JUDGMENT OF THE COURT (Sixth Chamber)
29 April 2004 *

In Case C-387/01,

REFERENCE to the Court under Article 234 EC by the Verwaltungsgerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Harald Weigel,

Ingrid Weigel

and

Finanzlandesdirektion für Vorarlberg,

on the interpretation of Articles 12 EC, 23 EC, 25 EC, 39 EC and 90 EC and Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1),

* Language of the case: German.

THE COURT (Sixth Chamber),

composed of: V. Skouris, acting for the President of the Sixth Chamber, C. Gulmann, J.-P. Puissochet, R. Schintgen and N. Colneric (Rapporteur), Judges,

Advocate General: A. Tizzano,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr and Mrs Weigel, by W. Weh, Rechtsanwalt,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Danish Government, by J. Molde and J. Bering Liisberg, acting as Agents,

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Commission of the European Communities, by E. Traversa and K. Gross, acting as Agents,

having regard to the Report for the Hearing

after hearing the oral observations of Mr and Mrs Weigel, represented by W. Weh and W. Simmer, Rechtsanwalt; of the Austrian Government, represented by F. Sutter, acting as Agent; of the Danish Government, represented by J. Molde; of the Finnish Government, represented by T. Pynnä, acting as Agent; and of the Commission, represented by K. Gross, at the hearing on 10 April 2003,

after hearing the Opinion of the Avocate General at the sitting on 3 July 2003,

gives the following

Judgment

1 By order of 20 September 2001, received at the Court on 8 October 2001, the Verwaltungsgerichtshof (Administrative Court) referred to the Court for a preliminary ruling under Article 234 three questions on the interpretation of Articles 12 EC, 23 EC, 25 EC, 39 EC and 90 EC and Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment (OJ 1977 L 145, p. 1), as amended by Council Directive 91/680/EEC of 16 December 1991 supplementing the common system of value added tax and amending Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) ('the Sixth Directive').

2 Those questions were raised in proceedings brought by Mr and Mrs Weigel against the Finanzlandesdirektion für Vorarlberg concerning the standard fuel consumption tax (Normverbrauchsabgabe, 'the NoVA') imposed on them by reason of the registration in Austria of motor vehicles belonging to them upon the transfer of their residence to that Member State.

Legal context

Community law

The provisions of the EC Treaty

3 According to the first paragraph of Article 12 EC:

'Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.'

4 Article 23(1) EC provides:

'The Community shall be based upon a customs union which shall cover all trade in goods and which shall involve the prohibition between Member States of

customs duties on imports and exports and of all charges having equivalent effect, and the adoption of a common customs tariff in their relations with third countries.'

5 Article 25 EC is worded as follows:

'Customs duties on imports and exports and charges having equivalent effect shall be prohibited between Member States. This prohibition shall also apply to customs duties of a fiscal nature'.

6 Article 39 EC stipulates:

'1. Freedom of movement for workers shall be secured within the Community.

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. The provisions of this article shall not apply to employment in the public service.'

7 The first paragraph of Article 90 EC is in the following terms:

'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.'

Secondary law

8 Article 2 of the Sixth Directive provides:

'The following shall be subject to value added tax:

1. the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such;

2. the importation of goods'.

9 Article 17 of the Sixth Directive confers a right in specified cases to deduct value added tax ('VAT') paid on inputs.

10 Article 33(1) of the Sixth VAT Directive is in the following terms:

'Without prejudice to other Community provisions, in particular those laid down in the Community provisions in force relating to the general arrangements for the holding, movement and monitoring of products subject to excise duty, this Directive shall not prevent a Member State from maintaining or introducing taxes on insurance contracts, taxes on betting and gambling, excise duties, stamp duties and, more generally, any taxes, duties or charges which cannot be characterised as turnover taxes, provided however that those taxes, duties or charges do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers'.

11 Council Directive 83/183/EEC of 28 March 1983 on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals (OJ 1983 L 105, p. 64) has as its purpose the elimination of obstacles to the free movement of persons within the European Community. Article 1 of the directive defines its scope as follows:

'1. Every Member State shall, subject to the conditions and in the cases hereinafter set out, exempt personal property imported permanently from another Member State by private individuals from turnover tax, excise duty and other consumption taxes which normally apply to such property.

2. Specific and/or periodical duties and taxes connected with the use of such property within the country, such as for instance motor vehicle registration fees, road taxes and television licences, are not covered by this Directive'.

12 Article 2 of Council Regulation (EEC) No 918/83 of 28 March 1983 setting up a Community system of reliefs from customs duty (OJ 1983 L 105, p. 1) provides that, subject to Articles 3 to 10 of the regulation, personal property imported by natural persons transferring their normal place of residence from a third country to the customs territory of the Community shall be admitted free of import duties.

National law

13 The Abgabenänderungsgesetz 1991 (Tax Amendment Law of 1991, BGBl. 695/1991) introduced the Normverbrauchsabgabegesetz (Law on Standard Fuel

Consumption Tax, 'the NoVAG') into Austrian law. According to Paragraph 15 (1) of that Law, as amended in 1995 (BGBl. 21/1995) and 1996 (BGBl. 201/1996), it applies to events occurring after 31 December 1991.

14 Paragraph 1 of the NoVAG provides:

'The following transactions shall be subject to the NoVA:

1. the supply for consideration in the national territory by a trader ... in the course of his business of vehicles not previously registered there and of demonstration vehicles ... ;

2. the commercial hiring out in the national territory of vehicles not previously registered there ... ;

3. the first-time registration in the national territory of vehicles, other than demonstration vehicles, where a charge to tax has not already been incurred under subparagraphs 1 or 2 or where reimbursement has taken place under Paragraph 12(1) after a charge to tax was incurred;

...'.

15 Under Paragraph 1(4) of the NoVAG, the supply, transfer from business to personal use ('*Eigenverbrauch durch Entnahme*'), and change in use of vehicles exempt under Paragraph 3(3) in particular are made subject to the NoVA.

16 Under Paragraph 2(1) and (2) of the NoVAG, motor vehicles comprise motor cycles and motor cars within the more specified tariff classification headings of the Combined Nomenclature.

17 Under Paragraph 4(1) of the NoVAG, the person chargeable to the NoVA in the cases of supply (Paragraph 1(1) and (4)), commercial hiring out (Paragraph 1(2)), transfer to personal use and change in use (Paragraph 1(4)) is the trader carrying out the supply or commercial hiring out or one of the other acts referred to in Paragraph 1(4). Paragraph 4(2) provides that the chargeable person in the case of a first-time registration (Paragraph 1(3)) is the person in whose name the vehicle is registered.

18 Under Paragraph 5 of the NoVAG, the chargeable value for NoVA purposes is determined as follows:

'(1) In the case of supply (Paragraph 1(1) and (4)), the NoVA shall be assessed on the consideration paid, as defined by Paragraph 4 of the UStG (Umsatzsteuergesetz) 1972 [Law on Turnover Tax of 1972].

(2) In all other cases (Paragraph 1(2), (3) and (4)), it shall be assessed on the fair market value of the vehicle, exclusive of VAT.

(3) The NoVA shall not be included in the chargeable value'.

19 In 2000, the following sentence was added to Paragraph 5(2) of the NoVAG (BGBl. I 142/2000):

'In the case of an intra-Community acquisition of a vehicle from an authorised dealer, the purchase price shall be deemed to be the fair market value of the vehicle.'

20 According to Paragraph 10(2) of the Bewertungsgesetz 1955 (Valuation Law of 1955, BGBl. 148/1955, 'the BewG'), the fair market value of a vehicle is the price a vehicle in its condition would sell for in the ordinary course of business.

21 Paragraph 5.2 of the Circular of 1 September 1995 amending the NoVA guidelines, issued by the Austrian Federal Ministry of Finance (Federal Ministry of Finance, Section IV, GZ 14 0609/8 IV/11/95, 'the circular of 1 September 1995'), adds the following details concerning the calculation of the NoVA:

'5.2 — Fair market value:

In all cases where the charge to tax does not arise as a result of a supply (e.g. leasing, private import, change of circumstances through change in use, transfer to personal use), the chargeable value is the fair market value exclusive of VAT and NoVA (see Paragraph 5(3) of the NoVAG). The fair market value is determined in accordance with Paragraph 10 of the BewG and takes into account the taxable person's position in the supply chain ... .

The following computation methods apply:

5.2.1 Intra-community import:

Fair market value is based on the domestic Eurotax valuations. It is the mean of the dealer's purchase and selling price (excluding VAT and NoVA). That mean corresponds, broadly speaking, to the price that the imported vehicle would achieve if sold privately in the national territory (= the private sale price within the meaning of Paragraph 10 of the BewG). The fair market value may differ from that value in the specific circumstances, because of differences in the terms of warranty coverage and after-sales service, repairs that may be required, features, and wear-and-tear. The price paid for the car in its country of origin may be taken as the fair market value for NoVA purposes if it is within 20% of the Eurotax mean valuation. If it lies outside that range, the taxable person has to substantiate the reason for the discrepancy.'

22 The rate at which the NoVA is charged is governed by Paragraph 6 of the NoVAG. The plaintiffs in the main proceedings were assessed at the surcharged rate provided for by paragraph 6 of that Paragraph.

23 Paragraph 6 of the NoVAG provides:

'(1) ...

(2) The rate for other motor vehicles shall be 2% multiplied by the fuel consumption in litres 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. Where average consumption is not more than 3 litres (2 litres in the case of diesel vehicles) the rate shall be 0%.

(3) The resulting rates shall be rounded up or down to the nearest whole percentage. The rate shall not exceed 16% of the basis of assessment.

...

(6) The tax shall be increased by 20% where the NoVA is not included in the chargeable value for VAT purposes.'

24 Paragraph 7(1)(3) of the NoVAG provides that in the cases covered by Paragraph 1(3) the tax liability is incurred on the date of registration.

25 According to the transitional provision contained in the first sentence of Paragraph 15(2) of the NoVAG, a first-time registration in the national territory is not subject to the NoVA where a vehicle has incurred VAT at the rate of 32% upon a supply or importation and the purchaser or importer is not entitled to deduct input VAT.

The main proceedings

26 Mr and Mrs Weigel, the plaintiffs in the main proceedings, are German nationals who transferred their residence to Austria in mid-1996. Mr Weigel, who had previously been working in Germany, was at that time appointed director of the Vorarlberger Landesbibliothek. Up to the birth of their child, his wife, Mrs Weigel, had also been working in Germany.

27 Mr and Mrs Weigel each imported a car into Austria as personal property. After moving residence, they were required to register the cars in that Member State. Having complied with that requirement, Mr and Mrs Weigel received NoVA assessments by decisions of the Finanzamt (Tax Office) Feldkirch of 2 October 1996, with Mr Weigel's vehicle being assessed for ATS 31 416 and that of his wife for ATS 7 668.

28 The tax charged to Mr Weigel was in respect of a 1995 Mitsubishi Space Wagon GLXi. That vehicle had a Eurotax valuation of ATS 187 000, which was taken as the chargeable value for NoVA purposes. Applying a rate of 14%, a charge of ATS 26 180 was assessed ('the base tax'). A surcharge of 20% of the base tax, amounting to ATS 5 236, was then applied, bringing the total charge to tax to ATS 31 416.

29 The tax charged to Mrs Weigel was in respect of a 1993 Nissan Sunny Y10 L2. That vehicle had a Eurotax valuation of ATS 71 000, which was taken as the chargeable value for NoVA purposes. Applying a rate of 9%, a charge of ATS 6 390 was assessed for the base tax. A surcharge of 20% of the base tax, amounting to ATS 1 278, was subsequently applied, bringing the total charge to tax to ATS 7 668.

30 On appeal by Mr and Mrs Weigel, the Finanzlandesdirektion für Vorarlberg upheld the NoVA assessments made by the Finanzamt, relying on the existence of the taxable event contemplated by Paragraph 1(3) of the NoVAG.

31 The Weigels challenged those decisions before the Verfassungsgerichtshof (Austrian Constitutional Court). That court declined to hear the case and, upon the plaintiffs' application, remitted the case to the Verwaltungsgerichtshof.

The order for reference and the questions referred

32 The Verwaltungsgerichtshof states that the NoVA is a policy measure to encourage the purchase of low-fuel vehicles. What distinguishes the present case, which concerns Paragraph 1(3) of the NoVAG, is the fact that the chargeable event was the importation of cars by nationals of another Member State of the European Union when transferring their residence to Austria in connection with a change of place of work.

33 Having noted that the NoVA is normally included in the chargeable value for VAT purposes, the Verwaltungsgerichtshof points out that the surcharge provided for in Paragraph 6(6) of the NoVAG was introduced in order to compensate for a VAT undercharge that arises where the NoVA is not included in the chargeable value for VAT purposes. That happens in particular in the case of imported cars, where VAT is collected on importation, at which point the chargeable value for VAT purposes does not yet include the NoVA, since the charge to the NoVA arises, according to Paragraph 1(3) of the NoVAG, only when the cars are subsequently registered.

34 In relation to its first question, the Verwaltungsgerichtshof rejects the claims of Mr and Mrs Weigel that they were discriminated against. It states that a worker changing residence within Austria who purchased a vehicle which had not previously been registered in that Member State would have to pay both the NoVA and VAT. The referring court accepts, however, that a worker moving to Austria from another Member State is not in the same position as an Austrian national, since the latter, unlike the former, has the option, when buying a car, of choosing a model with lower fuel consumption and thereby incurring a lower charge to the NoVA.

35 The Verwaltungsgerichtshof also considers it possible that the imposition of an additional tax on an imported car, charged solely because of the purchaser's work-related transfer of residence, might be considered to be a breach of Article 39 EC.

36 As to the second question, the Verwaltungsgerichtshof takes the view that both the NoVA and the surcharge constitute a pecuniary charge that is part of a general system of internal taxation, which would rule out any breach of Articles 23 EC and 25 EC. However, since in practice the surcharge affects mainly transactions relating to goods crossing borders, the Verwaltungsgerichtshof believes that it may perhaps be regarded as a charge having equivalent effect [to a customs duty] contrary to those provisions.

37 In relation to Article 90 EC, the Verwaltungsgerichtshof is uncertain as to whether, firstly, the use of fair market value on the domestic market takes due account of the judgments in Case C-47/88 *Commission* v *Denmark* [1990] ECR I-4509 and Case C-345/93 *Nunes Tadeu* [1995] ECR I-479. Secondly, given that, in the case of the surcharge, no provision has been made for the deduction of input tax, the referring court takes the view that imported cars are taxed more heavily where the consignee is an undertaking having a right of deduction. In the

light, for example, of the judgment in Case C-265/99 *Commission* v *France* [2001] ECR I-2305, paragraph 40, the surcharge might thus be incompatible with Article 90 EC.

38 In relation to the third question, the Verwaltungsgerichtshof notes that the creation of the single market and the adoption of Directive 91/680 first and foremost did away with turnover tax on imports as between Member States. If the surcharge is designed to replace the turnover tax that would otherwise be due on imports, it could be contrary to the provisions of the Sixth Directive.

39 In the light of those considerations, the Verwaltungsgerichtshof stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

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

2. Do Article 90 EC (prohibiting higher taxation on goods from other Member States) or Article 23 EC (customs union) and Article 25 EC (prohibition of customs duties or charges having equivalent effect between the Member States) preclude the imposition of the standard fuel consumption tax referred to in the first question (base tax or surcharge)?

3. Is the surcharge payable as part of the *Normverbrauchsabgabe* referred to in the first question compatible with the Sixth Directive ... as amended by Council Directive 91/680/EEC ...?'

The questions referred

40 The first point to be noted is that, as set out in the grounds of the order for reference, the consumption tax at issue in the main proceedings consists of a base tax ('the NoVA base tax') and a potential surcharge ('the 20% surcharge'). The latter, the referring court explains, is intended to make up for the fact that no VAT is charged on the vehicle concerned where the operative event is one that is not subject to VAT, in particular the first-time registration of the vehicle in Austria.

41 The first and second questions each comprise two parts, the first part concerning the NoVA base tax and the second the 20% surcharge.

The NoVA base tax

The first part of the first question

42 By the first part of its first question, the referring court asks essentially whether Article 39 EC or Article 12 EC preclude the imposition of a consumption tax such

as the NoVA base tax at issue in the main proceedings on a private individual from one Member State who on taking up residence in another Member State because of a change of place of work imports his or her car into the latter State.

43 Before examining whether the imposition of a tax having the characteristics of the NoVA base tax may constitute a breach of Article 39 EC and Article 12 EC, it is necessary to consider that measure in the light of the provisions of Directive 83/183. As the Commission of the European Communities rightly observed, there is no need to consider whether there has been a breach of the Treaty rules in question if a provision of that directive already precludes the charging of a tax such as the NoVA base tax on individuals in the position of Mr and Mrs Weigel.

44 The fact that the question of the application of Directive 83/183 was canvassed only by Mr and Mrs Weigel and by the Commission and was not actually submitted to the Court by the national court does not prevent the Court from considering it. Even though, strictly speaking, the national court has directed its question solely to the interpretation of Articles 39 EC and 12 EC, the Court is not thereby precluded from providing the national court with all those elements for the interpretation of Community law which may be of assistance in adjudicating on the case pending before it, whether or not that court has specifically referred to them in its questions (see, to that effect, Case C-241/89 *SARPP* [1990] ECR I-4695, paragraph 8, Case C-315/92 *Verband Sozialer Wettbewerb* ('*Clinique*') [1994] ECR I-317, paragraph 7, and Case C-87/97 *Consorzio per la tutela del formaggio Gorgonzola* [1999] ECR I-1301, paragraph 16).

— Directive 83/183

45 According to the Commission, with which Mr and Mrs Weigel agree in substance, the NoVA base tax is prohibited by Article 1(1) of Directive 83/183, at least in so far as it exceeds the administrative cost of registering the vehicle. The exemption

prescribed by that provision covers not only taxes levied directly on imports of property but also taxes on processes that are intimately linked to the importation, such as the registration of a motor vehicle. The Commission takes the view that Article 1(2) of the directive, which excludes 'motor vehicle registration fees' from the exemption, does not apply to the NoVA base tax. The exception contained in that provision must be strictly construed. The term 'registration fee', in particular, should comprise only fees intended to cover the costs of registration. The Commission cites both the French version, which refers to '*droits perçus lors de l'immatriculation*' rather than '*taxes perçues lors de l'immatriculation*', and the English version, which refers to 'fees', a term applicable only to charges other than taxes.

46 The Commission's argument that Article 1(1) of Directive 83/183 applies to the NoVA base tax cannot be upheld.

47 A tax such as the NoVA base tax must be regarded as falling outside the scope of the exemption in Article 1(1) of Directive 83/183. That provision concerns certain specified types of charge which normally apply to property imported permanently. Contrary to what the Commission submits, a consumption tax, such as the NoVA base tax, cannot be regarded as a tax linked to importation as such. The first four subparagraphs of Paragraph 1 of the NoVAG read together show that the operative event giving rise to the NoVA is not importation. In the case of subparagraph 3, which is at issue in the main proceedings, the operative event attracting the NoVA is first-time registration in the State, which is not necessarily linked to the act of importation.

48 Given that a tax having the characteristics of the NoVA base tax is not one that comes within the exemption provided for in Article 1(1) of Directive 83/183 and that, accordingly, no exemption can be granted in application of that directive, it is not necessary to decide whether such a tax is excluded from the scope of the directive by Article 1(2).

49 It follows that Directive 83/183 does not preclude the imposition of a tax such as the NoVA base tax on a private individual from one Member State who on taking up residence in another Member State because of a change of place of work imports his or her car into the latter State.

— Article 39 EC

50 Article 39(2) EC expressly provides that the free movement of workers requires the abolition of all discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

51 According to the case-law of the Court, Article 39 EC also prohibits national rules which, although they apply without regard to the nationality of the workers concerned, constitute an obstacle to their freedom of movement (see Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 96).

52 The provisions of the Treaty relating to freedom of movement for persons are intended to facilitate the pursuit by Community citizens of occupational activities of all kinds throughout the Community, and preclude measures which might place

Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State (see, in particular, *Bosman*, cited above, paragraph 94, Case C-18/95 *Terhoeve* [1999] ECR I-345, paragraph 37, and Case C-190/98 *Graf* [2000] ECR I-493, paragraph 21).

53 A rule such as that at issue in the main proceedings applies without regard to the nationality of the worker concerned to all those who register a car in Austria and, accordingly, it is applicable without distinction.

54 It is true that it is likely to have a negative bearing on the decision of migrant workers to exercise their right to freedom of movement.

55 However, the Treaty offers no guarantee to a worker that transferring his activities to a Member State other than the one in which he previously resided will be neutral as regards taxation. Given the disparities in the legislation of the Member States in this area, such a transfer may be to the worker's advantage in terms of indirect taxation or not, according to circumstance. It follows that, in principle, any disadvantage, by comparison with the situation in which the worker pursued his activities prior to the transfer, is not contrary to Article 39 EC if that legislation does not place that worker at a disadvantage as compared with those who were already subject to it (see, in relation to social security, Joined Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829, paragraph 51).

56 On the basis of the evidence before the Court, such is the case in the main proceedings.

— Article 12 EC

57 Article 12 EC, which enshrines the general principle that there can be no discrimination on grounds of nationality, applies independently only to situations governed by Community law in respect of which the Treaty lays down no specific prohibition of discrimination (see Case C-100/01 *Oteiza Olazabal* [2002] ECR I-10981, paragraph 25, and Case C-289/02 *AMOK* [2003] ECR I-15059, paragraph 25).

58 As far as the free movement of workers is concerned, that principle is implemented and given specific effect by Article 39 EC.

59 There is therefore no need to express a view on Article 12 EC in so far as the facts at issue in the main proceedings fall within the scope of Article 39 EC.

60 Accordingly, the answer to be given to the first part of the first question is that Articles 39 EC and 12 EC do not preclude the imposition of a consumption tax such as the NoVA base tax at issue in the main proceedings on a private individual from one Member State taking up residence in another Member State because of a change of place of work and importing his or her car into the latter State in so doing.

The first part of the second question

61 By the first part of the second question, the referring court is in effect submitting two separate questions to the Court, asking first whether the NoVA base tax constitutes a customs duty or a charge having equivalent effect, within the

meaning of Articles 23 EC and 25 EC and secondly whether, and if so to what extent, that tax constitutes discriminatory internal taxation contrary to Article 90 EC.

62 It should be noted at the outset that, contrary to what Mr and Mrs Weigel claim, Regulation No 918/83, by virtue of Article 2, has no application to the main proceedings. The scope of that regulation comprises only personal property imported by natural persons transferring their normal place of residence to the customs territory of the Community. Mr and Mrs Weigel, however, moved from the Member State where they lived to another Member State.

63 Also, as far as the respective spheres of application of Articles 25 EC and 90 EC are concerned, the Court has consistently held that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, with the result that, under the system established by the Treaty, the same charge cannot belong to both categories at the same time (see Case C-234/99 *Nygård* [2002] ECR I-3657, paragraph 17, Case C-101/00 *Tulliasiamies and Siilin* [2002] ECR I-7487, paragraph 115, and Case C-383/01 *De Danske Bilimportører* [2003] ECR I-6065, paragraph 33).

— Articles 23 EC and 25 EC

64 The Court has consistently held (see, in particular, Case C-90/94 *Haahr Petroleum* [1997] ECR I-4085, paragraph 20, and Case C-213/96 *Outokumpu* [1998] ECR I-1777, paragraph 20) that any pecuniary charge, whatever its designation and mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a border, and which is not a customs duty in the strict sense, constitutes a charge having equivalent effect within the meaning of

Articles 23 EC and 25 EC. However, such a charge may not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 90 EC (see, to that effect, *Nygård*, paragraph 19).

65 In the present case, the NoVA base tax is manifestly of a fiscal nature and it is charged not by reason of the vehicle crossing the border of the Member State which established it, but in view of other operative events, of which first-time registration of the vehicle in that State is one. It must therefore be regarded as part of a general system of internal dues on goods and hence examined in the light of Article 90 EC (see, to that effect, *De Danske Bilimportører*, paragraph 34).

— Article 90 EC

66 As far as the taxation of imported used cars is concerned, the Court has held that Article 90 EC seeks to guarantee the complete neutrality of internal taxation as regards competition between products already on the domestic market and imported products (see, to that effect, *Commission* v *Denmark*, paragraph 9, *Nunes Tadeu*, paragraph 18, and *Tulliasiamies and Siilin*, paragraph 52).

67 According to settled case-law, the first paragraph of Article 90 EC 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 (see Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraphs 20 and 29, *Outokumpu*, paragraph 34, and Case C-393/98 *Gomes Valente* [2001] ECR I-1327, paragraph 21).

68 A comparison between the tax treatment of imported used vehicles, such as those at issue in the main proceedings, and that of used cars bought locally, which constitute similar or competing products, shows that the NoVA base tax is charged on both those categories of vehicle without distinction. While it is true that somebody buying a used vehicle already registered in Austria does not pay the NoVA base tax directly, the fact remains that the price paid for the vehicle already includes a residual portion of the NoVA base tax, which reduces in line with the vehicle's depreciation through use.

69 However, the tax burden on both categories of used car is the same only if the amount of a consumption tax such as the NoVA base tax charged on used cars from another Member State does not exceed the amount of the residual NoVA base tax incorporated in the value of a similar used car already registered in the State (see, to that effect, *Nunes Tadeu*, paragraph 20, and *Gomes Valente*, paragraph 23).

70 In that regard, the Court has held that it is contrary to the first paragraph of Article 90 EC to charge tax on imported used motor vehicles based on a value which is higher than the real value of the vehicle with the result that they are taxed more heavily than similar used cars on the domestic market (see, to that effect, *Commission* v *Denmark*, cited above, paragraph 22). It is therefore necessary, in taxing imported used cars, to take account of their actual depreciation.

71 To avoid discriminatory taxation, the taxable value imputed to the imported used vehicle by the revenue authorities should faithfully reflect the value of a similar used vehicle already registered on the domestic market.

72 According to the documents before the Court, in particular the circular of 1 September 1995, the taxable value imputed to imported used vehicles by the Austrian revenue authorities for the purposes of the NoVA base tax is their fair market value. That is a set value based on Eurotax ratings and, as a general rule, it corresponds to the price the imported vehicle would achieve in a private sale on the domestic market.

73 With regard to such a valuation process, the Court has acknowledged that although 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, to avoid the administrative burden inherent in such a system, a Member State may 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, mileage, general condition, fuel type, make or model, a value for second-hand vehicles which, as a general rule, is very close to their actual value (*Gomes Valente*, paragraph 24).

74 The Court has also accepted that in drawing up those scales, the authorities of a Member State may 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 (*Gomes Valente*, paragraph 25).

75 To avoid any discrimination, the set values based on the Eurotax rates must reflect the actual depreciation of vehicles precisely and produce the desired outcome that the tax charged on imported second-hand vehicles in no case exceeds the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the State.

76 It is for the national court to determine whether the fair market valuation method satisfies the conditions set out in the previous paragraph.

77 Disputing that the NoVA base tax is calculated on the basis of fair market value, Mr and Mrs Weigel submit, inter alia, that second-hand car prices were lower in Germany than in Austria. Referring to paragraph 18 of the *Nunes Tadeu* judgment, cited above, they argue in particular that the tax in question eliminates the competitive advantage which those vehicles would hold on the Austrian market in its absence.

78 In that regard, it should be observed that the Court has already held that 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 90 EC (*Nunes Tadeu*, paragraph 18).

79 However, the documents before the Court, in particular the circular of 1 September 1995, show that the fair market value is a set value that corresponds, broadly speaking, to the price the imported vehicle would achieve on the domestic market. Consequently, the NoVA base tax charged on imported used cars tends to correspond to the residual NoVA incorporated in the value of used cars already registered in the State.

80 Accordingly, a consumption tax such as the NoVA base tax at issue in the main proceedings cannot prevent a trader taking advantage of the price differences between second-hand cars in the Member States.

81 It follows from the above considerations that the answer to be given to the first part of the second question is that:

— a consumption tax such as the NoVA base tax at issue in the main proceedings constitutes internal taxation of which the compatibility with Community law must be examined not under Articles 23 EC and 25 EC but under Article 90 EC,

— Article 90 EC must be interpreted as meaning that it does not preclude a consumption tax such as the NoVA base tax at issue in the main proceedings to the extent that the charges to that tax precisely reflect the actual depreciation of second-hand vehicles imported by private individuals and produce the desired outcome that the tax charged on imported second-hand vehicles in no case exceeds the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the State.

The 20% surcharge

The second part of the second question

82 With regard to the 20% surcharge referred to in Article 6(6) of the NoVAG, the second part of the second question is best considered first.

— Articles 23 EC and 25 EC

83 The file shows that the 20% surcharge applies only in very exceptional circumstances to purely domestic events. However, it should be recalled that a charge which is imposed on both imported products and domestic products but in practice applies almost exclusively to imported products because domestic production is extremely small does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 23 EC and 25 EC if it is part of a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products. It therefore constitutes internal taxation within the meaning of Article 90 EC (Case 193/85 *Cooperativa Co-Frutta* [1987] ECR 2085, paragraph 14, and Case C-343/90 *Lourenço Dias* [1992] ECR I-4673, paragraph 53).

84 The same is true of the 20% surcharge. Therefore, a tax of that kind must be examined not under Articles 23 EC and 25 EC but under Article 90 EC.

— Article 90 EC

85 Community law does not as yet 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 differentiation is compatible with Community law, however, only if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and 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 (see, to this effect, Case 196/85 *Commission* v *France* [1987] ECR 1597, paragraph 6, and *Outokumpu*, paragraph 30).

86 Consequently, the Court has already held that a criterion for charging higher taxation which by definition can never be fulfilled by similar domestic products cannot be considered to be compatible with the prohibition of discrimination laid down in Article 90 EC. Such a system has the effect of excluding domestic products in advance from the heaviest taxation (Case 319/81 *Commission* v *Italy* [1983] ECR 601, paragraph 17). Likewise, the Court has held that such differential taxation is incompatible with Community law if the products most heavily taxed are, by their very nature, imported products (Case 106/84 *Commission* v *Denmark* [1986] ECR 833, paragraph 21).

87 The 20% surcharge is generally assessed only on the NoVA base tax charged on imported second-hand vehicles and it applies only in exceptional circumstances to the NoVA base tax charged on purely domestic transactions. In so far as the purpose of the 20% surcharge is to prevent supposed distortions of competition, it must be remembered that a tax aimed at eliminating a competitive advantage held by imported products over domestic products would be manifestly contrary to Article 90 EC.

88 Accordingly, it must be found that a tax such as the 20% surcharge is incompatible with Article 90 EC.

89 Consequently, the answer to be given to the second part of the second question is that Article 90 EC must be interpreted as meaning that it precludes the imposition of a 20% surcharge, in the case of the importation by a private individual of a second-hand car from another Member State, on a tax having the characteristics of the NoVA base tax at issue in the main proceedings.

The second part of the first question and the third question

90 In the light of the answer given to the second part of the second question, there is no need to reply to the second part of the first question or the third question.

Costs

91 The costs incurred by the Austrian, Danish and Finnish 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 (Sixth Chamber),

in answer to the questions referred to it by the Verwaltungsgerichtshof by order of 20 September 2001, hereby rules:

1. Articles 39 EC and 12 EC do not preclude the imposition of a consumption tax such as the Normverbrauchsabgabe base tax at issue in the main proceedings on a private individual from one Member State who on taking up residence in another Member State because of a change of place of work imports his or her car into the latter State.

2. A consumption tax such as the Normverbrauchsabgabe base tax at issue in the main proceedings constitutes internal taxation of which the compatibility with Community law must be examined not under Articles 23 EC and 25 EC but under Article 90 EC.

3. Article 90 EC must be interpreted as meaning that it does not preclude a consumption tax such as the Normverbrauchsabgabe base tax at issue in the main proceedings to the extent that the charges to that tax precisely reflect the actual depreciation of second-hand vehicles imported by private individuals

and produce the desired outcome that the tax charged on imported second-hand vehicles in no case exceeds the amount of the residual tax incorporated in the value of similar second-hand vehicles already registered in the State.

4. Article 90 EC must be interpreted as meaning that it precludes the imposition of a 20% surcharge, in the case of the importation by a private individual of a second-hand car from another Member State, on a tax having the characteristics of the Normverbrauchsabgabe base tax at issue in the main proceedings.

Skouris Gulmann Puissochet

Schintgen Colneric

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass V. Skouris

Registrar President