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Opinion of Mr Advocate General Darmon delivered on 8 December 1987. - Criminal proceedings against Rainer Drexl. - Reference for a preliminary ruling: Corte d'appello di Genova - Italy. - Turnover tax levied on the importation of goods by private individuals. - Case 299/86.

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Opinion of the Advocate-General

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Mr President,

Members of the Court,

1 . In its case-law, in particular the Schul (1) and Bergeres-Becque (2) judgments, the Court has already answered, in advance as it were, the first two questions submitted by the Corte di Appello (Court of Appeal), Genoa . Moreover, the appellant in the main proceedings, the Italian Government and the Commission are agreed on that point . However, the problem raised by the third question has not yet been decided, at any rate directly, by the Court, even though there are a number of factors in its case-law which point to the solution .

2 . Hence the importance of this case lies in the third question . In that question, the national court asks the Court of Justice, in substance, to explain to what extent Community law precludes any differentiation as regards both the nature and the severity of the penalties imposed in the event of failure to pay value-added tax on importation or on a purely domestic transaction involving the same product where the rate of tax is, by virtue of Community law, identical in both cases . In addition to that question of principle a specific question arises, namely whether under national law a failure to pay value-added tax on imports may be treated as a smuggling offence which, as a customs offence, is subject to criminal penalties, whereas a failure to pay tax on domestic transactions, described by the national court as a "comparable offence", attracts different penalties .

3 . In proceedings for a preliminary ruling the Court is bound by the internal legal classification made by the national court . Accordingly, the question of principle which arises is whether different penalties may be imposed in the two sets of circumstances referred to .

4 . According to the appellant and the Commission, any offence concerning the payment of value-added tax, whether it be failure to pay tax on importation or evasion of tax on a domestic transaction, should attract identical penalties . However, the Italian Government maintains that

there are differences between the two types of offence which justify the imposition, in the first-mentioned case, of stricter penalties .

5 . Before dealing with that question, however, it is appropriate to answer the arguments put forward by the Italian Government concerning the effect, if any, of Community law on national criminal law in matters of tax evasion . The Italian Government considers that, in such matters, Community law can require only the substantive provisions of the Treaty, in particular Article 95 thereof and the directives harmonizing the relevant legislation, to be complied with, so that any issue involving the imposition of national penalties in the event of the infringement of those provisions would fall outside the scope of Community law and within the exclusive jurisdiction of the State authorities .

6 . That argument cannot be accepted . The Community rules on taxation are not unconnected either with the free movement of goods or with the free movement of persons . The infringement of those rules, and of national measures adopted for their implementation, is a matter which is closely connected with Community law . Although it is acknowledged that Community law cannot itself determine which penalties are applicable in such matters, the fact remains that it may set limits to the powers of the national authorities to impose penalties .

7 . Whatever its specific features may be, criminal law, as is clear from the case-law of the Court, does not fall outside the scope of Community law . Moreover, the Court expressly stated in its judgment in SAIL (3) that :

"The effectiveness of Community law cannot vary according to the various branches of national law which it may affect ."

It also stated in Ratti (4) that a national provision which had not yet been brought into line with a directive notwithstanding the expiry of the period prescribed therefor was inapplicable under national law even though it was enforceable by criminal penalties .

8 . Community law has a twofold effect on national criminal law . Where a rule imposing a prohibition or penalty is incompatible with Community law, the legal basis for the offence is removed . Where the penalties imposed by national legislation for the infringement of Community or national rules constitute, in view of their severity, an obstacle to the exercise of one of the freedoms enshrined in the Treaty, those penalties must be set aside or mitigated . (5)

9 . Admittedly, the Court held in Casati (6) that :

"In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible ."

But it recalled that :

"Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons ."

In the same judgment the Court emphasized, in particular, that :

"The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom ."

Ultimately, the case-law of the Court requires that the penalties imposed by national law should be "appropriate" (7) and "reasonable", (8) in other words proportionate to the nature of the offence .

10 . The same principles apply with regard to the imposition of penalties for the infringement of national fiscal provisions concerning value-added tax . I would recall that the levying of value-added tax both on domestic transactions and on imports is provided for by the Sixth Directive . (9) I would also recall that, as the Court has consistently held, value-added tax levied on importation is not a charge having an effect equivalent to a customs duty within the meaning of Articles 12 and 13 of the EEC Treaty but constitutes domestic taxation which is caught by Article 95 of the Treaty; (10) that view was reiterated by the Court in Profant (11) which involved the importation of a motor vehicle as in this case .

11 . It is unreasonable to argue, as the Italian Government does, that the only effect of Community law in fiscal matters is to impose an obligation to comply with the substantive provisions of Community law, excluding the subsidiary aspects relating to their implementation . The Commission is correct in referring to the judgment in Commission v Republic of Ireland (12) in which the Court held that Ireland had failed to fulfil its obligations under the first paragraph of Article 95 of the Treaty inasmuch as it provided for a deferment of payment of excise duties on certain alcoholic beverages manufactured in Ireland that was more favourable than that provided in respect of the same products imported from other Member States . In other words, contrary to the Italian Government' s contention, the prohibition of discrimination in fiscal matters encompasses matters that are subsidiary to the levying of the tax .

12 . In explaining that non-payment of value-added tax on importation is equated with a customs offence, and consequently attracts the penalties imposed for such an offence, the Italian Government seeks to rely on certain provisions of the Sixth Directive . Those provisions are, in particular, the second and third subparagraphs of Article 10 (3) concerning the chargeable event and the chargeability of value-added tax on importation, Article 11B(2) concerning the taxable amount, and Article 14 (1) concerning exemptions from customs duties . The first two provisions allow the Member States to apply, with regard to the chargeable event and the chargeability of the tax, the rules in force relating to customs duties, and to take, as the taxable amount, the value specified in the Community regulation on the valuation of goods for customs purposes . (13)

13 . Those provisions do not, any more than the third provision concerning exemptions, prejudge either the nature of value-added tax levied on importation or the nature of the offence . The purely technical connection between them is not relevant with regard to the determination of the penalty . Nor is it generally applicable, as is clear from Article 12 (5) of the Sixth Directive which provides as follows :

"The rate applicable on the importation of goods shall be that applied to the supply of like goods within the territory of the country ".

It is noteworthy that the Italian Government disputes the applicability of that provision with regard to the assessment of the system of penalties, although it considers the significance of the three provisions referred to earlier to be all but decisive .

14 . The Italian Government considers, moreover, that the various obligations imposed on persons liable to value-added tax on domestic transactions, such as the submission of returns, payment, invoicing and registration, justify the application of a system of penalties which differs from that provided for with regard to importation . However, the Italian Government makes no reference to Article 23 of the Sixth Directive, which provides that "as regards imported goods, Member States shall lay down the detailed rules for the making of the declarations and payments ." That article empowers the Member States to provide that value-added tax charged on importation may be paid subsequently, subject to compliance with the conditions relating to the submission of the returns

containing the information needed to calculate, in particular, the chargeable amount of the tax provided for in Article 22 (4) which concerns the return to be submitted by taxable persons who are subject to "obligations under the internal system ."

15 . It is not possible to equate value-added tax levied on importation in the course of trade between Member States with a customs duty or, consequently, to impose in the event of non-payment of the tax the penalties provided for non-payment of customs duties . The rules applicable to importation must not be less favourable than those governing similar domestic transactions . To apply criminal legislation systematically, by the adoption of penalties for non-payment of customs duties, to any evasion of value-added tax on importation, when failure to pay value-added tax on domestic transactions is less severely penalized, is tantamount to attaching particular significance to the crossing of a frontier within the Community, which is incompatible with the common market .

16 . Admittedly, there are differences between the levying of value-added tax on importation and the charging of value-added tax on domestic sales of goods, particularly as regards the taxable persons and the chargeable event . However, those differences do not seem to me to be capable of justifying the striking diversity between the penalties imposed in those two sets of circumstances . The difficulties involved in detecting a failure to pay value-added tax on importation cannot have any effect on the system of penalties applicable to that offence by penalizing it more severely than the evasion of value-added tax on domestic transactions .

17 . Value-added tax is a national tax which has been given a Community character and which is used in part to fund the Community' s budget . Hence it is in the interests of the Community that failure to pay value-added tax, either on domestic transactions or upon importation, should be effectively penalized . Moreover, as it was aware of the problems raised by tax avoidance and tax evasion, the Council adopted a directive on mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European Agricultural Guidance and Guarantee Fund, and of agricultural levies and customs duties, (14) and amended it so as to include value-added tax (15) on the ground that the limited field of application of national provisions relating to the recovery of value-added tax constitutes "an obstacle to the establishment and functioning of the common market ." (16) Similarly, by a directive of 6 December 1979, (17) the Council brought value-added tax within the scope of the directive concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (18) "in order to ensure that ((indirect taxes)) are correctly assessed and collected", (19) and it pointed out that "as a matter of particular urgency, mutual assistance must be extended to cover value-added tax, both because it is a general tax on consumption and because it plays an important part in the Community' s own resources system ". (20)

18 . Clearly there are no valid grounds for the view that non-payment of value-added tax on importation is more reprehensible than evasion of value-added tax on domestic transactions . Offences of the same nature should attract comparable penalties .

19 . It is true that the penalties applicable to customs offences generally involve, in view of the damage caused to the Treasury, a punitive and a compensatory element . (21) There is nothing to prevent the imposition of criminal penalties in the event of non-payment of value-added tax, provided they are not excessive or disproportionate and so constitute in themselves an obstacle to the exercise of the freedoms established by the Treaty .

20 . Finally, it is appropriate in my view to draw the attention of the national court to the existence of two Council Directives of 28 March 1983 which have been referred to in the proceedings before the Court, one on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, (22) and the other on tax exemptions applicable to permanent imports from a Member State of the personal property of individuals . (23)

21 . In the light of the case-law of the Court and of the foregoing considerations, I suggest that the Court answer the questions submitted by the Corte di Appello, Genoa, as follows :

"(1) Community law prohibits the levying of value-added tax on motor vehicles imported from other Member States without taking account of the residual amount of 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) The value-added tax thus levied by the importing State, when sales of such goods between private individuals within that State are not subject to the tax, constitutes an internal tax prohibited by Article 95 of the EEC Treaty .

(3) The provisions of Community law, and in particular Article 95 of the EEC Treaty, preclude the application of stricter penalties for non-payment of value-added tax on importation than for non-payment of internal value-added tax on domestic sales of similar goods ."

(1) Judgment of 5 May 1982 in Case 15/81 ((1982)) ECR 1409 . Judgment of 21 May 1985 in Case 47/84 ((1985)) ECR 1491 .

(2)

Judgment of 23 January 1986 in Case 39/85 ((1986)) ECR 259 .

(3)

Judgment of 21 March 1972 in Case 82/71 ((1972)) ECR 119 at p . 135, paragraph 5 of the decision .

(4)

Judgment of 5 April 1979 in Case 148/78 ((1979)) ECR 1629 .

(5)

Those principles were laid down by the Court, as regards the free movement of persons, in judgments such as that of 7 July 1976 in Case 118/75 Watson ((1976)) ECR 1185; 14 July 1977 in Case 8/77 Sagulo ((1977)) ECR 1495; and 3 July 1980 in Case 157/79 Pieck ((1980)) ECR 2171 and, as regards the free movement of goods, in judgments such as that of 15 December 1976 in Case 41/76 Donckerwolcke ((1976)) ECR 1921; 30 November 1977 in Case 52/77 Cayrol ((1977)) ECR 2261; and 28 March 1979 in Case 179/78 Rivoira ((1979)) ECR 1147 .

(6)

Judgment of 11 November 1981 in Case 203/80 ((1981)) ECR 2595 at p . 2618, paragraph 27 of the decision .

(7)

Judgment of 8 April 1976 in Case 48/75 Royer ((1976)) ECR 497 at p . 514, paragraph 42 of the decision .

(8)

Judgment of 14 July 1977 in Case 8/77 Sagulo ((1977)) ECR 1495 at p . 1506, paragraph 12 of the decision .

(9)

Council Directive 77/388/EEC of 17 May 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).

(10)

See Case 15/81, referred to earlier .

(11)

Judgment of 3 October 1985 in Case 249/84 ((1985)) ECR 3250 .

(12)

Judgment of 27 February 1980 in Case 55/79 ((1980)) ECR 481 .

(13)

That is to say Regulation (EEC) No 803/68 of 27 June 1968 of the Council (Official Journal, English Special Edition, 1968 (I), p . 170), replaced by Council Regulation (EEC) No 1224/80 of 28 May 1980 (Official Journal 1980, L 134, p . 1), as amended by Council Regulations (EEC) No 3193/80 of 8 December 1980 (Official Journal 1980, L 333, p . 1), No 320/85 of 6 February 1985 (Official Journal 1985, L 34, p . 33) and No 1055/85 of 23 April 1985 (Official Journal 1985, L 112, p . 50)

(14)

Council Directive 76/308/EEC of 15 March 1976, Official Journal 1976, L 73, p . 18 .

(15)

Council Directive 79/1071/EEC of 6 December 1979, Official Journal 1979, L 331, p . 10 .

(16)

Second recital in the preamble .

(17)

Council Directive 79/1070/EEC of 6 December 1979, Official Journal 1979, L 331, p . 8 .

(18)

Council Directive 77/799/EEC of 19 December 1977, Official Journal 1977, L 336, p . 15 .

(19)

Third recital in the preamble .

(20)

Fourth recital in the preamble .

(21)

See, for instance, J . Pradel, Droit pénal, vol . 1, Paris, Cujas, 3rd ed . 1981, p . 313 et seq .; C . J . Berr and H . Tremeau, Le droit douanier, Paris, LGDJ, 2nd ed . 1981 especially at p . 423 et seq .

(22)

Council Directive 83/182/EEC, Official Journal 1983, L 105, p . 59 .

(23)

Council Directive 83/183/EEC, Official Journal 1983, L 105, p . 64 .