JUDGMENT OF THE COURT
26 OCTOBER 1982 [1]

Wilfried Wolf
v Hauptzollamt Düsseldorf
(reference for a preliminary ruling from the Finanzgericht Düsseldorf)

(Customs duties — Smuggled drugs)

Case 221/81

Common Customs Tariff — Customs duties — Application to drugs distributed through illegal channels — Not permissible — Penalties for offences — Powers of Member States

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, regardless of whether the drugs are discovered and destroyed under the control of those authorities or are not detected by them.

This finding is without prejudice to the powers of Member States to take criminal proceedings in respect of contraventions of their drugs laws and to impose appropriate penalties, including fines.

In Case 221/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Düsseldorf for a preliminary ruling in the action pending before that court between

WILFRIED WOLF, Goslar,

and

HAUPTZOLLAMT [Principal Customs Office] DÜSSELDORF

1 — Language of the Case: German.

on the interpretation of the Community provisions on the customs union in connection with the unlawful importation of drugs,

THE COURT

composed of: J. Mertens de Wilmars, President, A. O'Keeffe, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. By a final judgment of the Landgericht [Regional Court] Düsseldorf of 26. April 1976, Wilfried Wolf, the plaintiff in the main action, was committed to prison for 8 years for unlawfully trafficking in drugs.

According to the findings of the Landgericht, Mr Wolf had operated as a "dealer" in the old quarter of Düsseldorf from mid-July 1965 until his arrest about mid-October 1975. Mr Wolf had been involved in the sale of 742 grammes of heroin and 150 grammes of cocaine, most of which he had obtained in Düsseldorf and various other towns, the remainder having been imported by him from the Netherlands.

On the basis of Article 57 (2) of the Customs Law (Zollgesetz), the Hauptzollamt Düsseldorf, the defendant in the main action, considered that the plaintiff should pay import duties on the quantities of drugs referred to in the judgment of the Landgericht, on the one hand because he had not himself declared imported goods which were subject to customs control and therefore was the first person to have concealed them from the customs authorities and, on the other hand, because he had purchased imported goods subject to customs control after the liability to pay customs duties had arisen and before it had been extinguished, whilst he knew, or should have known, that the goods in question were subject to customs control.

By notice of assessment of 3 December 1976, amended on 28 January 1977, the Hauptzollamt claimed payment of those duties from the plaintiff. Taking as a basis the purchase price paid by the plaintiff, the Hauptzollamt estimated the dutiable value of the 742 grammes of heroin at DM 74 200 and of the 150 grammes of cocaine at DM 15 000.

The objection lodged by the plaintiff in the main action against the notice of assessment was dismissed and he appealed to the Finanzgericht Düsseldorf.

2. Referring to the judgment of the Court of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385, the Finanzgericht Düsseldorf, by order of 10 June 1981, decided to stay the proceedings and requested the Court to give a ruling on the following questions:

"1. Are the provisions of the EEC Treaty on the customs union (Articles 9 (1) and 12 to 29) to be interpreted as meaning that since the introduction of the Common Customs Tariff a Member State has no longer been authorized to levy customs duties on smuggled drugs which in the event of discovery would have to be confiscated and destroyed?

2. If the answer to the aforesaid question is in the negative and customs duties are to be levied, the preliminary questions set forth by the Finanzgericht [Finance Court] Hamburg, in its order of 15 January 1980 — IV 89/78H — making a reference for a preliminary ruling in Case 50/80 are submitted in the alternative."

3. In the statement of grounds of the order making the reference, the Finanzgericht mentions that in the judgment of 5 February 1981 cited above the Court held that "the introduction of the Common Customs Tariff no longer leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but it does leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines".

The Finanzgericht wishes to know whether the principle enunciated in that judgment extends also to those cases in which the smuggled drugs were not discovered and could not therefore be confiscated and destroyed. It is not clear from the grounds of the judgment whether, and if so for what reason, the confiscation and destruction constitute one of the factors on which the solution adopted was based or whether such circumstances represent merely one possible factual variation to which the principle enunciated applies. In that respect, the Finanzgericht points out that if confiscation and destruction are of decisive importance, the question of when the customs duties become payable, and by whom, would often be decided by chance.

The Finanzgericht then points out that Regulation No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition, 1968 (I), p. 170) relates only to normal trade. Moreover, the recitals in the preamble to Council Directive 79/623 of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31), clearly indicate that a customs debt is of an economic nature and does not serve the aims of criminal law. The absolute prohibition of the importation of drugs therefore falls outside the scope of customs law and the powers to adopt rules thereunder.

In the event of a negative reply to the first question, the first questions referred to the Court by the Finanzgericht Hamburg in its order of 15 January 1980

in Case 50/80 cited above become important to determine the value for customs purposes of the smuggled drugs. Those questions are worded as follows:

"1. Are the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 and of Regulation (EEC) No 603/72 of the Commission of 24 March 1972 to be interpreted as meaning that, with the exception of those provisions which require goods subject to customs control to be formally presented, they also apply directly to the valuation for customs purposes of goods smuggled into the customs territory of the Community?

2. Are the provisions of Regulation (EEC) No 803/68 of the Council, especially Articles 1, 2, 4, 6, 7 and 8 thereof, to be interpreted as meaning that the value for customs purposes of the goods smuggled into the customs territory of the Community is fixed with reference to the time and place of their introduction into the customs territory of the Community, even if according to the national substantive legal provisions from time to time applicable the liability to the customs arises at another time and is payable by a person other than the first buyer residing in Community territory?

3. Are the provisions of Regulation (EEC) No 375/69 of the Commission of 27 February 1969 and of Regulation (EEC) No 1343/75 of the Commission of 26 May 1975 to be interpreted as meaning that they apply also in the event of goods being smuggled into the customs territory of the Community with the attendant condition that any buyer subsequent to the first residing in that territory who is found to be in possession of the smuggled goods has to supply particulars of the price which he has paid so that the price paid by that person is the relevant value for customs purposes, or do the competent national authorities have to take the purchase price paid by the first buyer residing in Community territory as the basis of the value of the smuggled goods for customs purposes in accordance with the rules laid down in Articles 1, 2, 4, 6, 7 and 9 of Regulation (EEC) No 803/68?"

4. The order making the reference was received at the Court Registry on 22 July 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Government of the French Republic, represented by Maryse Aulagnon, a member of the Secretariat General of the Inter-Departmental Committee for Questions of European Economic Cooperation attached to the Prime Minister's Office and by the Commission of the European Communities, represented by its legal adviser, Rolf Wägenbaur, acting as Agent.

By order of 3 Februay 1982, the Court decided to join Cases 221/81 and 240/81 for the purpose of the oral procedure.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Commission to provide the Court with a description of the laws and regulations and customs practices governing, in each of the Member States,

On the one hand, the illegal importation of drugs the use and marketing of which are strictly forbidden within their territory; and,

On the other hand, the illegal importation of products the marketing of which is not prohibited as such within national territory but which are or have been smuggled into that territory.

The information collected by the Commission from the Member States may be summarized as follows:

The illegal importation of drugs the use and marketing of which are strictly prohibited gives rise to liability to pay customs duties and the levying of import duties in Belgium. Such imports give rise to liability to pay customs duties in the Federal Republic of Germany, Ireland und the Netherlands.

However, in the Federal Republic of Germany, since the judgment of the Court of 5 February 1981 in Case 50/80 cited above, import duties are not levied after discovery of the drugs in the event of their destruction, and there is moreover a presumption that they have been destroyed. In Ireland, the liability to pay customs duties is regarded as extinguished by reason of the fact that unlawfully imported drugs are confiscated and destroyed. In the Netherlands, import duties are levied where the drugs have been consumed and the illegal importation can be proved, but they are not levied in the event of confiscation and destruction.

In Italy, the illegal importation of drugs gives rise to liability to pay customs duties, except in the case of re-export or destruction by official order.

The illegal importation of drugs does not give rise to any liability to pay customs duties in Greece or Luxembourg, where drugs which are discovered are confiscated and destroyed. In Luxembourg, however, liability to pay customs duties arises if the drugs have been consumed.

Finally, the illegal importation of drugs does not give rise to the levying of duties in Denmark, France or the United Kingdom. However, in France, in those cases where illegally imported drugs are not destroyed by official order but are sold, for example to approved laboratories, duties are levied upon such sale. In the United Kingdom, duties are not levied in any case, regardless of whether the offending importer sold, consumed or re-exported the drugs.

The illegal importation of products the marketing of which is not *per se* prohibited gives rise to liability to pay customs duties in all the Member States, except in Greece where illegally imported goods are confiscated.

However, import duties are not levied in Denmark in those cases where the party liable to duty is unknown and the products are destroyed or sold.

In Ireland, import duties are regarded as having been paid where a smuggled product is returned to the person concerned against payment of a sum determined by arrangement and in cases where the product is confiscated and subsequently sold; on the other hand, the liability to pay customs duties is regarded as extinguished if the products are destroyed by official order or re-exported.

In Luxembourg, products smuggled into the country are as a rule confiscated and sold. Import duties are levied upon the sale if the products are sold with a view to consumption within the country; duties are also levied where the products in question have been consumed.

In the United Kingdom, duties are not levied when the products are confiscated

unless they are returned to the importer or sold by official order. On the other hand, duties are levied in the case of sale or re-export by the importer.

II — Summary of the written observations submitted to the Court

The *Government of the French Republic* points out that the first question submitted by the Finanzgericht raises the problem of the customs régime applied to drugs whose use is prohibited but which have been sold in a Member State in circumstances where, in the absence of any confiscation, their existence could not be established. In the light of the judgment of the Court of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385 the question to be answered is whether the confiscation and destruction of the products concerned are likely to be a factor giving rise to the non-collection of customs duties and whether, in consequence, the unlawful distribution of undiscovered drugs may call for a different course of action.

The French Government notes that the terms of the operative part ("drugs which have been smuggled in and destroyed as soon as they were discovered") and certain paragraphs in the statement of grounds of the above-mentioned judgment appear to establish a link between the unlawfulness of the use of the imported product and its destruction. It considers however that the Court established that link merely with a view to making a general statement based restrictively on the actual facts of the case.

In effect, the operative part sums up a series of arguments according to which the destruction of smuggled drugs could not be regarded as a pre-condition for the applicability of the Common Customs Tariff. As the Court emphasized, that inapplicability is based on the unlawfulness of the use of drugs ("the ... question ... is not concerned simply with the case of the illegal importation of any product but concerns the smuggling of a harmful substance intended for an unlawful use, which was destroyed as soon as it was discovered" — paragraph 9 of the decision in the judgment cited above).

In that respect, the French Government also refers to paragraphs 11 to 14 of the decision, from which it appears that the Community provisions on customs matters cannot be applied to products the use of which is authorized and which are "capable of being part of the market and absorbed into commercial circulation" (paragraph 12).

That view is in harmony with the French legislation which makes no distinction between a case where drugs are unlawfully imported, seized and destroyed (Case 50/80) and the present case in which drugs were sold. With the exception of a number of specific uses subject to close State supervision, the use of drugs on French territory is absolutely prohibited. Consequently, no liability to pay customs duties can arise and importation cannot give rise to the payment of duties.

Moreover, the French Government aligns itself with the arguments put forward by the court making the reference, and concludes that since the introduction of the Common Customs Tariff a Member State no longer has authority to levy customs duties on drugs which are smuggled into a country and put to uses in respect of which no lawful trade exists and which, if discovered, must be confiscated and destroyed.

The *Commission of the European Communities* states that in its opinion the decisive criterion to be inferred from the *Horvath* judgment cited above regarding the applicability of the Common Customs Tariff is whether or not the goods in question are of a kind capable of being absorbed into circulation (paragraph 11). In the case of drugs, such as heroin and cocaine, importation and marketing are prohibited in all the Member States (paragraph 10). The fact that the products must be seized and taken out of circulation is merely the legal consequence to be inferred from the prohibition of putting them into circulation.

That point of view is confirmed by the fact that the other grounds stated by the Court in relation to drugs smuggled into a country and destroyed upon discovery remain valid where, because of the circumstances, destruction is out of the question.

The Commission also refers in particular to the recitals in the preamble to Council Directive 79/623 of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31), and draws attention to the essentially economic nature of import and export duties. Moreover, Article 2 of that directive provides that a customs debt arises in the normal case of customs clearance and in the restrictively listed cases of failure to comply with customs requirements in the narrow sense, such as infringement of Community provisions regarding customs procedures or the removal of goods liable to import duty from the customs supervision involved in the temporary storage of goods. On the other hand, there is no provision in the directive giving rise to any liability to pay customs duties in a case where there is an absolute prohibition on importation.

The Commission therefore proposes that the first question should be answered in the affirmative. It emphasizes however that its analysis applies solely to the case of drugs the circulation of which is strictly prohibited. Consequently, its conclusion is without prejudice to the more general case of the import of goods in breach of a prohibition on importation, such as for example the importation of handguns in baggage.

III — Oral procedure

At the sitting on 25 May 1982 oral argument was presented by the Government of the French Republic, represented for the purposes of the oral procedure by Alexandre Carnelutti, Secretary for Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, acting as Agent, assisted by Ursula Baumann, an expert in its Customs Union Department.

The Advocate General delivered his opinion at the sitting on 30 June 1982.

Decision

1 By order of 10 June 1981, received at the Court on 22 July 1981, the Finanzgericht [Finance Court] Düsseldorf referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the application of the Common Customs Tariff to smuggled drugs.

2 The dispute in the main proceedings concerns the determination of the custom duties applicable to quantities of heroin and cocaine which were purchased by the plaintiff in the main proceedings on the black market in Germany and the Netherlands and re-sold by him in contravention of the Betäubungsmittelgesetz [German Drugs Law]. For those offences he was sentenced by a German criminal court to eight years' imprisonment.

3 It is pointed out in the order for reference that, in its judgment of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385, the Court stated that the introduction of the Common Customs Tariff no longer left a Member State the power to apply customs duties to drugs which had been smuggled in and destroyed as soon as they had been discovered but did leave it full freedom to take criminal proceedings in respect of offences committed.

4 Since in the present case the smuggled drugs were not discovered and therefore could not be seized and destroyed, the Finanzgericht has asked whether in its above-mentioned judgment the Court, in referring to destruction of the drugs, regarded such destruction as an essential pre-condition for the solution adopted. It adds that, if such were the case, the question whether a customs debt arose would often depend on the mere chance of discovery.

5 In those circumstances, the national court has submitted various questions for a preliminary ruling, the first being as follows:

"Are the provisions of the EEC Treaty on the customs union (Articles 9 (1) and 12 to 29) to be interpreted as meaning that since the introduction of the Common Customs Tariff a Member State has no longer been authorized to levy customs duties on smuggled drugs which in the event of discovery would have to be confiscated and destroyed?"

6 Before that question is dealt with, it is appropriate to consider the preliminary question whether the unlawful importation into the Community of illegally marketed drugs gives rise to a customs debt.

7 So phrased, the question does not concern the problem of the unlawful importation of products in general but that of the unlawful importation of drugs.

8 As the Court pointed out in the *Horvath* judgment cited above, drugs such as morphine, heroin and cocaine display special features in so far as their harmfulness is generally recognized and their importation and marketing are prohibited in all the Member States, except in trade which is strictly controlled and limited to authorized use for pharmaceutical and medical purposes.

9 This legal position is in conformity with the Single Convention on Narcotic Drugs, 1961, (United Nations Treaty Series 520, No 7515), to which all the Member States are now parties. In the preamble to that Convention the parties state that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind; they declare that they are conscious of their duty to prevent and combat that evil, whilst recognizing that the medical use of narcotic drugs is indispensable for the relief of pain and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes. Pursuant to Article 4 of the Convention the parties are to take all the measures necessary to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

10 As a result, drugs which are not confined within channels of distribution strictly controlled by the competent authorities for use for medical and scientific purposes are subject, by definition, to a total prohibition of importation and distribution in all the Member States.

11 In practice, as soon as such drugs are discovered they are seized and destroyed in accordance with the national drugs laws, except in a number of rare cases where the product seized lends itself to medical or scientific use and is released into controlled channels of distribution, whereupon it becomes subject to customs duties.

12 On the other hand, drugs distributed through illegal channels are not subject to customs duties when they remain within such channels, regardless of whether they are discovered and destroyed or are not detected by the authorities.

13 A customs debt cannot therefore arise upon the importation of drugs which may not be marketed and integrated into the economy of the Community. The introduction of the Common Customs Tariff, provided for in subparagraph (b) of Article 3 of the Treaty, falls within the scope of the objectives assigned to the Community in Article 2 and the guide-lines laid down in Article 29 for the operation of the customs union. Imports of drugs into the Community, which can give rise only to repressive measures, fall wholly outside those objectives and guide-lines.

14 That view is confirmed by the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170) and by those of Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal, 1979, L 179, p. 31). The preamble to that directive states specifically that the moment when the customs debt arises must be defined in the light of the economic nature of the duties on imports and in terms of the conditions under which the goods subject to import duties are integrated into the economy of the Community. In such circumstances, no customs debt can arise when drugs are imported through illegal channels of distribution, since they must be seized and destroyed upon discovery instead of being put into circulation.

15 Moreover, as the national court points out, there is no justification for making a distinction in that regard between drugs which have not been

discovered and those which are destroyed under the control of the competent authorities, since if such a distinction were made the application of customs duties would be subject to the chance of discovery.

16 It is apparent from the foregoing 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.

17 This finding is without prejudice to the powers of Member States to take criminal proceedings in respect of contraventions of their drugs laws and to impose appropriate penalties, including fines.

18 In the light of this answer, it is unnecessary to deal with the other questions raised by the national court.

Costs

19 The costs incurred by the Government of the French Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Finanzgericht Düsseldorf by order of 10 June 1981, hereby rules:

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.

Mertens de Wilmars O'Keeffe Everling Chloros

Pescatore Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 26 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 30 JUNE 1982 [1]

Mr President,
Members of the Court,

1. The problem of the customs treatment to be accorded to smuggled drugs, which is the common subject-matter of the two cases, 221/81 and 240/81, has recently been examined by the Court, giving rise to the judgment of 5 February 1981 in Case 50/80, *Horvath* v *Hauptzollamt Hamburg-Jonas* [1981] ECR 385. In that judgment it was stated that "the introduction of the Common Customs Tariff no longer leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but does leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines".

The questions raised in these two cases call for development and expansion of the previous analysis of the Community customs tariff rules (and in particular the provisions of Article 9 (1) and Articles 18 to 29 of the EEC Treaty). The fundamental point to be established is

1 — Translated from the Italian.