61995J0347

Judgment of the Court (Fifth Chamber) of 17 September 1997. - Fazenda Pública v União das Cooperativas Abastecedoras de Leite de Lisboa, UCRL (UCAL). - Reference for a preliminary ruling: Supremo Tribunal Administrativo - Portugal. - National charge on the marketing of dairy products - Charge having equivalent effect - Internal taxation - Turnover tax. - Case C-347/95.

European Court reports 1997 Page I-04911

Keywords

1 Free movement of goods - Customs duties - Charges having equivalent effect - Internal taxation - Charge applicable to domestic and imported products but benefiting the former solely or to a greater extent - Criteria for characterization

(EC Treaty, Arts 9, 12 and 95)

2 Tax provisions - Harmonization of laws - Turnover taxes - Common system of value added tax - Prohibition of the levying of other national charges which can be characterized as turnover taxes - Purpose - Meaning of `turnover taxes' - Scope - Charge levied only on certain products - Excluded

(Council Directive 77/388, Art. 33)

Summary

3 A charge on the marketing of diary products levied without distinction on domestic and imported products constitutes a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the Treaty, if the revenue from it is intended to finance activities benefiting only the taxed domestic products and if the resultant advantages fully offset the burden which the latter products bear; if those advantages only partly offset the burden borne by the domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty and must be reduced proportionally.

If the activities financed by the charge benefit domestic products and taxed imported products but the former obtain a proportionally greater advantage from them, the charge constitutes, to that

extent, a charge having an effect equivalent to a customs duty or discriminatory internal taxation, depending on whether the advantage accruing to the taxed domestic products fully or only partly offsets the burden which they bear.

It follows that, with a view to determining how the charges on the marketing diary products are to be characterized in law, it is incumbent on the national court to consider:

- whether the revenue from the charge is used for stabilization only of trade with the other Member States in the products which bear the charges;

- whether the institutional integration of the organizations representing the economic agents concerned and the implementation of the national and Community aid schemes and financial and fiscal incentives in favour of the agri-foodstuffs industry and the distribution of agri-foodstuffs, to which part of the revenue from the charges in question is appropriated, benefit only domestic production or whether they benefit such production proportionally more than imported products.

4 Since the aim pursued by Article 33 of the Sixth Directive (77/388) on the harmonization of the laws of the Member States relating to turnover taxes is to preclude the introduction of taxes, duties and charges which, because they are levied on the movement of goods and services in a way comparable to value added tax, would compromise the functioning of the common system of value added tax, that provision does not preclude the levying of a charge which is applied only to certain products, is not proportional to the price of those products, is not charged at each stage of the production and distribution process and is not imposed on the added value of the goods. Since it displays none of the characteristics of value added tax, such a charge does not apply to the movement of goods and services in a manner comparable to value added tax.

Parties

In Case C-347/95,

REFERENCE to the Court under Article 177 of the EC Treaty by the Supremo Tribunal Administrativo (Portugal) for a preliminary ruling in the proceedings pending before that court between

Fazenda Pública

and

União das Cooperativas Abastecedoras de Leite de Lisboa, UCRL (UCAL),

on the interpretation of Articles 9, 12 and 95 of the EC Treaty and Article 33 of the Sixth 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 (OJ 1977 L 145, p. 1),

THE COURT

(Fifth Chamber),

composed of: J.C. Moitinho de Almeida, President of the Chamber, L. Sevón, D.A.O. Edward, P. Jann and M. Wathelet (Rapporteur), Judges,

Advocate General: G. Tesauro,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

- the Fazenda Pública, by Maria Aldina Moreira, of the Lisbon Bar,

- the Portuguese Government, by Luís Fernandes, Director of the Legal Service of the Directorate-General for the European Communities, Ministry of Foreign Affairs, and Luís Augusto Máximo dos Santos, of the University of Lisbon, acting as Agents,

- the Commission of the European Communities, by António Caeiro, Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 23 January 1997,

gives the following

Judgment

Grounds

1 By judgment of 11 October 1995, received at the Court Registry on 13 November 1995, the Supremo Tribunal Administrativo (Supreme Administrative Court) referred to the Court of Justice for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 9, 12 and 95 of the EC Treaty and Article 33 of the Sixth 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 (OJ 1977 L 145, p. 1, hereinafter `the Sixth Directive').

2 Those questions were raised in proceedings between the Fazenda Pública (Portuguese Ministry of Finance) and União das Cooperativas Abastecedoras de Leite de Lisboa, UCRL (Union of Dairy Cooperatives of Lisbon, hereinafter `UCAL') in relation to non-payment by the latter of charges on the marketing of dairy products provided for by Article 1 of Decree-Law No 309/86 of 23 September 1986.

3 According to that provision, `The charges on milk products, whether of domestic origin or imported, intended for public consumption shall be as follows:

Butter4 ESC/kg; ... Flavoured milk and chocolate milk1 ESC/litre'.

4 Originally, the revenue from those charges accrued to the Junta Nacional dos Produtos Pecuários (National Board for Livestock Products), an organization responsible for economic coordination set up in 1939.

5 Following the Portuguese Republic's accession to the European Communities all the rights and powers of that body were transferred, by Decree-Law No 15/87, to a newly created public body, the Instituto Regulador e Orientador dos Mercados Agrícolas (Agricultural Guidance and Stabilization Board, hereinafter `IROMA').

6 Article 3(4) of Decree-Law No 15/87 entrusted to IROMA, a body endowed with legal personality and financial and administrative autonomy, the management and coordination of the markets in agricultural and livestock products. More specifically, it was given the following tasks: provision of

the institutional guarantees available for those products under the national and Community systems for intervention, prices, allocation of premiums, aid and grants (subparagraph (b)); management of the financial mechanisms established at national or Community level in order to support measures of intervention, stabilization, guidance and organization of the markets concerned (subparagraph (c)); monitoring of developments in, and the functioning of, the agricultural and livestock markets in Portugal and in the other Member States (subparagraph (d)); regulation and stabilization of external trade in agricultural and livestock products (subparagraph (e)); national participation in the management of the Community markets in those products (subparagraph (f)); cooperation with the national administration and relevant Commission departments, in particular regarding the compilation and dissemination of information on the functioning of those markets (subparagraph (g)); cooperation with the bodies representing economic agents with an interest in the functioning of the markets in question (subparagraph (h)); information and training for producers, industrialists, traders and consumers in the sector (subparagraph (i)); legislative initiative regarding the stabilization, guidance and organization of the markets in question (subparagraph (j)); and, finally, the management of slaughterhouses (subparagraph (l)).

7 Upon the adoption of Decree-Law No 282/88 of 12 August 1988, all those responsibilities, with the exception of the management of slaughterhouses, were transferred to a new body, the Instituto Nacional de Intervenção e Garantia Agrícola (hereinafter `INGA'), which was attached to IROMA.

8 However, IROMA continued to received one-half of the revenue from the charges at issue in this case, the other half being allocated to INGA.

9 Decree-Law No 56/90 of 13 February 1990 then established a new specialized directorate within the Ministry of Agriculture, the Direcção-Geral dos Mercados Agrícolas e da Indústria Agro-Alimentar (hereinafter `DGMAIAA'). By the same decree-law, all the responsibilities previously held by IROMA and INGA (Article 6), together with numerous other specific responsibilities concerning the management and stabilization of markets in agricultural and livestock products, were transferred to DGMAIAA (Article 2).

10 Thus, pursuant to Article 2(2) of Decree-Law No 56/90,

`DGMAIAA shall in particular be responsible for:

...

(f) ensuring the institutional integration of the organizations representing the relevant economic operators, so as to guarantee their cooperation in the functioning and management of the agricultural and livestock markets and in defining the development strategy for the agri-foodstuffs industry and for distribution of such foodstuffs;

...

(i) drawing up programmes and plans for the purposes of applying to the agri-foodstuffs industry and to the distribution of agri-foodstuffs national and Community aid schemes and financial and fiscal incentives;

...'.

11 Subsequently, upon the entry into force of Decree-Law No 284/91 of 9 August 1991, 15% of the revenue from the charges in question was appropriated to DGMAIAA. The aggregate revenue from those charges, as from that year, was thus shared between DGMAIAA, INGA and IROMA.

12 The charges in question ceased to be payable under Portuguese law on 23 October 1993, the date of the entry into force of Decree-Law No 365/93 of 22 October 1993.

13 IROMA initiated a fiscal procedure for enforcement against UCAL to recover ESC 16 810 for unpaid charges payable on the marketing of diary products for the month of August 1991.

14 In proceedings before the Tribunal Tributário de Lisboa (Lisbon Tax Court) UCAL contested the order resulting from that procedure, arguing that the charges in question were unconstitutional. It succeeded at first instance, but only because the court held that those charges were incompatible with Articles 9 and 12 of the Treaty.

15 The Fazenda Pública appealed against that decision to the Supremo Tribunal Administrativo, which stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

`1. Are the "charges" described, which have the characteristics of taxes described above, contrary to Article 95 of the Treaty of Rome?

2. Are they to be regarded as charges having an effect equivalent to a customs duty on imports, prohibited by Articles 9 and 12 of that Treaty?

3. Are they to be regarded as turnover tax within the meaning of Article 33 of the Sixth Directive, without prejudice to Article 378 of the Act of Accession or any other Community legislation?'

The first and second questions

16 By its first two questions the national court essentially seeks to ascertain whether charges like those at issue may constitute charges having an effect equivalent to customs import duties within the meaning of Articles 9 and 12 of the Treaty or discriminatory internal taxation prohibited by Article 95 of the Treaty.

17 It must first be borne in mind that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied concurrently, so that under the system of the Treaty the same taxation cannot belong to both categories at the same time (Case 10/65 Deutschmann v Germany [1965] ECR 469, at 473 to 474; Case 57/65 Lütticke v Hauptzollamt Saarlouis [1966] ECR 205, at 211; and Case C-266/91 Celbi v Fazenda Pública [1993] ECR I-4337, paragraph 9).

18 It is settled case-law that any pecuniary charge, whatever its designation or mode of application, which is imposed unilaterally on goods by reason of the fact that they cross a frontier, and which is not a customs duty in the strict sense, constitutes a charge having an effect equivalent to a customs duty within the meaning of Articles 9, 12, 13 and 16 of the Treaty, even if it is not imposed on behalf of the State (see in particular Case 158/82 Commission v Denmark [1983] ECR 3573, paragraph 18).

19 Pecuniary charges under a general system of internal taxation applying systematically to domestic and imported products according to the same criteria, on the other hand, are covered by Article 95 et seq. of the Treaty (Celbi, cited above, paragraph 11). Those provisions prohibit a Member State from directly or indirectly imposing on the products of other Member States any internal taxation in excess of that imposed on similar domestic products or of such a nature as to afford protection to other domestic products, and therefore the criterion for the application of Article 95 is whether or not those charges are discriminatory or protective (see in particular Case C-17/91 Lornoy and Others v Belgium [1992] ECR I-6523, paragraph 19).

20 It must nevertheless be borne in mind that, for the purposes of the legal characterization of a charge levied on domestic and imported products in accordance with identical criteria, it may be necessary to take into account the purpose for which the revenue from the charge is applied.

21 Thus, if the revenue from such a charge is intended to finance activities for the special advantage of the taxed domestic products, it may follow that the charge imposed on the basis of the same criteria nevertheless constitutes discriminatory taxation in so far as the fiscal burden on domestic products is neutralized by the advantages which the charge is used to finance whilst the charge on the imported products constitutes a net burden (Case 73/79 Commission v Italy [1980] ECR 1533, paragraph 15; Joined Cases C-78/90 to C-83/90 Compagnie Commerciale de l'Ouest and Others [1992] ECR I-1847, paragraph 26).

22 It is settled case-law (see in particular Compagnie Commerciale de l'Ouest and Others, cited above, paragraph 27; Lornoy and Others, cited above, paragraph 21, and Case C-72/92 Scharbatke v Germany [1993] ECR I-5509, paragraph 10) that if the advantages stemming from the use of the revenue from a charge forming part of a general system of internal charges applying systematically to domestic and imported products fully offset the burden borne by the domestic product when it is placed on the market, that charge constitutes a charge having an effect equivalent to a customs duty, contrary to Articles 9 and 12 of the Treaty. On the other hand, if the advantages accruing to the taxed domestic products from the use of the revenue from the charge only partly offset the burden borne by those products, such a charge would constitute a breach of the prohibition of discrimination laid down by Article 95 of the Treaty.

23 If the advantages for domestic production fully offset the burden borne by it, the charge levied on the product must, being a charge having an effect equivalent to a customs duty, be regarded as unlawful in its entirety; if on the contrary those advantages only partly offset the burden borne by domestic production, the charge levied on the imported product, which is legal in principle, will simply have to be reduced proportionally (Case 94/74 IGAV v ENCC [1975] ECR 699, paragraph 13, and Compagnie Commerciale de l'Ouest and Others, cited above, paragraph 27).

24 It is also clear from the case-law of the Court that for the principle concerning the offsetting of the burden to apply, the taxed product and the domestic product benefiting from it must be the same (Case 77/76 Cucchi v Avez [1977] ECR 987, paragraph 19, and Case 105/76 Interzuccheri v Rezzano e Cavassa [1977] ECR 1029, paragraph 12).

25 What is more, the criterion of whether the burden is offset, in order to be usefully and correctly applied, presupposes a check, during a reference period, on the financial equivalence of the total amounts levied on domestic products in connection with the charge in question and the advantages afforded exclusively to those products. Any other parameter, such as the nature, scope or indispensable character of those advantages, would not provide a sufficiently objective basis for determining whether a domestic fiscal measure is compatible with the Treaty (Celbi, cited above, paragraph 18).

26 In this case, it will therefore be for the national court, applying the principles just referred to, to verify whether or not domestic production in fact derives an exclusive benefit or a proportionally greater benefit than imported products from the services of the bodies to which the charges accrue, which might offset wholly or in part the burden constituted by those charges.

27 In that respect, the national court will take into account the roles played by IROMA and by DGMAIAA in relation to the regulation and stabilization of external trade in agricultural and livestock products, under Article 3(4)(e) of Decree-Law No 15/87. If the expression `external trade' covers not only trade in the products concerned with non-member countries but also intra-Community trade, that activity is liable to benefit only domestic products.

28 Similarly, the national court will also consider whether or not the tasks entrusted to DGMAIAA, with a view to ensuring institutional integration of the organizations representing the economic operators concerned (Article 2(2)(f) of Decree-Law No 56/90) and drawing up programmes and plans for the purposes of applying national and Community aid schemes and financial and fiscal incentives to the agri-foodstuffs industry and to the distribution of agri-foodstuffs (Article 2(2)(i) of Decree-Law No 56/90), benefit domestic production exclusively or, at the very least, proportionally more than imported products.

29 In view of those considerations, the answer to the first two questions must be as follows:

1. (a) A charge levied on domestic and imported products alike constitutes a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the Treaty, if the revenue from it is intended to finance activities benefiting only the taxed domestic products and if the resultant advantages fully offset the burden which the latter products bear; if those advantages only partly offset the burden borne by the domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty and must be reduced proportionally.

(b) If the activities financed by the charge benefit domestic products and taxed imported products but the former obtain a proportionally greater advantage from them, the charge constitutes, to that extent, a charge having an effect equivalent to a customs duty or discriminatory internal taxation, depending on whether the advantage accruing to the taxed domestic products fully or only partly offsets the burden which they bear.

2. It is for the national court to undertake the verifications necessary for determining how the contribution in question is to be characterized in law. In so doing it will consider:

(a) whether the revenue from the charge is used for stabilization only of trade with the other Member States in the products which bear the charge;

(b) whether the institutional integration of the organizations representing the economic agents concerned and the implementation of the national and Community aid schemes and financial and fiscal incentives in favour of the agri-foodstuffs industry and the distribution of agri-foodstuffs, to which part of the revenue from the charges in question is appropriated, benefit only domestic production or whether they benefit such production proportionally more than imported products.

The third question

30 Essentially, the third question from the national court seeks to ascertain whether charges such as those at issue in the main proceedings must be regarded as turnover taxes within the meaning of Article 33 of the Sixth Directive.

31 In order to answer that question, it must be borne in mind first of all that Article 33 of the Sixth Council Directive provides:

`Without prejudice to other Community provisions, the provisions of 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 characterized as turnover taxes.'

32 It is clear from the wording of that provision that it prohibits the Member States from introducing or maintaining taxes, duties or charges in the nature of turnover taxes (Case 252/86 Bergandi v Directeur Général des Impôts [1988] ECR 1343, paragraphs 10 and 11; Joined Cases 93/88 and 94/88 Wisselink and Others v Staatssecretaris van Financiën [1989] ECR 2671, paragraphs 13 and 14; and Case C-200/90 Dansk Denkavit and Poulsen Trading v Skatteministeriet [1992] ECR I-2217, paragraph 10).

33 As the Court held in the judgments cited above and in Case 295/84 Rousseau Wilmot v Organic [1985] ECR 3759, paragraph 16), the aim pursued by Article 33 of the Sixth Directive is to preclude the introduction of taxes, duties and charges which, because they are levied on the movement of goods and services in a way comparable to value added tax, would compromise the functioning of the common system of value added tax. Taxes, duties and charges must be regarded as being imposed on the movement of goods and services in a way comparable to VAT if they exhibit the essential characteristics of VAT (Dansk Denkavit and Poulsen Trading, cited above, paragraph 11).

34 As the Court made clear in the judgments cited above, those characteristics are as follows: VAT applies generally to transactions relating to goods or services; it is proportional to the price of those goods or services; it is charged at each stage of the production and distribution process; and, finally, it is imposed on the added value of goods and services, since the tax payable on a transaction is calculated after deducting the tax paid on the previous transaction.

35 Contributions of the kind at issue in this case, which display none of those characteristics, are not levied on the movement of goods and services in a manner comparable to VAT.

36 First, they do not apply generally but only to certain products; second, they are not proportional to the price of those products; third, they are not charged at each stage of the production and distribution process; and, finally, they are not imposed on the added value of goods and services, so that the part of the tax paid on the previous transaction is not deductible.

37 The answer to the third question from the national court must therefore be that a tax levied only on certain products, which is not proportional to the price of those products, is not charged at each stage of the production and distribution process and is not imposed on the added value of the products, is not in the nature of a turnover tax within the meaning of Article 33 of the Sixth Directive.

Decision on costs

Costs

38 The costs incurred by the Portuguese Government and the Commission of the European Communities, 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 action pending before the national court, the decision on costs is a matter for that court.

Operative part

On those grounds,

THE COURT

(Fifth Chamber),

in answer to the questions referred to it by the Supremo Tribunal Administrativo by judgment of 11 October 1995, hereby rules:

1. (a) A charge levied without distinction on domestic and imported products constitutes a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the Treaty, if the revenue from it is intended to finance activities benefiting only the taxed domestic products and if the resultant advantages fully offset the burden which the latter products bear; if those advantages only partly offset the burden borne by the domestic products, the charge constitutes discriminatory internal taxation prohibited by Article 95 of the Treaty and must be reduced proportionally.

(b) If the activities financed by the charge benefit domestic products and taxed imported products but the former obtain a proportionally greater advantage from them, the charge constitutes, to that extent, a charge having an effect equivalent to a customs duty or discriminatory internal taxation, depending on whether the advantage accruing to the taxed domestic products fully or only partly offsets the burden which they bear.

2. It is for the national court to undertake the verifications necessary for determining how the contribution in question is to be characterized in law. In so doing, it will consider:

(a) whether the revenue from the charge is used for stabilization only of trade with the other Member States in the products on which the charge is imposed;

(b) whether the institutional integration of the organizations representing the economic agents concerned and the implementation of the national and Community aid schemes and financial and fiscal incentives in favour of the agri-foodstuffs industry and the distribution of agri-foodstuffs, to which part of the revenue from the charges in question is appropriated, benefit only domestic production or whether they benefit such production proportionally more than imported products.

3. A tax levied only on certain products, which is not proportional to the price of those products, is not charged at each stage of the production and distribution process and is not imposed on the added value of the products, is not in the nature of a turnover tax within the meaning of Article 33 of the Sixth 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.