

trade in the goods in question is hindered by the pecuniary burden which it imposes on the price of the exported articles.

4. The prohibitions or restrictions on imports and exports referred to in Article 36 of the EEC Treaty are by nature clearly distinguished from customs duties and assimilated charges whereby the economic conditions of importation or exportation are affected without restricting the freedom of decision of those involved in commercial transactions. Because such measures constitute an exception to the fundamental principle of the elimination of all obstacles to the free movement of goods between Member States, they must be strictly construed.

5. The prohibitions and restrictions referred to in Article 36 of the EEC Treaty cannot justify the retention of measures, such as customs duties or charges having equivalent effect, which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States.

In order to avail themselves of Article 36, Member States must observe the limitations imposed by that provision both as regards the objective to be obtained and as regards the nature of the means used to attain it. The levy of a tax on the exportation of goods possessing artistic or historic value is incompatible with the provisions of the Treaty.

In Case 7/68

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Armando Toledano, acting as Agent, with an address for service in Luxembourg at the offices of its Legal Adviser, Émile Reuter, 4 boulevard Royal,

applicant,

and

ITALIAN REPUBLIC, represented by Adolfo Maresca, Minister plenipotentiary, acting as Agent, assisted by Pietro Peronaci, Deputy State Advocate-General, with an address for service in Luxembourg at the Italian Embassy,

defendant,

Application for a declaration that the Italian Republic has failed to fulfil the obligations imposed on it by Article 16 of the Treaty establishing the European Economic Community by continuing to levy, after 1 January 1962, the progressive tax provided for by Law No 1089 of 1 January 1939 on exports to other Member States of the Community of objects of artistic, historic, archaeological or ethnographic interest;

THE COURT

composed of: R. Lecourt, President, A. Trabucchi and J. Mertens de Wilmars,

Presidents of Chambers, A. M. Donner, W. Strauß, R. Monaco and P. Pescatore (Rapporteur), Judges,

Advocate-General: J. Gand

Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts

Italian Law No 1089 of 1 June 1939 on the protection of articles of artistic or historic interest (published in the *Gazzetta Ufficiale*, 8 August 1939, No 184) contains several provisions relating to the exportation of such articles; in particular, it provides, according to the circumstances, for an absolute prohibition on exportation (Article 35), the requirement of a licence (Article 36), a right of pre-emption vested in the State (Article 39) and the imposition on exportation of a progressive tax on the value of the article ranging by successive stages from 8% to 30% (Articles 37).

In January 1960, the Commission asked the Italian Republic to abolish the tax as regards the other Member States by the end of the first stage of the transitional period, that is to say, before 1 January 1962, since it considered that the tax had an effect equivalent to a customs duty on exportation and so was contrary to Article 16 of the EEC Treaty. After a prolonged exchange of correspondence, the Commission by letter of 25 February 1964 set in motion the procedure laid down by Article 169 of the EEC Treaty and called on the Italian Government to submit its observations on the alleged violation of the Treaty by the Italian Republic. The observations did not satisfy the Commission, which then by letter of 24 July 1964 delivered the reasoned opinion provided for by the first paragraph of Article 169 of the Treaty.

The Commission stated its reasons for declaring that the Italian Republic had

failed to fulfil the obligations imposed on it by Article 16, and gave it a time-limit of two months in which to abolish the disputed tax on transactions with other Member States. This time-limit was extended to 31 December 1965 after the Commission had been informed by the Italian Government that a parliamentary committee had been set up with the task of studying a system of protection which would take account of the Commission's observations.

On 16 May 1966, the Commission, in reply to a fresh request for an extension, informed the Italian Government that it had already granted an extension sufficient to allow for the abolition of the tax in question, having regard to the necessary parliamentary procedures, and that it reserved the right to bring the matter before the Court of Justice at the appropriate time.

A draft law by the Government to exempt exports to Member States of the Communities from payment of the tax was approved by the Italian Senate on 26 July 1967 and passed to the Chamber of Deputies. The draft law lapsed on dissolution of the Italian Parliament on 11 March 1968. Meanwhile, the Commission had brought proceedings before the Court of Justice by an application lodged on 7 March 1968.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— declare that the Italian Republic has failed to fulfil the obligations imposed on it by Article 16 of the Treaty establishing

the EEC by continuing to levy against other Member States after 1 January 1962 the progressive tax provided for by Article 37 of Law No 1089 of 1 June 1939;

— order the defendant to pay costs.

The *defendant* contends that the Court should:

— dismiss the application by the Commission;
— order it to pay the costs.

III — Procedure

The written procedure followed the normal course.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry.

The oral submissions of the parties were made at the hearing on 3 October 1968. During the hearing the defendant replied to certain questions put to it by the Judge-Rapporteur.

The Advocate-General delivered his opinion at the hearing on 23 October 1968.

IV — Submissions and arguments of the parties

The submissions and arguments of the parties may be summarized as follows:

A — Admissibility

The *defendant* complains that the Commission lodged its application a few days prior to the dissolution of the Italian Parliament, at a time when it was known for certain that this was imminent; but it makes no formal plea of inadmissibility.

The Commission should have seen that it was advisable to defer the commencement of proceedings which only legislation could resolve in the way which it desired. In not doing so, it failed to comply with Article 2 of the Treaty, prohibiting any measure capable of giving rise to an imbalance which might prejudice the harmonious development of the activities of Member States, by

disregarding the practical difficulties facing the Italian Republic in the present case.

The *applicant* points out that the Italian Government does not deny that Article 169 of the Treaty allows the applicant to decide when to commence proceedings in the Court after the State concerned has not responded to the Commission's reasoned opinion within the period laid down; in the present instance the application was made nearly four years after communication of the reasoned opinion, and more than eight years after the first approaches had been made to the defendant.

Article 155 of the Treaty states that the Commission shall ensure that the provisions of the Treaty are applied, and it was therefore both entitled and bound, in view of the length of time which had already passed and the lapse of the Government's draft law owing to the dissolution of the Parliament, to have to bring the matter before the Court at the time when it did so.

B — The substance of the case

1. Scope of the disputed tax

The *defendant* observes that the Law of 1 June 1939 applies only to a specific category of goods which cannot be equated with consumer goods or articles of general use, and which are not therefore subject to the provisions of the Treaty applicable to ordinary merchandise.

The *applicant* replies that, whilst the goods which are taxed are works of art, they are the subject of commercial transactions and are, therefore, subject to the provisions of the Treaty.

2. The classification of the disputed tax having regard to Article 16 of the Treaty

The *applicant* asserts that the disputed tax is applied exclusively to articles exported; it therefore concludes that it is a tax having an effect equivalent to customs duties on exports. As such it ought to have been abolished, as far as other Member States were concerned, under Article 16 of the Treaty, as from 1 January 1962.

Relying on the case-law of the Court, the applicant claims that in considering the

question of charges having an effect equivalent to customs duties it is the effect, not the purpose, of the measure which should be taken into account. The effect of customs duties on exports is to increase the cost of the exported products and thereby restrict them; that is, equally, the primary effect of the disputed tax, which influences the export of the goods taxed by its effect on their cost. The *defendant* maintains that the distinction drawn by the Commission between the 'purpose' and the 'effect' of the tax is not justified in the present instance; the two closely coincide. The disputed tax has a legitimate aim: to ensure the protection and maintenance of the national artistic, historic and archaeological heritage in the national territory. Consequently, it says, the tax is in no way of a fiscal nature; in any event its contribution to the budget is insignificant.

The disputed provision in the Law of 1 June 1939 did not, therefore, create a charge having an effect equivalent to customs duties, but a measure which, by making the export of articles of special interest more difficult, pursued the legitimate end of safeguarding the national heritage of which they are part.

The *applicant* replies that in the first place customs duties and equivalent charges on export are prohibited by Article 16 in any form, and in the second place protection of the national heritage can be ensured—under the 1939 Law itself—by other and more effective means than a progressive tax.

Lastly, the *defendant* observes that the disputed charge has a limited effect and cannot be said to be a complete obstacle to exportation. In any case a number of the Treaty provisions reveal a preference for this kind of measure, which is least disturbing to the operation of the Common Market.

The *applicant* considers that it need only confine its comments to stating that in the

present case a Member State has retained its capability to restrict certain exports by means of a legal instrument contrary to the Treaty.

3. Legality of the disputed tax under Article 36 of the Treaty

The *defendant* contends that the purpose, scope and effect of the disputed tax bring it more within the province of the Treaty provisions concerning quantitative restrictions than those on charges having an effect equivalent to customs duties on exports.

Article 36 permits restrictions on exports which are justified, as in the present case, on grounds of the protection of national treasures possessing artistic, historic or archaeological value, and which do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

The Commission is wrong in adopting a purely formalistic interpretation of the Treaty and its action is particularly inappropriate as applied to a legislative provision made long before the Treaty came into existence. The Treaty authorizes restrictive measures designed to protect the artistic heritage of Member States; this must be borne in mind in examining the 1939 Law and deciding that it does not conflict with the objectives of the Treaty.

The *applicant* replies that the Treaty imposes separate and distinct rules on customs and charges having equivalent effect, on the one hand, and on quantitative restrictions and measures having equivalent effect, on the other. Article 36, which appears in the Chapter dealing with quantitative restrictions, is a saving provision and should be interpreted strictly; it cannot apply by analogy in the sphere of charges having an effect equivalent to a customs duty on exports.

Grounds of judgment

The Commission has brought before the Court, under Article 169 of the Treaty an application for a declaration that the Italian Republic by continuing after 1 January 1962 to levy the progressive tax provided for in Article 37 of Law

No 1089 of 1 June 1939 on the export to other Member States of the Community of articles having an artistic, historic, archaeological or ethnographic value, has failed to fulfil the obligations imposed on it by Article 16 of the Treaty establishing the EEC.

A — Admissibility

The defendant, questioning the admissibility of the application, submits that the Commission, by bringing the matter before the Court at a time when the Italian Parliament, which had before it a draft law for the purpose of amending the provision in dispute, was on the point of being dissolved, disregarded the obligation imposed upon the Community institutions under Article 2 of the Treaty to 'promote throughout the Community a harmonious development of economic activities'.

It is for the Commission, under Article 169 of the Treaty, to judge at what time it shall bring an action before the Court; the considerations which determine its choice of time cannot affect the admissibility of the action, which follows only objective rules.

In the present case, the action of the Commission was in any case preceded by a prolonged exchange of views with the Italian Government, begun before the expiry of the second stage of the transitional period, to try to persuade the competent authorities in the Republic to do what was necessary to amend the provisions criticized by the Commission.

The action is therefore admissible.

B — The substance of the case

1. *The scope of the disputed tax*

By basing its action on Article 16 of the Treaty, the Commission considers that articles of an artistic, historic, archaeological or ethnographic nature, which are the subject of the the Italian Law of 1 June 1939, No 1089, fall under the provisions relating to the customs union. This point of view is disputed by the defendant, which considers that the articles in question cannot be assimilated to 'consumer goods or articles of general use' and are not therefore subject to the provisions of the Treaty which apply to 'ordinary merchandise'; for that reason they are excluded from the application of Article 16 of the Treaty.

Under Article 9 of the Treaty the Community is based on a customs union 'which shall cover all trade in goods'. By goods, within the meaning of that provision, there must be understood products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions.

The articles covered by the Italian Law, whatever may be the characteristics which distinguish them from other types of merchandise, nevertheless resemble the latter, inasmuch as they can be valued in money and so be the subject of commercial transactions. That view corresponds with the scheme of the Italian Law itself, which fixes the tax in question in proportion to the value of the articles concerned.

It follows from the above that the rules of the Common Market apply to these goods subject only to the exceptions expressly provided by the Treaty.

2. The classification of the disputed tax having regard to Article 16 of the Treaty

In the opinion of the Commission the tax in dispute constitutes a tax having an effect equivalent to a customs duty on exports and therefore the tax should have been abolished, under Article 16 of the Treaty, no later than the end of the first stage of the common market, that is to say, from 1 January 1962. The defendant argues that the disputed tax does not come within the category, as it has its own particular purpose which is to ensure the protection and safety of the artistic, historic and archaeological heritage which exists in the national territory. Consequently, the tax does not in any respect have a fiscal nature, and its contribution to the budget is insignificant.

Article 16 of the Treaty prohibits the collection in dealings between Member States of any customs duty on exports and of any charge having an equivalent effect, that is to say, any charge which, by altering the price of an article exported, has the same restrictive effect on the free circulation of that article as a customs duty. This provision makes no distinction based on the purpose of the duties and charges the abolition of which it requires.

It is not necessary to analyse the concept of the nature of fiscal systems on which the defendant bases its argument upon this point, for the provisions of the section of the Treaty concerning the elimination of customs duties between the Member States exclude the retention of customs duties and charges having equivalent effect without distinguishing in that respect between those which are and those which are not of a fiscal nature.

The disputed tax falls within Article 16 by reason of the fact that export trade in the goods in question is hindered by the pecuniary burden which it imposes on the price of the exported articles.

3. The classification of the disputed tax having regard to Article 36 of the Treaty

The defendant relies on Article 36 of the Treaty as authorizing export restrictions which, as in this case, are claimed to be justified on grounds of the protection of national treasures possessing artistic, historic or archaeological value. By reason of

its object, scope and effects, the tax in dispute is claimed to fall less within the provisions of the Treaty relating to charges having an effect equivalent to customs duties on exports than within the restrictive measures permitted by Article 36.

In fact, the divergence of view between the Commission and the Italian Government relates, it is argued, not to the objective but to the choice of means. As for the latter, the Italian authorities gave their preference to the levy of a charge which would disturb the functioning of the Common Market less than the application of prohibitions or export restrictions.

Article 36 of the Treaty provides that: 'The provisions of Articles 30 and 34 shall not preclude prohibitions or restrictions on ... exports ... justified on grounds of ... the protection of national treasures possessing artistic, historic or archaeological value'. This provision, both by its position and by an express reference to Articles 30 to 34, forms part of the chapter relating to the elimination of quantitative restrictions between Member States. The subject of that chapter is State intervention in intra-Community trade by measures in the nature of prohibitions, total or partial, on import, export or transit, according to circumstances. It is to such measures that Article 36 refers clearly and solely, as follows from the use of the words 'prohibitions or restrictions'. The prohibitions and restrictions in question are by nature clearly distinguished from customs duties and assimilated charges whereby the economic conditions of importation or exportation are affected without restricting the freedom of decision of those involved in commercial transactions.

The provisions of Title I of Part Two of the Treaty introduced the fundamental principle of the elimination of all obstacles to the free movements of goods between Member States by the abolition of, on the one hand, customs duties and charges having equivalent effect and, on the other hand, quantitative restrictions and measures having equivalent effect. Exceptions to this fundamental rule must be strictly construed.

Consequently, in view of the difference between the measures referred to in Article 16 and Article 36, it is not possible to apply the exception laid down in the latter provision to measures which fall outside the scope of the prohibitions referred to in the chapter relating to the elimination of quantitative restrictions between Member States.

Finally, the fact that the provisions of Article 36 which have been mentioned do not relate to customs duties and charges having equivalent effect is explained by the fact that such measures have the sole effect of rendering more onerous the exportation of the products in question, without ensuring the attainment of the object referred to in that article, which is to protect the artistic, historic or archaeological heritage.

In order to avail themselves of Article 36, Member States must observe the limitations imposed by that provision both as regards the objective to be attained and as regards the nature of the means used to attain it.

Consequently, the levy of the disputed tax, which falls outside the limits of Article 36, is incompatible with the provisions of the Treaty.

C — Costs

Under Article 69(2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs. The defendant has failed in its submissions.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the parties;

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 3(a), 5, 9, 16, 36, 169 and 171;

Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;

Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. Declares that the application is admissible;
2. Declares that the Italian Republic, by continuing to levy after 1 January 1962 the progressive tax laid down by Article 37 of the Law of 1 June 1939 No 1089 on the export to other Member States of the Community of articles of an artistic, historic, archaeological or ethnographic interest, has failed to fulfil its obligations under Article 16 of the Treaty establishing the European Economic Community;
3. Orders the defendant to pay the costs.

Lecourt

Trabucchi

Mertens de Wilmars

Donner

Strauß

Monaco

Pescatore

Delivered in open court in Luxembourg on 10 December 1968.

A. Van Houtte

R. Lecourt

Registrar

President