JUDGMENT OF THE COURT
2 April 1998 *

In Case C-213/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Uudenmaan Lääninoikeus (Finland) for a preliminary ruling in the proceedings pending before that court brought by

Outokumpu Oy,

on the interpretation of Articles 9, 12 and 95 of the EC Treaty,

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. Gulmann, H. Ragnemalm and R. Schintgen (Rapporteur) (Presidents of Chambers), G. F. Mancini, J. C. Moitinho de Almeida, P. J. G. Kapteyn, J. L. Murray, D. A. O. Edward, J.-P. Puissochet, G. Hirsch, P. Jann and L. Sevón, Judges,

Advocate General: F. G. Jacobs,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Outokumpu Oy, by Arto Kukkonen, of the Helsinki Bar,

* Language of the case: Finnish.

— the Finnish Government, by Holger Rotkirch, Ambassador, Head of the Legal Department of the Ministry of Foreign Affairs, acting as Agent,

— the French Government, by Catherine de Salins, Deputy Director in the Legal Directorate of the Ministry of Foreign Affairs, and Jean-Marc Belorgey, Chargé de Mission in that directorate, acting as Agents,

— the Commission of the European Communities, by Allan Rosas, Principal Legal Adviser, and Enrico Traversa, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Outokumpu Oy, the Finnish Government and the Commission at the hearing on 24 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 13 November 1997,

gives the following

Judgment

1 By order of 30 May 1996, received at the Court on 25 June 1996, the Uudenmaan Lääninoikeus (Uusimaa Provincial Administrative Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of Articles 9, 12 and 95 of that Treaty.

2 Those questions were raised in proceedings brought by Outokumpu Oy (hereinafter 'Outokumpu'), the parent company of the Finnish Outokumpu group,

against the decision of the Piiritullikamari (District Customs Office), Helsinki, assessing duty on electricity imported from Sweden by Outokumpu during September 1995.

3 In Finland, Paragraph 1 of the Eräiden energialähteiden valmisteverosta annettu laki (Law No 1473/94 of 29 December 1994 on excise duty on certain sources of energy) prescribes that coal, peat, natural gas, electricity and pine oil are subject to basic duty and additional duty payable to the State. Paragraph 2(4) of that Law defines electricity as meaning electrical energy within customs tariff heading 2716.

4 Under Paragraph 3 of Law No 1473/94, the customs authorities are responsible for levying and supervising the taxes on the products specified in the Law.

5 Under Paragraph 4 of Law No 1473/94, duty is payable according to the following tax table, annexed to the Law (p = penni = 0.01 FMK):

Product	*Product group*	*Basic duty*	*Additional duty*
Coal, coal briquettes, solid fuels processed from coal; lignite	1	—	116.1 FMK/tonne
Peat	2	—	3.5 FMK/MWh
Natural gas, gas products	3	—	11.2 p/nm^3*
Electrical energy			
— produced by nuclear power	4	1.5 p/kWh	0.9 p/kWh
— produced by water power	5	—	0.4 p/kWh
— imported	6	1.3 p/kWh	0.9 p/kWh
Pine oil	7	18.55 p/kg	—

* The duty payable on natural gas for the period from 1 January 1995 to 31 December 1997 is reduced by 50%.

6 Under the first subparagraph of Paragraph 14 of Law No 1473/94, persons who

(1) produce electricity in Finland by nuclear or water power;

(2) in the course of business receive electricity from the Community or import it from outside the Community,

are liable to pay electricity duty.

7 The duty does not apply, however, to electrical energy produced in a generator with an output of less than two megavolt-amperes (second subparagraph of Paragraph 14 of Law No 1473/94).

8 Also exempted from the duty are:

— peat used for producing electricity, if production does not exceed 25 000 MWh per calendar year (Paragraph 7);

— electricity produced by nuclear or water power in Finland which the producer himself exports outside the Community or supplies for consumption in a part of the Community other than Finland (Paragraph 16).

9 Finally, according to the documents in the case, electricity produced from certain industrial waste falls outside the scope of Law No 1473/94.

10 Under Paragraph 17 of Law No 1473/94, all persons liable to pay duty under point 2 of the first subparagraph of Paragraph 14 are obliged to comply with the provisions of the Valmisteverotuslaki (Law No 1469/94 on excise duty).

11 It appears from the legislative proposal presented to the Finnish Parliament that the taxation of coal, electricity, natural gas, milled peat and sod peat, and crude pine oil is based on ecological considerations. Moreover, the flat rate of duty on imported electricity was calculated so as to correspond to the average rate levied on electricity produced in Finland, but without taking into account the reduction of duty on peat and natural gas.

12 Law No 1473/94 entered into force on 1 January 1995.

13 Outokumpu has imported electricity from Sweden since 1 November 1995 under a contract with the Swedish company Vattenfall AB.

14 The first supplies were delivered, on an experimental basis, from 18 September to 9 October 1995. For that trial supply, Outokumpu submitted on 17 October 1995 a tax declaration for September 1995 to the District Customs Office. In a covering letter with that declaration, Outokumpu stated that in its opinion the levying of electricity duty on those imports was contrary to Articles 12 and 13 of the EC Treaty, with the result that no duty was payable.

15 On 23 October 1995 the District Customs Office decided that under Paragraph 4 of Law No 1473/94 Outokumpu was liable to pay electricity duty of 1.3 p/kWh +0.9 p/kWh, in accordance with the tax table for imported electricity.

16 Outokumpu instituted proceedings before the Uudenmaan Lääninoikeus for annulment of the decision of the Helsinki District Customs Office on the ground that the excise duty on electricity was a charge having equivalent effect to a customs duty, prohibited by Articles 9 and 12 of the Treaty. Outokumpu submitted, in the alternative, that a duty of that kind was discriminatory under Article 95 of the Treaty, and asked for it to be reduced to the lowest level of duty on electricity produced in Finland, namely 0 p/kWh, the rate applicable to exempted electricity or electricity falling outside the scope of Law No 1473/94.

17 Since it considered that the outcome of the case before it depended on the interpretation of Articles 9, 12 and 95 of the Treaty, the national court stayed proceedings and referred the following questions to the Court for a preliminary ruling:

'Under Finnish national legislation on the taxation of energy, excise duty on electricity is levied in Finland on electrical energy produced there, the amount of the duty depending on the method of production of the electricity. On electricity produced by nuclear power, the excise duty charged is a basic duty of 1.5 p/kWh and an additional duty of 0.9 p/kWh. On electricity produced by water power, the excise duty charged is only an additional duty of 0.4 p/kWh. On electricity produced by other methods, for example from coal, excise duty is charged on the basis of the amount of input materials used to produce the electricity. On electrical energy produced by some methods, for example in a generator with an output below two megavolt-amperes, no excise duty at all is charged. On imported electricity, the excise duty charged, regardless of the method of production of the electricity, is a basic duty of 1.3 p/kWh and an additional duty of 0.9 p/kWh. The excise duty on electricity is thus determined with respect to imported electricity on a different basis from that applied to electricity produced in Finland. The levying of excise duties determined on the basis of the method of production of the energy is founded on environmental grounds in the drafting history of the law. The amount of duty chargeable on imported electricity is not, however, determined on the basis of the method of production of the electricity. The excise duty chargeable on imported electricity is higher than the lowest excise duty chargeable on electricity produced in Finland, but lower than the highest excise duty chargeable on electricity produced in Finland. The excise duty on imported electricity is levied on the importer, whereas the excise duty relating to electricity produced in Finland is levied on the electricity producer.

1. Is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a charge having equivalent effect to a customs duty, within the meaning of Articles 9 and 12 of the EC Treaty?

2. If it is not a charge having equivalent effect to a customs duty, is excise duty on electricity, determined for imported electricity in the manner described above, to be regarded as a tax which discriminates against imports from other Member States, within the meaning of Article 95 of the EC Treaty?'

18 By those questions, which should be examined together, the national court seeks a ruling from the Court on the classification from the point of view of Articles 9, 12 and 95 of the Treaty, and if appropriate on the compatibility with those provisions, of an excise duty which is levied on electricity of domestic origin at rates which vary according to its method of production, while being levied on imported electricity at a flat rate which is higher than the lowest rate but lower than the highest rate applicable to electricity of domestic origin.

19 As regards classification, the Court has consistently held (see, *inter alia*, Case C-90/94 *Haahr Petroleum* v *Åbenrå Havn and Others* [1997] ECR I-4085, paragraph 19) that provisions relating to charges having equivalent effect and those relating to discriminatory internal taxation cannot be applied together, so that under the system established by the Treaty the same charge cannot belong to both categories at the same time.

20 The Court has also consistently held (see, *inter alia*, *Haahr Petroleum*, paragraph 20) that any pecuniary charge, 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 within the meaning of Articles 9, 12, 13 and 16 of the EC Treaty. However, such a charge may not be so characterised if it forms part of a general system of internal dues applying systematically to categories of products according to objective criteria applied without regard to the origin of the products, in which case it falls within the scope of Article 95 of the Treaty.

21 The first point to note is that a duty of the kind at issue in the main proceedings forms part of a general system of taxation which is levied not only on electrical energy as such but also on several primary energy sources such as coal products, peat, natural gas and pine oil.

22 Second, both imported electricity and electricity of domestic origin form part of the same tax system and the duty is levied by the same authorities, whatever the origin of the electricity, under procedures governed by the general legislation on excise duties.

23 Third, with the exception of electricity of domestic origin produced in generators with an output below two megavolt-amperes and of that produced in small quantities from peat, the duty is levied on electricity, whatever its origin, whether domestic or imported. In those circumstances, the fact that in the case of imported electricity the duty is payable by the importer on importation does not provide a sufficient basis for the conclusion that it is imposed on the goods concerned by reason of the fact that they cross the frontier.

24 Outokumpu observes, however, that according to the Court's case-law (see, in particular, Case 132/78 *Denkavit Loire* v *France* [1979] ECR 1923, paragraph 8), in order to form part of a general system of internal dues, the charge imposed on imported products must be imposed on domestic products and imported products at the same marketing stage and the chargeable event must be identical for both classes of products.

25 On this point, it must be stated that, in circumstances such as those of this case, no difference may be discerned in the fact that imported electricity is taxed at the time of importation and electricity of domestic origin at the time of production, since in view of the characteristics of electricity the marketing stage is the same for both operations, namely the stage when the electricity enters the national distribution network (see, to that effect, Joined Cases C-149/91 and C-150/91 *Sanders Adour and Guyomarc'h Orthez Nutrition Animale* v *Directeur des Services Fiscaux des Pyrénées-Atlantiques* [1992] ECR I-3899, paragraph 18).

26 Outokumpu further submits that the duty at issue is not imposed on imported and domestic products according to the same criteria and without reference to their

origin. Duty is levied on electricity of domestic origin at different rates depending on whether it is produced by nuclear or water power, or is taxed only at the level of the raw materials used or is exempted, whereas imported electricity is taxed, as an end product exclusively, at a flat rate whatever its method of production. The taxable amounts and rates of tax thus differ depending on whether the electricity is of domestic origin or imported.

27 The Court has already held that a charge in the form of an internal tax may not be regarded as a charge having equivalent effect to a customs duty unless the detailed rules governing the levying of the charge are such that it is imposed solely on imported products to the exclusion of domestic products (Case 32/80 *Officier van Justitie* v *Kortmann* [1981] ECR 251, paragraph 18). As may be seen from paragraph 23 above, that is not the case of the duty at issue in the main proceedings.

28 The Court has also held that the fact that the origin of the goods determines the amount of the duty to be levied cannot remove it from the scope of Article 95 of the Treaty (*Haahr Petroleum*, paragraph 25).

29 Consequently, an excise duty of the kind at issue in the main proceedings constitutes internal taxation within the meaning of Article 95 of the Treaty, not a charge having equivalent effect to a customs duty within the meaning of Articles 9 and 12.

30 As regards the compatibility of such a duty with Article 95 of the Treaty, it is settled case-law, first, that in its present state of development Community law does not restrict the freedom of each Member State to establish a tax system which differentiates between certain products, even products which are similar within the meaning of the first paragraph of Article 95 of the Treaty, on the basis of objective criteria, such as the nature of the raw materials used or the production processes employed. Such differentiation is compatible with Community law, however, only

if it pursues objectives which are themselves compatible with the requirements of the Treaty and its secondary legislation, and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, against imports from other Member States or any form of protection of competing domestic products.

31 Article 95 of the Treaty therefore does not preclude the rate of an internal tax on electricity from varying according to the manner in which the electricity is produced and the raw materials used for its production, in so far as that differentiation is based, as is clear from the actual wording of the national court's questions, on environmental considerations.

32 As the Court stated in Case 302/86 *Commission* v *Denmark* [1988] ECR 4607, paragraph 8, protection of the environment constitutes one of the essential objectives of the Community. Moreover, since the entry into force of the Treaty on European Union, the Community's task includes the promotion of sustainable and non-inflationary growth respecting the environment (Article 2 of the EC Treaty) and its activities include a policy in the sphere of the environment (Article 3(k) of the EC Treaty).

33 Furthermore, as the Advocate General observes in paragraph 58 of the Opinion, compatibility with the environment, particularly of methods of producing electrical energy, is an important objective of the Community's energy policy.

34 However, on the question whether differentiation such as that which characterises the tax system at issue in the main proceedings is compatible with the prohibition of discrimination in Article 95 of the Treaty, the Court has consistently held that that provision is infringed where the taxation on the imported product and that on the similar domestic product are calculated in a different manner on the basis of different criteria which lead, if only in certain cases, to higher taxation being

imposed on the imported product (see, in particular, Case C-152/89 *Commission* v *Luxembourg* [1991] ECR I-3141, paragraph 20).

35 That is the case where, under a system of differential taxation of the kind at issue in the main proceedings, imported electricity distributed via the national network is subject, whatever its method of production, to a flat-rate duty which is higher than the lowest duty charged on electricity of domestic origin distributed via the national network.

36 The fact that electricity of domestic origin is in some cases taxed more heavily than imported electricity is immaterial in this connection since, in order to ascertain whether the system in question is compatible with Article 95 of the Treaty, the tax burden imposed on imported electricity must be compared with the lowest tax burden imposed on electricity of domestic origin (see, to that effect, *Commission* v *Luxembourg*, paragraphs 21 and 22).

37 The Finnish Government raises the objection that in view of the characteristics of electricity, the origin and consequently the method of production of which cannot be determined once it has entered the distribution network, the differential rates applicable to electricity of domestic origin cannot be applied to imported electricity. It submits that in those circumstances application of a flat rate, calculated so as to correspond to the average rate levied on electricity of domestic origin, is the only logical way of treating imported electricity in an equitable manner.

38 The Court has already had occasion to point out that practical difficulties cannot justify the application of internal taxation which discriminates against products from other Member States (see, *inter alia*, Case C-375/95 *Commission* v *Greece* [1997] ECR I-5981, paragraph 47).

39 While the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method.

40 Moreover, the Court has already held that although in principle Article 95 of the Treaty does not require Member States to abolish differences which are objectively justified and which national legislation establishes between internal taxes on domestic products, it is otherwise where such abolition is the only way of avoiding direct or indirect discrimination against the imported products (Case 21/79 *Commission* v *Italy* [1980] ECR 1, paragraph 16).

41 In the light of the foregoing considerations, the answer must be that the first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

Costs

42 The costs incurred by the Finnish and French Governments and by 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Uudenmaan Lääninoikeus by order of 30 May 1996, hereby rules:

The first paragraph of Article 95 of the EC Treaty precludes an excise duty which forms part of a national system of taxation on sources of energy from being levied on electricity of domestic origin at rates which vary according to its method of production while being levied on imported electricity, whatever its method of production, at a flat rate which, although lower than the highest rate applicable to electricity of domestic origin, leads, if only in certain cases, to higher taxation being imposed on imported electricity.

Rodríguez Iglesias Gulmann Ragnemalm Schintgen

Mancini Moitinho de Almeida Kapteyn Murray

Edward Puissochet Hirsch Jann Sevón

Delivered in open court in Luxembourg on 2 April 1998.

R. Grass G. C. Rodríguez Iglesias

Registrar President