everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser.

Such legislation cannot be justified either by Article 32 of the directive, which does not cover sales of second-hand goods where, because such sales are between taxable persons who have been able to exercise the right to a deduction on capital goods, there is no risk of double taxation, or by Article 27 which, whilst authorizing special derogations in order to prevent certain types of tax evasion or avoidance, does not permit a general derogation from the rules of Article 11 such as the substitution of a minimum basis of assessment for the price agreed between the parties.

REPORT FOR THE HEARING
in Case C-131/91 *

I — Legal background to the main proceedings

A — *The national provisions*

1. Under *Article 35 of the Belgian Value Added Tax Code*, as amended by Article 17 of *the Law of 27 December 1977* (*Moniteur Belge* of 30 December 1977), 'The King may lay down a minimum basis of assessment for supplies and imports of: 1. motor cars, motor cycles and other land vehicles whatever the type of motor, and also trailers; 2. ...'.

2. That article was implemented by Royal Decree No 17 of 20 July 1970 (*Moniteur Belge* of 31 July 1970), which laid down a minimum basis of assessment for VAT purposes for both new and second-hand cars. That decree was repealed by *Royal Decree No 17 of 20 December 1984* (*Moniteur Belge* of 3 January 1985) laying down a minimum basis of assessment for value added tax purposes for second-hand cars and second-hand vehicles intended for mixed use (private and commercial). Article 1 of the decree provides that:

'A minimum basis of assessment for value added tax purposes shall apply to second-hand cars and second-hand vehicles intended for mixed use supplied within the territory of the country to users or imported by users ...'.

3. Under Article 2(1) of the decree the basis of assessment may not be lower than a

* Language of the case: Dutch.

specified percentage of the list price. The percentages are fixed according to the period of time which elapsed between the date on which the vehicle was first used and the date on which it was supplied or imported: 85% if VAT is due within three months; 80% if VAT is due within four, five or six months; 70% if VAT is due within seven, eight or nine months; 65% if VAT is due within ten, eleven or twelve months; 55% if VAT is due within two years; 45% if VAT is due within three years, and so forth.

4. According to Article 2(2), the list price is the price, fixed by the manufacturer at the time when the vehicle was first used, for sale to the user of new cars intended for mixed use of the same type with their equipment and accessories.

B — *The Community provisions*

5. As regards the basis of assessment, Article 11A(1)(a) of the Sixth Directive provides that:

'1. The taxable amount shall be:

(a) in respect of supplies of goods and services other than those referred to in (b), (c) and (d) below, everything which constitutes the consideration which has been or is to be obtained by the supplier from the purchaser, the customer or a third party for such supplies including subsidies directly linked to the price of such supplies'.

6. Article 27 of the Sixth Directive provides for simplification measures by way of derogation from the rules of secondary Community law concerning the levying of VAT. Article 27(1) provides that:

'The Council, acting unanimously on a proposal from the Commission, may authorize any Member State to introduce special measures for derogation from the provisions of this directive, in order to simplify the procedure for charging the tax and to prevent certain types of tax evasion or avoidance. Measures intended to simplify the procedure for charging the tax, except to a negligible extent, may not affect the amount of tax due at the final consumption stage.'

Article 27(5) provides as follows:

'Those Member States which apply on 1 January 1977 special measures of the type referred to in paragraph 1 above may retain them providing they notify the Commission of them before 1 January 1978 and providing that where such derogations are designed to simplify the procedure for charging tax they conform with the requirement laid down in paragraph 1 above.'

7. In addition, Article 32 of the directive lays down special rules concerning second-hand goods in the following terms:

'The Council, acting unanimously on a proposal from the Commission, shall adopt before 31 December 1977 a Community taxation system to be applied to used goods, works of art, antiques and collectors' items.

Until this Community system becomes applicable, Member States applying a special system to these items at the time this directive comes into force may retain that system.'

II — Facts and procedure

8. *The plaintiff in the main proceedings*, 'K' Line Air Service Europe BV, sold in 1988 a Mercedes 280 SE motor car which had already been used, and which was therefore no longer a 'new' car, to Eulaerts NV, the *first defendant in the main proceedings*, for the sum of BFR 260 000. VAT was calculated on the selling price at 25% plus 8% luxury tax, resulting in a total amount of BFR 85 800. The plaintiff and the first defendant are taxable persons for VAT purposes.

9. In the course of an inspection the tax authorities noted that under the Belgian legislation VAT should have been calculated by reference to the minimum basis of assessment for second-hand cars. That minimum basis of assessment was 55% of the list price. The VAT payable on the supply of the car therefore amounted to BFR 176 963. That amount was paid by 'K' Line.

10. 'K' Line claimed from Eulaerts, the purchaser of the car, the additional VAT and luxury tax amounting to BFR 91 163 (176 963 — 85 800). However, Eulaerts refused to pay the invoice because in its view the minimum basis of assessment was contrary to the provisions of the Sixth Directive.

11. 'K' Line therefore instituted proceedings against Eulaerts before the Rechtbank van Eerste Aanleg, Brussels, claiming payment of the sum of BFR 91 163. Subsequently, the Belgian State was also joined to the proceedings with a view to securing reimbursement of the sum should Royal Decree No 17 infringe the Sixth Directive.

12. By a judgment of 2 May 1991 the Rechtbank van Eerste Aanleg declared the application admissible and, before giving judgment on the substance, referred the following *question* to the Court of Justice for a *preliminary ruling*:

'Are the provisions of Royal Decree No 17 of 20 July 1970, as amended by Royal Decree No 17 of 20 December 1984, enacted in implementation of Articles 35 and 52 of the VAT Code, contrary to Articles 11 and 27 of the Sixth VAT Directive and to the principle of the free movement of goods, as provided for in Articles 9, 10 and 11 of the EEC Treaty?'

13. The order for reference was lodged at the Registry of the Court on 16 May 1991.

14. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Eulaerts, the first defendant, represented by H. van den Keybus of the Brussels Bar; by the Belgian State, the second defendant, represented by I. Maselis of the Brussels Bar; and by the Commission of the European Communities, represented by J. F. Buhl, Legal Adviser, and P. van Nuffel, of its Legal Service, acting as Agents.

III — Written observations submitted to the Court

A — *The compatibility of Royal Decree No 17 with the Sixth Directive*

1. *Eulaerts*, the *first defendant*, observes first that under *Article 11 of the Sixth Directive* the taxable amount in the case of the sale of goods is the price. According to Eulaerts, that uniform taxable amount has crucial importance for the harmonization of the legislation of the Member States concerning VAT, since it makes it possible *inter alia* for the application of the Community rate to taxable transactions to lead to comparable results. In this case, the taxable amount provided for by the Sixth Directive is, according to Eulaerts, completely disregarded, the Belgian State maintaining its own rules which are entirely different from the Community rules.

Eulaerts adds that the derogating measures provided for in *Article 27 of the Sixth Directive* do not apply to this case. In that regard it refers to the judgment of the Court in Case 324/82 *Commission* v *Belgium* [1984] ECR 1861; it claims that that case concerns not only new cars but also 'voitures de direction', which must be regarded as second-hand cars.

Eulaerts states that in that judgment the Court interpreted Article 27 of the directive to the effect that the derogating measures provided for therein must be necessary in the light of the objective to be achieved (in this case combatting tax evasion) so as to be in proportion to that objective (principle of proportionality). Measures which derogate in a manner which is too absolute or too general from the general rules of the directive are prohibited.

Eulaerts states that in the abovementioned case the Court took the view that the Belgian derogating measures were too absolute and too general. In this case there is, in its view, an even more flagrant breach of those principles. In that case the Belgian State was criticized for not taking into account price discounts in determining the taxable amount. In this case it is the price agreed by the parties itself which is completely disregarded and replaced by a fixed amount, namely the minimum taxable amount.

Eulaerts states further that the Belgian system of taxation departs from Article 11 of the Sixth Directive and that that divergence

is not proportionate to the results achieved. It is, in its view, possible to combat tax evasion by less restrictive means. Regard should be had in that connection to the extensive supervisory powers already possessed by the tax authorities, which allow them to verify the correctness of the returns made.

Eulaerts argues that the rule laying down a minimum taxable amount is not therefore proportionate to the aim pursued. Moreover, it is not a measure designed to simplify the procedure for charging the tax and affects considerably the amount of VAT for which the taxable person is liable.

Eulaerts submits finally that the Belgian State cannot rely on *Article 32 of the Sixth Directive*. It considers that that article must be interpreted as meaning that until 31 December 1977 the Council could adopt Community tax rules applicable to second-hand goods. Prior to that the Member States could apply their own national rules.

Eulaerts points out that the Council did not adopt such uniform rules. In its view, it must be concluded that after 31 December 1977 Article 11 becomes applicable to second-hand goods. The primary purpose of Article 32 is to harmonize the legislation of the Member States. Since that aim has not been achieved by the Council, it is necessary to have recourse to the fundamental general principles of the Sixth Directive, in particular Article 11. Eulaerts concludes that for second-hand goods also the taxable amount must be determined by reference to the price.

2. The *Belgian State*, the *second defendant*, refers first to the judgments of the Court in Case 324/82 *Commission* v *Belgium*, above and Case 391/85 *Commission* v *Belgium* [1988] ECR 579. It maintains that in those judgments it was only in relation to new cars that the Court held that the minimum taxable amount based on the list price was incompatible with the Sixth Directive. As regards the minimum taxable amount for second-hand cars, Belgium points out that the Commission has not instituted infringement proceedings because it considers that the Belgian legislation is covered by the second paragraph of Article 32 of the directive.

Belgium argues further that under the *second paragraph of Article 32 of the Directive* Member States which, at the time of the entry into force of the directive, applied a special VAT system to second-hand goods may, pending the application of Community rules on this matter, retain their systems (judgment in Case C-163/88 *ORO Amsterdam Beheer* [1989] ECR 4081, paragraph 24).

Belgium, pointing out that the Sixth Directive entered into force on 1 January 1978, refers to the Belgian legislation and claims that the special system for the purposes of the second paragraph of Article 32 of the directive which applies in Belgium to second-hand cars was introduced in 1970,

that is to say before the entry into force of the Sixth Directive. That system, which falls wholly within the scope of the second paragraph of Article 32, may thus be retained pending the application of Community rules in this area.

Belgium argues further that the Council's failure to adopt the proposal for the directive concerning VAT on second-hand goods does not give rise to any obligation for the Belgian authorities to amend the special VAT system applicable to second-hand goods (judgment in *ORO* above, at paragraph 15) in such a way that the same taxable amount applies to supplies and imports of both second-hand goods and new goods.

Belgium proposes therefore that the first part of the question be answered as follows:

'The provisions of Royal Decree No 17 of 20 December 1984 are not contrary to Articles 11 and 27 of the Sixth VAT Directive, since by virtue of Article 32 of that directive the Member States may retain their VAT systems concerning second-hand goods pending the entry into force of Community rules concerning the taxation of such goods.'

3. The *Commission*, after setting out the relevant Community and national legislation and the case-law of the Court, states that the present dispute concerns the taxable amount on the sale of a second-hand car between taxable persons. In its view, the reply to the question raised by the national court therefore requires in particular examination of the scope of *Article 32 of the Sixth Directive* concerning 'second-hand goods'. If Article 32 of the directive is not applicable, the Commission considers that the question arises as to the effect of Article 27 of the directive, concerning the simplification measures which the Member States may adopt pursuant to that article.

As regards the scope of Article 32 of the directive, the Commission states that that article provides that Member States applying a special system to second-hand goods at the time when the directive entered into force may retain that system until a Community system becomes applicable; the Community system should have been adopted before 31 December 1977 (judgment in *ORO*, above, paragraph 24).

The Commission observes that, since the introduction of VAT, and since before 1 January 1978, Belgium has applied a special system (consisting in calculating VAT by reference to a minimum taxable amount) for the taxation of new and second-hand cars. Since 10 April 1984 that system has applied only to second-hand cars. In the Commission's view that system, which would be contrary to Article 11 of the Sixth Directive in the absence of any derogating provision, is therefore in principle compatible with Community law by virtue of Article 32 of the directive pending the entry into force of a Community scheme.

However, the Commission considers that it is necessary to examine whether Article 32 of the Sixth Directive may be relied upon in order to apply taxation different from that provided for by Article 11 with respect to the sale of used cars between taxable persons. In other words, the question which arises is whether the sale which is the subject of the main proceedings was a transaction in 'second-hand goods' for the purposes of Article 32.

Under the normal rules of taxation supplies of goods — new or used — made for consideration within the territory of the country by a taxable person are subject to VAT in proportion to their price. It follows that, in the absence of any special provision, goods re-introduced into commercial channels from the final consumption stage are taxed again and in full; this may be avoided if a final consumer wishing to sell the used goods enters into a transaction directly with another final consumer. In order to lessen the cumulative effect of this further taxation, which causes normal commercial channels to be avoided, it is appropriate to grant taxable persons who have acquired such goods without tax for resale a right to deduct a certain amount intended to correspond to the residual input tax.

The Commission states further that under the proposal for a *directive which is at present under examination by the Council* (OJ 1989 C 76, p. 10) the scope of the arrangements for second-hand goods is as follows: 'The special arrangements shall apply to suppliers of goods as referred to in paragraph 1 where they are effected by a taxable person ("taxable dealer") who acquires such goods in the course of his business from a private person or from a taxable person who was not entitled to deduct VAT when he acquired them, with a view to resale' (Article 32A(3)).

According to the Commission, the aim of Article 32 of the directive is to establish rules for goods which have borne VAT definitively and are therefore, upon their reintroduction into commercial channels, liable to be taxed again without account being taken of the tax already incorporated in their price.

It follows, in the Commission's view, that capital goods, even if they are used goods in respect of which a taxable person was able to deduct VAT, do not constitute 'second-hand goods' for the purposes of the Sixth Directive. The concept of 'second-hand goods' may be defined only by reference to the system of deduction. The Commission considers that it is a fiscal concept and not a concept relating to the physical state of the goods.

Where a new car is not supplied to a final consumer but as capital goods to a taxable person, the latter is able to deduct the VAT paid on the purchase of the car from the VAT for which he is liable in respect of his activity. Where that taxable person resells the car after use, it is no longer a new car but none the less does not qualify as 'second-hand goods' for the purposes of Article 32 of the Sixth Directive, since the VAT paid by

the seller at the previous stage was deductible. In the Commission's view, since there is no double taxation, such a transaction cannot be regarded as falling under Article 32 of the directive.

The Commission adds that the situation would be different if at the previous stage the taxable person had acquired the car from a non-taxable person. In such a case (which applies to professional dealers in second-hand cars) the car has borne tax and has been subsequently reintroduced into commercial channels. The Commission considers that it follows, with reference to the dispute in the main proceedings, that, although the Belgian rules concerning VAT on second-hand goods are not contrary to Community law by virtue of Article 32 of the Sixth Directive, such rules may not be applied to supplies of 'second-hand' goods on which taxable persons deducted the VAT, as was the case in the main proceedings, since in such a case there is no supply of 'second-hand goods' for the purposes of Article 32. According to the Commission, such a supply of capital goods must be taxed by reference to the taxable amount laid down by the normal rules, that is to say Article 11 of the Sixth Directive.

As regards *Article 27 of the Sixth Directive*, the Commission states that the Belgian Government might seek to rely upon that provision in order to retain the current rules laying down a fixed taxable amount for the taxation of second-hand cars, which are capital goods. It points out in that regard that on 23 December 1977 Belgium notified to the Commission the Belgian provisions concerning the minimum taxable amount for the charging of VAT under Article 27(5).

The Commission considers, however, that Belgium may not rely on that exception. In support of that view it refers to the judgment in Case 324/82 *Commission* v *Belgium*, above, in which the Court held that in principle the notified measures 'may not derogate from the basis for charging VAT laid down in Article 11, except within the limits strictly necessary for achieving that aim.' The Court took the view in that judgment that the Belgian measures were disproportionate to the aim sought, and the Commission does not see how the position can be otherwise in the present case. In any event, the Commission observes that, in view of the substantial changes made to the Belgian legislation, the notification made by Belgium in 1977 is no longer effective.

In conclusion, the Commission proposes the following reply to the preliminary question:

'Until such time as a Community system for the taxation of second-hand goods becomes applicable, the retention by a Member State of a special system for the taxation of

second-hand cars which already existed at the time when the Sixth Council Directive entered into force is not contrary to the provisions of that directive. However, a special system of that type may not be applied to a supply by a taxable person of capital goods on which he deducted VAT, since such a supply does not constitute a supply of second-hand goods for the purposes of Article 32 of the Sixth Directive.'

According to Eulaerts, it is possible that such cars are therefore less frequently imported. Consequently, the national provision in question constitutes a measure having equivalent effect to a quantitative restriction on imports prohibited by Article 30 of the EEC Treaty.

B — *The compatibility of Royal Decree No 17 with Articles 9 to 11 of the EEC Treaty*

Eulaerts concludes that the Belgian rules may not be applied, since they are contrary to Article 11 of the Sixth Directive and to the provisions concerning the free movement of goods (Title 1, Chapter 2 of the EEC Treaty, more particularly Article 30).

1. *Eulaerts* considers that, by applying a minimum taxable amount, the Belgian State prevents the parties from taking account of the specific depreciation of the motor car concerned. Yet certain makes of car have the reputation of depreciating more rapidly than other makes because of rust. Makes which have that reputation command a lower price on the second-hand market.

The application of a uniform rate of depreciation for all second-hand cars works to the disadvantage of such cars by comparison with those which have a better reputation. They continue to be subject to a taxable amount exceeding the agreed price.

2. *Belgium* argues that the minimum taxable amount introduced by Royal Decree No 17 constitutes neither a customs duty nor a charge having equivalent effect to a customs duty.

In that regard it states that the Court has consistently held that the prohibition on charges having equivalent effect to customs duties covers any tax which is payable on or by reason of importation and which, since it applies specifically to imported products to the exclusion of similar domestic products, has the same effect upon the free movement of goods as a customs duty, inasmuch as it affects the cost price of the imported products.

Belgium points out that the minimum taxable amount for second-hand cars provided for by Royal Decree No 17 applies without distinction to cars supplied in Belgium to users and to cars imported by users (Article 1(1)). Consequently, it considers that Royal Decree No 17 cannot contravene Articles 9 and 11 of the EEC Treaty.

By way of alternative Belgium examines the compatibility of the Belgian rules of Article 95. It argues that the minimum taxable amount cannot be regarded as discriminatory internal taxation. It points out that under Article 1 of Royal Decree No 17 the minimum taxable amount, calculated as a percentage of the list price, applies both to second-hand cars imported into Belgium by users and to those supplied to users in Belgium.

Belgium proposes that the Court reply as follows to the second part of the preliminary question:

'The provisions of Royal Decree No 17 do not constitute a customs duty on imports or exports or a charge having equivalent effect and are therefore compatible with Articles 9, 10 and 11 of the EEC Treaty.'

3. The *Commission* considers that the dispute in the main proceedings concerns solely the question as to the amount of VAT due on the sale of a second-hand car in Belgium. In the Commission's view, there does not appear to be any relevant international aspect to the dispute such as to require an interpretation of the Community provisions concerning the free movement of goods.

M. Diez de Velasco
Judge-Rapporteur