OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 October 1987 *

Mr President,
Members of the Court,

1. In the new action which the Commission has brought against the Kingdom of Belgium concerning the taxation of motor cars it claims that the Court should declare that, 'by retaining in practice, under its Law of 31 July 1984, the list price as the basis for the taxation of new saloon cars and estate cars, Belgium has failed to take the measures necessary to comply with the judgment delivered by the Court of Justice on 10 April 1984, [1] in which the Court declared that practice to be contrary to Directive 77/388/EEC'.

2. Directive 77/388/EEC is entitled 'Sixth Council Directive of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover tax — Common system of value-added tax: uniform basis of assessment' (hereinafter referred to as the 'Sixth Directive'). [2]

3. The operative part of the judgment of 10 April 1984 with which Belgium has allegedly failed to comply reads as follows:

'By retaining the catalogue price as the basis for charging VAT on cars, as a special measure derogating from Article 11 of the Sixth Directive, when the requirements laid down in Article 27 (5) of the directive are not fulfilled, the Kingdom of Belgium has failed to fulfil its obligations under the EEC Treaty'.

4. By Royal Decree No 17 of 20 December 1984 laying down a minimum basis for charging VAT on second-hand saloon cars and estate cars, which repeals Royal Decree No 17 of 20 July 1970, Belgium terminated the practice whereby the list price was used as the minimum taxable amount for new cars for VAT purposes.

5. Belgium's contention that from that date the list price is no longer used in Belgium as the basis for charging VAT on new cars must therefore be accepted.

6. However, the purchaser of a new car must still pay a tax proportional to the list price, since, by a Law of 31 July 1984, Belgium amended its code on taxes equivalent to stamp duties so that with retroactive effect from the date of the judgment of the Court a registration tax, the rate of which is identical to the rate of VAT, is charged on the list price of new cars.

7. Belgium contends that by adopting that law it has not failed correctly to comply with the judgment of 10 April 1984 since that judgment does not have any bearing on taxes other than VAT.

* Translated from the French.

1 — Judgment of 10 April 1984 in Case 324/82 Commission v Belgium [1984] ECR 1861.

2 — Official Journal 1977, L 145, p. 1.

8. It is true that the Court did not, in the operative part of its judgment or in the grounds thereof, make any reference to the list price except with regard to Articles 11 and 27 of the directive, which deal solely with VAT.

9. Moreover, Belgium has demonstrated — in my view convincingly and without being contradicted in this respect by the Commission — that the registration tax has characteristics which distinguish it from VAT. The arguments which it has put forward are contained in the Report for the Hearing. The most decisive argument concerns the fact that registration tax is not deductible.

10. It might therefore be concluded, on the basis of the actual terms of the judgment of 10 April 1984, that Belgium has in fact adopted the measures needed to comply with that judgment and that the Commission's application is unfounded.

11. To reach that conclusion would be to adopt a strict interpretation of Article 171 which could be described in the following terms: Article 171 requires a Member State to adopt the precise measures arising out of the operative part of the judgment by which the Court held that the Member State had failed to fulfil its obligations. Those measures may be negative (repeal of a provision, as was the case here) or positive (adoption of a new provision).

12. If, however, the Member State adopts a new measure which is outside the framework laid down by the judgment or which raises a point of law not considered in the judgment, this is a new fact whose compatibility with Community law the Commission may contest only by instituting entirely new proceedings, not linked with the question whether the preceding judgment has been complied with.

13. It must be admitted that such an approach would be logical and consistent. Does that mean that it is the only possible approach? The Commission thinks not, since in its application it seeks a declaration that the judgment of the Court has been incorrectly implemented, and not that there has been a fresh infringement, independent of the old one.

14. It should also be noted that the fresh proceedings instigated by the Commission seem almost like two combined actions against Belgium for failure to fulfil its obligations, one for infringement of Article 171 of the EEC Treaty and the other for failure to comply with Article 33 of the Sixth Directive.

15. Indeed, even in its letter of formal notice the Commission claimed that the registration tax infringed Article 33 of the Sixth Directive. It repeated that argument in the reasoned opinion, in the application and in the reply.

16. It is therefore undeniable that as regards the latter complaint Belgium had the same opportunity of defending itself as it would have had if entirely separate proceedings had been instituted against it for failure to fulfil its obligations. At the hearing, however, the Commission insisted that its action related solely to the infringement of Article 171.

17. Belgium, on the other hand, denies that this action for infringement of Article 171 is in proper form because, as it rightly points out, Article 171 is not cited in the reasoned opinion or in the application instituting proceedings before the Court. It seems to

me, however, that the fact that the article was cited in the letter of formal notice and was set out in the conclusion of both the reasoned opinion and the application is sufficient for this action to be considered an action for the infringement of Article 171. I therefore propose that the Court should reject that submission.

18. In support of the Commission's point of view two lines of reasoning may be put forward, which may overlap. The first is based on the implied scope of the judgment of 10 April 1984 and the second on the connection between the measures adopted by Belgium and compliance with that judgment.

19. The first approach emphasizes the fact that the subject-matter of the Commission's application which gave rise to the judgment of 10 April 1984 was necessarily limited to the method of charging VAT, since at that time in Belgium there was no other tax on new cars. There was therefore no reason for the Court to consider the compatibility with the Sixth Directive of other taxes based on the list price. The Court was, however, fully aware of the fact that, under the system established by the Sixth Directive, there could be no tax on turnover other than VAT (see Article 33 of the Directive). Therefore the judgment of 10 April 1984 implied that the supply (the chargeable event for VAT purposes) of a new car could not give rise to any taxation based on the list price.

20. It follows that if registration tax is charged on the supply of new cars and if (as the Commission seeks to establish) it constitutes a turnover tax, the judgment of the Court has not been properly complied with.

21. The second approach is as follows:

22. Article 171 requires a Member State to adopt the necessary measures to comply with a judgment by which the Court held that it was in breach of one of its obligations. If in complying with a judgment a Member State infringes a rule of Community law, it is not respecting Article 171 of the Treaty and is liable to be found to have thereby failed to fulfil its obligations.

23. In this case Belgium, obliged as a result of the judgment of the Court to abolish the minimum basis for charging VAT, adopted a set of measures which were expressly stated, in the recitals to the Royal Decree of 20 December 1984 amending the general rules on taxes equivalent to stamp duties (*Moniteur belge* of 3 January 1985, p. 17), to be an 'inseparable whole'. The introduction of a registration tax based on the list price of new cars constitutes a major part of that whole. It was even stated, in the preamble to the aforesaid Royal Decree, that the registration tax was intended to 'compensate for the abolition of the minimum taxable amount for VAT purposes'.

24. If it should therefore be found that the registration tax is contrary to a provision of Community law, namely Article 33 of the Sixth Directive, Belgium would not have properly complied with the judgment in question and would therefore have failed to fulfil its obligations under Article 171 of the Treaty.

25. Which of the two interpretations of Article 171 is to be accepted, the narrow interpretation supported by Belgium or the wide interpretation of the Commission?

26. It seems to me that the arguments put forward in support of the second interpretation prove, in this case at least, that the connection between the conduct on the part of the Member State complained of and the compliance with the judgment of the Court is sufficiently close for the application brought by the Commission against Belgium for failure to fulfil its obligations under Article 171 to be regarded as admissible.

27. It must therefore then be considered whether the registration tax must be regarded as a turnover tax within the meaning of Article 33 of the Sixth Directive.

28. That article provides that 'without prejudice to other Community provisions, the provisions of 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 characterized as turnover taxes'.

29. If the Belgian registration tax has the character of turnover tax, it is therefore quite simply prohibited.

30. In its judgment of 27 November 1985 in Case 295/84 *Rousseau Wilmot SA* v *Caisse de compensation de l'organisation autonome nationale de l'industrie et du commerce* — Organic [1985] ECR 3759, the Court laid down guidelines as to what is meant by a turnover tax.

31. In paragraph 16 of that judgment the Court stated as follows:

'In leaving the Member States free to maintain or introduce certain indirect taxes such as excise duties on the condition that they are not taxes which can be 'characterized as turnover taxes', Article 33 of the Sixth Directive seeks to prevent the functioning of the common system of value-added tax from being compromised by fiscal measures of a Member State levied on the movement of goods and services and charged on commercial transactions in a way comparable to value-added tax. The purpose of that provision cannot therefore be to prohibit the Member States from maintaining or introducing duties or charges which are not fiscal but have been introduced specifically in order to finance social funds and which are based on the activity of undertakings or certain categories of undertakings and calculated on the basis of the total annual turnover without directly affecting the price of goods or services.'

32. I propose to examine the various criteria set out in that paragraph one by one.

33. (a) First of all, it is clear that the contested tax is a fiscal measure. Moreover, the Kingdom of Belgium admits that it is intended to bring in an amount equivalent to the amount by which the VAT collected has been reduced as a result of the judgment of the Court. As a result of the tax, too, individuals are taxed in the same way as before, since in general it prevents price discounts or rebates granted by the seller from affecting the level of taxation (see paragraph 31 of the judgment of 10 April 1984).

34. (b) It must also be acknowledged that this is a tax levied on the movement of motor vehicles.

35. It is levied on the first use of a vehicle and is then charged on any change of ownership. In other words, it is levied on successive disposals of the same goods, although its minimum basis of assessment, expressed by a decreasing percentage of the list price, is reduced as the car becomes older (Article 10 of the general regulation on taxes equivalent to stamp duties, as amended by the regulation of 20 December 1984).

36. (c) Is the tax charged on commercial transactions in a way comparable to the VAT, and does it directly affect the price of the goods concerned?

37. From the way in which the basis of assessment is formally defined ('In the case of new saloon cars and new estate cars, the tax shall be charged on the list price in force on the date of registration of the vehicle' — Article 5 (1) introduced by the Law of 31 July 1984) it must be concluded that it is certainly charged on a commercial transaction, since the list price includes the price which was actually paid. In principle, the tax is charged not only on the rebate granted by the seller but also on the price actually paid by the purchaser, which also constitutes the assessment basis for VAT. Furthermore, in the table headed 'Example illustrating the effect of registration tax in practice', which was supplied to the Court by the Belgian Government in reply to the questions asked by the Court, there is a column entitled 'Base d'importation de principe = prix de catalogue' ('Basic taxable amount = list price').

38. It is not until later that exemption from registration tax is granted in an amount equivalent to that which was used as the assessment basis for VAT (new Article 7 (2) of the code on taxes equivalent to stamp duties, introduced by the Law of 31 July 1984).

39. As the Belgian Government stresses in paragraph 53 of its defence, the purchaser of the car is merely granted a 'tax credit' for the VAT paid by him. In my view, it may therefore be said that registration tax is charged on commercial transactions in the same way as VAT.

40. If one turns away from the theoretical aspects and observes the way in which the system operates in practice, one finds that either the two taxes are paid simultaneously when the car is paid for (see for example the bill of sale submitted to the Court by the Commission) or the purchase price and VAT are paid and registration tax is paid separately. In both cases the actual taxable amount for the purposes of registration tax is the difference between the list price and the price actually paid, that is to say the discount granted by the seller.

41. This is why the Belgian Government states in paragraph 26 of its rejoinder that the taxable amount for the purposes of registration tax 'is not the consideration for a transaction, expenditure on consumption or a fraction of turnover'. But can it still be said that, as things truly stand, registration tax is not charged on commercial transactions in a way comparable to VAT and does not directly affect the price of the goods in question, in accordance with the criterion laid down by the Court?

42. In this connection it may first be noted that the taxable amount for registration tax

purposes is quite different from that for the taxes which have already been held by the Court not to be turnover taxes.

43. In *Rousseau Wilmot*, the tax was based on the total annual turnover of the companies concerned, and the *Grad* Case (judgment of 6 October 1970 in Case 9/70 *Grad* v *Finanzamt Traunstein* [1970] ECR 825) concerned a fixed sum of one pfennig per tonne per kilometer.

44. By contrast, the registration tax 'affects the price of the goods concerned', since it increases the price which must be paid for the car by the consumer if he wishes to use it for the purpose for which it is intended. The case of a person wishing to purchase a car without also applying for a registration plate is in practice so unusual that it may be disregarded.

45. It also seems to me that, even if only the actual basis on which the tax is charged, that is to say the difference between the list price and the actual price, were to be taken into account, it must be recognized that this can be ascertained only on the basis of the precise terms of the sale, that is to say of a commercial transaction, to which it is therefore inseparably linked.

46. Does not the fact that registration tax may be charged by the garage owner, on behalf of the State, at the same time as VAT, also imply that registration tax is charged on the transaction in a way comparable to VAT? Lastly, I would refer to the other similarities between the two taxes pointed out by the Commission, which need not be referred to once again here.

47. The Belgian Government, however, maintains that the chargeable event for this tax is not the purchase of the car but solely its registration. The tax is merely a standard charge levied when a car is authorized to be used on the public highway.

48. If that were so, however, the tax would have to be charged whenever a car was authorized to be used on the public highway. But that is not the case. Registration tax is not in fact charged at all when VAT has been charged on the basis of the list price or where an exemption from VAT has been granted (see Article 7 of the code on taxes equivalent to stamp duties, as amended by the Royal Decree of 17 October 1980 and by the Law of 31 July 1984).

49. In my view, the fact that registration tax is so wholly interchangeable with VAT conclusively proves that it is a turnover tax prohibited by Article 33 of the directive.

50. Would the position be different if VAT was charged at the same time as registration tax instead of being deducted from it?

51. I would be inclined to say that prima facie that would not alter the legal nature of the registration tax and it would still be a turnover tax prohibited by Article 31. But that is a problem which requires a very close examination and which need not be resolved by the Court in these proceedings.

52. Lastly, with regard to the concerns about tax evasion expressed by the Belgian Government, I would recall that in its judgment of 10 April 1984 the Court stated

that measures of the kind which Article 27 of the Sixth Directive allows to be retained 'may, where appropriate, entail the application of standard amounts, provided that the special measures do not derogate from the rules laid down by Article 11 further than is necessary to avoid the risk of tax evasion or avoidance' (paragraph 30). That possibility might perhaps be worth exploring.

Conclusion

53. For all the reasons set out above, I propose that the Court should declare that the Kingdom of Belgium, by retaining in practice in its Law of 31 July 1984 the list price as the basis for the taxation of new saloon cars and new estate cars, has not adopted the measures necessary to comply with the judgment of the Court of Justice of 10 April 1984, and should order the defendant to pay the costs.