In Case 27/74

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Düsseldorf for a preliminary ruling in the action pending before that court between

DEMAG AG, Duisburg

v

FINANZAMT DUISBURG-SÜD

on the interpretation of Articles 12, 96, 107 and 109 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, C. Ó Dálaigh and Lord Mackenzie Stuart, Presidents of Chambers, A. M. Donner (Rapporteur), R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, M. Sørensen, Judges,

Advocate-General: G. Reischl
Rigstrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

The order of refererence and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the European Economic Community may be summarized as follows:

I — Facts and procedure

In 1967 and 1968 the German economy experienced a considerable boom accompanied by a large balance of payments surplus. In view of the strong competitiveness of the German economy and the greater rise in prices in the main purchasing countries, this surplus in balance of payments risked increasing with undesirable consequences, namely: a disturbance in the internal equilibrium manifesting itself in a rise in prices on the national market and speculative transactions in view of a possible revaluation of the German mark. In these circumstances the German

Government decided to put a brake on exports and to promote imports by resorting to a temporary change in the frontier countervailing charge in the shape of turnover tax; the exportation of products exempted from turnover tax was to be charged at 4 % (starting at a lower rate) and the import of goods liable to turnover tax was to be relieved in a corresponding manner. These interventions were provided for by the Gesetz zur außenwirtschaftlichen Absicherung (Law concerning protective measures in external trade), made under Article 4 of the *Gesetz zur Förderung der Stabilität und des Wachstums* (Law for encouraging stability and growth of trade) of 29 November 1968 (BGBl. I. 125;) (hereinafter called 'AbsichG'), which entered into force on 1 December 1968.

Under AbsichG exports of goods between 29 November 1968 and 31 March 1970 were liable to a special turnover tax (Article 2). Article 3 set out the basis on which the charge was calculated; Article 4 laid down the rates (4 % as a general rule, 2 % for certain products listed in Annex I to the law on turnover tax); Article 5 provided for the conditions giving rise to the tax debt and for procedure; Articles 6 and 7 provided for certain exemptions in favour of free ports and Article 8 contained a transitional scheme for 'existing contracts'. Under Article 11 AbsichG was originally to cease to apply after 31 March 1970. AbsichG was prematurely repealed by order dated 28 October 1969 (BGBl. I. 2045). It appears both from the observations of the Government of the Federal Republic of Germany and from those of the Commission that the German authorities duly informed the Commission of the proposed law. placed before the Bundestag on 22 November 1968, by a Note Verbale from the Permanent Representative on 25 November 1968.

The Finanzamt Duisburg-Süd, the defendant in the main action, issued notices demanding prepayment from the plaintiff in the main action of the special turnover tax for the period December 1968 to September 1969 on exports which the plaintiff had made. The plaintiff appealed against these notices, maintaining that Article 2 of AbsichG was inapplicable insofar as it introduced a charge having an effect equivalent to a customs duty on export, which was prohibited by Article 12 of the EEC Treaty. On the objections being rejected by the customs authorities, the plaintiff brought the matter before the Finanzgericht Düsseldorf.

The plaintiff submitted a legal opinion by Professors A. Heldrich and K. Zweigert to the Finanzgericht. According to the main arguments of this opinion, since AbsichG constituted a charge which was unilaterally levied and applied to goods by reason of the fact that they crossed the frontier, thus burdening the free movement of goods within the Community, it infringed Article 12 of the EEC Treaty. Although this Court has found on several occasions that Article 12 on the one hand and Articles 95 to 97 of the EEC Treaty on the other hand cannot be applied in conjunction in the same case, it is not possible to infer from this case law that AbsichG constitutes internal taxation within the meaning of Article 95 of the EEC Treaty. The question of the alternative of Articles 12 and 95 of the EEC Treaty can arise only with regard to a tax on imports intended to place all categories of products whatever their origin in a comparable position. The present case is concerned with a tax on export, which, by placing the German products exported in a more unfavourable tax position than comparable foreign products, distorts competition to the detriment of German producers. As a result, neither the systematic relationship between AbsichG and the turnover tax law, nor the conditions for levying the tax in question can disguise the fact that AbsichG was a measure of external economic policy not referred to in Articles 95 to 97.

Nor can Article 107 of the EEC Treaty be pleaded in support of AbsichG. Although this Article allows Member States to retain their competence with regard to policy on rates of exchange, it cannot be used as a legal basis for a disguised violation of the principle of free movement of goods. Having regard to the recent economic problems and the serious consequences of variations in the rates of exchange for the common agricultural market, a restrictive interpretation of Article 107 of the EEC Treaty is called for, according to which the provision is applicable only to alterations in the rate of exchange in the strict sense.

Recourse to the safeguard clause of Article 109 (1) of the EEC Treaty cannot be had in the present case, because it is impossible to speak of a 'sudden crisis' in the German balance of payments at the time.

The Finanzgericht Düsseldorf decided by order dated 8 March 1974 to stay the proceedings and to submit the following questions to the Court, in accordance with Article 177 of the EEC Treaty, for a preliminary ruling:

1. Does the prohibition against the introduction of charges having an effect equivalent to customs duties under Article 12 of the EEC Treaty include the introduction of a charge
   (a) which subjects industrial exports to other Member States of the Community to a financial charge of 4 %, alternatively 2 %;
   (b) which is disguised by the national legislator as a 'Sonderumsatzsteuer' (special turnover tax):
   (c) which refers back to concepts of national law on turnover tax;
   (d) which has the purpose of subjecting domestic exports to a special charge not otherwise existing in this form within the territory of the EEC in order to prejudice their ability to compete with the products of the other Member States, and
   (e) which has as a consequence that the products exported are thereupon subject to taxation by both the country of origin and that of destination?
2. Can the possible infringement by such a charge of Article 12 of the EEC Treaty be justified by the argument that the purpose of its introduction was to avoid a currency revaluation? Can there be deduced from the power reserved to Member States by Article 107 of the EEC Treaty to alter rates of exchange an authority also to introduce charges having an effect equivalent to customs duties that are to take the place of a revaluation? Under what conditions might the introduction of such a charge be justified as a protective measure within the meaning of Article 109 (1)? Where the conditions of Article 109 (1) of the EEC Treaty are not present, can the introduction of a charge having an effect equivalent to customs duty and taking the place of a revaluation be justified by the argument that the tasks of the Community under Article 2 of the Treaty include an increase in stability and thus also the maintenance of the external value of currency and under Article 3 (g) of the Treaty the remedy of disequilibria in the balances of payments of Member States?

The order of reference was registered at the Court on 19 April 1974.

The Federal Republic of Germany, represented by Martin Seidel, and the Commission of the European Communities, represented by its legal adviser, Rolf Wägenbaur, submitted their written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to proceed without a preparatory inquiry.

II — Observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice

1. First Question

The *Government of the Federal Republic of Germany,* referring to the legal opinion of Professor Zuleeg attached to its written observations, observes that AbsichG cannot be separated from the rules on monetary policy and comes in the first place within the sphere of economic and monetary policy, governed by Articles 103 to 109 of the EEC Treaty. Although these provisions, and in particular Articles 103 and 105, give a certain power of coordination to the Community, economic policy comes basically within the competence and responsibility of the Member States. It follows that the Member States must have the necessary means to control the course of the economy.

Accordingly AbsichG should be looked at from the point of view of Community law on the basis of Articles 103 to 109 and in particular Article 108 (1) of the EEC Treaty. This provision allows that where a Member State in in difficulties as regards its balance of payments it may have recourse to autonomous measures in the internal economy or the external monetary policy and in particular alter the rate of exchange of its currency. As regards the autonomous measures regarding the economic and monetary policy the Commission has only an advisory capacity. Only measures which are contrary to the rules of liberalization in the Treaty need prior authority from the Commission.

Article 107 of the EEC Treaty contains special rules intended to counteract the misuse of alterations in the exchange rate, which is the most trenchant measure of external monetary policy; no limitation on the other instruments of monetary policy may be inferred from this provision. It follows that measures are allowed which, although not formally constituting an alteration in the exchange rate, have basically the same effect. Since AbsichG produces the same effect as a selective alteration in the exchange rate — the tax on the exportation of goods and the corresponding exoneration from tax of imported goods had the effect of a revaluation of the exchange rate as regards the movements of goods — it answers this condition. Accordingly AbsichG would be open to objection from the point of view of Articles 103 to 109 of the EEC Treaty only if the German Government had insufficiently taken into account the Community interest. In view of the express approval from the other Member States and the Commission of the measure adopted by the German Government, it is not possible to state that the Community interest was prejudiced.

Alternatively the German Government states that AbsichG does not come under Article 12 of the EEC Treaty. The concept of customs duty and charge having an effect equivalent to a customs duty on imports or exports is limited so as to exclude charges levied within the framework of national turnover taxes. The rules provided for by AbsichG, which subjects exports to a levy of 4 % or, according to the case, 2 % and provides a simultaneous exoneration of imports 'of a corresponding amount', constitute a part of the general system of turnover tax. From the economic aspect AbsichG had partly put an end to the repayment of turnover tax from which exports benefited under the law relating to turnover tax. Moreover, AbsichG had expressly retained the fundamental bases of liability and concepts provided for by the turnover tax law. It follows that, although the German legislature has not pursued fiscal aims with AbsichG but objectives of economic and monetary policy, the rules in question are inseparable from the general rules relating to turnover tax. Accordingly the measures provided for by AbsichG do

not come under Article 12 of the EEC Treaty but within the sphere of Articles 95 to 97.

Article 96, the object of which is to abolish export subsidies in intra-Community trade, is limited to the prohibition of the grant of excessive repayments on export. This provision *does not create an obligation to make a repayment* of indirect taxes payable within the country. The legal position was changed by Directives No 67/227/EEC and 67/228/EEC of the Council of 11 April 1967 (OJ 1967, pp. 1301 and 1303); Article 10 of Directive No 67/228 expressly provides an obligation to exempt exports from tax. This obligation, however, was to enter into force only on 1 January 1970, which was subsequently postponed to 1 January 1972. It follows from the above that at the time AbsichG infringed neither Articles 95-97 nor the Directives on the harmonization of legislation of Member States concerning turnover taxes.

The German Government proposes the following reply to the first question:

The terms of Article 12 of the EEC Treaty must not be interpreted as meaning, that they apply to rules issued by a Member State for the purpose of re-establishing equilibrium in its external trade and which temporarily make the export of goods liable to turnover tax while exempting the import of goods from such tax up to a corresponding amount.

The *Commission* observes first of all that a tax such as described in the first question must be regarded as a charge having an equivalent effect to customs duties unless it avoids such classification. It follow from the case law of the Court in the judgments in Case 57/65 *Lütticke v Hauptzollamt Saarlouis* Rec. 1966, p. 293 and in Case 25/67 Milch, Fett und Eierkontor v Hauptzollamt Saarbrücken Rec. 1968, p. 305 that the same tax cannot constitute both a charge having an equivalent effect referred to in Articles 9, 12 and 13 and internal taxation covered by Articles 95 and 97 of the EEC Treaty. The principles of this case law relating to Articles 95 and 97 are likewise applicable to cases of export referred to in Article 96. The EEC Treaty provides here also for different rules so that in the same way as regards the relationship between Articles 9, 12 and 96 it must be admitted that the two rules are, by definition, mutually exclusive. The same principles are decisive as regards the relationship between Articles 9 and 12 on the one hand, and on the other hand the provisions of the secondary legislation of the Community issued by the Council under Article 99. The rules here are obviously different and cannot be applied jointly to the same case. It is thus obvious that an internal rule which leads to an excessive tax on imports contrary to the principles of Directive No 67/228/EEC must be regarded as infringing this Directive and not the prohibition against charges having an effect equivalent to customs duties.

It is therefore obvious that 'internal taxation', even if it is excessive, cannot be classified as 'a charge having an equivalent effect'.

The Commission is of the same opinion as the German Government with regard to the nature of the measures provided for by AbsichG: The special turnover tax on exports corresponds from the substantive point of view and at a fiscal level to a partial abolition, in the region of 4 % or 2 %, of the exemption granted in respect of supplies intended for export. It has the effect of a partial exemption from tax of the exported products in question. Accordingly AbsichG does not infringe Article 96 of the EEC Treaty.

It is true that Article 10 (1) of Directive No 67/228/EEC provides that the supply of goods consigned or transported to places outside the territory in which the State concerned applies VAT shall be exempted from VAT, but since this provision was not yet binding at the time

that AbsichG was in force, it cannot be used as an argument against AbsichG.

The fact that AbsichG is not inspired by fiscal considerations is irrelevant as regards its classification within the sphere of Articles 95 to 97. No contrary conclusion is to be derived from Cases 7/67 *Wöhrmann v Hauptzollamt Bad Reichenhall* Rec. 1968, p. 261 and 20/67 *Kunstmühle Tivoli v Hauptzollamt Würzburg* Rec. 1968, p. 293 in which the Court took the view that turnover tax is basically of a fiscal nature.

The Commission proposes the following reply to the first question:

'A tax which has the characteristics listed by the Finanzgericht Düsseldorf must not be regarded as a "charge having an effect equivalent to a customs duty" but on the contrary is "internal taxation". As such it is compatible with the Treaty and in particular with Article 96 of the EEC Treaty. Such a tax would have infringed the second Directive on VAT if the latter had already been binding at that time'.

2. *Second Question*

The *German Government* observes that Article 107 of the EEC Treaty requires Member States to treat their policy with regard to rates of exchange as a matter of common concern. Moreover it specifies the power of the Member States with regard to autonomous actions which they can undertake with regard to policy on the rates of exchange of their currency. It is not necessary to answer the question whether the introduction of a charge having an effect equivalent to a customs duty comes within this power as a measure of external economic policy; under Articles 108 and 109 of the EEC Treaty such a measure is in any event open to Member States, subject to the conditions provided for by these provisions. There is a double condition in Article 109, namely that the crisis in the balance of payments should occur suddenly and that the Council does not take a decision on mutual assistance in accordance with Article 108 (2). AbsichG satisfies these two conditions. On the one hand there was a sudden crisis in the balance of payments, abruptly unleashed by a wave of speculation, and on the other hand the mutual assistance referred to in Article 108 (2) could not come into question in view of the 'surplus' nature of the crisis in the balance of payments.

If it is thought that the crisis cannot be described as 'sudden', the Commission must be regarded as having given the authority provided for in Article 108 (3). This appears from the approval expressed by the Commission immediately before AbsichG entered into force.

Articles 2 and 3 (g) of the EEC Treaty are not enabling rules; therefore they do not confer on Member States the power of introducing charges having an effect equivalent to customs duties intended to avoid revaluation.

The *Commission* explains that Articles 108 and 109 of the EEC Treaty provide a system of safeguard clauses in the event of difficulties in the balance of payments. On the other hand Article 107 of the EEC Treaty provides that the power with regard to rates of exchange remains with the Member States, although they are required to treat this policy as a matter of common concern.

In the event of an alteration in the rate of exchange the question of a possible conflict with Article 12 of the EEC Treaty would not arise. Such a conflict could arise only when a Member State introduced a measure — e.g. a charge having an effect equivalent to customs duties — intended to avoid a revaluation. Articles 108 and 109 of the EEC Treaty contain safeguard clauses even for the cases where difficulties in balance of payments cannot be resolved by an alteration in the rate of exchange.

In any event Article 107 neither expressly nor implicitly authorizes an infringement of binding rules such as Article 12 of the EEC Treaty.

A Member State could envisage recourse

to Article 109 (1) of the EEC Treaty in the following conditions:

(a) There must be a *sudden crisis* in the balance of payments: difficulties or threatening circumstances in external economic policy do not suffice for the application of this provision;

(b) A decision is not immediately taken in accordance with Article 108 (2);

(c) The safeguard measures must be limited to strictly necessary interventions and disturb the functioning of the Common Market as little as possible;

(d) The Commission and the other Member States must be informed of the measures adopted *at the latest* on their entry into force.

As regards the interpretation of Articles 2 and 3 (g) of the EEC Treaty, the Commission is completely in agreement with the observations of the German Government.

The plaintiff in the main action, represented by P. Wendt of the Hamburg Bar, the Government of the Federal Republic of Germany and the Commission made oral observations at the hearing on 17 September 1974.

The Advocate-General delivered his opinion on 2 October 1974.

Law

1 By order dated 8 March 1974, filed at the Registry on 19 April 1974, the Finanzgericht Düsseldorf, pursuant to Article 177 of the EEC Treaty, referred two question on the interpretation of Articles 12 and 107 to 109 of the said Treaty.

These questions are intended to enable the national court to assess the compatibility with Community law of certain provisions of a German law (Gesetz über Maßnahmen zur außenwirtschaftlichen Absicherung gemäß Par. 4 des Gesetzes zur Förderung der Stabilität und des Wachstums der Wirtschaft (AbsichG) of 29 November 1968 (BGBl I, p. 1255).

2 Under this law, passed in order to put a brake on exports and to promote imports in order to reduce the surplus in the balance of payments and to prevent internal disequilibrium, exports effected between 29 November 1968 and 31 March 1970 were liable to a special turnover tax, at the rate of 4 % in general and 2 % as regards certain goods listed in Annex I to the law on turnover tax.

3 The plaintiff in the main action, having been required to pay this special turnover tax, brought an action before the national court claiming that the collection of this tax infringed Article 12 of the Treaty.

According to the Finanzamt, the defendant in the main action, the special turnover tax was part of the national system of turnover tax and as such came not under Article 12 but under Article 95 et seq. of the Treaty.

First Question

4 It is first asked whether the prohibition against the introduction of charges having an effect equivalent to customs duties under Article 12 of the EEC Treaty include the introduction of a charge which

(a) subjects industrial exports to other Member States of the Community to a financial charge of 4 %, alternatively 2 %;

(b) which is disguised by the national legislator as a 'Sonderumsatzsteuer' (special turnover tax);

(c) which refers back to the concepts of national law on turnover tax;

(d) which has the purpose of subjecting exports to a special charge not otherwise existing in this form within the territory of the EEC in order to prejudice their ability to compete with the products of the other Member States, and

(e) which has as a consequence that the products exported are subject to taxation by both the country of origin and that of destination.

5 It appears from the file that the question seeks to know whether a tax such as is mentioned comes within the category of charges having equivalent effect referred to in Article 12 of the Treaty or whether it may be regarded as coming under internal taxation referred to in Article 95 from the fact that it is integrated into the national system of turnover tax.

6 Articles 12 and 13 on the one hand and 95 on the other cannot be applied jointly in the same case, since charges having an effect equivalent to customs duties on the one hand and internal taxation on the other are subject to different systems and provisions.

Further it is not only turnover tax and charges of a similar nature which are to be regarded as internal taxation but also the charges and other measures intended to compensate the effects of these charges with regard to import and export of goods.

7 Whereas Article 12 prohibits Member States from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, Article 95 is limited to prohibiting discrimination against the products of other Member States by means of internal taxation.

Thus whereas the first provision aims at any impediment to intra-Community trade, the second is limited to impediments of a kind which favour national products.

This difference is confirmed by Article 96 which provides that where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them, whether directly or indirectly and thus leaves open the question whether Member States have the power to reduce the amount of the repayment, a measure which could, however, affect Community trade.

8 In the procedure for a preliminary ruling under Article 177 of the Treaty, the Court cannot classify a specific national tax for the purpose of applying Articles 12 und 95, since the interpretation of legislative and other acts of a national nature remains within the jurisdiction of the national court and this Court is competent only to interpret and assess the validity of the Community acts referred to in the said Article.

However, the Court is competent to interpret the aforementioned provisions of the Treaty in order to enable the national court to apply the rule of Community law correctly to the tax in question.

9 In these circumstances it is right to observe that a national measure described as a 'special turnover tax' and which 'refers back to concepts of national law on turnover tax' can subject commercial exports to other Member States to a financial charge.

Such is in particular the case when it is a question of a general measure which applies to all exported products without distinction and when practically the sole effect of the charge in question is to reduce the exoneration of the exported products from turnover tax.

A charge which subjects without distinction industrial exports to other Member States to a financial charge by partially abolishing the exoneration from internal taxation and which is closely integrated into the national system of turnover tax, comes under internal taxation within the meaning of Article 95 et seq. of the Treaty, and cannot therefore constitute a charge having an effect equivalent to a customs duty within the meaning of Article 12 of the Treaty.

10 In addition, the plaintiff in the main action, observing that as from 1 October 1968 the turnover tax in the Federal Republic of Germany had been replaced by a system of value added tax, referred to Article 10 of the Second Council Directive of 11 April 1967 on the harmonization of legislation of Member States concerning turnover taxes (OJ 71/67, p. 1303).

11 Under Article 10 (1) (a) exemption from value added tax is accorded to 'the supply of goods consigned or transported to places outside the territory in which the State concerned applies value added tax'.

12 However, the provision, based on Articles 99 and 100 of the Treaty, imposed obligations on Member States only as from 1 January 1972 (Third Council Directive of 9 November 1969, OJ L 320/69, p. 34).

13 Since the German measure in question expired before this date, the argument is not therefore relevant to the case.

Second Question

14 The second question asks whether the 'possible infringement' of Article 12 of the Treaty could be justified in particular under Article 107 to 109 of the Treaty, by the fact that the purpose of introducing the charge was to avoid a currency revaluation.

15 This question has been asked in the event of the first question receiving an affirmative reply.

Since such is not the case the question does not arise.

Costs

16 The costs incurred by the Commission of the European Communities. and the Federal Republic of Germany, which have submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the amin action are concerned, a step in the action pending before a national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Düsseldorf by order of that court dated 8 March 1974, hereby rules:

A charge which subjects without distinction industrial exports to other Member States to a financial charge by partially abolishing the exoneration from internal taxation and which is closely integrated into the national system of turnover tax, comes under internal taxation within the meaning of Article 95 et seq. of the Treaty, and cannot therefore constitute a charge having an effect equivalent to a customs duty within the meaning of Article 12 of the Treaty.

Lecourt Ó Dálaigh Mackenzie Stuart Donner Monaco
Mertens de Wilmars Pescatore Kutscher Sørensen

Delivered in open court in Luxembourg on 22 October 1974.

A. Van Houtte
Registrar

R. Lecourt
President