – on a migrant worker moving to Austria from another Member State to take up employment there and importing his or her own vehicle into that country and registering it, is not contrary to Article 39 EC.

Nor is such a measure contrary to the rules on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals laid down by Directive 83/183 and, specifically, Article 1 thereof.

2) Since they do not constitute customs duties or charges having equivalent effect, taxes such as the NoVA are not contrary to Articles 23 EC and 25 EC.

Nor does a tax such as the NoVA base tax, the amount of which is calculated using fixed scales to determine the value of an imported used vehicle, in itself give rise to discrimination prohibited by Article 90 EC provided the fixed scales precisely reflect the actual depreciation of the vehicle and the taxable value imputed to the vehicle thus corresponds exactly to the value of a similar used vehicle to be found on the domestic market. It is for the national court, however, to determine whether the fixed scale method used by the Austrian administration satisfies these conditions. The NoVA surcharge, on the other hand, is discriminatory and hence incompatible with Article 90 EC in so far as it applies to imported products in ordinary circumstances and to domestic products only in exceptional circumstances.

3) A tax such as the NoVA surcharge does not satisfy the requirements of a turnover tax as referred to in the Sixth VAT Directive and cannot therefore be considered to be a parallel tax prohibited by Article 33.

1 – Original language: Italian.

2 – Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1).

3 – OJ 1983 L 105, p. 64.

4 – BGBl. N-o 695/1991.

5 – Ministry of Finance Circular of 1 September 1995.

6 – Case C-190/98 *Graf* [2000] ECR I-493, paragraph 23.

7 – In support, the Commission cites Case C-177/94 *Perfili* [1996] ECR I-161, paragraph 17, Case C-379/92 *Peralta* [1994] ECR I-3453, paragraph 52, and the Opinion of Advocate General Jacobs in Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, points 37 to 47.

8 – See, in relation to Article 48 of the Treaty (now, after amendment, Article 39 EC), Case 1/78 *Kenny* [1978] ECR 1489, paragraph 18. See also Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraphs 50 and 51. In relation to other aspects of the free movement of persons, see the cases cited by the Commission, footnote 7 above.

9 – Case C?280/91 *Viessmann* [1993] ECR I?971, paragraph 17, and Case C-42/96 *Immobiliare* SIF [1997] ECR I-7089, paragraph 28.

10 – Proposal for a Council Directive governing the tax treatment of private motor vehicles moved permanently to another Member State in connection with a transfer of residence or used temporarily in a Member State other than that in which they are registered, COM (1998) 30 final (OJ 1998 C 108 , p. 75), as amended by COM (1999) 165 final (OJ 1999 C 145, p. 6).

11 – Case C-451/99 *Cura Anlagen* [2002] ECR I-3193, paragraph 40.

12 – Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (‘Regulation No 918/83’; OJ 1983 L 105, p. 1).

13 – Of the many judgments to this effect, see Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 19.

14 – See, for example, in relation to the Danish vehicle registration charge, the Opinion of Advocate General Jacobs in Case C-383/01 *Danske Bilimportører* [2003] ECR I-6065, point 36.

15 – See Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, paragraph 9, and Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, paragraph 18.

16 – Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 28.

17 – Case 193/85 *Co-Frutta* [1987] ECR 2085, paragraphs 11 to 13, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 53.

18 – Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 29.

19 – Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 21 and Case C–90/94 *Haahr Petroleum* (above), paragraph 30.

20 – Case C-347/90 *Bozzi* [1992] ECR I-2947, paragraph 9.

21 – See, in particular, the judgments in Case 252/86 *Bergandi* v *Directeur-GénéraldesImpôts*

[1988] ECR 1343, paragraph 15, Joined Cases 93/88 and 94/88 *Wisselink and Others* v *Staatssecretaris van Finan* ciën [1989] ECR 2671, paragraph 18, Case C-109/90 *Giant* v *Gemeente Overijse* [1991] ECR I?1385, paragraphs 11 and 12, Case C-200/90 *Dansk Denkavit and Poulsen Trading* v *Skatteministeriet* [1992] ECR I?2217, paragraph 11, and Case C-347/90 *Bozzi* (above), paragraph 12 and Case C-208/91 *Beaulande* [1992] ECR I-6709, paragraph 14.