JUDGMENT OF THE COURT (Sixth Chamber)
6 December 1990 *

In Case C-343/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht München (Finance Court, Munich), Federal Republic of Germany, for a preliminary ruling in the proceedings pending before that court between

Max Witzemann

and

Hauptzollamt München-Mitte (Principal Customs Office, Munich Centre),

on the interpretation of Articles 3, 9, and 12 to 29 of the EEC Treaty and Article 2 of the 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 (Official Journal 1977 L 145, p. 1),

THE COURT (Sixth Chamber),

composed of: G. F. Mancini, President of Chamber, T. F. O'Higgins, M. Díez de Velasco, C. N. Kakouris and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs
Registrar: J. A. Pompe, Deputy Registrar

after considering the observations submitted on behalf of the Commission of the European Communities by Jörn Sack, Legal Adviser, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 2 October 1990,

* Language of the case: German.

after hearing the Opinion of the Advocate General delivered at the sitting on 25 October 1990,

gives the following

Judgment

1 By order dated 21 June 1989, which was received at the Court on 6 November 1989, the Finanzgericht München referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Articles 3, 9, and 12 to 29 of the Treaty and Article 2 of the 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 (Official Journal 1977 L 145, p. 1, hereinafter referred to as 'the Sixth Directive').

2 That question arose in the context of proceedings between Max Witzemann and the Hauptzollamt München-Mitte (hereinafter referred to as 'the Hauptzollamt') concerning the payment of customs duty and import value-added tax (hereinafter referred to as 'VAT') on the introduction of counterfeit banknotes into the Federal Republic of Germany.

3 By judgment of the Landgericht München I (Regional Court, Munich I) of 16 February 1982, Mr Witzemann was sentenced to a term of imprisonment for counterfeiting currency, an offence punishable under Paragraph 146 et seq. of the Strafgesetzbuch (Criminal Code). That judgment, which is final, found that in 1981 Mr Witzemann brought a consignment of counterfeit United States banknotes, of which he had taken delivery in Italy, into the Federal Republic of Germany.

4 On the basis of that finding, the Hauptzollamt charged Mr Witzemann customs duty and import VAT on the counterfeit currency. The customs duty was charged, apparently, on the ground that the Community origin of the goods was not established.

5 Mr Witzemann appealed against that decision to the Finanzgericht München, claiming that the collection of customs duties and VAT on importation was contrary to Articles 9 and 12 to 29 of the Treaty.

6 The Finanzgericht therefore stayed the proceedings and sought a preliminary ruling from the Court on the following question:

'Are the provisions of the EEC Treaty (Article 3(b), Article 9(1), Articles 12 to 29) and the 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 (Article 2(2)) to be interpreted as meaning that a Member State is not entitled to impose customs duties or import turnover tax on illegally imported goods, the production and sale of which is — as in the case of counterfeit currency — prohibited in all the Member States?'

7 Reference is made to the Report for the Hearing for a fuller account of the legal background, the facts of the case in the main proceedings and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 The question raised by the national court comprises two parts relating, respectively, to the levying of customs duty and to the collection of import VAT on counterfeit currency.

Customs duty

9 Since the grounds on which the Hauptzollamt charged customs duty on a consignment of counterfeit currency coming from another Member State are not clearly apparent from the papers in the case, it must be pointed out *in limine* that customs import duty may be charged only on goods imported into the customs territory of the Community from a non-member State, and not on goods coming from other Member States (Articles 9 and 12 to 15 of the Treaty).

10 The first part of the question must therefore be understood as seeking essentially to determine whether a customs debt may arise upon the importation of counterfeit currency into the customs territory of the Community.

11 In its judgments in Case 221/81 *Wolf* v *Hauptzollamt Düsseldorf* [1982] ECR 3681 and Case 240/81 *Einberger* v *Hauptzollamt Freiburg ('Einberger I')* [1982] ECR 3699, the Court ruled that no customs debt arises upon the importation of drugs otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes.

12 The Court arrived at that ruling after observing that the importation and marketing of narcotic drugs, otherwise than through those strictly controlled economic channels, are prohibited in all the Member States, in conformity with their international undertakings in that field. It concluded that a customs debt cannot arise upon the importation of drugs which may not be marketed and integrated into the economy of the Community.

13 The Court also pointed out that the introduction of the Common Customs Tariff, provided for in Article 3(b) of the Treaty, falls within the scope of the objectives assigned to the Community in Article 2 and the guidelines laid down in Article 29 for the operation of the customs union. Imports of drugs into the Community, which can give rise only to penalties under the criminal law, fall wholly outside those objectives and guidelines.

14 That approach is all the more appropriate in the case of counterfeit currency. Counterfeit currency is also covered by an international convention, the International Convention for the Suppression of Counterfeiting Currency (*League of Nations Treaty Series*, 1930-31 Vol. CXII, p. 371), to which all the Member States with the exception of the Grand-Duchy of Luxembourg are at present parties, and Article 3 of which requires the contracting parties to punish as ordinary crimes any fraudulent making or altering of currency, the fraudulent uttering of counterfeit currency, and the introduction into a country, or the receiving or obtaining, of counterfeit currency with a view to uttering the same and with knowledge that it is counterfeit. Furthermore, the making, possession, importation and marketing of

counterfeit currency, whether national or foreign, are prohibited in all the Member States.

15 It follows that there is an absolute prohibition, in all the Member States, on the importation or bringing into circulation of counterfeit currency, whereas trade in drugs and their use are permitted for medical and scientific purposes.

16 The answer to the first part of the question must therefore be that Community law must be interpreted as meaning that no customs debt can arise upon the importation of counterfeit currency into the customs territory of the Community.

Import VAT

17 In the second part of its question, the national court seeks essentially to determine whether Article 2 of the Sixth Directive is to be interpreted as meaning that VAT may be collected upon the importation of counterfeit currency into the Community.

18 The Court has already held, in its judgment in Case 294/82 *Einberger* v *Hauptzollamt Freiburg ('Einberger II')* [1984] ECR 1177, that import VAT and customs duty display comparable essential features since they arise from the fact of importation of goods into the Community and the subsequent distribution thereof through the economic channels of the Member States and since each constitutes a component of the sale price which is calculated in a similar manner by successive traders. Their parallel nature is confirmed by the fact that Article 10(3) of the Sixth Directive authorizes Member States to link the chargeable event and the date when the VAT on importation falls due with those laid down for customs duties.

19 The Court therefore concluded that illegal imports of drugs into the Community, which can give rise only to penalties under the criminal law, are wholly alien to the provisions of the Sixth Directive on the definition of the basis of assessment and, in consequence, to the origination of a VAT debt.

20 For the reasons set out above in relation to customs duties, the Court's considerations concerning the illegal importation of drugs apply *a fortiori* to imports of counterfeit currency.

21 The answer to the second part of the question raised by the Finanzgericht München must therefore be that Article 2 of the 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 must be interpreted as meaning that import value-added tax may not be collected on the importation of counterfeit currency into the Community.

22 Neither that ruling nor the ruling with regard to customs duties in any way affects the powers of Member States to prosecute breaches of their laws against counterfeit currency and to impose appropriate penalties, with all the consequences which such penalties imply, whether financial or otherwise.

Costs

23 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (Sixth Chamber),

in answer to the question referred to it by the Finanzgericht München, by order of 21 June 1989, hereby rules:

(1) Community law must be interpreted as meaning that no customs debt can arise upon the importation of counterfeit currency into the customs territory of the Community.

(2) Article 2 of the 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 must be interpreted as meaning that import value-added tax may not be collected on the importation of counterfeit currency into the Community.

Mancini O'Higgins

Díez de Velasco Kakouris Kapteyn

Delivered in open court in Luxembourg on 6 December 1990.

J.-G. Giraud
Registrar

G. F. Mancini
President of the Sixth Chamber