

JUDGMENT OF THE COURT

17 October 1995 *

In Case C-83/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landgericht Darmstadt (Germany) for a preliminary ruling in the criminal proceedings before that court against

Peter Leifer,

Reinhold Otto Krauskopf,

Otto Holzer,

on the interpretation of Articles 113, 223(1)(b) and 224 of the EC Treaty, and Articles 1 and 11 of Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590), as amended by Council Regulation (EEC) No 3918/91 of 19 December 1991 (OJ L 372, p. 31),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, C. N. Kakouris, D. A. O. Edward, J.-P. Puissochet and G. Hirsch (Presidents of Chambers),

* Language of the case: German.

G. F. Mancini, F. A. Schockweiler, J. C. Moitinho de Almeida, P. J. G. Kapteyn (Rapporteur), C. Gulmann, J. L. Murray, P. Jann and H. Ragnemalm, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

- Peter Leifer, by Jochim Thietz-Bartram, Rechtsanwalt, Hamburg,
- the German Government, by Ernst Röder, Ministerialrat at the Federal Ministry for Economic Affairs, and Bernd Kloke, Regierungsrat at that Ministry, acting as Agents,
- the Greek Government, by Panagiotis Kamarineas, State Legal Adviser, and Christina Sitara, Legal Agent for the Judicial Council of State, acting as Agents,
- the Spanish Government, by Alberto Navarro Gonzalez, Director-General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, a member of the State Legal Department for Matters before the Court of Justice, acting as Agents,

- the French Government, by Philippe Martinet, Secretary for Foreign Affairs at the Legal Affairs Directorate of the Ministry for Foreign Affairs, and Catherine de Salins, Deputy Director in the same Directorate, acting as Agents,

- the Italian Government, by Ivo Braguglia, Avvocato dello Stato,

- the United Kingdom, by John E. Collins, Assistant Treasury Solicitor, acting as Agent, and Stephen Richards, Barrister,

- the Commission of the European Communities, by Peter Gilsdorf, Principal Legal Adviser, and Jörn Sack, Legal Adviser, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Peter Leifer, Reinhold Otto Krauskopf, represented by Thomas Marx, Rechtsanwalt, Hamburg, and Otto Holzer, represented by Endrick Lankau, Rechtsanwalt, Darmstadt, the German Government, the Greek Government, represented by Panagiotis Kamarineas and Galateia Alexaki, Advocate in the special service for contentious Community affairs at the Ministry for Foreign Affairs, acting as Agents, the Spanish Government, the French Government, the United Kingdom and the Commission at the hearing on 21 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 18 May 1995,

gives the following

Judgment

- 1 By order of 21 February 1994, received at the Court on 7 March 1994, the Landgericht (Regional Court) Darmstadt referred to the Court for a preliminary ruling under Article 177 of the EC Treaty six questions on the interpretation of Articles 113, 223(1)(b) and 224 of the EC Treaty, and Articles 1 and 11 of Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590), as amended by Council Regulation (EEC) No 3918/91 of 19 December 1991 (OJ L 372, p. 31).
- 2 Those questions were raised in criminal proceedings brought against Peter Leifer, Reinhold Otto Krauskopf and Otto Holzer, who are charged in the main proceedings with having delivered plant, plant parts and chemical products to Iraq from 1984 to 1988 without having the necessary export licences.
- 3 Under Paragraph 2 of the Außenwirtschaftsgesetz (Law on Foreign Trade, hereinafter 'the AWG'), the government is empowered to prescribe by regulation which legal transactions and activities may be prohibited or require a licence.
- 4 Paragraph 7 of the AWG, headed 'Protection of security and external interests', lays down in subparagraph (1) the circumstances in which such restrictions may be imposed:

'Legal transactions and activities in the sphere of foreign trade may be curtailed in order to:

1. guarantee the security of the Federal Republic of Germany;

2. prevent disturbance to the peaceful co-existence of nations;

3. prevent the external relations of the Federal Republic of Germany from being seriously disrupted.'

5 It was on that basis that the German Government adopted the Außenwirtschaftsverordnung (Regulation on Foreign Trade, hereinafter 'the AWW'), Annex AL to which specifies the goods which require a licence. List AL, as repeatedly amended, provides that a licence is required for certain plant and plant parts and for certain chemical substances. A licence for chemical plants is required only if they are to be exported to countries which are not members of the OECD. The list therefore covers the goods exported by the defendants in the main proceedings.

6 According to the order for reference, the Public Prosecutor, Darmstadt, considered that the exports in question had appreciably disturbed the international relations of the Federal Republic of Germany and he therefore brought criminal proceedings in respect of the offence committed. However, the Landgericht, the court making the reference, is unsure whether the Federal Republic of Germany has the power, as a Member State of the European Community, to adopt export licensing procedures in relation to trade with non-member countries and to impose criminal penalties in that regard. It explains that, if the national provisions are incompatible with Community law, they must not be applied, which will remove the very basis of the criminal offence. For those reasons, the Landgericht has referred the following questions to the Court for a preliminary ruling:

'1. (a) Is Article 113 of the EEC Treaty to be interpreted as meaning that it covers national rules restricting the export to non-member countries of goods

which may be used for both military and civil purposes (so-called “dual-use goods”) as contained in section A of Part 1 of the Export List and in the 52nd Regulation of 14 May 1984 (Bundesanzeiger 91/84) with the insertion of No 1710 in section C of Part I of the Export List, and in the 56th Regulation of 6 August 1984 amending the Außenwirtschaftsverordnung (AWV) with the insertion of Paragraph 5a of the AWV (BGBl. 1984 I, p. 1079) and in the 53rd Regulation amending the Export List with the insertion of section D in Part I thereof (BGBl. 1984 I, p. 1080)?

- (b) Are only the Community institutions therefore competent to impose such export restrictions, subject to any power in favour of individual Member States and subject to the exceptions provided for in the EEC Treaty?

If so:

2. Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of Council Regulation No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590), as last amended by Council Regulation (EEC) No 3918/91 of 19 December 1991 (OJ 1991 L 372, p. 31, hereinafter “the Export Regulation”), to be interpreted as meaning that by way of exception they allow a Member State to adopt national provisions

such as those described in Question 1 in order to restrict the export of dual-use goods to non-member countries?

3. Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that they allow Member States to adopt national provisions:
 - (a) which, as a condition for the grant of an export licence, impose on the applicant the whole burden of proving that dual-use goods are intended for civil use?
 - (b) according to which an export licence may be refused if the goods are objectively suitable for military use?
4. (a) Should Article 1 of the Export Regulation be interpreted as meaning that the freedom to export provided for therein also includes freedom from export licensing procedures and national criminal penalties upon infringement of the national export licensing regulations?
 - (b) Do criminal penalties of the Member States have the effect of restricting the freedom to export within the meaning of Article 1 of the Export Regulation, which the individual Member States have no power to adopt unless

authorized by the Community institutions and subject to the exception in Article 11 of the Export Regulation?

5. (a) Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that individual Member States may exceptionally adopt export licensing procedures with penalties for their infringement, not in order to safeguard their own security, but merely in order to prevent considerable disturbance of the peaceful coexistence of nations or of the external relations of the Member State concerned (see points 2 and 3 of Paragraph 7(1) of the German Außenwirtschaftsgesetz)?
- (b) Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that they permit individual Member States exceptionally to adopt criminal provisions which penalize the export without a licence of dual-use goods and POCL_3 which may be used for both military and civil purposes, as provided for in Paragraph 34(1), point 3, Paragraph 33(1) and Paragraph 7(1) of the AWG in conjunction with Paragraph 70(1), point 1, Paragraph 5 and Paragraph 5a of the AWV and sections A, C, No 1710, and section D of Part I of the Export List in the versions of 14 May 1984 and 6 August 1984, and are such criminal provisions, which include imprisonment, compatible with the principle of proportionality?
- (c) Are Articles 223(1)(b) and 224 of the EEC Treaty and Article 11 of the Export Regulation to be interpreted as meaning that in the event of the

unauthorized export of dual-use goods they allow Member States to impose imprisonment and fines merely because the goods are objectively suitable for military use?

- (d) Does Community law allow a penalty to be imposed only if it is factually proved that there is a reasonable likelihood of the military use of dual-use goods and that the exporter has knowledge thereof?

6. If the questions are answered wholly or partly in the negative:

Does Article 113 of the EEC Treaty and/or Article 1 of the Export Regulation have direct effect in favour of individual citizens, so that Article 113 of the EEC Treaty and/or Article 1 of the Export Regulation creates rights in favour of the individual Community citizens which the national courts must protect?’

Question 1

- 7 By its first question the national court seeks to ascertain whether Article 113 of the Treaty is to be interpreted as meaning that national rules restricting exports of dual-use goods to non-member countries fall within the scope of that article and, if so, whether the Community has exclusive competence in that regard.
- 8 Article 113 of the Treaty provides that the common commercial policy is to be based on uniform principles, particularly in regard to changes in tariff rates, the

conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade.

- 9 Implementation of such a common commercial policy requires a non-restrictive interpretation of that concept, so as to avoid disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries (see Opinion 1/78 of the Court [1979] ECR 2871, paragraph 45).
- 10 So, national rules whose effect is to prevent or restrict the export of certain products fall within the scope of the common commercial policy within the meaning of Article 113 of the Treaty.
- 11 The fact that the restriction concerns dual-use goods does not affect that conclusion. The nature of those products cannot take them outside the scope of the common commercial policy.
- 12 Since full responsibility for commercial policy was transferred to the Community by Article 113(1), national measures of commercial policy are therefore permissible only if they are specifically authorized by the Community (judgments in Case 41/76 *Donckerwolke v Procureur de la République* [1976] ECR 1921, paragraph 32, and Case 174/84 *Bulk Oil v Sun International* [1986] ECR 559, paragraph 31).

- 13 The answer to Question 1 must therefore be that Article 113 of the Treaty is to be interpreted as meaning that rules restricting exports of dual-use goods to non-member countries fall within the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorization.

Question 2

- 14 In view of the answer given to Question 1, Question 2 must be regarded as seeking to establish whether a Member State may, exceptionally, adopt national measures restricting the export of dual-use goods to non-member countries pursuant to Article 223(1)(b) or Article 224 of the Treaty, or on the basis of Article 11 of Council Regulation (EEC) No 2603/69 of 20 December 1969 establishing common rules for exports (OJ, English Special Edition 1969 (II), p. 590, hereinafter 'the Export Regulation').
- 15 The first question to be examined is whether national measures such as those at issue fall within the scope of the Export Regulation and then whether such measures may be justified on the basis of Article 11 of that regulation.
- 16 Article 1 of the Export Regulation provides that: 'The exportation of products from the European Economic Community to third countries shall be free, that is to say, they shall not be subject to any quantitative restriction, with the exception of those restrictions which are applied in conformity with the provisions of this Regulation.'

- 17 Article 11 of the Export Regulation provides for such an exception by providing that: 'Without prejudice to other Community provisions, this Regulation shall not preclude the adoption or application by a Member State of quantitative restrictions on exports on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value, or the protection of industrial and commercial property.'
- 18 The German Government doubts that the requirement to obtain a licence constitutes a quantitative restriction: rather, on its view, the Export Regulation prohibits only quantitative restrictions on imports and not measures having equivalent effect.
- 19 That view cannot be accepted.
- 20 It is true that Article 34 of the Treaty, which concerns the free movement of goods within the Community, distinguishes between quantitative restrictions and measures having equivalent effect.
- 21 However, it does not follow that the concept of quantitative restrictions used in a regulation concerning trade between the Community and non-member countries must be interpreted as excluding any measure having equivalent effect within the meaning of Article 34 of the Treaty.

- 22 As the Court has emphasized in previous judgments, in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part (Case 292/82 *Merck v Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, paragraph 12, and Case 337/82 *St Nikolaus Brennerei v Hauptzollamt Krefeld* [1984] ECR 1051, paragraph 10).
- 23 A regulation based on Article 113 of the Treaty, whose objective is to implement the principle of free exportation at the Community level, as stated in Article 1 of the Export Regulation, cannot exclude from its scope measures adopted by the Member States whose effect is equivalent to a quantitative restriction where their application may lead, as in the present case, to an export prohibition.
- 24 Moreover, that finding is supported by Article XI of the General Agreement on Tariffs and Trade, which can be considered to be relevant for the purpose of interpreting a Community instrument governing international trade. That article, headed 'General Elimination of Quantitative Restrictions', refers in its first paragraph to 'prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures'.
- 25 Mr Leifer considers that an export restriction may be applied only if the goods are used for strategic purposes and only in order to protect public security. So he considers that, unlike in a case where the essential security interests of the Federal Republic of Germany are endangered, the disturbance of peaceful coexistence between nations or of the external relations of Germany cannot justify such measures.

- 26 The Court recalls here that in Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'* [1991] ECR I-4621, paragraph 22, it held that the concept of public security within the meaning of Article 36 of the Treaty covers both a Member State's internal security and its external security. To interpret the concept more restrictively when it is used in Article 11 of the Export Regulation would be tantamount to authorizing the Member States to restrict the movement of goods within the internal market more than movement between themselves and non-member countries.
- 27 As the Advocate General stated in point 41 of his Opinion, it is difficult to draw a hard and fast distinction between foreign-policy and security-policy considerations. Moreover, as he observes in point 46, it is becoming increasingly less possible to look at the security of a State in isolation, since it is closely linked to the security of the international community at large, and of its various components.
- 28 So the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations may affect the security of a Member State.
- 29 Although it is for the national court to decide whether Article 11, as interpreted by the Court of Justice, applies to the facts and measures which it is called on to appraise, it should, however, be observed that it is common ground that the exportation of goods capable of being used for military purposes to a country at war with another country may affect the public security of a Member State within the meaning referred to above (see the judgment in Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'*, cited above, paragraph 22).
- 30 The answer to Question 2 must therefore be that under Article 11 of the Export Regulation a Member State may, exceptionally, adopt national measures restricting

the export of dual-use goods to non-member countries on the ground that this is necessary in order to prevent the risk of a serious disturbance to its foreign relations or to the peaceful coexistence of nations which may affect the public security of a Member State within the meaning of that article.

- 31 It is therefore unnecessary to consider whether the national measures at issue may also be justified on the basis of Articles 223(1)(b) or 224 of the Treaty.

Question 3

- 32 In view of the replies given to the preceding questions, this question essentially concerns the application of the principle of proportionality and seeks to ascertain more particularly whether Article 11 of the Export Regulation permits Member States either to impose on applicants for an export licence the burden of proving that dual-use goods are for civil use, or to refuse a licence if the goods are objectively suitable for military use.
- 33 Since Article 11 forms an exception to the principle of the freedom to export goods laid down in Article 1 of the Export Regulation, it must be interpreted in a way which does not extend its effects beyond what is necessary for the protection of the interests which it is intended to guarantee.
- 34 It is for the national court to consider whether the position as stated in its questions is based on a correct interpretation of its national law, which the German

Government disputes, and then to assess whether the measures in question are necessary and appropriate to achieve the objectives pursued and whether or not those objectives could have been attained by less restrictive measures.

35 However, depending on the circumstances, the competent national authorities have a certain degree of discretion when adopting measures which they consider to be necessary in order to guarantee public security in a Member State within the meaning indicated above. When the export of dual-use goods involves a threat to the public security of a Member State, those measures may include a requirement that an applicant for an export licence show that the goods are for civil use and also, having regard to specific circumstances such as *inter alia* the political situation in the country of destination, that a licence be refused if those goods are objectively suitable for military use.

36 The answer to the third question must therefore be that, if there is a threat to public security, which is a matter for the national court to consider, an obligation on the applicant to prove that the goods will be used exclusively for civil purposes or a refusal to issue a licence if the goods can objectively be used for military purposes can be consistent with the principle of proportionality.

Questions 4 and 5

37 With regard to Questions 4 and 5(a), it is sufficient to state that it follows from the answers given to Questions 1 and 2 that national measures requiring a licence for

the export of dual-use goods do constitute barriers to the freedom to export goods provided for in Article 1 of the Export Regulation, but may nevertheless be justified on the basis of Article 11 under the conditions indicated in the answers to the national court's other questions.

- 38 In Question 5(b), (c) and (d) the national court seeks essentially to ascertain whether and, if so, on which conditions, Member States may impose criminal penalties for breaches of the licensing procedure.
- 39 The right to impose criminal penalties for any breach of that procedure is a matter falling within the competence of the Member States. However, although Community law does not therefore preclude national rules from making the failure to comply with that obligation a matter subject to penalties, the penalties laid down may not be disproportionate to the public security aim pursued.
- 40 It is for the national court to determine whether the criminal penalties applicable comply with the principle of proportionality, taking account of all the elements of each case, such as the nature of the goods capable of endangering the security of the state, the circumstances in which the breach was committed and whether or not the trader who has illegally exported the goods was acting in good or bad faith (see, to that effect, Case C-367/89 *Richardt and 'Les Accessoires Scientifiques'*, cited above, paragraph 25).
- 41 It should be added that in proceedings under Article 177 of the Treaty it is not for the Court of Justice to comment on the contention of the German Government

that Question 5(c) is based on a misinterpretation of the relevant German legislation.

- 42 Accordingly, the answer to that question must be that Community law does not preclude national authorities from making breaches of the licensing procedure subject to criminal penalties, provided that the penalties applicable do not exceed what appears to be proportionate in relation to the public security aim pursued.

Question 6

- 43 By its last question the national court asks the Court whether Article 113 of the Treaty and/or Article 1 of the Export Regulation have direct effect.

- 44 It is sufficient to state here that, by virtue of the second paragraph of Article 189 of the EC Treaty, a regulation is binding in its entirety and is directly applicable in all Member States. A provision such as Article 1 of the Export Regulation is therefore a direct source of rights and obligations for all those which it concerns, whether Member States or individuals who are parties to legal relationships governed by Community law (see the judgment in Case 106/77 *Simmenthal* [1978] ECR 629, paragraph 15).

- 45 That conclusion is not affected by the exceptions referred to in Article 11 of the Export Regulation since they are open to judicial review so that the fact that a

Member State may rely on those exceptions does not prejudice the provisions of Article 1 which confer on individuals rights which they may assert before the courts.

- ⁴⁶ Accordingly, the answer to the last question must be that Article 1 of the Export Regulation confers on individuals rights which they may assert before the courts.

Costs

- ⁴⁷ The costs incurred by the German, Greek, Spanish, French and Italian Governments, the United Kingdom, and 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 proceedings 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 Landgericht Darmstadt, by order of 21 February 1994, hereby rules:

1. Article 113 of the EC Treaty is to be interpreted as meaning that rules restricting exports of dual-use goods to non-member countries fall within

the scope of that article and that in this matter the Community has exclusive competence, which therefore excludes the competence of the Member States save where the Community grants them specific authorization.

2. Under Article 11 of Council Regulation (EEC) No 2603/69 of 20 December 1969 (OJ, English Special Edition 1969 (II), p. 590), as last amended by Council Regulation (EEC) No 3918/91 of 19 December 1991, a Member State may, exceptionally, adopt national measures restricting the export of dual-use goods to non-member countries on the ground that this is necessary in order to prevent the risk of a serious disturbance to its foreign relations or to the peaceful coexistence of nations which may affect the public security of a Member State within the meaning of that article.
3. If there is a threat to public security, which is a matter for the national court to consider, an obligation on the applicant to prove that the goods will be used exclusively for civil purposes or a refusal to issue a licence if the goods can objectively be used for military purposes can be consistent with the principle of proportionality.
4. Community law does not preclude national authorities from making breaches of the licensing procedure subject to criminal penalties, provided that the penalties applicable do not exceed what appears to be proportionate in relation to the public security aim pursued.

5. Article 1 of Regulation (EEC) No 2603/69 confers on individuals rights which they may assert before the courts.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Hirsch

Mancini

Schockweiler

Moitinho de Almeida

Kapteyn

Gulmann

Murray

Jann

Ragnemalm

Delivered in open court in Luxembourg on 17 October 1995.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President