JUDGMENT OF THE COURT (Fifth Chamber)

22 February 2001 *

In Case C-393/98,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Supremo Tribunal Administrativo (Portugal) for a preliminary ruling in the proceedings pending before that court between

Ministério Público,

António Gomes Valente

and

Fazenda Pública,

on the interpretation of Article 95 of the EC Treaty (now, after amendment, Article 90 EC),

* Language of the case: Portuguese.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur), D.A.O. Edward, P. Jann and L. Sevón, Judges,

Advocate General: N. Fennelly,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Mr Gomes Valente, by J. Sá Pereira, advogado,

— the Portuguese Government, by L. Fernandes, Â. Seiça Neves and H. Ventura, acting as Agents,

— the Netherlands Government, by M.A. Fierstra, acting as Agent,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the Commission of the European Communities, by E. Traversa and A.M. Alves Vieira, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Portuguese Government, represented by L. Fernandes and V. Guimarães, acting as Agent, and the Commission, represented by A.M. Alves Vieira, at the hearing on 8 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 21 September 2000,

gives the following

Judgment

1 By order of 7 October 1998, received at the Court on 5 November 1998, the Supremo Tribunal Administrativo (Supreme Administrative Court), Portugal referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) three questions on the interpretation of Article 95 of the EC Treaty (now, after amendment, Article 90 EC).

2 Those questions were raised in proceedings between Mr Gomes Valente and Fazenda Pública (the Portuguese tax authorities), Mr Gomes Valente claiming reimbursement of the car tax which he had paid on importing into Portugal a second-hand vehicle from another Member State.

National legal background

3 At the time of the notice of assessment of the tax due from Mr Gomes Valente for the permanent importation of his vehicle, the Portuguese system of car tax was laid down by Decree-Law No 40/93 of 18 February 1993 (*Diário da República* I, Series A, No 41 of 18 February 1993), as amended by Law No 10-B/96 of 23 March 1996 (*Diário da República* I, Series A, of 23 March 1996) ('Decree-Law No 40/93'). That statute has subsequently been amended many times.

4 Portuguese car tax is a specific, single-stage tax, which is paid when the vehicle first enters the Portuguese market, and thus at the time when it is first registered in Portugal. According to Article 1(1) of Decree-Law No 40/93:

'Car tax is an internal tax on light passenger vehicles — including multi-purpose vehicles, racing cars and other vehicles primarily for the carriage of persons, excluding motor caravans — whether imported new or second-hand, including those assembled or manufactured in Portugal, and which are intended to be registered'.

5 Under Article 1(4) of Decree-Law No 40/93, car tax varies according to cylinder capacity and is assessed in accordance with the tables annexed to the Decree-Law, which form an integral part thereof.

6 According to Article 3(1) of Decree-Law No 40/93:

'No light passenger vehicle, whether new or second-hand, may be registered if proof of payment of car tax is not presented to the General Directorate for Road Traffic (Direcção-Geral de Viação) by means of the official register of collection, guarantee or exemption from payment.'

7 Article 1(7) of Decree-Law No 40/93, as amended by Law No 75/93 of 20 December 1993 and Law No 39-B/94 of 27 December 1994, provides that second-hand vehicles imported into Portugal and which originate in Member States or are in free circulation there are to benefit from reductions in car tax in accordance with the following scale:

— after 1 to 2 years of use, the reduction is 18%;

— after 2 to 3 years of use, the reduction is 24%;

— after 3 to 4 years of use, the reduction is 32%;

— after 4 to 5 years of use, the reduction is 41%;

— after 5 to 6 years of use, the reduction is 49%;

— after 6 to 7 years of use, the reduction is 55%;

— after 7 to 8 years of use, the reduction is 61%;

— after 8 years of use, the reduction is 67%.

8 Those various percentage reductions in car tax are applied to the tax which would be demanded, on the date of importation of the second-hand vehicle, for an equivalent new vehicle. According to the preamble to Decree-Law No 40/93, those reductions are designed to compensate for loss of value resulting from wear.

The dispute in the main proceedings and the questions referred

9 Mr Gomes Valente bought a second-hand light passenger vehicle, a BMW (model 325 turbo diesel), in France, with a cylinder capacity of 2 497 cm^3, which was registered for the first time, in France, on 2 December 1991.

10 On 16 September 1996, Mr Gomes Valente declared to the Aveiro customs office that the vehicle was intended for permanent importation and that its value was PTE 2 500 000. On the same date, that office issued an assessment of the car tax ('imposto automóvel') at PTE 1 856 994, which the applicant paid.

11 Mr Gomes Valente's action against that assessment notice having been rejected by a judgment of the Tribunal Fiscal Aduaneiro (Customs Court) of Oporto (Portugal) on 16 October 1997, Mr Gomes Valente and the Public Prosecutor at the Tribunal Fiscal Aduaneiro appealed against that judgment before the Supremo Tribunal Administrativo.

12 Mr Gomes Valente argues that the Oporto Court's judgment goes against the case-law of the Court of Justice concerning the interpretation of Article 95 of the Treaty, which, by reason of the direct effect of that provision, entails the disapplication to the present case of national legislation contrary to Community law. He points out that, in paragraphs 14 and 15 of its judgment in Case C-345/93 *Nunes Tadeu* [1995] ECR I-479, the legal context of which was the system of vehicle taxation prior to that which was in force when he imported his vehicle into Portugal, the Court held that a rule which restricted the reduction in the tax for imported second-hand cars to a certain percentage of the tax levied on new cars of the same type, without having regard to the vehicle's actual depreciation, discriminated against imported second-hand cars. In his submission, despite the amendments made to the system of vehicle taxation following the *Nunes Tadeu* judgment, Portuguese car tax remains contrary to Article 95 of the Treaty because it is not calculated on the basis of the real commercial value of second-hand cars.

13 Mr Gomes Valente requested the Supremo Tribunal Administrativo to make a reference to the Court of Justice, suggesting to it the following questions:

'1. Does legislation, like the Portuguese legislation, which imposes a fixed-rate levy on imported used light passenger vehicles taking account only of the cylinder capacity of the vehicle, subject to deduction from the levy of a percentage of 18, 24, 32, 41, 49, 55, 61 or 67% (depending whether the imported vehicle has been in use for between one and two, two and three, three and four, four and five, five and six, six and seven or seven and eight years) of what would be payable on a new vehicle (imported or bought on the domestic market) and where for a vehicle which has been used for more than eight years 33% of the car tax which would be payable on a new vehicle (imported or bought on the domestic market) has to

be paid without, in either of such situations, account being taken of all the other factors which influence the value of a car, such as kilometrage, state of upkeep and the model, among others, guarantee perfect neutrality of domestic taxation as regards competition between domestic and imported products (in this case cars) and is it compatible with the first paragraph of Article 95 of the EEC Treaty?

2. Is it compatible with the first paragraph of Article 95 of the EEC Treaty for national legislation to provide that the tax levied on an imported product and the tax levied on a similar national product are to be calculated differently and according to different procedures: the car tax on the imported used vehicle is calculated on the basis of its cylinder capacity, subject to a deduction based solely on its years of use whereas in transactions on the national market involving a similar used vehicle no car tax is paid (since, being a single-stage tax, it is paid only once when the vehicle is put into circulation, in new condition), when the fact is that its price may still incorporate a residual portion of that tax if it has not been in use for more than about four to five years, that portion always being of uncertain amount, and not being separate from the purchase price, or separable from it, because, amongst other possible reasons, the purchase of a used vehicle in Portugal is not subject to car tax?

3. In the light of the first paragraph of Article 95 of the EEC Treaty, may it be considered that such a system cannot, not even in only a few cases, lead to higher taxation of the imported product and that the system is regulated in such a way that the possibility is always excluded of an imported vehicle being taxed at a higher level than a similar national vehicle?

4. May, in the light of Community law, such a system be regarded as transparent to the requisite extent so as to make it possible to determine objectively whether the fiscal charge on an imported vehicle exceeds that levied on a similar national car?

5. In the light of Community law, may such a system be applied in a fair way to products from the domestic market and to imported products?'

14 In those circumstances, the Supremo Tribunal Administrativo decided to stay the proceedings and refer the following three questions to the Court of Justice for a preliminary ruling:

'1. Are the questions raised in these proceedings by the appellant and set out above relevant? What is the answer to those questions under Community law?

2. Does depreciation of the real value of used vehicles, referred to in the judgment of the European Court of Justice in Case C-345/93 *Nunes Tadeu* necessarily imply that a valuation or expert assessment must be carried out on every vehicle or may the calculation be made in general and abstract terms by reference to a legal criterion?

3. If the Commission discontinues infringement proceedings against a Member State on the understanding that the new national legislation is now in conformity with Community law, may a national supreme court, relying on the interpretation of Community law and of national law adopted by the Commission, be relieved of the obligation imposed on it by Article 177 of the Treaty to request a preliminary ruling from the Court of Justice and decide the case in accordance with the interpretation adopted by the Commission?'

The third question

15 By its third question, which it will be convenient to examine first, the national court essentially asks whether the fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has any effect on the obligation upon a court of last instance of that Member State to refer to the Court of Justice, pursuant to the third paragraph of Article 177 of the Treaty, a question of Community law in relation to the legislation concerned.

16 In that respect, it should be remembered, first, that, according to the third paragraph of Article 177 of the Treaty, where a question of Community law is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal must bring the matter before the Court of Justice (Case C-337/95 *Parfums Christian Dior* v *Evora* [1997] ECR I-6013, paragraph 24).

17 According to case-law that is well established, that obligation to refer is based on cooperation, with a view to ensuring the proper application and uniform interpretation of Community law in all the Member States, between national courts, in their capacity as courts responsible for the application of Community law, and the Court of Justice (see, in particular, Case 283/81 *CILFIT and Lanificio di Gavardo* v *Italian Ministry of Health* [1982] ECR 3415, paragraph 7; *Parfums Christian Dior*, cited above, paragraph 25), and it is particularly designed to prevent a body of national case-law that is not in accordance with the rules of Community law from being established in any Member State (see, in particular, Case 107/76 *Hoffman-La Roche* v *Centrafarm* [1977] ECR 957, paragraph 5, and Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *Netherlands State* [1982] ECR 3723, paragraph 8).

18 Moreover, as the Finnish Government has indicated in its written observations, in paragraph 16 of its judgment in Joined Cases 142/80 and 143/80 *Amminis-*

trazione delle Finanze dello Stato v *Essevi and Salengo* [1981] ECR 1413, the Court of Justice held that the Commission is not empowered to determine conclusively, by opinions formulated pursuant to Article 169 of the EC Treaty (now Article 226 EC) or by other statements of its attitude under that procedure, the rights and duties of a Member State, or to give it guarantees concerning the compatibility of a given line of conduct with the Treaty, and that, according to Articles 169, 170 and 171 of the EC Treaty (now Articles 226 EC, 227 EC and 228 EC), the rights and duties of Member States may be determined and their conduct appraised only by a judgment of the Court of Justice.

19 The answer to the third question must therefore be that the fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has no effect on the obligation upon a court of last instance of that Member State to refer to the Court of Justice, pursuant to the third paragraph of Article 177 of the Treaty, a question of Community law in relation to the legislation concerned.

The first and second questions

20 By the first and second questions, which it will be convenient to examine together, the national court essentially asks, first, whether the first paragraph of Article 95 of the Treaty permits a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the real value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales laid down by statute, regulation or administrative provision, without requiring the national authorities to carry out an individual assessment of the value of each second-hand vehicle imported. In the event of an affirmative answer, the referring court asks, second, whether a system of taxation such as that at issue in the main proceedings complies with the requirements of the first paragraph of Article 95 of the Treaty.

21 As for the question whether the taking into account of the real depreciation of a second-hand car, to which the *Nunes Tadeu* judgment refers, requires an expert study of each vehicle, excluding the possibility of it being calculated in a general and abstract manner with the aid of a criterion laid down by statute, it should be remembered at the outset that, according to settled case-law, the first paragraph of Article 95 of the Treaty is infringed where the tax charged on the imported product and that charged on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being imposed on the imported product (Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 20, and case-law cited therein; Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 34).

22 In its judgment in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509, at paragraph 21, the Court of Justice held that Article 95 of the Treaty precludes a Member State from applying to imported second-hand vehicles a registration duty calculated on the basis of a fixed taxable value never capable of amounting to less than 90% of the taxable value of the vehicle when new, thereby limiting the depreciation of those vehicles to 10%, whatever their age or condition. In the Court's view, the levying of a registration duty for which the basis of assessment is at least 90% of the value of the vehicle when new generally constitutes manifest overtaxation of those vehicles in comparison with the residual registration duty in the case of previously-registered used cars bought on the national market, whatever their age or condition (*Commission* v *Denmark*, paragraph 20).

23 In paragraph 15 of its judgment in *Nunes Tadeu*, the Court held that a rule which restricts the reduction in the amount of the tax charged on new cars to 10%, without having regard to the vehicle's actual depreciation, discriminates against imported second-hand cars. It therefore held it incompatible with Article 95 of the Treaty for a Member State to charge on second-hand cars from another Member State a tax which, being calculated without taking the vehicle's actual depreciation into account, exceeds the residual tax incorporated in the value of

similar second-hand motor vehicles already registered in the national territory (*Nunes Tadeu*, paragraph 20).

24 It does not, however, follow from the case-law cited in paragraphs 21 to 23 of this judgment that the actual depreciation of the vehicles cannot be taken into account otherwise than by means of an assessment or expert examination of each of them. Avoiding the administrative burden inherent in such a system, a Member State might be able to establish, by means of fixed scales determined by statute, regulation or administrative provision and calculated on the basis of criteria such as a vehicle's age, kilometrage, general condition, method of propulsion, make or model, a value for second-hand vehicles which, as a general rule, would be very close to their actual value.

25 In drawing up those scales, the authorities of a Member State might refer to a guide indicating the average prices of second-hand vehicles in the national market or to a list of average current prices used as a reference in the sector.

26 It should, however, be added that, in order for a system of taxation of imported second-hand cars which takes into account the actual depreciation of the vehicles on the basis of general criteria to be compatible with Article 95 of the Treaty, it would have to be arranged in such a way, making allowance for the reasonable approximations inherent in any system of that type, as to exclude any discriminatory effect.

27 In that respect, the procedure before the Court has concentrated on essentially two points, the first being the degree of precision with which the fixed scale reflects the actual depreciation of the vehicle and the second being the opportunity for the owner of an imported second-hand vehicle to bring an action challenging the application to his vehicle of a scale based on general criteria.

28 As regards the first of those points, although the application of a taxation scale for imported second-hand cars based on a single criterion of depreciation — as in the case of the legislation at issue in the main proceedings, which, in this case, was based on the number of years for which the vehicle was used — is not in itself contrary to the first paragraph of Article 95 of the Treaty, it nevertheless appears that taking other factors of depreciation into account, such as the make, the model, the kilometrage, the method of propulsion, the mechanical state or the state of maintenance of the vehicle, is likely to result in the fixed scale reflecting the actual depreciation of vehicles much more precisely and permits the aim of ensuring that the tax charged on imported second-hand vehicles does 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 to be achieved much more easily.

29 In this case, the Portuguese Government has not been able to demonstrate that depreciating factors other than the number of years' use of the vehicles had been taken into account in order to determine the percentages of reduction in the tax, and, moreover, it acknowledged at the hearing that the scale of reduction laid down by Decree-Law No 40/93 did not reflect with sufficient precision the actual depreciation of vehicles.

30 Furthermore, in reply to the questions put by the Court at the hearing, it was not able to indicate on what basis the national authorities had been able to establish a percentage of depreciation amounting to only 18% for all vehicles used for up to two years and a practically linear reduction in the value of second-hand cars used for between two and eight years or more.

31 As regards the second point, it might be argued that a fixed scale, whilst reflecting the general trend of depreciation in vehicles but only in an imprecise manner,

might nevertheless be compatible with Article 95 of the Treaty if the owner of an imported vehicle had an opportunity to challenge the application of that scale to his vehicle before a court.

32 It is true that such a possibility, for the owner of an imported vehicle to challenge the application of the fixed scale to his vehicle by demonstrating that it leads to taxation higher than the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory, would prevent any possible discriminatory effects of a system of taxation based on such a scale.

33 The direct effect of the first paragraph of Article 95 of the Treaty, recognised in the judgment in Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205, at p. 211, implies that an individual must be able to challenge the compatibility with that provision of national legislation establishing statutory criteria or scales which have been applied in order to calculate the tax levied on his imported second-hand vehicle.

34 Such a possibility is in any event subject to the condition that the criterion or criteria on the basis of which the scale is calculated are brought to the knowledge of the public.

35 In this case, even if the Portuguese Government indicated at the hearing that a tax might always be challenged before the courts, it has not been able to demonstrate the existence, in the system of taxation at issue in the main proceedings, of a right for the taxpayer to adduce evidence that the fixed scale was inadequate to determine the real value of the second-hand vehicle imported by him.

36 Moreover, the factors on the basis of which the percentages of reduction in the tax were determined are not indicated in Decree-Law No 40/93.

37 Bearing in mind the considerations set out above and the case-law concerning Article 95 of the Treaty as referred to in paragraphs 21 to 23 above, the effect of which is that the maximum amount of tax applicable to imported second-hand vehicles is determined by that of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory, a system of taxation such as that at issue in the main proceedings is not capable of ensuring that the amount of tax due on the importation of a vehicle from another Member State does not exceed, even in a few cases, that of the residual tax borne by an equivalent vehicle already registered in national territory. Such a system does not therefore exclude in any event the possibility that imported products might be taxed more heavily than national products.

38 As regards the factual situation which underlies the dispute in the main proceedings, the figures supplied by the Portuguese Government in reply to the written questions of the Court show that the application of the scale of reductions laid down by Decree-Law No 40/93 did not exclude all discrimination to the detriment of imported second-hand vehicles.

39 According to the Portuguese Government, the price of a vehicle such as Mr Gomes Valente's in 1991, that is to say when new, might be estimated at PTE 10 478 000 and, in 1996, the year in which Mr Gomes Valente imported the vehicle into Portugal, the average value of such a vehicle on the Portuguese second-hand market was PTE 4 600 000.

40 Those figures show a depreciation of 56% of the value of the vehicle, whereas, according to the scale established by the legislation in force, the reduction in the tax due was only 41% in relation to the car tax calculated on the price of the new vehicle.

41 However, in the context of national legislation such as that at issue in the main proceedings, the reduction in the tax must be directly proportional to the loss in value of the vehicle so that the amount of tax on imported second-hand vehicles does not exceed that of the residual tax incorporated in the value of similar second-hand vehicles already registered in the national territory.

42 The Portuguese Government argued at the hearing that the system of taxation of imported second-hand cars was in fact intended to restore equality of treatment in principle between the commercial value of domestic second-hand vehicles and that of imported second-hand vehicles.

43 That argument cannot be accepted. 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 of the Treaty, which seeks to guarantee that internal charges have no effect on competition between domestic and imported products (*Nunes Tadeu*, paragraph 18).

44 The answer to the first and second questions, as reformulated in paragraph 20 above, must therefore be that the first paragraph of Article 95 of the Treaty does not permit a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the actual value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, unless those criteria or scales are capable of guarantee-

ing that the amount of the tax due does not exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory.

Costs

45 The costs incurred by the Portuguese, Finnish and Netherlands Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by order of 7 October 1998, hereby rules:

1. **The fact that the Commission discontinues infringement proceedings against a Member State concerning a piece of legislation has no effect on the**

obligation upon a court of last instance of that Member State to refer to the Court of Justice, pursuant to the third paragraph of Article 177 of the EC Treaty (now the third paragraph of Article 234 EC), a question of Community law in relation to the legislation concerned.

2. The first paragraph of Article 95 of the Treaty does not permit a Member State to apply to second-hand vehicles imported from other Member States a system of taxation in which the depreciation in the actual value of those vehicles is calculated in a general and abstract manner, on the basis of fixed criteria or scales determined by a legislative provision, a regulation or an administrative provision, unless those criteria or scales are capable of guaranteeing that the amount of the tax due does not exceed, even in a few cases, the amount of the residual tax incorporated in the value of similar vehicles already registered in the national territory.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 22 February 2001.

R. Grass A. La Pergola

Registrar President of the Fifth Chamber