

OPINION OF ADVOCATE GENERAL
JACOBS

delivered on 26 October 1995 *

1. This case, referred by the Corte di Appello, Salerno, puts in issue the interpretation of Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals¹ and Council Directive 69/73/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action in respect of inward processing.² The case also raises an issue concerning the interpretation of the Sixth VAT Directive.³

2. On 21 May 1982 Pezzullo Pastifici Mangimifici SpA ('Pezzullo') provisionally imported 1 000 tonnes of durum wheat from Canada with a view to processing it into wheat semolina for re-exportation. After re-exporting the wheat semolina, Pezzullo released for consumption in Italy the by-products of the processing (middlings, bran and meal), which were thus imported definitively on 15 January 1985.

3. In respect of the definitive importation of those by-products, the Salerno customs authorities required payment of a levy and value added tax. Pursuant to Article 191 of the Italian Customs Law (Presidential Decree No 43 of 23 January 1973), they also required the payment of default interest for the period between provisional importation and definitive importation. They calculated the total amount of interest due at LIT 18 315 610, namely LIT 17 382 352 in relation to the levy and LIT 933 258 in relation to the VAT.

4. Pezzullo paid the levy and the VAT due plus the default interest. However, considering that the provisions of Italian law on the basis of which the interest was charged were incompatible with Community law, on 18 October 1988 it applied to the Tribunale di Salerno for restitution of the interest paid. Following the rejection of its application, Pezzullo appealed to the referring court.

5. In that court, Pezzullo claimed that the default interest charged pursuant to Article 191 of the Italian Customs Law was an internal duty or a charge having equivalent effect incompatible with Articles 9, 12, 13, 30 and 38 of the Treaty. It also alleged infringement

* Original language: English.

1 — OJ 1975 L 281, p. 1.

2 — OJ, English Special Edition 1969 (I), p. 75.

3 — 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.

of Council Regulation No 19/62⁴ and Council Regulation No 120/67⁵ on the ground that those regulations prohibited the levying of any customs duty or charge having equivalent effect in trade with third countries. The Italian Finance administration contended that at the time when provisional importation took place Regulation No 19/62 and Regulation No 120/67 were not in force since they had been repealed by Regulation No 2727/75.⁶ It also contended that Article 191 of the Italian Customs Law was in conformity with Council Directive 69/73/EEC on inward processing.⁷

6. In the light of those arguments, the referring court has asked the following question:

'Was the imposition of default interest provided for in Article 191 of the Italian Customs Law in respect of definitive importation at the time of the import operation at issue in the proceedings (1982) prohibited by provisions of Community law which took precedence over national law?'

7. In its observations, the Commission raises the possibility that the question referred may be inadmissible on the ground that the

national court does not indicate clearly the provisions of Community law which it considers applicable in this case. It also points out that the national court refers only briefly to the arguments of the parties without discussing them in detail.

8. It is true that the order for reference is laconic. It would have been helpful if the national court had provided more details. I consider however that the question referred is sufficiently precise and that it should be answered. In view of the nature of the question, the information given in the order for reference and in the written observations submitted to this Court by the Italian Government and by the Commission is sufficient to enable the Court to give a useful reply to the referring court. The present case can be distinguished from other cases where the Court rejected the reference as inadmissible.⁸ The question referred in the present case is straightforward, it is easy to see the importance of the answer to the question for the outcome to the national proceedings, and it is possible to provide a useful answer without the need to require any further factual information. In the circumstances of this case, I do not consider that the brevity of the order for reference is such as to prejudice the ability of Member States and others who are entitled to submit observations under Article

4 — Journal officiel 1962, p. 933.

5 — Council Regulation No 120/67/EEC of 13 June 1967 on the common organization of the market in cereals, OJ, English Special Edition 1967, p. 33.

6 — See above, note .

7 — See above, note .

8 — See Joined Cases C-320/90 to C-322/90 *Telemarsicabruzzo and Others* [1993] ECR I-393; Case C-157/92 *Banchero* [1993] ECR I-1085; Case C-378/93 *La Pyramide* [1994] ECR I-3999; Case C-458/93 *Saddik* [1995] ECR I-511; Case C-167/94 *Grau Gomis and Others* [1995] ECR I-1023, rectified by Order of 6 June 1995.

20 of the Statute of the Court to do so. The question referred should therefore be answered. That approach is confirmed by the judgment of the Court in *Vaneetveld*.⁹

9. The fact that the question referred does not specify the provisions of Community law which may be applicable is not material. The order for reference does refer to the provisions of Community law which were invoked by the parties in the main proceedings. Moreover, the Court has held that in the preliminary reference procedure, with a view to assisting the national court, the Court may consider provisions of Community law to which the national court has not referred in its question.¹⁰ I turn therefore to examine the question referred.

10. As we have seen, the Italian authorities charged default interest both in relation to the levy due and in relation to the VAT due. I will first examine the issue whether the charging of default interest in relation to the levy is compatible with Community law. I will then turn to the issue whether the charging of default interest in relation to the VAT is so compatible.

Default interest in relation to import duty

11. It is clear that Articles 12, 13 and 30 of the Treaty, which were invoked by Pezzullo in the main proceedings, are not applicable in this case since they refer to intra-Community trade and not to trade with third countries. Similarly, Articles 9 and 38 of the Treaty, which were also referred to by Pezzullo in the main proceedings, are not directly relevant in the present case.

12. The basic Community measure applicable at the material time to the products in issue in this case is Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals ('the Regulation').¹¹ The Regulation, which replaced Council Regulation No 120/67/EEC on the common organization of the market in cereals,¹² lays down a single price system which is supported by a system of external protection. In particular, it provides for the charging of a levy on imports from third countries, its aim being to cover the difference between prices prevailing in third countries and Community prices.¹³

9 — Case C-316/93 [1994] ECR I-763.

10 — See e. g. Case C-315/92 *Verband Sozialer Wettbewerb v Clinique Laboratories and Estée Lauder* [1994] ECR I-317, paragraph 7 of the judgment.

11 — See above, note 1. The Regulation has since been amended.

12 — See above note 5.

13 — See the preamble, recital 10, and Articles 13 to 20.

13. Article 18(2), which is part of Title II of the Regulation headed 'Trade with third countries', states as follows:

'Save as otherwise provided in this Regulation or where derogation therefrom is decided by the Council, acting by a qualified majority on a proposal from the Commission, the following shall be prohibited:

— the levying of any customs duty or charge having equivalent effect,

— the application of any quantitative restriction or measure having equivalent effect ...'.

14. The national court refers only to the compatibility with Community law of the default interest charged for the period between temporary and definitive importation. It does not question the compatibility with Community law of the levy itself, which the Italian custom authorities required Pezzullo to pay in respect of the definitive importation of the by-products of the processing. The issue which arises from the question referred is whether the imposition of default interest is a charge having equivalent effect to a customs duty and, if so,

whether it is covered by the derogation provided for in Article 18(2) of the Regulation.

15. The Court has interpreted the concept of a charge having equivalent effect to a customs duty in Article 9 et seq. of the Treaty broadly. It has held that any pecuniary charge, however small and whatever its designation and 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 equivalent effect, even if it is not imposed for the benefit of the State and is not discriminatory or protective in effect, and even if the product on which the charge is imposed is not in competition with any domestic product.¹⁴

16. According to the case-law of the Court, the concept of a charge having equivalent effect to a customs duty in agricultural regulations has the same meaning as in the provisions of the Treaty.¹⁵ Moreover, the concept is to be interpreted in the same way whether the trade in question is conducted within the Community or with non-member countries.¹⁶ The Court has nevertheless held that, where the elimination of charges having an effect equivalent to customs duties is applied to trade with third countries, its objectives and legal basis are different from those which

14 — Joined Cases 2/69 and 3/69 *Diamantarbeiders v Brachfeld* [1969] ECR 211, paragraphs 15 to 18 of the judgment; Case 46/76 *Bauhuis v Netherlands* [1977] ECR 5, paragraph 10.

15 — See Case 34/73 *Variola v Amministrazione Italiana delle Finanze* [1973] ECR 981, paragraph 3 of the judgment.

16 — Case C-125/94 *Aprile v Amministrazione delle Finanze dello Stato* [1995] ECR I-2919, paragraphs 39 to 41.

underlie and justify the prohibition of such charges in intra-Community trade.¹⁷ In so far as intra-Community trade is concerned, the prohibition is laid down in Article 9 of the Treaty itself, and is unconditional and absolute because it is designed to establish free movement of goods within the Community. On the other hand, in so far as trade with third countries is concerned, the question whether it is necessary to abolish, maintain, amend or introduce charges having equivalent effect must be related both to the requirements of the common commercial policy and to the requirements, consequent upon the introduction of the Common Customs Tariff, of harmonization of conditions of importation from third countries. Thus, the prohibition is not absolute in so far as trade with third countries is concerned and, when it imposes that prohibition, the Council may make exceptions or derogations from it. As we have seen, Article 18(2) expressly refers to such derogations.

17. Even if it were accepted that the default interest in issue is a charge having equivalent effect to a customs duty, it would still be compatible with Community law as falling within the derogation provided for in Article 18(2) by the words 'Save ... where derogation therefrom is decided by the Council, acting by a qualified majority on a proposal from the Commission'. That is so because Council Directive 69/73/EEC of 4 March 1969 on the harmonization of provisions laid down by law, regulation or administrative action in respect of inward processing¹⁸ ('the Directive'), which was applicable at the material

time, allows Member States to charge default interest.

18. The Directive was repealed with effect from 1 January 1987 by Council Regulation (EEC) No 1999/85 of 16 July 1985 on inward processing relief arrangements.¹⁹ That regulation was repealed with effect from 1 January 1994 by the Community Customs Code.²⁰ Neither Regulation No 1999/85 nor the Community Customs Code was applicable at the time when the facts giving rise to the present proceedings occurred.

19. The Directive lays down common rules in respect of inward processing arrangements, its aim being to achieve a limited degree of harmonization with a view to ensuring uniform application of the Common Customs Tariff.²¹ Article 2 defines inward processing arrangements as customs arrangements whereby imported goods which do not satisfy the conditions laid down in Articles 9 and 10 of the Treaty may be processed without giving rise to liability for payment of customs duties, of charges having equivalent effect or of agricultural levies, where such goods are intended for export outside the customs territory of the

17 — Case 70/77 *Simmenthal v Amministrazione delle Finanze dello Stato* [1978] ECR 1453, paragraphs 21 to 23 of the judgment.

18 — See above, note 1.

19 — OJ 1985 L 188, p. 1. See also Commission Regulation (EEC) No 2228/91 of 26 June 1991 laying down provisions for the implementation of Regulation (EEC) No 1999/85 on inward processing relief arrangements, OJ 1991 L 210, p. 1.

20 — Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code, OJ 1992 L 302, p. 1.

21 — See the preamble, recital 2.

Community wholly or partly in the form of compensating products.²²

products covered by inward processing arrangements to be put on the market.²³ Article 16 states as follows:

20. Under Article 3, exemption from customs duties, charges having equivalent effect and agricultural levies is to be granted in accordance with one of two methods. The goods may be subject to a customs procedure under which the payment of charge is suspended throughout the period for which the goods remain in the customs territory of the Community. Alternatively, the amount of the charges applicable to the imported goods must be deposited, in which case reimbursement must be made on exportation of the compensating products obtained therefrom. The choice of the procedure is left to the competent authorities of the Member States and, where the first procedure is chosen, those authorities may require the lodging of security.

'Where goods are put on the market in accordance with the conditions provided for in Article 15(1)(a) or the first indent of Article 15(1)(b), the customs duties, charges having equivalent effect or agricultural levies to be charged in respect of compensating products, intermediate products or goods in the unaltered state, shall be those appropriate to the imported goods according to the rate or amount applicable on the date of acceptance of the relevant customs document by the competent authorities and on the basis of the value for customs purposes and other items of charge ascertained or accepted as applicable on that date, without prejudice to any outstanding arrears of interest due'²⁴ (emphasis added).

21. Article 15 provides that, where circumstances so warrant, in particular in the case of undertakings engaged in continuous production both for the Community market and for external markets, the competent authorities may allow compensating products or

22. Thus, Article 16 of the Directive expressly enables Member States to charge default interest on the payment of import duties and agricultural levies for products subject to inward processing arrangements. I note that, according to a Special Report of the Court of Auditors on the Community Inward Processing System,²⁵ which

22 — Compensating products are defined in Articles 2(3) and 24 of the Directive. They include products produced by the processing of goods, including fitting or assembling goods or adjusting goods to other goods.

23 — See Articles 15(1)(a) and 15(1)(b), first indent.

24 — By way of derogation, Article 18 provides that the Council, acting by a qualified majority on a proposal from the Commission, shall prepare a list of compensating products and of intermediate products which when put on the market shall be subject to application of customs duties, charges having equivalent effect or agricultural levies appropriate to them and not to those appropriate to imported goods.

25 — OJ 1983 C 88, p. 3.

reviewed the position in eight Member States, only Italy imposed interest consistently and in doing so used a rate of interest below market rates.²⁶

earlier directive, namely Article 15 of Council Directive 71/118/EEC on health problems affecting trade in fresh poultry meat,²⁹ was a derogation within the meaning of Article 11(2) of Regulation No 2777/75 from the prohibition of the levying by Member States of charges having an effect equivalent to customs duties.

23. The Directive is a measure providing for a derogation within the meaning of Article 18(2) of the Regulation. The fact that the Directive was adopted before the Regulation does not prevent it from being such a measure. That view is supported by the judgment of the Court in *Land of Berlin v Wigei*.²⁷ In that case, the Court was concerned with the question whether health inspection charges levied on the importation of consignments of fresh poultry meat from Hungary were charges having an effect equivalent to customs duties incompatible with Article 11(2) of Council Regulation (EEC) No 2777/75 on the common organization of the market in poultry meat.²⁸ The text of Article 11(2) was identical to Article 18(2) of the Regulation. The Court pointed out that although Article 11(2) prohibited the levying of customs duties other than those laid down in the Common Customs Tariff or domestic charges having equivalent effect, that prohibition applied subject either to any provisions to the contrary contained in Regulation No 2777/75 or to any derogation therefrom decided by the Council acting by a qualified majority on a proposal from the Commission. The Court held that a provision of an

24. It should be noted that Article 18(2) of the Regulation refers to derogations decided by the Council acting 'by a qualified majority', whereas the Directive was adopted on the basis of Article 100 of the Treaty by unanimity. Since, however, under Article 18(2) derogations may be made by the Council acting by a qualified majority, *a fortiori* they can be made by the Council acting by unanimity. In *Land of Berlin v Wigei*, the Court accepted that Directive 71/118 provided for a derogation within the meaning of Article 11(2) of Regulation No 2777/75 although that directive had been adopted by the Council pursuant to Articles 100 and 43 of the Treaty by unanimity.

25. In any event, even if for any reason it were not accepted that the Directive is a measure providing for a derogation within the meaning of Article 18(2), it could still provide for a valid exception from the prohibition of import duties and measures having equivalent effect imposed by the Regulation. Independently of the express derogation

26 — *Op. cit.*, paragraph 19.

27 — Case 30/79 [1980] ECR 151.

28 — OJ 1975 L 282, p. 77.

29 — OJ, English Special Edition 1971(I), p. 106.

provided for in Article 18(2), that prohibition must be interpreted in the light of other Community measures. The Regulation is a general measure setting up a common organization of the market in cereals and cannot be interpreted so as to render inapplicable Article 16 of the Directive which provides for a specific rule with regard to inward processing arrangements.

26. I conclude that, even if it were accepted that the default interest in issue is a charge having equivalent effect to a customs duty, it is not prohibited by the Regulation and therefore that, in requiring Pezzullo to pay default interest, the Italian authorities have not infringed Community law.

27. In the light of the above conclusion, it is not strictly necessary to examine whether the default interest in issue is a charge having equivalent effect to a customs duty. With regard to that issue, it is sufficient to make the following observations.

28. In my view, it is doubtful whether, where products are temporarily imported into the Community under inward processing arrangements and subsequently the by-products of the processing are released

for free circulation, default interest in relation to the import levy due for the period between provisional and definitive importation can be considered as a charge having equivalent effect to a customs duty.

29. The Regulation should be interpreted as meaning that the obligation to pay import levy arises upon the importation of the products into the Community. It follows that, in principle, where import levy is not paid when the products are imported, default interest is due. As the Italian Government points out, the obligation to pay default interest is the natural consequence of the delay in the payment of the levy, its aim being to remove the financial advantage which the importer would gain by that delay and to ensure that the objectives of the import levy are fulfilled. Default interest therefore cannot be considered as a charge having equivalent effect to a customs duty. It may be otherwise if the rate of interest is excessive.

30. Do different considerations apply when goods are imported into the Community under inward processing arrangements? In my view, that is not the case. The objectives of inward processing arrangements support the conclusion that default interest is not a charge having equivalent effect to a customs duty. The underlying purpose of such

arrangements, whether established at national or at Community level, is to ensure that tariff barriers designed to protect a national market do not operate in such a way as to create difficulties for the export industry. In particular, inward processing arrangements seek to ensure that an exporter who uses goods from third countries in order to manufacture products for export is not put at a disadvantage internationally, by giving the exporter the possibility of acquiring those goods under the same conditions as undertakings from third countries.³⁰ Clearly, it is not the purpose of inward processing arrangements to enable an importer to release for free circulation in the Community products from third countries without paying fully the import levies imposed by the Regulation, which aim at protecting the Community agricultural markets.

market was intended to be an exceptional occurrence in cases where changing market conditions so warranted.³¹ The Report states:

'It could hardly have been the intention to favour those processors selling on the Community market, who use third country raw materials, by granting them a delay of several months in the payment of import charges at the expense of the Community. To avoid such an outcome either stricter regulations should be introduced to limit diversions to the minimum or, alternatively, an interest provision should be considered ...'.³²

31. That is also made clear by the Directive. As we have seen, the Directive permits under certain circumstances the release for free circulation of materials imported under inward processing arrangements or of products processed therefrom. It provides for release for free circulation 'where circumstances so warrant' but does not specify any criteria or any limits. The Special Report of the Court of Auditors on the Community Inward Processing System points out that, in the spirit of the Directive, release on the Community

32. It is noteworthy that, in the view of the Court of Auditors, where compensating products are released for free circulation, a charge of interest at market rates should be compulsory. That would offset the cash flow advantages inherent in the suspension system,³³ and inward processors would thus be put on the same footing as other manufacturers when they sold on the Community market but would be unaffected when they

30 — See Report of the Court of Auditors, above note, paragraph 2 and see also Case C-437/93 *Hauptzollamt Heilbronn v Temic Telefunken Microelectronic* [1995] ECR I-1687, paragraphs 18 and 19.

31 — See above, note, at paragraph 17 of the Report.

32 — *Ibid.*

33 — Under the Directive, exemption from customs duties, charges having equivalent effect and agricultural levies is granted either in accordance with the suspension system or in accordance with the reimbursement system, the choice being left to the national authorities: see Article 3.

exported outside the Community, which is the intention of the Directive.³⁴

In cases where imported goods are not subject to any of these Community duties, Member States may apply the provisions in force governing customs duties as regards the chargeable event and the date when the tax becomes chargeable.

Default interest on VAT

33. In my view the Commission rightly submits that the rules on VAT differ on this point from those applicable to import duty. Article 10(3) of the Sixth VAT Directive³⁵ provides:

Where goods are placed on importation under one of the arrangements provided for in Article 16(1)A or under arrangements for transit or temporary admission, the chargeable event and the date when the tax becomes chargeable shall occur only when the goods cease to be covered by these arrangements and are declared for home use.'

'As regards imported goods, the chargeable event shall occur and the tax shall become chargeable at the time when goods enter the territory of the country as defined in Article 3.

34. By virtue of Article 16(1)A(e), the last paragraph of Article 10(3) applies in the case of inward processing arrangements.³⁶

Where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, Member States may link the chargeable event and the date when the tax becomes chargeable with those laid down for these Community duties.

35. Thus, the VAT Directive expressly provides that the chargeable event and the moment when the tax becomes chargeable do not occur until the goods cease to be covered by the arrangements and are declared for home use. By virtue of Article 10(1)(b) the moment when tax becomes chargeable is the moment when the tax authorities become entitled to claim the tax from the person liable to pay, notwithstanding that the time of payment may be deferred. It is therefore the

³⁴ — Report of the Court of Auditors, above note 25, paragraph 19. But see Commission Replies to the Observations of the Court of Auditors on the Community Inward Processing System, OJ 1983 C 88, p. 9, paragraphs 17 to 19.

³⁵ — Cited at note above.

³⁶ — The English text is ambiguous, but the meaning is clear in other language versions of the provision.

earliest moment from which interest for non-payment of tax can accrue.

those goods by way of a deduction. Article 17(1) provides that the right of deduction arises when the deductible tax becomes chargeable. Provided he uses goods for the purpose of making taxable supplies, an importer who pays tax at the moment of importation is therefore entitled to full and immediate deduction of tax. An importer who takes advantage of inward processing arrangements is not entitled to make a deduction until the tax becomes chargeable upon the cessation of the arrangements. A charge for interest from the moment of original importation would therefore be unjustified.

36. That VAT does not become chargeable until the goods in question cease to be covered by the inward processing arrangements may perhaps be explained by the characteristics of the VAT system. Unlike import duty, VAT does not represent an irrecoverable cost for importers. Under Article 17(2) of the VAT Directive a taxable person using goods for the purpose of making taxable supplies has the right to recover the VAT incurred on

Conclusion

37. Accordingly, I am of the opinion that the question referred should be answered as follows:

At the time when the importation in issue in the proceedings took place, Community law did not preclude the charging of default interest on import duty for the period between provisional and definitive importation, but did preclude the charging of such interest on the VAT payable in respect of the importation.