OPINION OF ADVOCATE GENERAL

Sharpston

delivered on 13 July 2006 (1)

Case C-290/05

Ákos Nádasdi

v

Vám- és Pénzügy?rség Észak-Alföldi Regionális Parancsnoksága

1. In this reference for a preliminary ruling, the Hajdú-Bihar Megyei Bíróság (Hajdú-Bihar County Court), Hungary, wishes to know whether a national registration duty on motor cars is compatible with the first paragraph of Article 90 EC. The duty in question is imposed on each vehicle when it is first placed on the road in the Member State, and its amount is determined by the vehicle's technical characteristics and environmental classification, regardless of value. The question is raised in particular with regard to the application of that duty to second-hand vehicles imported from other Member States.

Relevant Community law

2. Article 90 EC provides:

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

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

3. That article, in particular the first paragraph, has been examined by the Court on a number of occasions with specific reference to national taxes imposed on second-hand motor vehicles imported from other Member States. (2) That case-law is well established and well known, but it may be useful to recapitulate its essential elements. When considering the case-law, it must be borne in mind that, if the sales price of any item includes x% of tax when new, its second-hand price after depreciation will also contain x% of *residual* tax.

4. First, *Commission* v *Denmark* (3) concerned a duty levied upon first registration of motor vehicles in Denmark. For new vehicles (all of which were imported because there was no Danish

production), the rate was more than 100% of the price. For imported second-hand vehicles, the taxable value was 100% of the price of the vehicle as new for vehicles less than six months old and 90% of that price for those more than six months old. The sale of second-hand vehicles already registered in Denmark did not give rise to payment of a further registration duty.

5. The Court noted that although there was no Danish production of motor vehicles, Denmark still had a second-hand-vehicle market. A product becomes a domestic product as soon as it has been imported and placed on the market. Imported second-hand vehicles and those bought locally constitute similar or competing products. Article 90 EC therefore applied to the registration duty charged on the importation of second-hand vehicles. In that regard, not only the rate of internal taxation on domestic and imported products but also the basis of assessment and the detailed rules for levying the tax had to be taken into consideration.

6. The Court then acknowledged that, because the amount levied on new vehicles was very high, the portion of duty still incorporated in the value of a second-hand vehicle was written off more slowly in Denmark than in some other Member States. However, a duty levied on a taxable value of at least 90% of the value of the vehicle when new still constituted manifest over-taxation of imported second-hand vehicles, in comparison with the residual registration duty in the value of previously registered second-hand vehicles bought on the Danish market. Consequently, there was discriminatory taxation of imported second-hand vehicles.

7. In *Nunes Tadeu*, (4) the tax in issue was a single-stage tax levied on light passenger motor vehicles registered in Portugal, whether imported new or second-hand, or assembled or manufactured in Portugal. The amount of tax varied according to the vehicle's cylinder capacity and not its price, but there was a reduction of 10% for imported second-hand vehicles first registered more than two years previously.

8. The Court noted that the disputed tax did not apply to second-hand vehicle transactions within Portugal because it was charged only once, when the vehicle was first registered there, and part of it remained incorporated in the value of second-hand vehicles which had already been registered and purchased on the Portuguese market.

9. However, the tax on an imported second-hand vehicle, whatever its age or condition, could not be less than 90% of that charged on a new vehicle, whereas the residue of the tax incorporated in the value of a second-hand vehicle purchased in Portugal could be less than that since the residual value of the tax diminished proportionately with the vehicle's depreciation. Such a tax was thus manifestly excessive for imported second-hand vehicles compared with the residue of the tax in second-hand vehicles already registered and subsequently purchased on the Portuguese market. Consequently, it discriminated against imported second-hand vehicles.

10. A slightly more complex system of taxation was in issue in *Commission* v *Greece*. (5) A special consumer tax was charged on a vehicle's first sale or on importation, and an additional duty was payable on its first registration, in Greece. Both were charged as a percentage (varying according to engine capacity) of price. For imported second-hand vehicles, the taxable value was determined by deducting 5% for each year of use from the price of a corresponding new vehicle, up to a maximum of 20%. In addition, the rates of special consumer tax were reduced for vehicles using anti-pollution technology meeting certain criteria. Imported second-hand vehicles using such technology were, however, not eligible for the reduced rates.

11. With regard to the special consumer tax and the additional duty, the Court noted that the tax on imported second-hand vehicles was reduced for each year of use by only 5% of the total charged on a new vehicle, up to a maximum reduction of 20%, however old the vehicle in question might be. In contrast, the residual portion of the tax incorporated in the value of a second-hand

vehicle bought in Greece decreased proportionately as the vehicle depreciated. Vehicles generally depreciate in value by considerably more than 5% a year, even more so in the first years, and continue to depreciate for more than four years. Consequently, the tax on imported second-hand vehicles was usually higher than the proportion of the tax still incorporated in the value of second-hand vehicles already registered and purchased on the Greek market.

12. The Greek Government had claimed that the maximum reduction of 20% was justified by the aim of discouraging old, dangerous and polluting vehicles from being put into circulation. However, the Court pointed out, the pursuit of such an objective does not relieve a Member State from its duty to observe the rule of non-discrimination laid down in Article 90 EC. A system of taxation can be considered compatible with that article only if it is so structured as to exclude any possibility of imported products being taxed more heavily than domestic products, so that it cannot in any event have discriminatory effect. (6)

13. With regard to the reduction in rates for vehicles using anti-pollution technology, the Court stated that it was contrary to Article 90 EC for a Member State to confer tax advantages on less polluting domestic vehicles while refusing those advantages to vehicles from other Member States which satisfy the same criteria. That could not be affected either by a Commission statement approving such measures or by technical difficulty in assessing whether imported second-hand vehicles met the criteria in question.

14. *Gomes Valente* (7) concerned the same tax as *Nunes Tadeu*, but arose following an amendment replacing the single reduction of 10% for imported second-hand vehicles first registered more than two years previously with a fixed scale of reductions from 18% after 1 year's use to 67% after 8 years' use.

15. The Court stated that *Commission* v *Denmark* and *Nunes Tadeu* did not mean that actual depreciation could be taken into account only by assessment or expert examination of each vehicle. It might also be possible, by means of fixed scales based on criteria such as age, mileage, general condition, method of propulsion and make or model, to establish a value for second-hand vehicles which, as a general rule, would be very close to their actual value. In drawing up such scales, it might be possible to refer to a guide or list indicating average current prices of second-hand vehicles on the national market. However, to be compatible with Article 90 EC, such a system would have to be arranged so as to exclude any discriminatory effect.

16. The fixed scale of reductions in issue was not based on criteria of the kinds indicated. It was not capable of ensuring that the amount of tax due on the importation of a vehicle from another Member State did not exceed that of the residual tax borne by an equivalent vehicle already registered in Portugal. It therefore did not exclude the possibility that imported products might be taxed more heavily than national products.

17. *Tulliasiamies and Siilin* (8) concerned a Finnish car tax which had to be paid before a vehicle was registered or brought into service. The amount payable was the vehicle's taxable value less a fixed sum, but could not be less than 50% of that taxable value. For an imported second-hand vehicle, the tax charged was the same as for an equivalent new vehicle, less – subject to minor exceptions – 0.5% per calendar month of use after the sixth month, up to a maximum of 150 months (thus 75% after 12 and a half years).

18. The Court noted that, in the case of a second-hand vehicle already registered in Finland, car tax might have been paid on it when new on the basis of the purchase value of the new vehicle to the official importer, excluding profit margins. In contrast, the car tax payable for second-hand vehicles imported by private individuals was calculated on the basis of the purchase price, to the consumer, of a similar new vehicle, which was as a rule higher than that paid by the official

importer. That system did not exclude the possibility of imported second-hand vehicles being subjected, in certain cases, to tax in an amount exceeding the residual tax incorporated in the value of a similar second-hand vehicle already registered in the national territory. Therefore it was to that extent contrary to Article 90 EC.

19. The calculation of depreciation at 0.5% per month between the 7th and the 150th months did not, the Court found, take into consideration the actual depreciation of each second-hand vehicle and was therefore also contrary to Article 90 EC. Moreover, if actual depreciation is defined in a general and abstract way on the basis of criteria laid down by national law, Article 90 EC requires the system of taxation to be arranged so as to exclude any discriminatory effect. That presupposes that the criteria on which the method of calculation is based are made public, and that the owner of a second-hand vehicle imported from another Member State is able to challenge the application of a flat-rate method of calculation to that vehicle, which may mean that its particular characteristics have to be examined in order to ensure that the tax applied to it does not exceed the residual tax incorporated in the value of a similar second-hand vehicle already registered in the national territory.

20. *Weigel* (9) concerned a standard fuel consumption tax imposed on vehicles upon their first registration in Austria. The basis of assessment was either the consideration paid or, in some cases, the fair market value of the vehicle. The amount payable was, essentially, 2% of the basis of assessment multiplied by a defined fuel-consumption figure, (10) up to a maximum of 16%. However, there was a 20% surcharge where, in particular, the tax was levied simply by reason of the first-time registration of the vehicle in Austria, in the absence of a transaction giving rise to VAT.

21. The Court examined first the basic charge and came to the conclusion that there was no infringement of Article 90 EC provided that – as appeared to be the case – the method of assessing fair market value reflected the actual depreciation of vehicles precisely and produced the desired outcome that the tax charged on imported second-hand vehicles in no case exceeded the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in Austria.

22. With regard to the 20% surcharge, however, the Court noted that a criterion for charging higher taxation which by definition can never be fulfilled by similar domestic products cannot be compatible with Article 90 EC, because it excludes domestic products in advance from the heaviest taxation. (11) It is similarly incompatible if the products most heavily taxed are, by their very nature, imported products. (12) The 20% surcharge applied only in exceptional circumstances to the basic charge on purely domestic transactions, and was thus incompatible with Article 90 EC.

23. It may be distilled from that case-law that, in order to be compatible with the first paragraph of Article 90 EC, a national tax levied once only on each vehicle, on its first registration in a Member State, must, in so far as it affects second-hand vehicles, be calculated in such a way as to avoid any discrimination against such vehicles from other Member States. Such a tax must therefore not impose on imported second-hand vehicles a burden which exceeds the burden of residual tax included in the cost of an equivalent vehicle first registered in the same Member State at an earlier stage in its existence.

24. The Court has also specified that the detailed rules for levying the tax must be taken into account in assessing compatibility with Article 90 EC; that the pursuit of an environmental objective does not absolve a Member State from the need to avoid discrimination; that depreciation in value need not be assessed individually in every case but may be based on scales or tables using relevant criteria to provide a good approximation of depreciated value; and that it must be possible for an owner to challenge the application of such scales or tables in cases where

they do not take account of the true characteristics of an individual vehicle.

Relevant national law

25. One precondition for registering a passenger car or motor caravan (13) for use on the road in Hungary is that registration duty (*regisztrációs adó*) must have been paid.

26. Prior to 1 February 2004, consumption duty (*fogyasztási adó*) was levied on such vehicles. It was a one-off sum, calculated as a proportion of the declared value, that proportion being determined according to certain consumption characteristics of the vehicle.

27. From that date, consumption duty was replaced by registration duty by Law No CX of 2003 (Law on Registration Duty). Registration duty is levied as a fixed amount for each class of vehicle. Vehicles are classified essentially by engine type (14) and capacity, and by environmental protection rating. (15) There are also classes for 'museum-type' vehicles and 'other' vehicles. The amount of duty is unrelated to the value of the vehicle. It applies without distinction to imported vehicles (whether new or second-hand) and to vehicles manufactured in Hungary.

28. It emerged at the hearing that since 1 January 2006 – and thus after the material time in the present case – a scale of reductions in the amount of duty payable has been introduced, (16) depending on the number of months elapsed between the time when the vehicle was first placed on the road and the time when the administrative procedure for the payment of duty was initiated. The reduction varies from 3% (where less than two months have elapsed) to 66% (when more than 25 years have elapsed).

29. Other taxes (including an annual tax) are also levied on motor vehicles, but they are not in issue in the present case.

The main proceedings and the order for reference

30. On 2 May 2004, Mr Nádasdi bought a second-hand Volkswagen Passat in Germany for EUR 6 000 and on 13 May he applied to be assessed for registration duty for the vehicle. On 14 May, duty was assessed at HUF 150 000 (about EUR 600) and immediately paid.

31. However, also on 14 May 2004, a significant increase in the rate of registration duty came into effect. (17) On 11 November 2004, therefore, the tax authorities revoked the original assessment and replaced it with an assessment for HUF 390 000 (about EUR 1 550), requiring Mr Nádasdi to pay an extra HUF 240 000 (about EUR 950).

32. Mr Nádasdi seeks judicial review of that reassessment before the referring court. His challenge concerns the date of entry into effect of the increase in registration duty, in relation to the moment of his acquisition and application for registration of the vehicle in question. In the national proceedings he makes no allegation of incompatibility with Community law.

33. The national court however considers itself bound to apply Community law of its own motion, and has doubts about the compatibility of the Hungarian registration duty with Article 90 EC. It considers that second-hand vehicles acquired abroad and those previously registered in Hungary before 1 February 2004 are 'similar' products; and that the amount of registration duty on imported second-hand vehicles may be said to be higher than the amount of residual duty in the value of similar domestic second-hand vehicles. The question arises whether registration duty

makes domestic second-hand vehicles more attractive to buy and thus creates discrimination in the market for second-hand vehicles acquired in other Member States. The national court states moreover that it is a court of (first and) last instance in the proceedings, and therefore obliged to refer its doubts to the Court of Justice.

34. Its questions are as follows:

‘(1) Does the first paragraph of Article 90 EC allow Member States to maintain in force a duty on second-hand motor vehicles from other Member States, when that duty is wholly independent of the value of the vehicle and the amount is determined solely on the basis of the technical characteristics of the vehicle (engine type, engine capacity) and its environmental classification?

(2) If the answer to the first question is in the affirmative, is Law No CX of 2003 on registration duty, which is applicable in this case, compatible, as regards imported second-hand motor vehicles, with the first paragraph of Article 90 EC when the registration duty is not payable on motor vehicles which were placed in circulation in Hungary before the law in question entered into force?’

35. Written observations have been submitted by the Hungarian and Polish Governments, and by the Commission. Mr Nádasdi, the Hungarian Government and the Commission presented oral argument at the hearing on 1 June 2006.

Assessment

Admissibility

36. The Hungarian Government submits that the reference is inadmissible because it does not explain why an interpretation of Community law is necessary for the referring court to decide the issue before it, namely the moment of entry into effect of the increase in registration duty. Nor, in the Government’s view, is any such interpretation relevant for that purpose. The moment of entry into effect of the increase, and its application to the acquisition of a vehicle on a particular date, is a matter purely of national law.

37. It is true that determination of the moment of entry into force of the increase in the Hungarian registration duty, and its application to the acquisition or registration of a vehicle on a particular date, which appear to be the only points in issue between Mr Nádasdi and the tax authority, are in no way dependent on any interpretation of Community law.

38. However, as long ago as 1978, the Court stated in *Simmenthal*, (18) a case which concerned the imposition of a national levy already held to be contrary to Community law, that ‘every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it’. That statement has been reaffirmed frequently over the years, in a number of areas, most recently in *Mangold*. (19)

39. By prohibiting discriminatory taxation, the first paragraph of Article 90 EC confers on individuals the right not to be subjected to such taxation, a right which must be protected by national courts. (20)

40. Consequently, if any aspect of the Hungarian Law on registration duty is prohibited by that paragraph, it is the duty of the national court to disapply that aspect of the law (21) in any case within its jurisdiction.

41. I am not aware that the Court has ever gone as far as to require a national court to raise of its own motion the issue of the compatibility of a national provision with Community law, in proceedings in which no such issue was raised before it. (22) Indeed, to do so would be to place a practically intolerable burden on national courts, which in almost every case would be required to review each and every provision which they were called upon to apply in the light of the whole range of Community law.

42. None the less, clearly nothing in Community law precludes a national court from raising such an issue of its own motion. Only if national rules were to prohibit such a course of action would any difficulty arise, and in that case it might be necessary to refer a question to the Court on the legality of those national rules. (23) However, there is no indication in the present case of any such rules which might prevent the referring court from examining the issue which it has raised and on which it seeks guidance from the Court.

43. Consequently, there are in my view no grounds for declining to answer the questions referred, which, moreover, are clearly not hypothetical but pertinent to the case before the national court.

The correct comparator

44. In order to assess the disputed registration duty in the light of the first paragraph of Article 90 EC, it is necessary to determine whether, when imposed on second-hand vehicles imported from other Member States, it exceeds the internal taxation on ‘similar domestic products’.

45. The referring court considers that there is competition on the market between (a) second-hand vehicles imported from other Member States since *registration duty* was introduced on 1 February 2004, on which that duty is levied in full, and (b) second-hand vehicles placed on the road in Hungary before that date, on which the previous *consumption duty* was levied and the present value of which includes a residual proportion of that consumption duty.

46. The Commission however submits that the two categories thus defined are not properly comparable for the purposes of Article 90 EC. The Hungarian Government stresses the difficulty of making a comparison because of the difference in basis of assessment between the two duties, but agrees with the referring court in considering that any comparison must none the less verify whether over a period of time (which in this case, it submits, includes both the period when consumption duty was levied prior to the introduction of registration duty and the period since the introduction of a progressive reduction according to the age of second-hand vehicles) the system of taxation discriminates against vehicles from other Member States.

47. In this regard, I agree with the Commission.

48. If a Member State introduces a tax levied on the occasion of the first placing of a vehicle on the road, that tax will affect only vehicles, new or second-hand, first placed on the road after the date of its introduction. As regards second-hand vehicles, it can in principle apply only to those imported from abroad. They will necessarily bear more tax than second-hand vehicles already on the road in the Member State before the tax was introduced, which by definition bear none. (24) If the two categories were regarded as comparable for the purposes of Article 90 EC, it would never

be possible for a Member State to introduce such a tax. Similarly, it would be impossible to increase the rate of taxation or take any other step having the same effect, for example by changing the structure of the tax.

49. Article 90 EC is however designed not to prevent a Member State from introducing new taxes or from changing the rate or structure of existing taxes, but to ensure that they are applied in a non-discriminatory manner to both domestic products and those imported from other Member States. What must be determined is whether the tax in issue differs in its effects on second-hand vehicles already on the road in the Member State and on those imported from other Member States. If it is to be assessed correctly, it must be assessed independently on the basis of the rate(s) applicable at the material time and not by comparison with other taxes or other rates.

50. Consequently, for the purposes of the present case, the effect of *registration duty* on second-hand vehicles newly imported from another Member State should be compared with the effect of *residual registration duty* on similar second-hand vehicles already registered in Hungary which have already borne that same duty at an earlier stage. A comparison with second-hand vehicles already registered in Hungary whose value includes *residual consumption duty* is not relevant. Moreover, in the main proceedings the national court must assess registration duty as it stood when it was imposed on Mr Nádasdi's vehicle. The subsequent introduction of a scale of reductions therefore cannot be relevant either.

51. It is true that in order to compare the full amount of a tax with the residual amount of the same tax after a period of depreciation it is necessary to assume that such a period has elapsed. It is also true that, on the actual date on which a new tax or a new tax rate is introduced, no such period can in fact have elapsed. In the present case, the national court must assess the Hungarian registration duty as it stood on the day on which a new rate was introduced. In order to do that, it must therefore make a theoretical projection forwards over time and determine whether in that light there is discriminatory taxation of second-hand vehicles from other Member States. The assessment of a tax as it stands at a particular moment would be distorted if subsequent changes to the tax system were taken into account. (25)

The questions referred

52. The national court first asks essentially whether the first paragraph of Article 90 EC precludes the imposition on second-hand motor vehicles from other Member States of a duty the amount of which is assessed solely on the basis of the vehicle's technical characteristics and environmental classification, regardless of its value.

53. However, that provision does not concern the basis of assessment of a tax as such. It applies only in so far as the national tax may lead to higher taxation of products from other Member States as compared with similar domestic products. As the Court stated in *Outokumpo*, (26) 'Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article [90 EC], on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only if it pursues objectives 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, against imports from other Member States or any form of protection of competing domestic products.'

54. The national court's second question is essentially whether the Hungarian registration duty

introduced in 2004 is compatible with the first paragraph of Article 90 EC in so far as it burdens imported second-hand vehicles but not vehicles placed on the road in Hungary before it was introduced.

55. However, as I have explained above, such a comparison is not relevant for the purposes of that provision. Rather, the effect of registration duty on second-hand vehicles newly imported from another Member State must be compared with the effect of residual registration duty on similar second-hand vehicles already registered in Hungary which have already borne that same tax at an earlier stage.

56. I propose therefore to restructure and reformulate the questions referred in order to provide the national court with an interpretation of Community law which will be helpful to it.

57. First, is a tax such as the Hungarian registration duty compatible in principle with Article 90 EC in so far as it is levied on the registration in Hungary of a second-hand vehicle imported from another Member State, but will have been levied at an earlier stage on a second-hand vehicle already registered in Hungary?

58. Second, is the answer to that first question affected by the fact that the amount of registration duty is assessed solely on the basis of the vehicle's technical characteristics and environmental classification, regardless of its value?

Compatibility in principle

59. It seems to me that the approach taken by the Court in its relevant case-law to date (27) leads to the unavoidable conclusion that, by not taking depreciation into account when determining the amount of registration duty applicable to second-hand vehicles imported from other Member States, the method of determining that duty discriminates between such vehicles and similar second-hand vehicles already registered in Hungary which have already borne that same duty at an earlier stage.

60. In order to make such an assessment, it is necessary to compare vehicles similar in all relevant respects other than the date of placing on the road in Hungary. Registration duty is imposed on the basis of certain fixed criteria – in particular engine type and capacity and environmental protection rating. For example, the rate of duty imposed on Mr Nádasdi's vehicle was for either a petrol engine of between 1601 and 1800 cc or a diesel engine of between 1701 and 2000 cc, with an environmental protection rating of 5 or above. Likewise, the comparison must be between vehicles showing the same depreciation characteristics – which vary according to model, age, mileage etc.

61. Bearing those factors in mind, a new vehicle on which registration duty was paid in Hungary in May 2004 will have lost a significant part of its value – say 30% – by December 2005, (28) when it might be sold at 70% of its original cost, including a residual 70% of the amount of registration duty applicable to its category as determined by fuel, engine capacity and environmental protection rating. A vehicle of the same model, age, mileage and other characteristics, bought second-hand in another Member State and registered in Hungary in December 2005, will however attract 100% of the registration duty for that category. The duty thus burdens imported second-hand vehicles more heavily than similar second-hand vehicles already registered in Hungary which have already borne the same duty at an earlier stage.

62. That, it is clear from the Court's case-law, is in principle contrary to the first paragraph of

Article 90 EC.

Basis of assessment

63. The Hungarian and Polish Governments stress that the Hungarian registration duty is essentially an environmental tax, in that its amount depends entirely on engine type and capacity and environmental protection rating. A ‘high level of protection and improvement of the quality of the environment’ is, they point out, one of the fundamental goals of the European Community, set out in Article 2 EC.

64. Poland refers also to Community initiatives to encourage environmental protection in the use of motor vehicles, such as Directive 2000/53/EC of the European Parliament and of the Council on end-of life vehicles (29) and the Commission’s Proposal for a Council Directive on passenger car related taxes, (30) and to the Court’s statement in *Outokumpu* (31) that Article 90 EC does not preclude the rate of an internal tax (in that case on electricity) from varying according to the manner of production and the raw materials used, in so far as that differentiation is based on environmental considerations.

65. Both Governments suggest therefore not only that the registration duty is compatible with Community law, but also that an unfavourable ruling by the Court would amount to hindering a Member State in its pursuit of the objectives sought by the Treaty and by the Community institutions.

66. I cannot agree. The purpose of Article 90 EC is to prohibit any internal taxation which, all other things being equal, burdens products from other Member States more heavily than similar domestic products. A tax does not escape that prohibition simply because, in addition to its fundamental purpose of raising revenue, it seeks to favour environmentally-friendly products or habits. On the contrary, if it pursues such an aim, it must do so in a manner which does not burden domestic products less than those imported from other Member States.

67. Indeed, it is clear from the Court’s case-law that a tax such as that in issue in *Nunes Tadeu* and *Gomes Valente*, (32) which bore a clear resemblance to the registration duty in issue in the present case, is contrary to Article 90 EC; and that environmental concerns, such as those adduced in *Commission* v *Greece*, (33) must be satisfied in a way which does not discriminate against products from other Member States.

68. It is true that Member States are in principle free to tax motor vehicles according to such environmental criteria as they deem most appropriate, and that where the aims are environmental the amount of such taxation may be unrelated to the price of a vehicle. Why, then, if the purpose and basis of the tax are environmental and unrelated to value, should Community law require depreciation to be taken into account when taxing second-hand vehicles? It might be thought that such a requirement runs counter to the Member State’s freedom by necessarily linking the amount of tax to the price of each vehicle.

69. However, that view does not survive closer scrutiny. The type of tax in issue is levied once only, at the time of the vehicle’s first registration for use in the Member State concerned and thus in the vast majority of cases at or very close to the time of its acquisition by a resident in that State. Such a tax becomes part of the vehicle’s capital value, and that is the aspect which must be borne in mind when assessing its effect on competing products from other Member States. Other types of environmental taxation would fall to be assessed differently. Periodic taxes, for example, form part of a vehicle’s running costs rather than its capital value, so that there is no need to take

depreciation of that value into account.

70. It is not for this Court to decide how Hungary should organise its system of vehicle taxation in order to satisfy its concern for environmental protection whilst ensuring equality of treatment as between second-hand vehicles already registered in Hungary and those newly placed on the road there following importation from another Member State.

71. However, there are clearly means of reconciling environmental considerations with those of equal treatment. For example, in so far as Hungary retains a single-stage duty levied when each vehicle is first placed on the road, it may adopt some mechanism such as the fixed-rate scales referred to in *Gomes Valente* (34) with, where appropriate, the possibility of a challenge and specific assessment as referred to in *Tulliasiamies*. (35) Alternatively, it must be open to any Member State to adopt a system based solely on an annual circulation tax, such as that outlined in the Commission's proposal for a directive on passenger car related taxes (36) (whether that proposal is eventually adopted or not).

Limitation of the temporal effects of the judgment

72. Finally, Poland in its written observations requests that, in the event of a judgment finding a levy such as the registration duty in question incompatible with the first paragraph of Article 90 EC, the Court should limit the temporal effect of that judgment. Hungary made the same request at the hearing.

73. According to settled case-law, the interpretation which the Court gives to a rule of Community law clarifies and where necessary defines the meaning and scope of that rule as it must be, or ought to have been, understood and applied from the time of its coming into force. The rule as thus interpreted can, and must, be applied by the courts even to legal relationships arising and established before the judgment ruling on the request for interpretation. (37)

74. The Court has most recently stated its practice in limiting the temporal effect of such judgments as follows:

'It is only exceptionally that, in application of a general principle of legal certainty which is inherent in the Community legal order, the Court may decide to restrict the right to rely upon a provision it has interpreted with a view to calling in question legal relations established in good faith …

Moreover, it is settled case-law that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling ...

The Court has taken that step only in quite specific circumstances, where there was a risk of serious economic repercussions owing in particular to the large number of legal relationships entered into in good faith on the basis of rules considered to be validly in force and where it appeared that individuals and national authorities had been led to adopt practices which did not comply with Community legislation by reason of objective, significant uncertainty regarding the implications of Community provisions, to which the conduct of other Member States or the Commission of the European Communities may even have contributed …' (38)

75. If the request is to be granted in the present case, it is therefore first necessary for the criterion of 'good faith' to be met.

76. At the hearing, Hungary stated that between 1 May 2004 and 31 December 2005

registration duty had been paid in good faith on more than 80 000 second-hand vehicles imported from other Member States. It made however no submission as to the existence of any objective, significant uncertainty (39) regarding the implications of Article 90 EC or as to any conduct of other Member States or the Commission which might have led it to believe that such uncertainty existed. I am therefore not persuaded that the first criterion is satisfied.

77. As regards the second criterion – the existence of a risk of serious economic repercussions for the Member State concerned – the Hungarian Government produced figures at the hearing estimating the total amount of revenue from registration duty on second-hand vehicles imported from other Member States to be some HUF 29 billion (EUR 116 million), which it said represented 0.6% of a year's State revenue. It accepted that not all of that amount, but only the part which transpired to have been overcharged once depreciation had been taken into account, would have to be reimbursed. It stressed however the administrative costs involved in dealing with such a large number of individual cases and in particular in identifying all those entitled to a reimbursement.

78. A need to reimburse taxation would be a financial consequence of the ruling which I propose. As such, it would not normally justify limiting the temporal effect of that ruling. I do not think moreover that it can qualify as a serious economic repercussion justifying such limitation. The amount involved is in fact likely to be considerably less than the 0.6% of State revenue advanced. Reimbursement can concern only the overcharged portion and, contrary to the Hungarian Government's fears, Community law cannot require a Member State to seek out all those who have borne the burden of the excess charge but merely to refund the excess to those who claim it.

79. Nor can it be assumed that the administrative burden of establishing the amount due in individual cases will be excessive. In principle, it should be sufficient to establish a system of fixed-rate scales based on relevant criteria, subject to the possibility of a challenge and specific assessment. (40)

80. Consequently, I do not consider that the existence of a risk of serious economic repercussions for Hungary has been established, and I find no grounds for any limitation of the temporal effect of the judgment in the present case.

81. I would finally remark that it is surprising that it was the Polish, rather than the Hungarian, Government which first raised this point in the present proceedings. Since any temporal limitation must be based on an assessment of the situation – existence of good faith and risk of serious difficulties – in the particular Member State concerned, I think it would be undesirable in principle if such a limitation were to be granted at the sole request of a different Member State.

Conclusion

82. In the light of all the above considerations, I am of the opinion that the Court should give the following answers to the questions referred for a preliminary ruling by the Hajdú-Bihar Megyei Bíróság:

(1) In order to determine whether a tax imposed on motor vehicles when they are first placed on the road in a Member State is compatible with the first paragraph of Article 90 EC in so far as it applies to second-hand vehicles, the effect of that tax on the cost of such vehicles newly imported from another Member State must be compared with the effect of the residual amount of tax on the cost of similar second-hand vehicles which have already been placed on the road in the first Member State and which have already borne that same tax at an earlier stage. A comparison with second-hand vehicles already placed on the road in the Member State before the introduction of

that tax is not relevant.

(2) A tax imposed on second-hand motor vehicles when they are first placed on the road in a Member State, the amount of which is calculated without taking the vehicle's actual depreciation into account, so that when applied to such vehicles imported from other Member States it exceeds the amount of residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory, is, to the extent of that excess charge, incompatible with the first paragraph of Article 90 EC.

(3) That incompatibility is not affected by the fact that the tax in question is intended to pursue aims related to environmental protection or is levied solely on the basis of objective criteria relevant to such protection.

1 – Original language: English.

2 – The prohibitions in Article 90 EC were previously in Article 95 of the EC Treaty, which is referred to in the older case-law. For the sake of consistency I shall none the less use the present numbering in all that follows.

3 – Case C-47/88 [1990] ECR I-4509; see in particular paragraphs 17 to 21.

4 – Case C-345/93 [1995] ECR I-479; see in particular paragraphs 4, 10 and 13 to 15.

5 – Case C-375/95 [1997] ECR I-5981; see in particular paragraphs 3 to 5, 21 to 23, 28, 29, 40 and 43 to 47.

6 – See also Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 34.

7 – Case C-393/98 [2001] ECR I-1327; see in particular paragraphs 7, 24 to 26, 28 to 30 and 37.

8 – Case C-101/00 [2002] ECR I-7487; see in particular paragraphs 5, 6, 57, 60, 61, 78 to 80 and 85 to 89.

9 – Case C-387/01 [2004] ECR I-4981; see in particular paragraphs 23, 40, 65 to 81, 86 and 87.

10 – Namely 'fuel consumption in litres' – presumably per 100 km – 'reduced by 3 litres (2 litres in the case of diesel vehicles) to be measured by overall consumption on the MVEG (Motor Vehicles Emissions Group) Cycle in accordance with Directive 80/1268, as amended by Directive 93/116' Thus, no tax was charged where average consumption did not exceed 2 or 3 litres, as the case may be.

11 – See also Case 319/81 *Commission* v *Italy* [1983] ECR 601, paragraph 17.

12 – See also Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 21.

13 – Different provisions, not in issue here, may apply for other types of vehicle. In what follows, I shall however use the term 'vehicle' to designate only a 'passenger car or motor caravan' to which registration duty applies.

14 – That is to say, petrol or diesel.

15 – This is a rating on a scale from 1 to 10, apparently based essentially on exhaust and noise emission. Better environmental performance is indicated by a higher number on the scale.

Registration duty takes account only of whether the rating is less than 5 (entailing a higher rate of duty) or 5 or more (entailing a lower rate).

16 – By Law No CXIX of 2005, Article 53 and Annex 13, Part II.

17 – Law No XII of 2004.

18 – Case 106/77 [1978] ECR 629, at paragraph 21.

19 – Case C-144/04 [2005] ECR I-9981, paragraph 77. That case concerned discrimination on grounds of age, but *Simmenthal* has also been reaffirmed with regard to taxes levied contrary to Community law – see for example Joined Cases C-10/97 to C-22/97 *IN. CO. GE. '90 and Others* [1998] ECR I-6307, paragraphs 20 and 21.

20 – As first recognised 40 years ago in Case 57/65 *Lütticke* [1966] ECR 205, pp. 210 to 212.

21 – As the Court held in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673 (paragraph 49, and paragraph 1 of the operative part), the fact that certain elements of a system of internal taxation, or certain rules for its application, are discriminatory and thus prohibited by Article 90 EC does not necessarily mean that the whole of the system has to be considered incompatible. (That case also concerned the Portuguese tax in issue in *Nunes Tadeu* and *Gomes Valente*, but is not relevant to the question of the treatment of second-hand vehicles imported from other Member States as compared to those already registered in Portugal.)

22 – Compare Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen* [1995] ECR I-4705, paragraph 27.

23 – See Case C-312/93 *Peterbroeck* [1995] ECR I-4599, paragraph 21, from which it seems that Community law will sometimes preclude the application of such rules.

24 – As the Hungarian Government points out, to impose a new duty on vehicles already on the road which have already borne another tax would involve retroactive double taxation.

25 – As a matter of economic reality, second-hand vehicles imported into Hungary shortly after the replacement of consumption duty by registration duty competed with second-hand vehicles already registered in Hungary whose value included residual consumption duty. A similar situation exists where the rate of duty is changed. In such situations, there may be a de facto transitional difference between the rate of duty borne by a second-hand car previously registered in Hungary and one newly registered there. However, such differences are unavoidable when Member States exercise their fiscal sovereignty to adjust their tax systems in such areas. Given that sovereignty, the test in Community law must be whether each successive (rate of) tax is discriminatory in itself, not whether it may give rise to transitional differences of treatment following a change to the system.

26 – Case C-213/96 [1998] ECR I-1777, paragraph 30.

27 – As summarised in point 4 et seq. above.

28 – To take as an example the period from the introduction of registration duty to the introduction of the scale of reductions.

29 – Of 18 September 2000 (OJ 2000 L 269, p. 34).

30 – COM(2005) 261 final, of 5 July 2005.

31 – Cited in footnote 26, paragraph 31.

32 – See point 7 et seq. and point 14 et seq. above.

33 – Cited in footnote 5 above; see in particular point 12 et seq. above.

34 – See point 15 above.

35 – See point 19 above.

36 – Cited in footnote 30 above.

37 – See, for example, Case C-402/03 *Skov* [2006] ECR I-0000, paragraph 50.

38 – Case C-423/04 *Richards* [2006] ECR I-0000, paragraphs 40 to 42.

39 – See my Opinion of 22 June 2006 in Case C-228/05 *Stradasfalti*, points 87 to 89 for an expression of some doubt as to the most appropriate formulation for this criterion.

40 – See the references to *Gomes Valente* and *Tulliasiamies* at point 71 above.