



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

31 May 2018*

(Reference for a preliminary ruling — Controls of cash entering or leaving the European Union — Regulation (EC) No 1889/2005 — Scope — Article 63 TFEU — Free movement of capital — Third-country national transporting a significant amount of undeclared cash in his luggage — Obligation to declare the sum being taken out of Spanish territory — Penalties — Proportionality)

In Case C-190/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal Superior de Justicia de Madrid (Madrid High Court of Justice, Spain), made by decision of 5 April 2017, received at the Court on 12 April 2017, in the proceedings

Lu Zheng

v

Ministerio de Economía y Competitividad

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, C.G. Fernlund (Rapporteur), A. Arabadjiev, S. Rodin and E. Regan, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Spanish Government, by A. Gavela Llopis, acting as Agent,
- the Belgian Government, by P. Cottin and M. Jacobs, acting as Agents,
- the Greek Government, by K. Boskovits, E. Zisi and A. Dimitrakopoulou, acting as Agents,
- the European Commission, by P. Arenas and M. Wasmeier, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion, gives the following

* Language of the case: Spanish.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(1) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community (OJ 2005 L 309, p. 9).
- 2 The request has been made in the context of proceedings between Mr Lu Zheng and the Ministerio de Economía y Competitividad (Ministry of the Economy and Competitiveness, Spain) concerning the fine imposed for failure to comply with the obligation to declare certain cash sums on leaving Spanish territory.

Legal context

EU law

- 3 Recitals 2 and 3 of Regulation No 1889/2005 are worded as follows:
 - ‘(2) The introduction of the proceeds of illegal activities into the financial system and their investment after laundering are detrimental to sound and sustainable economic development. Accordingly, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [(OJ 1991 L 166, p. 77)] introduced a Community mechanism to prevent money laundering by monitoring transactions through credit and financial institutions and certain types of professions. As there is a risk that the application of that mechanism will lead to an increase in cash movements for illicit purposes, Directive 91/308 should be supplemented by a control system on cash entering or leaving the Community.
 - (3) At present such control systems are applied by only a few Member States, acting under national legislation. The disparities in legislation are detrimental to the proper functioning of the internal market. The basic elements should therefore be harmonised at Community level to ensure an equivalent level of control on movements of cash crossing the borders of the Community. Such harmonisation should not, however, affect the possibility for Member States to apply, in accordance with the existing provisions of the Treaty, national controls on movements of cash within the Community.’
- 4 Under Article 1 of that regulation:
 - ‘1. This Regulation complements the provisions of Directive 91/308 ... concerning transactions through financial and credit institutions and certain professions by laying down harmonised rules for the control, by the competent authorities, of cash entering or leaving the Community.
 2. This Regulation shall be without prejudice to national measures to control cash movements within the Community, where such measures are taken in accordance with Article [65 TFEU].’
- 5 Article 3(1) of that regulation provides:

‘Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.’

6 Article 9(1) of that regulation provides:

‘Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Those penalties must be effective, proportionate and dissuasive.’

The relevant provisions of Spanish law

- 7 In accordance with the combined provisions of Article 2(1)(v) and Article 34 of Ley 10/2010 de prevención del blanqueo de capitales y de la financiación del terrorismo (Law 10/2010 on the prevention of money laundering and terrorist financing) of 28 April 2010 (BOE No 103 of 29 April 2010) natural persons entering or leaving the national territory with means of payment in the sum of EUR 10 000 or more are required to make a prior declaration containing accurate information relating to the bearer, the owner, the recipient, the amount, the nature, the origin, the intended use, the route and the means of transportation of the means of payment.
- 8 Article 35(2) of that law provides that the failure to declare, where this is required, or the lack of veracity of the information declared, provided that this can be considered particularly relevant, will lead to the confiscation by the acting customs officials or police officers of all means of payment detected, except for the minimum subsistence rate.
- 9 Under Article 52(3)(a) of Law 10/2010, infringement of that obligation to declare constitutes a serious offence punishable, in accordance with Article 57(3) of that law, by a fine of no less than EUR 600 and no more than double the amount of the undeclared cash.
- 10 Under Article 59(3) of that law:

‘In order to determine the applicable penalty for failure to comply with the obligation to declare under Article 34, the following shall be considered aggravating circumstances:

- (a) the fact that the amount of the movement is significant; the amount shall be considered significant, in any event, when it is double the declaration threshold;
- (b) the lack of proof of the lawful origin of the means of payment;
- (c) inconsistency between the activity carried on by the person concerned and the amount of the movement;
- (d) the fact that the means of payment were found in a place or situation that reveals a clear intention to conceal them;
- (e) the fact that administrative penalties for failure to comply with the obligation to declare have been imposed on the person concerned within the last five years and may no longer be appealed against.’

The dispute in the main proceedings and the questions referred for a preliminary ruling

- 11 On 10 August 2014, Mr Zheng, a Chinese national, checked in his luggage at the Grand Canary airport (Spain) for a flight to Hong Kong (China), with stopovers in Madrid (Spain) and Amsterdam (Netherlands).

- 12 During an inspection carried out at the stopover in Madrid-Barajas airport, it was found that Mr Zheng's luggage contained the sum of EUR 92 900 in cash which he failed to declare in breach of the obligation under Article 34 of Law 10/2010.
- 13 That amount was seized, except for the sum of EUR 1 000 being the minimum subsistence rate referred to in Article 35(2) of that law.
- 14 On 15 April 2015, the Secretario General del Tesoro y Política Financiera (Secretary-General of the Treasury and Financial Policy, Spain), who operates within the Ministry of the Economy and Competitiveness, imposed an administrative fine of EUR 91 900 on Mr Zheng after finding as aggravating circumstances the significant amount of the undeclared sum, the failure to provide proof of the lawful origin of the cash, the inconsistency of the interested party's statements concerning his professional activity and the fact that the cash was found in a place which showed a deliberate intention to conceal it.
- 15 Mr Zheng lodged an appeal before the referring court against the decision imposing the fine on him, seeking either its revocation, or the imposition of a minimal penalty, or the imposition of a penalty proportionate to the infraction committed. In that regard, he relies on an infringement of the principle of proportionality.
- 16 The referring court considers in essence that, even if the cash at issue in the main proceedings remained on the territory of the European Union, Mr Zheng was subject to the obligation to declare under Article 3(1) of Regulation No 1889/2005, given that, before his arrival on Chinese territory, he would not have had access to the cash located in his luggage which had been checked in at the Grand Canary airport.
- 17 In view of the Court's interpretation of Article 9(1) of that regulation in its judgment of 16 July 2015, *Chmielewski* (C-255/14, EU:C:2015:475), the referring court has doubts concerning the scope of that provision and the compatibility with that provision of certain aspects of the national legislation which penalises the failure to comply with the obligation to declare cash movements.
- 18 It is in those circumstances that the Tribunal Superior de Justicia de Madrid (Madrid High Court of Justice) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:
- '(1) Must Article 9(1) of Regulation [No 1889/2005] be interpreted as precluding national legislation, such as that at issue in the main proceedings, which in order to penalise failure to comply with the obligation to declare under Article 3 of that regulation permits a fine to be imposed of up to double the value of the means of payment used?
- (2) Must Article 9(1) of Regulation [No 1889/2005] be interpreted as precluding national legislation, such as that at issue in the main proceedings, which lays down as aggravating circumstances, in the case of failure to comply with the obligation to declare, lack of proof of the lawful origin of the means of payment and inconsistency between the activity carried on by the person concerned [and the amount of the movement]?
- (3) In the event that the two preceding questions are answered in the affirmative, must Article 9(1) of Regulation [No 1889/2005] be interpreted as meaning that the imposition of a financial penalty which, independently of the amount of the movement, can be up to 25% of the undeclared cash satisfies the requirement of proportionality?'

Consideration of the questions referred

The admissibility of the first question

- 19 The Spanish Government disputes the admissibility of the first question referred on the ground that the fine at issue in the main proceedings is lower than the amount of the undeclared cash and therefore far from double that amount. Therefore, an answer to that question is not necessary to resolve the dispute in the main proceedings.
- 20 In that regard, it should be recalled that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation or the validity of a rule of EU law, the Court is in principle bound to give a ruling (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 24).
- 21 It follows that questions relating to EU law enjoy a presumption of relevance. The Court may refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 16 June 2015, *Gauweiler and Others*, C-62/14, EU:C:2015:400, paragraph 25).
- 22 In the present case, the Spanish Government does not dispute the fact that the national legislation at issue in the main proceedings permits the imposition of a fine of up to double the value of the undeclared cash. As is clear from paragraph 9 above, Article 57(3) of Law 10/2010 provides that any failure to comply with the obligation to declare, such as the one at issue in the main proceedings, is punishable by a fine of no less than EUR 600 and no more than double the amount of the undeclared cash.
- 23 Although it is true that the fine at issue in the main proceedings is not as high as the maximum amount permitted by that legislation, the fact remains that the amount of that fine was set in accordance with that legislation, taking into account the maximum amount laid down in that legislation.
- 24 Therefore, the first question referred does not appear to be manifestly hypothetical or devoid of any connection with the facts or purpose of the dispute in the main proceedings.
- 25 In those circumstances, that question must be declared admissible.

The first and second questions

Preliminary observations

- 26 The first and second questions, which should be answered together, concern the interpretation of Article 9(1) of Regulation No 1889/2005, and more specifically whether that provision precludes legislation of a Member State, such as that at issue in the main proceedings, which provides that the failure to comply with an obligation to declare significant sums of cash entering or leaving the territory of that State is punishable with a fine calculated by taking into account certain aggravating circumstances, and which may be up to double the undeclared amount.

- 27 It should be noted as a preliminary point that, according to settled case-law, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 13 October 2016, *M. and S.*, C-303/15, EU:C:2016:771, paragraph 16 and the case-law cited).
- 28 In that regard, it must be pointed out that the referring court starts from the premiss that the movement of cash at issue in the main proceedings must be regarded as leaving the European Union, given that Mr Zheng, before his arrival in China, did not have access to the money in his suitcase which had been checked in at the Grand Canary airport.
- 29 It must be recalled in that context that the obligation to declare laid down in Article 3(1) of Regulation No 1889/2005 applies only to natural persons entering or leaving the European Union and carrying cash of a value of EUR 10 000 or more. In addition, it is clear from that provision that the declaration provided for in that regulation must be made by the natural person concerned to the competent authorities of the Member State through which he or she enters or leaves the European Union.
- 30 Although that regulation does not define the concept of ‘natural person entering or leaving’ the European Union, the Court has already held that that notion is not ambiguous and must be understood as having its normal meaning, that is to say, as referring to the movement of a natural person from a place which is not part of EU territory to a place which is part of that territory, or from a place which is part of EU territory to one which is not (judgment of 4 May 2017, *El Dakkak and Intercontinental*, C-17/16, EU:C:2017:341, paragraphs 19 to 21).
- 31 It follows that Article 3(1) of Regulation No 1889/2005 must be interpreted to the effect that any natural person, such as Mr Zheng, who physically leaves the European Union while carrying cash of a value of EUR 10 000 or more is required to declare the sum being transported to the competent authorities of the Member State through which that person physically leaves the EU.
- 32 In the present case, since it is apparent from the order for reference that Mr Zheng was scheduled to leave the European Union via Amsterdam airport, he was required, under that regulation, to declare the cash at issue in the main proceedings, not to the Spanish authorities, but to the Netherlands authorities.
- 33 However, it must be assumed that Regulation No 1889/2005 does not in principle preclude legislation of a Member State from imposing obligations in addition to those for which that regulation makes provision.
- 34 It is apparent from recital 3 and from Article 1(2) of that regulation that it does not affect the possibility for Member States to apply, in accordance with the provisions of the TFEU, and in particular Article 65, national controls on movements of cash within the European Union.
- 35 Therefore, by the first and second questions referred, the referring court asks whether Articles 63 and 65 TFEU must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which provides that the failure to comply with an obligation to declare significant sums of cash entering or leaving the territory of that State is punishable with a fine calculated by taking into account certain aggravating circumstances and which may be up to double the undeclared amount.

Free movement of capital

- 36 Article 65(1)(b) TFEU provides that Article 63 TFEU, which, according to settled case-law, generally prohibits restrictions on movements of capital between Member States (judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraph 61 and the case-law cited), is to be without prejudice to the right of Member States, inter alia, to lay down procedures for the declaration of capital movements for purposes of administrative or statistical information, or to take measures which are justified on grounds of public policy or public security.
- 37 As such, national measures which restrict the free movement of capital may be justified on the grounds set out in Article 65 TFEU provided that they observe the principle of proportionality, a condition which requires them to be appropriate for ensuring the attainment of the objective legitimately pursued and not to go beyond what is necessary in order for it to be attained (see, to that effect, judgment of 6 March 2018, *SEGRO and Horváth*, C-52/16 and C-113/16, EU:C:2018:157, paragraphs 76 and 77 and the case-law cited).
- 38 In that respect, it must be pointed out that the Court has already accepted that the combating of money laundering, which is related to the aim of protecting public order, constitutes a legitimate aim capable of justifying a barrier to the fundamental freedoms guaranteed by the Treaty (judgment of 25 April 2013, *Jyske Bank Gibraltar*, C-212/11, EU:C:2013:270, paragraph 64 and the case-law cited).
- 39 In addition, with regard specifically to the obligation to declare at issue in the main proceedings, it is clear from well-established case-law that the free movement of capital, established by the Treaties, does not preclude the export of banknotes from being made conditional on a prior declaration (see, to that effect, judgments of 23 February 1995, *Bordessa and Others*, C-358/93 and C-416/93, EU:C:1995:54, paragraph 31, and of 14 December 1995, *Sanz de Lera and Others*, C-163/94, C-165/94 and C-250/94, EU:C:1995:451, paragraph 10).
- 40 However, the principle of proportionality has to be observed, not only as regards the determination of factors constituting an infringement, but also the determination of the rules concerning the severity of fines and the assessment of the factors which may be taken into account in the fixing of those fines (judgment of 9 February 2012, *Urbán*, C-210/10, EU:C:2012:64, paragraphs 53 and 54).
- 41 In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation (see, by analogy, judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 22).
- 42 In that context, the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed (see, by analogy, judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraph 23).
- 43 In that regard, it must be recalled that the Court held that, even though under Article 9(1) of Regulation No 1889/2005 Member States enjoy a margin of discretion concerning the choice of penalties which they adopt in order to ensure compliance with the obligation to declare laid down in Article 3 of that regulation, a fine corresponding to 60% of the undeclared cash sum, where that sum is greater than EUR 50 000, incurred for breach of that obligation, does not appear to be proportionate having regard to the nature of the infringement concerned. The Court held that such a fine goes beyond what is necessary in order to ensure compliance with that obligation and the fulfilment of the objectives pursued by that regulation, given that the penalty provided for in Article 9 does not seek to penalise possible fraudulent or unlawful activities, but solely a breach of that obligation (judgment of 16 July 2015, *Chmielewski*, C-255/14, EU:C:2015:475, paragraphs 29-31).

- 44 In the present case, it must be held that Article 57(3) of Law 10/2010, like Article 9 of Regulation No 1889/2005, does not seek to penalise possible fraudulent or unlawful activities, but merely the infringement of the obligation to declare.
- 45 In addition, even if such a fine is calculated by taking into account certain aggravating circumstances, provided they comply with the principle of proportionality, the fact that the amount of the fine may be up to double the undeclared cash sum and that, in any event, as in the present case, the fine may be set at an amount corresponding to nearly 100% of that sum goes beyond what is necessary in order to ensure compliance with the obligation to declare.
- 46 In the light of all of the foregoing considerations, the answer to the first and second questions is that Articles 63 and 65 TFEU must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which provides that the failure to comply with an obligation to declare significant sums of cash entering or leaving the territory of that State is punishable with a fine which may be up to double the undeclared amount.

The third question

- 47 By its third question, the referring court asks in essence whether the relevant EU law in the main proceedings must be interpreted to the effect that the imposition of a fine which, regardless of the amount of the movement of money, may be up to 25% of the undeclared cash sum satisfies the requirement for proportionality.
- 48 In that regard, although questions concerning EU law enjoy a presumption of relevance, as was observed in paragraphs 20 and 21 above, it is settled case-law that the need to provide an interpretation of EU law which will be of use to the national court makes it necessary for that court to define the factual and legal context of the questions it is asking or, at the very least, to explain the factual circumstances on which those questions are based. The order for reference must also set out the precise reasons why the national court is unsure as to the interpretation of EU law and considers it necessary to refer a question to the Court for a preliminary ruling (judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, paragraph 43 and the case-law cited).
- 49 In the present case, it is clear from the order for reference that the economic penalty referred to by the national court in the third preliminary question does not correspond to the penalty imposed on the applicant in the main proceedings, nor, in any case, does it appear to exist in the Spanish legal system. In any event, there is nothing in the case file before the Court which provides evidence of the existence of such a penalty.
- 50 That question must therefore be declared inadmissible, as the function entrusted to the Court within the framework of Article 267 TFEU is to contribute to the administration of justice in the Member States and not to deliver advisory opinions on general or hypothetical questions (judgment of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 42 and the case-law cited).

Costs

- 51 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

Articles 63 and 65 TFEU must be interpreted to the effect that they preclude legislation of a Member State, such as that at issue in the main proceedings, which provides that the failure to comply with an obligation to declare significant sums of cash entering or leaving the territory of that State is punishable with a fine which may be up to double the undeclared amount.

[Signatures]