JUDGMENT OF THE COURT (Sixth Chamber)
25 February 1988 *

In Case 299/86

REFERENCE to the Court under Article 177 of the EEC Treaty by the Corte d'Appello di Genova (Court of Appeal, Genoa) for a preliminary ruling in the criminal proceedings pending before that court against

Rainer Drexl

on the interpretation of Article 95 of the EEC Treaty,

THE COURT (Sixth Chamber)

composed of: O. Due, President of Chamber, T. Koopmans, K. Bahlmann, C. Kakouris and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of:

Mr Drexl, the appellant in the main proceedings, by Giuseppe Conte and Giuseppe Michele Giacomini, of the Genoa Bar,

the Government of the Italian Republic, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by Marcello Conti, Avvocato dello Stato,

the Commission of the European Communities, by Giuliano Marenco and Johannes Føns Buhl, acting as Agents,

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 27 October 1987

after hearing the Opinion of the Advocate General delivered at the sitting on 8 December 1987,

gives the following

Judgment

1 By an order of 12 November 1986, which was received at the Court Registry on 1 December 1986, the Corte d'Appello di Genova referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 95 of the Treaty in order to determine the compatibility with that provision of the Italian legislation on the charging of value-added tax on products imported from another Member State by private individuals.

2 The questions arose in criminal proceedings against Rainer Drexl, a German national residing in Loano, Italy, who is charged with the offence of smuggling or illegally importing a motor car from the Federal Republic of Germany by bringing it into Italian territory and using it there without complying with the provisions on temporary importation.

3 It is apparent from the order for reference that the defendant purchased in the Federal Republic of Germany a second-hand Volkswagen Golf motor car registered in that country whilst continuing to reside in Italy where he was working as a dental technician.

4 The Pretore d'Albenga (Magistrate's Court, Albenga), the court of first instance, assessed the amount of value-added tax evaded at LIT 1 134 000, equal to 18% of the undisputed value of the second-hand car. Taking account of mitigating circumstances, the court imposed a suspended fine of LIT 1 600 000 on Mr Drexl and ordered the confiscation of the car.

5 On appeal, the defendant contended, amongst other things, that the car had been duly purchased and registered in the Federal Republic of Germany where value-added tax at the rate of 13%, amounting to DM 2 148.57, had been paid.

6 It was in those circumstances that the Corte d'Appello di Genova stayed the proceedings and submitted to the Court the following questions for a preliminary ruling:

'(1) Do the Community rules on the harmonization of the legislation of the Member States relating to turnover tax (Article 95 of the EEC Treaty) prohibit the Member States from levying value-added tax on imports from another Member State of motor vehicles purchased subject to the payment of value-added tax in that State and registered in that State without taking account of the residual value-added tax paid in the Member State of exportation and still included in the value of the goods at the time of their importation?

(2) Does the value-added tax levied by a Member State upon the importation of goods without taking into account the residual tax still included in the value of the goods, where no such tax is charged upon sales of the same goods by private individuals within that State, constitute an internal tax in excess of that imposed on similar domestic products and as such prohibited under Article 95 of the EEC Treaty?

(3) Do the provisions of Community law which subject imports and domestic sales of a product to the same rate of tax preclude the application of national rules laying down, in the event of non-payment of the tax upon importation, penalties differing in nature and severity from those imposed for non-payment of the tax on domestic transactions? In particular, do the provisions of Community law regarding a harmonized tax system and the elimination of customs duties within the Community, in conjunction with the principles of proportionality and non-discrimination developed by the Court of Justice, preclude the application of a provision of national law (Article 70 of Presidential Decree No 633 of 26 October 1972) which treats offences involving the payment of value-added tax on imports from other Member States as

smuggling offences and imposes the penalties — including the criminal penalties — which are laid down in the customs legislation in relation to customs duties and which are different from those imposed for comparable offences involving domestic sales of the same goods (Article 50 of the Presidential Decree)?'

7 Reference is made to the Report for the Hearing for a fuller account of the relevant legislation and the facts of the case, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The first two questions, which should be considered together, concern the amount of value-added tax on importation which a Member State may impose on an individual who has imported used goods from another Member State. The third question concerns a different matter, namely the penalties for offences involving value-added tax, which are more severe in the case of imports than in the case of domestic transactions.

The first and second questions

9 It must be pointed out in the first place that a common system of value-added tax was established by Community directives on the basis of Articles 99 and 100 of the Treaty. Article 2 of the Sixth Council Directive of 17 March 1977 on the harmonization of the laws of the Member States relating to turnover taxes — Common system of value-added tax: uniform basis of assessment (Official Journal 1977, L 145, p. 1) provides that not only the supply of goods or services effected for consideration within the territory of a country by a taxable person but also the importation of goods, whether by a taxable person or a private individual, are to be subject to value-added tax. The imposition of value-added tax on importation is designed, in order to ensure the neutrality of the common system with regard to the origin of goods, to place imported products in the same position as similar domestic products with regard to the tax burdens borne by those two categories of goods.

10 According to an established body of case-law of the Court, the imposition of value-added tax on importation must not cause an imported product to be taxed twice, since such a result is contrary to Article 95 of the Treaty. That problem arises in particular where a private individual imports goods from another Member State without a tax exemption since such goods already attract value-added tax in that Member State unless relief is granted on exportation, as is done if the exporter is a taxable person.

11 The Court came to the conclusion that, if no tax relief is granted on exportation, the importation of goods from another Member State by a private individual may not give rise to the levying of value-added tax on importation except to the extent to which the residual part of the value-added tax paid in the Member State of exportation and still contained in the value of the product when it is imported is taken into account.

12 In its judgment of 21 May 1985 in Case 47/84 *Staatssecretaris van Financiën* v *Gaston Schul Douane-Expediteur BV* [1985] ECR 1491, the Court stated that in such a case the amount of value-added tax payable on importation must be calculated by taking into account the amount of value-added tax paid in the Member State of exportation which is still contained in the value of the product, in such a way that that amount is not included in the taxable amount and is in addition deducted from the value-added tax payable on importation.

13 In the light of the foregoing considerations, the answer to the first and second questions should be that Article 95 of the EEC Treaty must be interpreted as meaning that in the case of the importation from another Member State by a private individual of goods in respect of which there has not been granted either tax relief on exportation or tax exemption in the importing Member State, the value-added tax charged on importation must take into account the residual amount of value-added tax paid in the Member State of exportation which is still contained in the value of the goods at the time of importation, in such a way that that residual amount is not included in the taxable amount and is deducted from the value-added tax payable on importation.

The third question

14 By its third question the national court seeks to ascertain whether a system of penalties under which offences concerning value-added tax on importation are penalized more severely than those concerning value-added tax on domestic transactions is contrary to Article 95 of the Treaty, the principle of equal treatment and the principle of proportionality.

15 It is apparent from the documents before the Court that in Italian law a distinction is drawn between those two categories of offences. In the case of offences relating to value-added tax on importation, the provisions of customs legislation are applied, whereas another system of rules is applicable to infringements of obligations relating to the payment of value-added tax on domestic sales of goods and on the domestic provision of services. It is not disputed that the penalties provided for under the latter system are generally less severe than those resulting from the application of customs legislation.

16 In that regard, the Italian Government observes in the first place that the Member States retain exclusive powers to determine the penalties for offences against their tax legislation and that those powers are not restricted by Article 95 of the EEC Treaty or by the principles of non-discrimination and proportionality or affected by the harmonization of value-added tax since this concerns only the substantive provisions of national legislation and not criminal matters.

17 That argument cannot be accepted in its generality. Although it is true that criminal legislation and the laying down of penalties, even in the field of taxation, are matters for which the Member States are responsible, Community law sets certain limits in cases where national legislation may have an impact on the neutrality of internal taxation with regard to intra-Community trade, as required by Article 95 of the Treaty, and on the proper functioning of the common system of value-added tax laid down by Community directives.

18 As the Court has already held in another context concerning the free movement of persons, a system of penalties should not have the effect of jeopardizing the freedoms provided for by the EEC Treaty. That would be the case if a penalty

were so disproportionate to the gravity of the offence that it became an obstacle to the freedom guaranteed by Community law (see the judgment of 3 July 1980 in Case 157/79 *Regina* v *Pieck* [1980] ECR 2171).

19 It is therefore necessary to consider, from that point of view, whether a twin system of penalties for offences concerning value-added tax, such as that provided for by the Italian legislation, is compatible with the EEC Treaty.

20 The appellant in the main proceedings contends that irrespective of whether the offence of non-payment of value-added tax is committed on importation or in domestic transactions it must be regarded as the same offence and that, consequently, the application of penalties of different severity is contrary to Community law. The Commission takes a similar view. It maintains that national legislation which has the effect of systematically penalizing the non-payment of value-added tax on importation with penalties more severe than those imposed for the non-payment of value-added tax on domestic supplies of goods is incompatible with Article 95 of the EEC Treaty.

21 The Italian Government, however, considers that the two categories of offences are not comparable either from the point of view of their constituent elements or as regards the provisions applicable to them. On the latter point, the Italian Government draws attention to Article 10 (3) of the Sixth Directive, according to which the provisions concerning customs duties may apply as regards the chargeable event and the chargeability of value-added tax on importation; justification for a system of value-added tax aligned on the system of customs duties is thus to be found in the directive. With regard to the constituent elements of the offence, the Italian Government contends that offences concerning the payment of value-added tax on importation consist in bringing goods into the country without paying the tax, whereas offences concerning the payment of value-added tax on domestic transactions can be committed only by taxable persons who are subject to a number of obligations relating to the keeping of accounts, invoicing, the submission of declarations and so on.

22 It must be stated in that regard that the two categories of offences in question are distinguished by different circumstances concerning both the constituent elements of the offence and the greater or lesser extent of the difficulty of discovering it. Value-added tax on importation is charged simply when the goods actually enter

the territory of the Member State concerned, rather than on a transaction. Those differences mean, in particular, that the Member States are not required to have the same system of rules for the two categories of offences.

23 However, those differences cannot justify a manifest disproportion in the severity of the penalties laid down for the two categories of offences. Such a disproportion exists where the penalty provided for in the case of importation involves, as a general rule, a term of imprisonment and the confiscation of the goods pursuant to the rules laid down to combat smuggling whereas comparable penalties are not provided for, or are not generally imposed, in the case of offences concerning the payment of value-added tax on domestic transactions. A situation of that kind could in fact have the effect of jeopardizing the free movement of goods within the Community and would thus be incompatible with Article 95 of the Treaty.

24 As the Court stated in its judgment of 5 May 1982 in Case 15/81 *Gaston Schul Douane Expediteur BV* v *Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, the interpretation of Article 95 must take account of the objectives of the Treaty as laid down in Articles 2 and 3, which include, in the first place, the establishment of a common market involving the elimination of all obstacles to trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market. The Court added that it is important that not only traders but also private persons who carry out economic transactions across national frontiers should also be able to enjoy the benefits of that market.

25 The answer to the third question must therefore be that national legislation which penalizes offences concerning the payment of value-added tax on importation more severely than those concerning the payment of value-added tax on domestic sales of goods is incompatible with Article 95 of the Treaty in so far as that difference is disproportionate to the dissimilarity between the two categories of offences.

Costs

26 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 Corte d'Appello di Genova, by order of 12 November 1986, hereby rules:

(1) **Article 95 of the EEC Treaty must be interpreted as meaning that in the case of the importation from another Member State by a private individual of goods in respect of which there has not been granted either tax relief on exportation or tax exemption in the importing Member State, the value-added tax charged on importation must take into account the residual amount of value-added tax paid in the Member State of exportation which is still contained in the value of the goods at the time of importation, in such a way that that residual amount is not included in the taxable amount and is deducted from the value-added tax payable on importation.**

(2) **National legislation which penalizes offences concerning the payment of value-added tax on importation more severely than those concerning the payment of value-added tax on domestic sales of goods is incompatible with Article 95 of the EEC Treaty in so far as that difference is disproportionate to the dissimilarity between the two categories of offences.**

Due Koopmans

Bahlmann Kakouris O'Higgins

Delivered in open court in Luxembourg on 25 February 1988.

J.-G. Giraud
Registrar

O. Due
President of the Sixth Chamber