OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 15 June 1989 *

Mr President,
Members of the Court,

1. In its judgment of 6 July 1988, the cour d'appel, Paris, referred the following question to the Court for a preliminary ruling pursuant to Article 177 of the Treaty:

'Do the requirements of the French legislation and rules concerning the importation into France of textile goods coming from non-member countries and put into free circulation in one of the Member States of the EEC which, on the one hand, oblige importers of such goods in France to obtain an import licence in advance and, on other hand, define the statements which, subject to the penalties provided for in Article 414 of the French Customs Code, must be included in declarations in respect of imports into France, constitute quantitative restrictions prohibited by Article 30 of the EEC Treaty by virtue of the general principles of Community law as they stand at present?'

As is clear from the facts which I shall summarize below, this question must be understood as follows:

'Must Article 30 of the EEC Treaty be interpreted as precluding national legislation from making the importation of textile products originating in non-member countries and put into free circulation in another Member State subject to the issue of an import licence and to a declaration setting out information relating to the imported goods, particularly as regards their origin, on pain of imprisonment, confiscation of the goods and the imposition of fines the amount of which is based on the value of the goods?'

Facts

2. The national court has described the facts in the case pending before it as follows: Mr Levy and Mr Bazini, the appellants, were convicted on 23 December 1985 by the tribunal de grand instance (Regional Court), Paris, of lodging false declarations as to origin with a view to circumventing a ban on imports, contrary to Article 426(2) and (3) and Article 414 of the French Customs Code. The appellants were sentenced to a suspended term of imprisonment of three months and to the payment to the customs authorities, which had intervened in the proceedings as a civil party, of twice the sum of FF 3 998 357, once by way of confiscation of the goods and once by way of a fine. That conviction stemmed from 22 declarations relating to the importation of articles of clothing for men, women and children, lodged with the French customs office at Le Bourget between 8 March 1976 and 23 May 1977. The value of those goods for customs purposes was FF 3 998 357 and they were

* Original language: Dutch

packed in reusable boxes or boxes marked 'Belgium'. They were declared as coming from and originating in Belgium. An investigation carried out on the premises of the Dorotex undertaking, whose sole shareholder was Mr Bazini and which was managed by Mr Levy, followed by a request for international administrative collaboration addressed to the Belgian customs authorities resulted in the finding that the goods in question originated not in Belgium but in South Korea, Pakistan and Taiwan.

The question submitted for a preliminary ruling and the arguments of the parties

3. Observations were submitted to the Court by the French Government and by the Commission. The French Government concludes that, in the first place, the importation of textile products originating in non-member countries which have been put into free circulation in another Member State could be made conditional on the issue of an import licence and that, secondly, persons responsible for making false declarations as to origin could be sentenced to the penalties prescribed by Article 414 of the French Customs Code when inaccurate or incomplete declarations had been made deliberately and with intent to deceive.

The Commission comes to a different conclusion. It maintains that a distinction must be drawn between supervisory measures, on the one hand, and protective measures which a Member State has been authorized to adopt by the Commission, on the other. Where a Member State has been authorized merely to monitor trade flows, it cannot impose on a trader making false declarations the same penalties as apply where a protective measure is circumvented or infringed.

Before making my own assessment, I propose to set forth the arguments developed in the observations of the French Government and the Commission.

4. The French Government bases its reasoning on a decision which was in force at the material time, in 1976 and 1977, namely Commission Decision 71/202/EEC of 12 May 1971, as amended by Decision 73/55/EEC of 9 March 1973.[1] It cites Article 1 of the decision which is as follows:

'1. Member States are hereby empowered to make the importation of products originating in third countries and put into free circulation in other Member States subject to the granting of an import authorization where:

(i) the importation into the Member State in question of such products directly from the third country concerned is subject, in conformity with the Treaty, to quantitative restrictions or to voluntary restraint on the part of the third country concerned under a trade agreement with the Member State in question; and

1 — Published in OJ, English Special Edition 1971 (I), p. 343, and OJ 1973, L 80, p. 22, respectively.

(ii) deflection of trade is to be feared because of divergence between these measures and the measures of commercial policy applied in other Member States.

2. A Member State may require an applicant for an import authorization to supply all relevant information concerning the description of the product, its origin and price, and the quantity or value of goods which it is proposed to import, and also information concerning the free circulation of the product in another Member State.

3. Import authorizations shall be issued as promptly as possible and in any event not later than eight working days following submission of the application by the party concerned'.

According to the French Government, it is clear from that provision that at the material time a Member State could make imports of products originating in non-member countries but put into free circulation in another Member State conditional on the issue of an import licence provided that the direct importation of the products in question from the non-member countries concerned was itself subject in the first Member State to quantitative restrictions or to trade agreements on voluntary restraint, in accordance with the Treaty.

The French Government points out in connection with the condition referred to in the second part of the previous sentence that the made-up articles in question are not set out in Annex I to Council Regulation (EEC) No 1439/74 of 4 July 1974 [2] and were covered by the Multifibre Arrangement concluded between the Community and certain low-income countries. In those circumstances France claims that it was entitled to require import licences.

The French Government considers the question of the proportionality of the penalties prescribed by Article 414 of the French Customs Code for the customs offences defined in Article 426(2) and (3) of that code. [3] The French Government rejects the standpoint adopted in the proceedings before the national court by Mr Levy, who stated that the omissions or inaccuracies in this case are merely customs infringements within the meaning of Article 410 of the French Customs Code and therefore attract only the fixed-rate fine prescribed by that article. [4] In support of its point of view, the French Government refers to the Court's

2 — On common rules for imports (OJ 1974, L 159, p. 1) Annex I is entitled 'Common list of liberalized products'

3 — Article 414 prescribes, in particular, a term of imprisonment not exceeding three months, confiscation of the goods involved in the fraud and a fine of between one and three times the value of those goods, for any act of smuggling and any undeclared imports or exports where those infringements relate to goods which are prohibited or subject to a higher rate of tax for the purposes of the customs code. The meaning of undeclared imports or exports of prohibited goods is defined, in particular, in Article 426. According to paragraph 2 of that article, a false declaration is one which has the purpose or effect of circumventing the application of the prohibitions and, according to paragraph 3, it encompasses false declarations relating to the type, the value or the origin of the goods or the designation of the real addressee or the real consignor where those infringements have been committed using false, inaccurate, incomplete or inapplicable documents. According to Article 38(1), any goods whose importation or exportation is prohibited in any way or subjected (in particular) to restrictions or quality standards are regarded as prohibited. Article 38(2) provides that where the importation or exportation is permitted only on submission of an authorization, licence, certificate and so on, the goods are prohibited unless they are accompanied by a document which is in order or if they are presented under cover of an inapplicable document.

4 — Article 410 penalizes with a fine of FF 2 000 to 20 000 any infringement which is not more severely penalized by another provision of the code and, in particular, any omission or inaccuracy relating to one of the matters which must be set out in a declaration where the infringement has no effect on the application of the duties or prohibitions

judgment of 15 December 1976 in Case 41/76 *Donckerwolcke.*[5] In particular, the French Government states that this case involves an intent to deceive and, in other words, the absence of good faith, with the result that it would be disproportionate to impose the lighter penalties under Article 410 which are to apply only to omissions made in good faith. The French Government contends that, in a case such as this, it is quite justified to apply the heavier penalties prescribed by Article 414, namely a suspended term of imprisonment and a fine equivalent to twice the value for customs purposes.

5. The Commission's reasoning is as follows: its point of departure is the Court's judgment of 15 December 1971 in Joined Cases 51 to 54/71, *International Fruit Company*, in which the Court held that Community law precludes the application to intra-Community trade of a national provision which requires, even purely as a formality, import or export licences.[6] That principle is connected with Article 9(2) of the Treaty, as the Court also acknowledged in its judgment of 15 December 1976 in Case 41/76 *Donckerwolcke.*[7]

The only derogation from the aforesaid principle is pursuant to authorization by the Commission. In that regard, the Commission refers to Decision 71/202/EEC of 12 May 1971, to which the French Government had also referred. However, the Commission draws a clear distinction between two situations: on the one hand, the *monitoring* of intra-Community trade, which the Member States are authorized in general terms to carry out by Article 1 of that decision and, on the other, the *protective* measures which a Member State may apply only on the basis of the Commission's specific and express authorization.

According to the Commission, the legal position differs substantially according to whether supervisory or protective measures are involved. In the context of supervisory measures, a Member State is entitled, as described in Article 1 of the aforesaid decision, to require 'import authorization' specifying the origin of the goods as known to the importer; any penalties attaching to false declarations should in any event not be as high as the penalties imposed in the event of 'prohibited imports'; in particular, confiscation of the goods, as imposed in this case on the basis of Article 414 of the French Customs Code, is a disproportionate penalty and, consequently, it is incompatible with the Treaty. The Commission bases that argument primarily on paragraphs 36 to 38 of the Court's judgment in *Donckerwolcke.*

If the Commission has granted authorization to adopt protective measures in respect of the goods in question, that is to say the measures designed to exclude the goods from free circulation within the Community, the Commission would seem to be suggesting that it would be legitimate to apply a severe criminal penalty of the type applied in this case on the basis of Article 414 of the French Customs Code.

5 — [1976] ECR 1921. The French Government refers, in particular, to paragraph 35 of the judgment.

6 — [1971] ECR 1107, paragraph 9.

7 — [1976] ECR 1921, paragraph 21.

Assessment

6. In order to answer the question submitted to the Court for a preliminary ruling it is necessary, in my view, to take as a basis the fundamental principle contained in Article 9(2) in conjunction with Article 30 of the EEC Treaty.[8] This means at the same time that any derogations from the principle of the free movement of goods, which is applicable both to goods put into free circulation in another Member State and to goods produced in the Community itself, must be given a strict interpretation.[9]

For that reason it is necessary in any event, in my view, to endorse the distinction drawn by the Commission in its observations between, on the one hand, a situation in which protective measures have been authorized by the Commission on the basis of the first paragraph of Article 115 of the Treaty by derogation from the system of the free movement of goods and, on the other hand, a situation in which a Member State monitors trade flows within the Community possibly with a view to seeking such authorization.

I shall therefore continue to distinguish between two situations: on the one hand, a situation in which, at the time of the importation of the goods in question into France, that Member State was authorized to derogate from the principle of the free movement of goods, and on the other, a situation in which that was not the case in respect of those goods. In order to determine which of those two possibilities is applicable, the national court will have to ascertain whether France was authorized by the Commission on the basis of Article 115 to adopt protective measures during the period in question in respect of the particular goods in question originating in a specific non-member country. Of the authorizations mentioned by the Commission in its observations, three may have been applicable to the goods in question, albeit during certain limited periods and exclusively in respect of goods originating in South Korea.[10]

7. I shall begin by considering the situation in which the Commission had issued an authorization in respect of the goods in question to derogate from the principle of the free movement of goods, leaving aside the questions concerning the grounds for, and the validity of, such authorizations granted on the basis of Article 115 which the Court has already answered[11] and which have indeed not been raised by the national court.

In a situation of that kind, the Member State is entitled to exclude from free circulation goods from the country of origin referred to in the authorization and to keep

8 — See paragraphs 17 and 18 of the judgment in *Donckerwolcke*, cited in footnote 5.

9 — See paragraph 29 of the Court's judgment in *Donckerwolcke*. See also the Court's earlier judgments of 23 November 1971 in Case 62/70 *Bock* [1971] ECR 897, paragraph 14, and of 8 April 1976 in Case 29/75 *Kaufhof* [1976] ECR 431, paragraph 5.

10 — Decision 76/839/EEC of 9 September 1976 (OJ 1976, L 304, p. 29), Decision 77/762/EEC of 30 March 1977 (OJ 1977, L 314, p. 33) and Decision 77/482/EEC of 27 May 1977 (OJ 1977, L 198, p. 30). Decision 76/926/EEC of 10 November 1976 (OJ 1976, L 364, p. 8) and Decision 77/362/EEC of 3 March 1977 (OJ 1977, L 138, p. 29) relate to tariff headings for goods which, according to the French Government's observations, were not packed in the boxes in question.

11 — See the Court's judgment of 8 April 1976 in Case 29/75 *Kaufhof* [1976] ECR 443, paragraph 6, and the judgments of 5 March 1986 in Cases 59/84 and 242/84 *Tezi I* and *Tezi II* [1986] ECR 916 and 933, paragraphs 43, and 51 and 52

them outside its territory for as long as the Commission's decision granting authorization remains valid and under the conditions laid down therein. For the purposes of the implementation of that decision, a requirement of an import licence is justified. In such a case, one can see why importers should be required to declare the correct origin of the imported goods and non-compliance with that obligation may be treated as a serious infringement; severe penalties may accordingly be imposed to enforce compliance therewith. [12]

If that reasoning is applied to the point of law now before the Court, it would seem to be in conformity with the Court's case-law and with the principles enshrined in the Treaty that, in a situation such as that described, a Member State imposes severe penalties of the type provided for in Article 414 of the French Customs Code.

8. I now turn to the situation in which the Commission has not issued a (valid) authorization for the adoption of protective measures excluding the goods in question from freedom of movement. In a situation of this kind, a Member State can at most be allowed to monitor trade within the Community.

Two questions must be answered at this juncture: was a Member State entitled at the material time to require an import authorization under Article 1(1) of Decision 71/202/EEC, as amended in 1973, and was a Member State entitled to impose in respect of an incorrect answer to a question as to the origin of goods asked for the purposes of the issue of that import authorization penalties such as those provided for under national customs law in respect of 'prohibited imports'?

9. The *first* question therefore relates to the possibility for the Member State concerned of requiring, at the material time and in general terms, that is to say without the goods being identified, an import authorization as a condition for importation from another Member State and of requiring, as a condition for the issue of that import authorization, that the necessary information such as the origin of the goods to be imported should be specified. Such a possibility is based, as I said earlier, on Article 1(1) of Decision 71/202/EEC (cited in paragraph 4 of this Opinion), [13] which empowers the Member States in general terms to require an import authorization with a view to monitoring trade flows within the Community, subject to certain conditions (for goods which are subject to restrictions in external trade and in respect of which deflections of trade are to be feared).

The Court's judgment in *Donckerwolcke* and the Opinion of Mr Advocate General Capotorti in that case raise doubts regarding the compatibility with the Treaty of Article 1 of Decision 71/202/EEC. [14] In any event,

12 — See the Opinion of Mr Advocate General Capotorti in *Donckerwolcke* [1976] ECR 1945, second column.

13 — This decision was substantially amended by Commission Decision 80/47/EEC of 20 December 1979 (OJ 1980, L 16, p. 14). See footnote 15 below.

14 — [1976] ECR 1921, at pp. 1948 and 1949, adopted by Mr Advocate General Warner in Case 52/77 *Cayrol* v *Rivoira* [1977] ECR 2261, at p. 2290. See, in that regard, A. Weber: 'Die Bedeutung des Art. 115 EWGV für die Freiheit des Warenverkehrs', *EuropaRecht*, 1979, p. 30 *et seq.* at pp. 40 and 41; H. Kretschmer: 'Beschränkungen des innergemeinschaftlichen Warenverkehrs nach der Kommisionsentscheidung 80/47/EWG', *EuropaRecht*, 1981, p. 63 *et seq.* at p. 73.

the decision was replaced, after the events material to this case, by Decision 80/47/EEC which introduced a number of important amendments, in particular, so as to take account of the Court's case-law.[15] That question does not really arise in this case, in so far as the possible incompatibility of Article 1 of Decision 71/202/EEC with the Treaty relates to the possibility which that decision gives the Member States of delaying, without specific authorization from the Commission, the importation of goods for a maximum of eight days. In the lights of the facts, the essential feature of Article 1 which is relevant in these proceedings is the obligation to state the origin of the product in the event of importation. It is clear from the Court's case-law[16] that the Member States may require an importer to declare where the goods in question first originated even in the case of goods put into free circulation in another Member State and covered by a Community movement certificate. However, Member States may not require from the importer more in that respect than an indication of the origin of the products in so far as he knows it or may reasonably be expected to know it (see paragraph 35 of the judgment in *Donckerwolcke*, cited in paragraph 10 below). Within the limits of that restriction and subject to the answer to the second question given below, the Member States are therefore entitled to penalize non-compliance with an obligation imposed by them to make a declaration.

10. Clearly, the answer to the second question referred to in paragraph 8 concerning the severity of the penalties provided for by a Member State must be in the negative. The Court's case-law, and in particular paragraphs 35 to 38 of the judgment in *Donckerwolcke*, as subsequently reaffirmed,[17] is quite clear in that regard.

The grounds of the judgment to which reference is made are as follows:

'Nevertheless the Member States may not require from the importer more in this respect than an indication of the origin of the products in so far as he knows it or may reasonably be expected to know it' (paragraph 35);

'In addition the fact that the importer did not comply with the obligation to declare the real origin of goods cannot give rise to the application of penalties which are disproportionate taking account of the purely administrative nature of the contravention' (paragraph 36);

'In this respect seizure of the goods or any pecuniary penalty fixed according to the value of the goods would certainly be

15 — Decision 80/47/EEC of 20 December 1979 (OJ 1980, L 16, p. 14) made three important amendments. First of all, intra-Community surveillance is now possible only after specific authorization has been given by the Commission (Article 2). Secondly, the decision laid down the specific circumstances in which proof of origin may be required (Article 4). Thirdly, it limited the possibilities of delaying by a few extra days the issue of import documents until the Commission has taken a decision on the request for authorization to adopt protective measures (Article 3(4)). On 22 July 1987, the Commission adopted Decision 87/433/EEC (OJ 1987, L 238, p. 26), whereby it made a number of new adjustments based, in particular, on the *Tezi* judgments cited in footnote 11.

16 — See *Donckerwolcke*, cited in footnote 5, paragraphs 33 to 35 of the judgment, and the Court's judgments of 30 November 1977 in Case 52/77 *Cayrol* v *Rivoira* [1977] ECR 2261, paragraphs 34 to 36, and of 28 March 1979 in Case 179/78 *Rivoira* [1979] ECR 1147, paragraphs 16 and 17.

17 — See also the judgment cited in footnote 16 in Case 52/77 *Cayrol* v *Rivoira*, paragraphs 34 to 39, and the judgment of 28 March 1979 in Case 179/78 *Rivoira* [1979] ECR 1147, paragraph 18.

incompatible with the provisions of the Treaty as being equivalent to an obstacle to the free movement of goods' (paragraph 37);

'In general terms any administrative or penal measure which goes beyond what is strictly necessary for the purposes of enabling the importing Member State to obtain reasonably complete and accurate information on the movement of goods falling within specific measures of commercial policy must be regarded as a measure having an effect equivalent to a quantitative restriction prohibited by the Treaty' (paragraph 38).

On the basis of that unequivocal case-law, there can be no doubt that the Treaty precludes the application to intra-Community trade of a disproportionately strict criminal penalty — whether imprisonment, confiscation or else a fine of an amount which depends on the value of the goods — in order to ensure compliance with a purely administrative obligation. And that is what is involved here, namely an obligation imposed with a view to monitoring intra-Community movements of goods to declare where goods in free circulation first originated, that is to say goods in respect of which the Commission has validly authorized not the adoption of protective measures but only the exercise of supervision.

11. Those considerations in no way detract from the possibility open to the Member States of drawing a distinction according to the importer's intention, when penalizing purely administrative customs infringements. Community law is silent on that point, provided that the Member States do not apply disproportionately severe criminal penalties (such as those referred to in the preceding paragraph) which are intended to penalize serious customs infringements.

Nor do the considerations set out in the preceding paragraph in any way detract from the possibility open to the Member States of prohibiting and penalizing, within the limits set by the principle of proportionality, false declarations as to the origin of products offered for sale to consumers. [18] However, that is not at issue in the question submitted by the national court which is concerned with a false declaration of origin made by an importer to the customs authorities.

Conclusion

12. In the light of the foregoing observations, I suggest that the Court answer the question submitted by the national court in the following manner:

18 — See the Court's judgment of 25 April 1985 in Case 207/83 *Commission* v *United Kingdom* [1985] ECR 1201, paragraph 21.

'With regard to goods in respect of which during the period in question specific authorization had been given by the Commission to derogate from the principle of the free movement of goods, it was permissible for a Member State, within the field of application of the Commission's specific authorization and on the conditions laid down therein, to prevent the importation of those goods even though they had already been put into free circulation in another Member State. In those circumstances, false declarations as to the origin of those goods could be made subject to severe penalties such as the confiscation of the goods and/or fines of the same value.

With regard to goods in respect of which there was no specific authorization from the Commission for the adoption of protective measures but authorization for monitoring alone, a Member State could not impose disproportionately severe penalties, equivalent or comparable to those referred to in the preceding paragraph, in respect of the incorrect making of a declaration as to the origin of goods which had been put into free circulation in another Member State; the sole purpose of such a declaration of origin was to enable the Member State to monitor trade flows within the Community'.