

THE COURT

hereby rules:

1. A charge imposed on the issue of an import licence without which importation would not be possible is not governed by Article 95 of the EEC Treaty;
2. The decision as to costs is a matter for the Verwaltungsgericht, Frankfurt-am-Main.

Hammes

Donner

Lecourt

Trabucchi

Strauß

Delivered in open court in Luxembourg on 8 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 3 JUNE 1965¹

*Mr President,
Members of the Court,*

During 1962, 1963 and 1964 the Waldemar Deutschmann undertaking of Essen requested and obtained from the Außenhandelsstelle für Erzeugnisse der Ernährung und Landwirtschaft import licences for foodstuffs and agricultural products (especially fruit and vegetables) originating in other Member States of the Community. Having paid charges for these amounting to 1 943 DM under the Law of 17 December 1951 on the imposition of charges by the Außenhandelsstelle and the Regulation on Charges of 19 December 1956, as it existed on 20 January 1958, it brought an action before the Verwaltungsgericht, Frankfurt-am-Main, for the annulment of the requests for payment and for the refund of the sums paid. In support of

its action, it maintained that the imposition of charges was contrary to the Law of 1951, in that the Regulation on which calculation of the charges had been based laid down higher rates than were necessary to cover the expenses of the Außenhandelsstelle during the financial years in question. According to the information given to you by counsel, since 1958 two rates have existed, that is, the general rate of 0.15 per cent. and the rate of 0.015 per cent. (one tenth of the former), which was imposed on twelve 'bulk products' (especially cereals and raw materials for the manufacture of margarine), imports of which were made in large quantities. As you know, the authority concerned considers that these different rates are explained by the difference in the work performed by the Außenhandelsstelle in issuing the licences.

¹ — Translated from the French.

The Deutschmann undertaking also alleged infringement of Articles 9, 12, 30 and 95 of the Treaty of Rome and, as an alternative plea, requested that this question be referred to you under Article 177 of the Treaty for a preliminary ruling.

By an order of 3 February 1965, the Verwaltungsgericht, considering that in the circumstances it was not necessary to give a decision at that point on the first three Articles mentioned, referred the following question to you for a preliminary ruling:

'Must the first paragraph of Article 95 of the EEC Treaty be interpreted as meaning that the grant of import licences for foodstuffs and agricultural products originating in other Member States of the EEC may not be made the subject of any charge under the Law of 17 December 1951 on the imposition of charges by the Außenhandelsstelle?'

Of course, this question itself requires interpretation since, as you again recalled in the judgment of 4 February last in the Albatros case, within the framework of Article 177 you can 'neither apply the Treaty to a given case nor give judgment on the validity of a measure of national law with regard to it'. Article 95 must be interpreted on the basis of the information supplied by the Verwaltungsgericht.

The provision to be interpreted is worded as follows: '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'.

The third paragraph on the same Article provides that Member States shall, *not later than at the beginning of the second stage*, repeal or amend any provisions existing when this Treaty enters into force which conflict with the preceding rules.

In order to establish whether this Article

concerns charges of the type which gave rise to the request for interpretation, the two parties to the main action discuss at length the exact scope of the term 'Abgaben' ('taxation') used in the first paragraph, as well as the various categories of taxation known to German law.

The Deutschmann undertaking recalls that a distinction must be made between taxes in the strict sense ('Steuern')—which include customs duties—, charges ('Gebühren'), which are divided into utilization charges, administrative charges, consisting of remuneration for administrative measures taken by public authorities, and, finally, dues ('Beiträge') and it adds that the case-law of the Bundesverwaltungsgericht makes no clear distinction between a charge and a tax. But the wording of Article 95 is sufficiently wide ('taxation of any kind') to apply to such charges as those imposed by the Außenhandelsstelle, which, moreover, constitute taxes ('Steuern') in the true sense.

For the Federal Republic, which claims that they are only administrative charges, such charges do not fall within the concept of 'taxation' ('Abgaben'); from the fact that Article 95 appears in a Chapter headed 'Tax Provisions' ('Steuerliche Vorschriften') and from its similarity to Article 98, the Federal Republic concludes that it only applies to taxes in the strict sense.

The terminology of taxation, which already varies between national legal systems, does so to an even greater extent when transferred to the sphere of the Common Market; this explanation therefore appears to me to be rather empty and of little help in resolving the question before you. This question can, in any case, only be resolved if Article 95 is replaced in its context in the Treaty and considered in relation to those other provisions the aim of which is to eliminate obstacles to the free movement of goods.

In addition to the abolition of customs

duties, Article 13 (2) of the Treaty provides for the progressive abolition by the Member States, during the transitional period, of charges having an effect equivalent to customs duties in force between these States. It is for the Commission to determine, by means of directives, time-table for this abolition. In doing so, it must be guided by the rules provided for the abolition of customs duties which, according to Article 14, extends to the second and third stages of the transitional period and is brought about in particular by directives of the Council.

A comparison of Articles 13 and 95 shows clearly that they cannot be applied simultaneously, that is, the same charge—or taxation—cannot be governed by both at one and the same time. It cannot be abolished not later than at the beginning of the second stage of the transitional period and also be progressively abolished during the whole of this period. In its observations the Commission has clearly shown that, contrary to what has been maintained, it was also impossible to apply the two Articles together, giving priority to whichever provision was the more stringent at any given moment.

Thus, a distinction must be made between the scope of each provision and on this point your case-law has already laid down some guidelines. Like the Commission, the parties to the main action are agreed in referring to your judgment of 14 December 1962, *Commission of the EEC v Grand Duchy of Luxembourg and Kingdom of Belgium*, (Rec. 1962, p. 813), even if from it they draw different conclusions. On that occasion you were dealing with an application under Article 169 for a declaration that by increasing, after the entry into force of the Treaty, the rate of a special import duty imposed on the issue of import licences for gingerbread, these States had failed in their obligations, and you had to determine what constituted a charge having an

effect equivalent to a customs duty within the meaning of Articles 9 and 12. You considered that such a charge must be one which resulted from a unilateral decision and which, like a customs duty, adversely affected the aims of the Treaty and especially the free movement of goods, even if it did not have all the effects of a customs duty and even if other main or subsidiary aims were involved in it. One passage in your judgment gives a very full definition of this: 'A charge having equivalent effect . . . whatever it is called and whatever its mode of application, may be regarded as a duty imposed unilaterally either at the time of importation or subsequently, and which, if imposed specifically upon a product imported from a Member State to the exclusion of a similar domestic product, has, by altering its price, the same effect upon the free movement of products as a customs duty'.

Therefore, as soon as the charge is imposed on the imported product to the exclusion of the domestic product—which is the very essence of charges imposed on import licences—Article 13 (2) is applicable and, correspondingly, Article 95 is not.

What then is the scope of Article 95? It covers solely those charges which, apart from imports, are also imposed on domestic products, although on the latter at a lower rate (the paragraph in question forbids *higher* taxation to be imposed on imported products than is imposed on domestic products).

The Commission is attempting to establish that this distinction corresponds to the *ratio* of the various rules laid down for the reduction of taxation on imports. First, charges imposed solely on imports are generally protective measures with the same purpose as customs duties; it is therefore reasonable that the time-table applied for their abolition should be similar to that applied to such duties. Secondly, the differences which exist in the field of indirect taxes between im-

ported goods and domestic goods are mostly of a technical nature, which explains the more rapid reduction.

I must admit that I do not find this justification entirely convincing; but, whatever the reasons for the different treatment given to measures governed by Articles 13 and 95 respectively, there are valid reasons for accepting the distinction proposed by the Commission. It appears to agree with the logic of your judgment of 1962 which, as a criterion for the application of Articles 12 and 13, relies on the fact that the charge is imposed on an imported product to the exclusion of a similar domestic product, and merely allows Article 95 to 'fill in any loop-hole which certain taxation procedures might find in the prescribed prohibitions'. This view is supported in legal writing particularly by the opinion of Mr Catalano who considers 'as equivalent to customs duties all duties imposed on products imported from other Member States and not imposed on similar domestic products'. Finally, as the Commission states, it is supported by the fact that no other criterion can be found in the Treaty with which to define the scope of Article 13 (2) and the first and third paragraphs of Article 95. But the peculiar feature of this case—the oral arguments have shown this most clearly—is that, whilst the Commission and the Federal Republic agree on what falls within the ambit of Article 95, they disagree on the question whether charges such as those which gave rise to this preliminary question are covered by Article 12 and consequently are subject to progressive abolition under Article 13 (2).

The representative of the Federal Republic has informed you that, in his opinion, such charges which correspond to the provision of particular and defined services by the public authorities were not protective and were not intended to constitute a source of income; for this reason he considered that they fell outside the provisions of Articles

12 and 13. He added that the problem of charges having equivalent effect was under consideration and was the subject of discussions between his Government and the Commission.

However, even if you do adopt my suggested interpretation of Article 95, it is difficult not to pause for a moment at the question thus raised by the German Government and at the arguments invoked in its support, although we cannot hope to resolve it today.

It is said that such charges are solely intended to pay for the particular service requested of the public authorities. But, although it is clear that a charge paid by an importer for a service rendered for his personal benefit does not amount to a charge on imports contrary to the Treaty, there must actually be performance of a genuine service and the issue of a licence or other similar document before importation will not necessarily be regarded as a genuine service.

It is submitted that in view of their small number such charges have neither the purpose nor effect of protecting domestic production. From the point of view of the Treaty it is not the object sought which is important, but the result. But, however low a charge may be, it necessarily burdens those imports affected by it and puts them at a disadvantage in relation to domestic products; moreover, different rates, which are difficult to justify on the basis of the cost of the 'service rendered', may lead to a greater or lesser burden on certain products and to the presumption that protection is intended; on this point I refer to the observations made by the representative of the Commission and to the questions raised at the hearing.

It is of little importance into what category the charges in question are put as regards domestic regulations, or the body or department which benefits from them. Finally, although Article VIII of GATT places the charges imposed on

the grant of import licences in a special position, the differences, as regards the future of customs duties, between that Agreement and the EEC Treaty do not allow the conclusion to be drawn that the Treaty by implication adopts the same solution.

I am not saying that a charge which pays for a service rendered is governed by Articles 12 and 13, but that in order for it to escape those provisions the genuine nature of the service must be established.

Let me now return to the question before you to see in what terms a reply should be made. You are asked to state whether the provisions of the first paragraph of Article 95 of the Treaty must be interpreted as meaning that the grant of import licences for foodstuffs and agricultural products originating in other Member States cannot be made the subject of any charge under the Law of 1951.

If you share my opinion, it will be suffi-

cient for you to reply that Article 95 only concerns internal taxation which is imposed both on imports and on domestic products, although on the former to a greater extent than on the latter.

If you consider, on the other hand, that such charges as those envisaged by the Law of 1951 come within the scope of this Article, you must necessarily accept the self-executing nature of its provisions. Neither the first paragraph of this Article—to which the request for a preliminary ruling refers—nor the third appear to be of this type since, unlike Article 12 or 13 of the Treaty, which are referred to by the *Deutschmann* undertaking, it is not a question of the States' giving an undertaking not to act, but rather of their having undertaken to act; thus, as regards to the Community, they have undertaken an obligation which binds them in their capacities as States but does not create individual rights which national courts must protect.

In the light of these observations, I am of the opinion:

- that the first paragraph of Article 95 of the Treaty should be interpreted to refer only to internal taxation which is imposed on both imports and domestic products, although on the former to a greater extent than on the latter;
- that the decision as to costs incurred before this Court is a matter for the *Verwaltungsgericht, Frankfurt-am-Main*.