OPINION OF ADVOCATE GENERAL JACOBS
delivered on 22 April 1993 *

My Lords,

1. In this case the Giudice per le Indagini Preliminari (Judge responsible for preliminary inquiries) of the Tribunale di Milano has requested a preliminary ruling on the interpretation of Article 18 of the Agreement on free trade between the European Economic Community and Austria, which was concluded and adopted on behalf of the Community by Council Regulation (EEC) No 2836/72 of 19 December 1972 (Official Journal 1972 L 300, p. 1, hereafter 'the Agreement').

2. The question referred to the Court is as follows:

'Are national rules punishing offences concerning value added tax on importation more severely than those concerning value added tax on domestic sales of goods compatible with Article 18 of the Agreement between the EEC and Austria when that difference is disproportionate to the dissimilarity between the two categories of offence, having regard to the answer given to a similar question in the judgment of 25 February 1988 (Case 299/86 *Drexl* [1988] ECR 1213) in relation to Article 95 of the EEC Treaty?'

3. The main proceedings have their origin in a decision of 3 July 1991 by which the Italian Public Prosecutor ordered the seizure of 205 885 kg of aluminium ingots imported from Austria by Metalsa Srl on the ground that Metalsa had failed to pay the value added tax due on importation and, as a result, infringed certain provisions of Italian law concerning the payment of value added tax. The seizure of the aluminium ingots is a provisional measure. In accordance with Article 301 of Presidential Decree No 43 of 1973, the aluminium ingots will be confiscated if it is established by final decision that Metalsa infringed the provisions of Italian law concerning the payment of value added tax.

4. By a decision of 13 July 1991, the Public Prosecutor rejected Metalsa's request to release the aluminium ingots seized. Following that decision, Metalsa applied for their release to the Office of the Judge responsible for preliminary inquiries at the Tribunale di Milano. It is in the context of that application that the present reference for a preliminary ruling has been made.

5. Italian law draws a distinction between offences concerning the payment of value added tax on imports and offences concerning the payment of value added tax on domestic transactions. According to Article 70 of Presidential Decree No 633 of 1972, offences concerning the payment of taxes, including value added tax, on imports are punished by the penalties which are laid down in the customs legislation in relation to customs duties. One of those penalties is the penalty of confiscation. By contrast, offences

* Original language: English.

relating to the payment of value added tax on domestic transactions attract, in general, less severe penalties than those resulting from the application of customs legislation. The penalty of confiscation is not included among them.

6. In Case 299/86 *Drexl* [1988] ECR 1213, which concerned imports from other Member States, the Court examined that system of differential penalties. The Court stated at the second paragraph of the operative part of the judgment:

'National legislation which penalizes offences concerning the payment of value added tax on importation more severely than those concerning the payment of value added tax on domestic sales of goods is incompatible with Article 95 of the EEC Treaty in so far as that difference is disproportionate to the dissimilarity between the two categories of offences'.

It will be remembered that Article 95, first paragraph, of the Treaty provides as follows:

'No Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products.'

7. The ruling in *Drexl* must therefore be understood as applying only to imports from other Member States. [1] Metalsa, however, argues that a similar rule should be applied to imports from Austria on the basis of Article 18, first paragraph, of the Agreement which provides as follows:

'The Contracting Parties shall refrain from any measure or practice of an internal fiscal nature establishing, whether directly or indirectly, discrimination between the products of one Contracting Party and like products originating in the territory of the other Contracting Party.'

8. According to Metalsa, the spirit and the objectives of the Agreement are such as to justify an interpretation of Article 18 of the Agreement similar to that which the Court followed in relation to Article 95 of the Treaty in *Drexl*. Metalsa argues that, since Article 18 extends to any discriminatory measure or practice of an internal fiscal nature, it also covers discriminatory criminal penalties. Metalsa's arguments are disputed by the Commission and the Italian Government.

9. Before answering the question referred, it will be helpful briefly to consider the character and scope of the Agreement and to refer to the general criteria used by the Court in interpreting international agreements concluded by the Community.

1 — See also the Opinion of Advocate General Lenz in Case C-276/91 *Commission* v *France* [1993] ECR I-4413, I-4421, delivered on 17 February 1993. It should be noted that a new regime regarding the payment of value added tax has been introduced with effect from 1 January 1993. Under that regime, value added tax is no longer paid on intra-Community imports but on intra-Community acquisitions of goods for consideration. See Council Directive 91/680/EEC supplementing the common system of value added tax and amending Council Directive 77/388/EEC with a view to the abolition of fiscal frontiers (OJ 1991 L 376, p. 1) and in particular the new Article 28a of Directive 77/388 as further amended by Council Directive 92/111/EEC (OJ 1992 L 384, p. 47).

10. In its substantive provisions, the Agreement does in part resemble the Treaty. Articles 3 to 7 of the Agreement provide for the elimination of customs duties and charges having equivalent effect in trade between the Community and Austria. Article 13 provides for the abolition of quantitative restrictions on imports or measures having equivalent effect. These provisions are supplemented by Article 18 which, as stated, prohibits fiscal measures or practices of a discriminatory nature. Article 19 provides for the abolition of all restrictions on payments relating to trade in goods. Article 22 states that the Contracting Parties must refrain from any measure likely to jeopardize the fulfilment of the objectives of the Agreement and must take all general and specific measures required to fulfil their obligations under the Agreement. Articles 23 and 25 contain rules on competition, public aid and dumping.

11. Both Article 95 of the Treaty and Article 18 of the Agreement provide for the principle of fiscal equality. Indeed the terms of Article 18, first paragraph, of the Agreement, in referring to 'any measure or practice of an internal fiscal nature,' may seem to go further than the terms of Article 95, first paragraph, of the Treaty. In substance, however, the provisions are alike in prohibiting any form of direct or indirect fiscal discrimination.

12. But the apparent similarity between the two provisions should not detract from the fact that the EEC Treaty and the Agreement pursue fundamentally different objectives.

13. According to the preamble to the Agreement, which was concluded on the basis of Article 113 of the Treaty, its purpose is to consolidate and to extend the economic relations existing between the Community and Austria and to ensure, with due regard for fair conditions of competition, the harmonious development of their commerce. To that end, the Contracting Parties have agreed to eliminate progressively the obstacles to substantially all their trade in accordance with the provisions of the General Agreement on Tariffs and Trade concerning the establishment of free trade areas.

14. Under Article XXIV (8) of the General Agreement on Tariffs and Trade, a free trade area is understood to mean:

'a group of two or more customs territories in which the duties and other restrictive regulations of commerce ... are eliminated on substantially all the trade between the constituent territories in products originating in such territories.'

15. By contrast, the EEC Treaty does not seek merely to establish a free trade area in the sense understood in the context of the Agreement but to achieve economic integration leading to the establishment of an internal market and to contribute together with the other Community Treaties to making concrete progress towards European union (see Opinion 1/91 of 14 December 1991 on the Draft Agreement between the Community and the EFTA countries relating to the

creation of the European Economic Area [1991] ECR I-6079, paragraph 17).

16. The case-law of the Court makes clear that a provision in an international agreement concluded by the Community must be interpreted in its context and in the light of the purposes of the agreement (see Opinion 1/91, paragraph 14). Thus, the fact that an agreement on free trade concluded by the Community uses similar terms to those used by an article of the Treaty is not a sufficient reason for transposing the case-law of the Court in relation to that article to the provisions of the agreement: see Case 270/80 *Polydor* v *Harlequin Record Shops* [1982] ECR 329. In that case the Court was concerned with the interpretation of Articles 14 and 23 of the Agreement on free trade between the EEC and Portugal signed on 22 July 1972, when Portugal was still a member of EFTA. Articles 14 and 23 of that agreement were similar to Articles 30 and 36 of the Treaty. The Court held that, despite that similarity, certain restrictions on free trade on the ground of the protection of industrial and commercial property were justified in the framework of the free trade arrangements established by that agreement although similar restrictions would not be justified in the framework of the Treaty.

17. A provision in an international agreement must, however, be interpreted similarly to the equivalent provision of the Treaty, if the objectives of the agreement so require: see Case 17/81 *Pabst & Richarz* v *Hauptzollamt Oldenburg* [1982] ECR 1331, Case C-163/90 *Legros* [1992] ECR I-4625. [2] In *Pabst & Richarz* the Court interpreted Article 95 of the Treaty and Article 53(1) of the Association Agreement between the Community and Greece signed in 1961 in a similar way. The Court stated that Article 53(1) formed part of a group of provisions the purpose of which was to prepare for the entry of Greece to the Community and that it followed from the wording of Article 53(1) as well as from the objective and the nature of that Association Agreement that Article 53(1) precluded a national system of relief, such as the one in issue in those proceedings, from providing a more favourable tax treatment for domestic spirits than for those imported from Greece.

18. In *Legros* the Court was concerned, *inter alia*, with the interpretation of Article 6 of the Agreement on free trade between the Community and Sweden concluded in 1972, which prohibits the imposition of charges having equivalent effect to customs duties in trade between the contracting parties. The Court held that, in the particular circumstances of the case, Article 6 of that Agreement should be interpreted in the same manner as the equivalent provisions of the Treaty. The Court stated that, in the light of the objective of eliminating the obstacles to trade between the Community and Sweden, the abolition of customs duties on imports and charges having equivalent effect played a pivotal role. On that basis, the Court concluded that if the concept of a charge having equivalent effect were interpreted in the context of the Agreement with Sweden more restrictively than in the context of the Treaty,

2 — See also the Opinion of Advocate General Tesauro in Case C-207/91 *Eurim-Pharm* [1993] ECR I-3723, I-3733, delivered on 18 February 1993. That case concerns the interpretation of Articles 13 and 20 of the Agreement on free trade between the Community and Austria, which are similar to Articles 30 and 36 of the Treaty respectively. See also Case 65/79 *Procureur de la République* v *Chatain* [1980] ECR 1345.

the effectiveness of that Agreement would be substantially compromised: see paragraph 26 of the judgment.

19. In Case 104/81 *Hauptzollamt Mainz* v *Kupferberg* [1982] ECR 3641 the Court examined whether Article 21, first paragraph, of the Agreement on free trade between the EEC and Portugal contained a prohibition analogous to that of Article 95 of the Treaty. It should be noted that Article 21, first paragraph, of that Agreement is identical to Article 18, first paragraph, of the Agreement between the EEC and Austria, which is in issue in these proceedings. The Court stated at paragraphs 29 to 31 of the judgment:

'... it must be observed that although Article 21 of the Agreement and Article 95 of the EEC Treaty have the same object inasmuch as they aim at the elimination of tax discrimination, both provisions, which are moreover worded differently, must however be considered and interpreted in their own context.

As the Court has already stated ... the EEC Treaty and the Agreement on free trade pursue different objectives. It follows that the interpretation given to Article 95 of the Treaty cannot be applied by way of simple analogy to the Agreement on free trade.

... the question must therefore be answered to the effect that the first paragraph of Article 21 must be interpreted according to its terms and in the light of the objective which it pursues in the system of free trade established by the Agreement.'

20. It is clear therefore that the principle of fiscal equality provided for in Article 18, first paragraph, of the Agreement between the EEC and Austria must be interpreted in the light of the objectives of that Agreement. Since those objectives are more limited than the objectives of the EEC Treaty, it follows that there may be forms of fiscal discrimination which are prohibited by Article 95 but not by Article 18. It is therefore necessary to look at the interpretation of Article 95 followed by the Court in *Drexl* and to examine whether that interpretation can be transposed to Article 18, paragraph 1, of the Agreement, read in the light of its objectives. It must be noted at this stage that Article 18, paragraph 1, must be considered as having direct effect. In *Kupferberg*, the Court held that Article 21, first paragraph, of the free trade Agreement between the EEC and Portugal contained an unconditional rule against discrimination in matters of taxation and consequently produced direct effect throughout the Community. The same reasoning applies in relation to Article 18, paragraph 1, of the Agreement between the EEC and Austria, which is identical to Article 21, paragraph 1, of the Agreement at issue in *Kupferberg*.

21. In *Drexl* the Court examined the question whether a system of penalties under which offences concerning value added tax on importation are penalized more severely than offences concerning value added tax on domestic transactions is contrary to Article 95 of the Treaty, to the principle of equal treatment and to the principle of proportionality. The Court stated at paragraphs 22 to 25 of the judgment:

'It must be stated ... that the two categories of offences in question are distinguished by different circumstances concerning both the constituent elements of the offence and the greater or lesser extent of the difficulty of

discovering it. Value added tax on importation is charged simply when the goods actually enter the territory of the Member State concerned, rather than on a transaction. Those differences mean, in particular, that the Member States are not required to have the same system of rules for the two categories of offences.

However, those differences cannot justify a manifest disproportion in the severity of the penalties laid down by the two categories of offences. Such a disproportion exists where the penalty provided for in the case of importation involves, as a general rule, a term of imprisonment and the confiscation of the goods pursuant to the rules laid down to combat smuggling whereas comparable penalties are not provided for, or are not generally imposed, in the case of offences concerning the payment of value added tax on domestic transactions. A situation of that kind could in fact have the effect of jeopardizing the free movement of goods within the Community and would thus be incompatible with Article 95 of the Treaty.

As the Court stated in its judgment of 5 May 1982 in Case 15/81 *Gaston Schul Douane Expediteur BV* v *Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, the interpretation of Article 95 must take account of the objectives of the Treaty as laid down in Articles 2 and 3, which include, in the first place, the establishment of a common market involving the elimination of all obstacles to trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market ... .

The answer to the ... question must therefore be that national legislation which penalizes offences concerning the payment of value added tax on importation more severely than those concerning the payment of value added tax on domestic sales of goods is incompatible with Article 95 of the Treaty in so far as that difference is disproportionate to the dissimilarity between the two categories of offences.'

22. In *Drexl*, therefore, the Court accepted that differences exist between offences concerning the payment of value added tax on importation and those concerning the payment of value added tax on domestic transactions and that, in principle, Member States are free to impose different penalties for the two categories of offences. The Court held, however, that the principle of fiscal equality provided for by Article 95 of the Treaty should be interpreted broadly so as to prohibit the imposition of manifestly disproportionate penalties on comparable offences. The Court followed a broad interpretation of Article 95 in the light of the objectives of the Treaty and, in particular, in the light of the objective of establishing an internal market.

23. It should be noted that in *Drexl* the Court was concerned with the application of the principle of equality rather than with the application of the principle of proportionality. In its judgment, the Court examined whether a disproportionate *difference* between the penalties imposed for offences concerning the payment of value added tax on importation and those imposed for offences concerning the payment of value added tax on domestic transactions may jeopardize the free movement of goods. The Court did not examine whether the penalties imposed for offences concerning the

payment of value added tax on importation from other Member States were in themselves so disproportionate to the gravity of the offences as to constitute an obstacle to the freedoms guaranteed by Community law.

24. The Commission and the Italian Government claim that the interpretation followed by the Court in *Drexl* in relation to Article 95 cannot be transposed to Article 18 of the Agreement. First, the Commission and the Italian Government argue that Article 18 prohibits only substantive discrimination with regard to fiscal matters and does not affect the Member States' competence with regard to criminal penalties. Secondly, the Italian Government argues that, even if it is accepted that Article 18 prohibits discrimination with regard to criminal penalties, there is no breach of that prohibition where the offences concerned are different.

25. With regard to the first argument, the Commission argues that in *Drexl* the Court followed a broad interpretation of the principle of fiscal equality in the light of the objectives of the Treaty. It claims that the principle of fiscal equality cannot be interpreted in such broad terms in the context of a free trade agreement whose scope and objectives are much more limited. The Commission argues that, in the light of the objectives of the Agreement, the purpose of Article 18 is to prohibit discrimination as regards all measures and practices concerning the imposition and collection of value added tax. Thus, Article 18 encompasses the basis upon which value added tax is assessed, the rate of value added tax and the methods of payment and recovery of the tax which might have an effect on the free circulation of products originating in the territory of one of the Contracting Parties. The Commission concludes that restrictions on the competence of Member States to impose criminal sanctions apply only in the context of the Community, which aims at establishing an internal market and a European union, and not in the context of a free trade agreement. The Italian Government adopts a similar view.

26. With regard to the second argument, the Italian Government states that, even if it were accepted that the prohibition against fiscal discrimination provided for in Article 18 extended to criminal penalties, that prohibition would apply only to the imposition of different penalties for similar offences. However, offences concerning value added tax on importation are different from offences concerning value added tax on domestic transactions. It follows that the imposition of different penalties with regard to those two types of offences does not constitute fiscal discrimination; the system of differential penalties provided for by Italian law is not therefore contrary to Article 18 of the Agreement.

27. In my view Article 18 of the Agreement does not require any comparison to be made between penalties imposed by Member States for tax offences on imports from Austria and penalties for tax offences on domestic transactions or on imports from other Member States. The right of free trade provided for by the Agreement is more limited than the rights emanating from the Treaty provisions on the free movement of goods: in that respect, the submissions of the Commission and the Italian Government seem to me persuasive. Moreover, it is clear from the Court's decision in *Kupferberg* that not all forms of discrimination which are prohibited by Article 95 of the Treaty are necessarily prohibited by Article 18 of the Agreement. Indeed, even the notion of 'like product' in

Article 18 must be understood relatively narrowly in the light of the object of the Agreement: see paragraphs 41 and 42 of the *Kupferberg* judgment. It would be inconsistent with the Court's case-law to adopt a broad interpretation of Article 18 so as to require a comparison to be made between penalties relating to imports from Austria and penalties relating to domestic or intra-Community transactions.

28. I conclude that the interpretation followed by the Court in *Drexl* in relation to Article 95 of the Treaty cannot be transposed to Article 18, paragraph 1, of the Agreement. Nevertheless, Member States are in my view required, in the penalties they impose in relation to imports from Austria, to respect the principle of proportionality. That requirement does not follow from Article 18 which is confined to the prohibition of discrimination but rather from Article 13 of the Agreement.

29. It will be recalled that Article 13 of the Agreement prohibits quantitative restrictions on imports or measures having equivalent effect in trade between the Contracting Parties. It is in the following terms:

'1. No new quantitative restriction on imports or measures having equivalent effect shall be introduced in trade between the Community and Austria.

2. Quantitative restrictions on imports shall be abolished on 1 January 1973 and any measures having an effect equivalent to quantitative restrictions on imports shall be abolished not later than 1 January 1975.'

It seems to me that a penalty imposed in relation to imports from Austria which is so disproportionate to the gravity of the offence as to pose an obstacle to the right of free trade provided for by the Agreement would be a measure having equivalent effect contrary to Article 13 of the Agreement. Article 13 must be regarded as having direct effect: see the Opinion of Advocate General Tesauro in Case C-207/91 *Eurim-Pharm*, cited above at footnote 2, at paragraph 14.

30. It is true that criminal legislation is a matter which in principle falls within the competence of the Member States. However, the case-law of the Court makes clear that, in accordance with the principle of proportionality, penalties which are imposed by national law must not in view of their severity constitute an obstacle to the exercise of the fundamental freedoms provided for by the Treaty. See e. g. in relation to the free movement of goods, Case 41/76 *Donckerwolcke* v *Procureur de la République* [1976] ECR 1921 and Case 52/77 *Cayrol* v *Rivoira* [1977] ECR 2261, and in relation to the free movement of persons, Case 157/79 *R* v *Pieck* [1980] ECR 2171. In Case 203/80 *Casati* [1981] ECR 2595 the Court stated at paragraph 27 of the judgment:

'In principle, criminal legislation and the rules of criminal procedure are matters for which the Member States are still responsible. However, it is clear from a consistent line of cases decided by the Court, that

Community law also sets certain limits in that area as regards the control measures which it permits the Member States to maintain in connection with the free movement of goods and persons. The administrative measures or penalties must not go beyond what is strictly necessary, the control procedures must not be conceived in such a way as to restrict the freedom required by the Treaty and they must not be accompanied by a penalty which is so disproportionate to the gravity of the infringement that it becomes an obstacle to the exercise of that freedom.'

That reasoning was confirmed in *Drexl* at paragraph 18 of the judgment, although, as already stated, in that case the Court was concerned with the application of the principle of equality and not with the application of the principle of proportionality as such.

31. It is therefore clear that, according to the case-law of the Court, a system of penalties imposed by Member States must not be so disproportionate to the gravity of the offence that it becomes an obstacle to the exercise of a freedom guaranteed by the Treaty. In my view, analogous considerations should also apply in relation to international agreements concluded by the Community.

32. By virtue of Article 228(3) of the Treaty, international agreements concluded by the Community are binding on the institutions of the Community and on Member States. As the Court stated in Case 181/73 *Haegeman* v *Belgian State* [1974] ECR 449, the provisions of such agreements constitute an integral part of Community law. Also, according to the case-law of the Court, the provisions of such agreements are capable of producing direct effect (see e. g. *Kupferberg*, cited above at paragraph 19, Case 12/86 *Demirel* [1987] ECR 3719, paragraph 14 of the judgment, Case C-192/89 *S. Z. Sevince* v *Staatssecretaris van Justitie* [1990] ECR I-3461, paragraph 15 of the judgment). In terms therefore of their legal effect, they are treated similarly to provisions of the Treaty and other binding Community acts; moreover the Community may be liable for breaches of them by the Member States. It follows that the principle of proportionality, which is a general principle of Community law, also applies in relation to international agreements concluded by the Community and can therefore be used as an aid to the interpretation of the provisions of such agreements. It should be emphasized, however, that the application of the principle of proportionality may lead to different results in the case of an international agreement concluded by the Community on the one hand and in the case of the Treaty on the other hand.

33. I do not accept the Commission's argument that restrictions on the competence of Member States to impose criminal sanctions apply only in the context of the Community and not in the context of a free trade agreement.

34. If the Commission's view were accepted, the Member States would be free to impose any penalties whatsoever with regard to offences concerning the payment of value added tax on importation of goods from Austria notwithstanding that such penalties could constitute a disproportionate obstacle to the exercise of free trade and run counter to the objectives of the Agreement. That would be the case, for example, if a Member

State punished even an inadvertent failure to pay the full amount of value added tax due on the importation of goods from Austria by imposing cumulatively the penalties of confiscation and a fine ten times the value of the goods. In my view, the imposition of such penalties would be contrary to Article 13 of the Agreement because the risk of failing to satisfy the relevant requirements and therefore being subject to those penalties would be likely to discourage the importation of goods from Austria and would thus run counter to the objectives of the Agreement. If it were accepted that the principle of proportionality did not apply in those circumstances, persons who acquired a right under an agreement concluded between the Community and a non-member State, such as the right to import without any restrictions other than those permitted by the Agreement, would be deprived of the protection derived from the general principles of Community law. I see no reason why that should be so.

35. The principle of proportionality applies generally, in my view, to all provisions governing trade between the Community and third countries. Thus quantitative restrictions on exports to third countries permitted by Community law on grounds set out in the same terms as those mentioned in Article 36 of the Treaty, and penalties imposed for the breach of such restrictions, must be proportionate to the aims pursued (see my Opinions in Case C-367/89 *Aimé Richardt* [1991] ECR I-4621 and Case C-111/92 *Lange*, delivered on 1 April 1993, at paragraphs 21-24). Also, the Court has accepted that protective measures restricting trade with third countries provided for by Community regulations are subject to the principle of proportionality: see Case C-26/90 *Wünsche* [1991] ECR I-4961, at paragraphs 12 and 13 of the judgment; Case 112/80 *Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen* [1981] ECR 1095, at paragraph 40 of the judgment. Since the principle of proportionality applies in general in relation to trade with third countries, *a fortiori* it must also apply to an agreement concluded by the Community which establishes a free trade area.

36. In my view, therefore, it is incompatible with the Agreement for a Member State to impose a penalty for an offence concerning the payment of value added tax on imports from Austria which is so disproportionate to the seriousness of the offence as to pose an obstacle to the right of free trade provided for by the Agreement. Whether a penalty is so disproportionate in a specific case is a question for the national court. Two principles, however, could be laid down in this context. First, it is clear that the right of free trade provided for by an agreement concluded between the Community and a third State is more limited than the freedoms guaranteed by the Treaty. It follows that a national system of penalties which is so disproportionate as to pose an obstacle to the attainment of the common market is not necessarily so disproportionate as to pose an obstacle to the exercise of the right of free trade. Member States may therefore have wider discretion in the context of an international agreement than in the context of the Treaty. Secondly, when the penalty is confiscation of the imported goods, such matters as the state of mind of the owner of the goods seized and the value of the goods should, in my view, be taken into account: compare *Aimé Richardt*, at paragraph 25 of the judgment.

Conclusion

37. I am accordingly of the opinion that the question referred by the national court should be answered as follows:

Article 18, first paragraph, of the Agreement on free trade between the EEC and Austria does not require any comparison to be made between penalties imposed by Member States for tax offences on imports from Austria and penalties for tax offences on domestic transactions or on imports from other Member States. However a Member State may not impose a penalty for an offence concerning the payment of value added tax on imports from Austria which is so disproportionate to the seriousness of the offence as to pose an obstacle to the exercise of the right of free trade provided for by the Agreement.