# OPINION OF ADVOCATE GENERAL LENZ

delivered on 17 February 1993 *

*Mr President,*
*Members of the Court,*

## A — Introduction

1. The background of this action for failure to fulfil obligations under the Treaty is the common system of value added tax regulated by the Sixth Directive [1] in the version in which importation (meaning the physical entry of a product) from another Member State was a chargeable event. [2] The Commission alleges that the French Republic has adopted and applied, in Article 414 of the French Customs Code, a system of penalties for offences against the legislation concerning value added tax on importation which, in certain respects, is incompatible with Article 95 of the EEC Treaty. Article 414 of the Customs Code is worded as follows:

'Any act of smuggling and any act of importing or exporting without declaration where such offences relate to goods in the category of those which are ... heavily taxed within the meaning of this Code shall be punishable by a maximum of three years' imprisonment, confiscation of the undeclared goods, confiscation of the means of transport, confiscation of articles used to conceal the fraud and a fine equal to the value of the undeclared goods or up to twice that amount.

Offences relating to goods ... the value of which does not exceed FF 5 000 shall be punishable by a fine equal to the value of such goods.'

2. The Commission's action was prompted by a particular case in which that provision was applied and in which the Cour d'Appel, Amiens on appeal imposed a fine of FF 20 000 on a Belgian national, Mrs Yetta Patron, and ordered the confiscation of her car, which was registered in Belgium. According to that judgment, [3] in 1983 Mrs Patron imported her car into France, where she resided at the time, without making the necessary declaration. Article 414 of the Customs Code was applied because the imported vehicle was liable to value added tax of 33% and was therefore 'heavily taxed' within the meaning of that provision.

* Original language: German.

1 — Sixth Council Directive 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 (OJ 1977 L 145, p. 1).

2 — See Article 2(2) in conjunction with Article 7 of the directive in the original version. Since 1 January 1993 a new system has been in force on the basis of the amending Directive 91/680 of 16 December 1991 (OJ 1991 L 376, p. 1). The new system is no longer based on importation within the Community but on the purchase of goods within the Community for consideration within the country (See Article 28a in the version of the said amending directive).

3 — Judgment of 14 January 1986; see the annex to the rejoinder. The judgment was upheld by the Cour de Cassation on 15 February 1988.

3. In its application, the Commission raises two complaints on the basis of Article 95 of the EEC Treaty.

4. The first complaint relates to the fact that offences against the value added tax provisions for domestic transactions do not fall within Article 414 of the Customs Code, but are penalized under a special system of penalties. I refer to the Report for the Hearing [4] for the features of this system, as set out by the provisions submitted by the defendant Member State.

5. In this connection the Commission considers that Article 414 is incompatible with Article 95 of the Treaty because it is contrary to the principle laid down in the *Drexl* judgment. [5] In that judgment the Court ruled as follows:

'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.'

6. According to the Commission's second complaint, the said Article 414 contains no provision which ensures the application of the principles set out in the *Gaston Schul* judgment. [6] In the particular case of Mrs Patron, the Commission states that, according to those principles, the value added tax paid in the Member State of exportation must be taken into account in fixing the fine on the basis of the value added tax payable.

7. In the reply, the Commission again claims that, in the particular case of Mrs Patron, the penalty imposed was disproportionate to the tax owed. Moreover, Mrs Patron denied that she was resident in France. On this point it should be observed that, where persons have dual residence, several factors have to be taken into account for determining the Member State in which a vehicle must be registered and taxed. In this connection the Commission refers to Article 7(1) of Directive 83/182 [7] and the related judgment in the *Ryborg* case. [8]

8. The *Commission* claims that the Court should:

— declare that by introducing and applying the provisions of law, regulation or administrative action in force under Article 414 of the French Customs Code, which penalize offences concerning the payment of value added tax on importation from another Member State more severely than those concerning the payment of value added tax on domestic transactions, the French Republic has failed to fulfil its obligations under Article 95 of the EEC Treaty; and

4 — See section I(a) of the Report.

5 — Case 299/86 *Drexl* [1988] ECR 1213.

6 — Case 15/81 *Gaston Schul, Douane Expediteur BV* v *Inspecteur der Invoerrechten en Accijnzen* [1982] ECR 1409, last confirmed in the judgments in Cases C-120/88 *Commission* v *Italy* [1991] ECR I-621; C-119/89 *Commission* v *Spain* [1991] ECR I-641; and C-159/89 *Commission* v *Greece* [1991] ECR I-691.

7 — Council Directive of 28 March 1983 on tax exemptions within the Community for certain means of transport temporarily imported into one Member State from another, OJ 1983 L 105, p. 59.

8 — Case C-297/89 *Rigsadvokaten* v *Nicolai Christian Ryborg* [1991] ECR I-1943.

— order the French Republic to pay the costs.

The *French Government* contends that the Court should:

— declare the application unfounded, and

— order the applicant to pay the costs.

9. The French Government regards the Commission's complaints as unjustified, and takes the view that certain arguments in the reply are out of time.

B — Analysis

I. *Complaint that Article 414 of the Customs Code infringes the principle laid down in the* Drexl *judgment*

10. To examine this complaint properly, first a few observations on the principle developed in the *Drexl* judgment are called for, and then it will be necessary to determine the precise scope of the Commission's complaint.

11. *1.* In the *Drexl* case the Court examined two systems of penalties, one for offences on importation and the other for offences in relation to domestic transactions, which differed with regard to the nature and severity of the penalties. [9] As in the present case in relation to 'heavily taxed' goods, the system applying to importation was laid down in the provisions on smuggling.

12. In view of that situation the Court had to reconcile two principles: the principle that the Member States are responsible for criminal penalties [10] and the principle laid down by Article 95 of the Treaty that internal taxation must be neutral in relation to intra-Community trade.

13. In this connection the Court regarded certain differences in the penalties as permissible (paragraph 22 of the judgment):

'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 detecting 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. These differences mean, in particular, that the Member States are not required to have the same system of rules for the two categories of offences.'

14. However, the Court did not consider there was any justification for the difference in the severity of the penalties for the two categories of offence, which was disproportionate to the dissimilarity between the two categories. [11]

9 — See section II(b) of the Report for the Hearing in this case.

10 — Case 203/80 *Casati* [1981] ECR 2595, paragraph 27; and the *Drexl* case, cited above, paragraph 17.

11 — See paragraphs 23 and 25 of the judgment and paragraph 2 of the operative part.

15. Therefore the *discretion* left to the Member States has two characteristics. First, with regard to the chargeable event for value added tax, the Member States may lay down a different system of penalties for offences on importation, that is, a system which links up with the provisions on smuggling (in the sense of evading import duties). Secondly, the Member States may provide for penalties of differing severity because offences against the value added tax provisions on importation are generally more difficult to detect than offences relating to domestic transactions.

16. The *limits* set by the Court *to the Member States' discretion with regard to the framing of criminal legislation* [12] also relate to the severity of the respective penalties. In view of those limits the Member States are prohibited from infringing the requirement of equal treatment, for tax purposes, of domestic transactions and import operations by laying down for the latter such severe penalties that the difference in penalties no longer matches the difference between the two categories of offence. In this situation the greater severity of the penalties for offences on importation would appear not only as a response to the greater difficulty of detecting such offences, but also (at least in part) as an unacceptable obstacle to imports.

17. In the grounds of judgment, the Court clarified [13] the prohibition thus imposed on the Member States by saying that it must amount to *a manifest disproportion* in the severity of the penalties.

In my view, this clarification is not so much the result of weighing the Member States' interest in the framing of their criminal legislation against the Community's interest in safeguarding the fundamental freedoms and the smooth functioning of the common system of value added tax. [14] It is explained rather by the fact that a 'disproportion' in the abovementioned sense cannot in general be established with mathematical precision. Let me demonstrate this with the following questions:

— How great are we to regard the difference between the two categories of offence as far as the possibility of detection is concerned?

— How much weight is to be attached to such difference when specifying the penalties?

— Therefore, what should be the nature and degree of the differences between the penalties without their being disproportionate in relation to the differences between the two categories of offence?

18. The task of establishing the existence of a disproportion may be made more difficult

12 — See the quotation in paragraph 5 and paragraph 15 of this Opinion.

13 — See paragraph 23 of the judgment.

14 — The operative part of the judgment does not require the disproportion to be 'manifest'.

if the systems of penalties are not structured in the same way, as is the case here and as was also the case in *Drexl*.

19. Finally, on the basis of these considerations it is also possible to determine how to compare the two systems of penalties in order to throw light on any disproportion as defined above. Such clarification also seems to me necessary to enable the Commission's specific complaint to be examined.

20. In this connection it should be observed that the systems in question here are differently structured. In this case the comparison must take account of all the essential elements of both systems, so far as possible and necessary by contrasting comparable factors (normal penalty and severer penalties, penalties for attempted offences, rules for minor offences, incidental consequences [confiscation] and the like). Where the differences are particularly glaring, as in relation to the financial penalties or terms of imprisonment normally imposed, it may be sufficient to have regard to these. [15] Otherwise all the said elements must be balanced against one another. [16]

21. 2. Now that we have clarified the criterion which must, according to the *Drexl* judgment, be applied, we must define the complaint which the Commission bases on that judgment.

22. In this connection it should be observed that the only object of the Commission's criticism is *the provision for confiscation laid down by Article 414 of the Customs Code*, for which there is said to be no counterpart in the provisions concerning penalties for domestic transactions. The similar terms of the letter of formal notice, [17] the reasoned opinion, [18] and the application [19] all lead to this interpretation of the complaint. The argument in the reply might have given rise to doubt concerning this interpretation. Some of the considerations put forward there might create the impression that the Commission objects to the entire system laid down by Article 414 of the Customs Code because it provides for more severe penalties than does the system for offences relating to domestic transactions. [20] However, apart from the fact that in this connection the Commission has merely alleged a disproportion in that more comprehensive sense,

15 — Thus the Court made the following observations in the *Drexl* case (paragraph 23):
'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.'
However, it should be noted that the assumption that offences on importation normally lead to prison sentences under the Italian rules is incorrect: see Article 292 of Decree No 43 (Report for the Hearing [1988] ECR 1214, at p. 1215) and the judgment of the Italian Corte Suprema di Cassazione of 21 February 1989, Cassazione Penale 1989, No 1345, p. 1547, at p. 1550.

16 — That is well illustrated by the judgment of the Corte Suprema di Cassazione of 21 February 1989 (previous footnote) and the judgment delivered (on 14 December 1988) by the Corte d'Appello, Genoa, as the court of reference in the *Drexl* case, following the judgment of the Court of Justice: Cassazione Penale 1989, No 1367, p. 1568.

17 — Page 2, first and second paragraphs.

18 — Page 2, first paragraph; p. 3, first paragraph; p. 4, second paragraph.

19 — Page 3, under 1., second paragraph; p. 5, last paragraph.

20 — See p. 4, penultimate paragraph; p. 7, penultimate paragraph; p. 10, first paragraph at end.

without giving a detailed explanation, it replied as follows to a question from the Court:

'In this case the Commission questions whether the defendant State has power, when checking the recovery of value added tax on the importation of goods from other Member States, *to order penalties of confiscation of the imported goods* if such penalties are not provided for in the system of penalties for offences relating to value added tax within the country.' [21]

23. As the threat of confiscation as a penalty bears no relation to the penalties in connection with domestic transactions, it is said, it creates a manifest disproportion between the penalties laid down for the two categories of offence. [22]

24. The Commission adds that it did not

'*wish to complain generally of any difference in treatment, as regards penalties*, which France may provide for, depending on whether the offences are committed on importation or within the country, although any such difference cannot be justified merely by the fact that the offence is connected with the importation of goods and not a domestic transaction'. [23]

25. Finally, the Commission observes that, although the penalties may be on a sliding scale so as to take account of the different circumstances of offences and the difficulty of detecting some of them, there is no justification for the retention in an internal market of two provisions which are totally independent of each other and which lead to entirely different treatment according to whether the offence was committed on importation or within the country. [24]

26. All in all, these parts of the reply to the Court's question confirm what is already clear from the Commission's application and the documents in the pre-litigation procedure, namely that the Commission wishes to complain (only) of the power of confiscation laid down by Article 414 of the Customs Code, although it is clear that the existence of two independent systems of penalties causes it some disquiet.

27. *3.* The complaint, as clarified above, must now be examined in the light of the principles of the *Drexl* judgment which have already been set out. [25]

28. In my view, the action with regard to this complaint should be dismissed. As follows from my observations [26] concerning a comparison of different systems of penalties, in principle it is not sufficient to allege that there is a difference in one particular respect. On the contrary, a disproportionate difference within the meaning of the *Drexl* judgment can in general be found to exist only by means of a comprehensive comparison of the two systems. From this point of view, the Commission's complaint does not by its very nature meet the criterion laid down by the abovementioned judgment.

21 — Page 2 of the answer of 9 December 1992, under 1., first paragraph; emphasis added.

22 — See p. 2 of the reply, last two paragraphs.

23 — Page 3 of the reply, first paragraph; emphasis added.

24 — Page 3 of the reply, last paragraph.

25 — Paragraph 12 et seq. above.

26 — Paragraph 20 et seq. above.

29. However, it would have been necessary to take a different approach if, in its complaint, the Commission had made a comparison of the other elements of the two systems of penalties with the object of showing that both systems are fundamentally equally severe, [27] apart from the penalty of confiscation. On that basis it would then have been necessary to consider whether the Commission's comparison was correct in its method and its result and, if so, whether the penalty of confiscation creates a (manifest) disproportion as it is provided for only in the case of importation.

30. However, the application does not contain even a rudimentary argument concerning a comparison as described above. In this connection it is characteristic that the relevant provisions on the penalties for offences in relation to domestic transactions were received only with the defence, together with the reference to Article 350 of the Customs Code and the administrative practice in this area.

31. The only statement in the application which could be construed as an attempt at an argument in that sense is as follows:

'To apply criminal legislation systematically, by the adoption of penalties for non-payment of customs duties, to any evasion of value added tax on importation, when failure to pay value added tax on domestic transactions is less severely penalized, is tantamount to attaching particular significance to the crossing of a frontier within the Community, which is incompatible with the common market.' [28]

32. That statement by the Commission is however entirely in general terms and does not explain how the French legislation is to be assessed in this respect. This finding is hardly surprising either because, on closer examination, it emerges that the passage quoted above has been taken word for word from the Opinion delivered by Advocate General Darmon in the *Drexl* case and therefore relates to the Italian provisions at issue there. [29]

33. In so far as the reply contains an attempt at a comparison of the two systems of penalties, [30] I take this to be only a reaction to the defendant State's arguments in the defence. It should also be noted that, under Article 19 of the Protocol on the Statute of the Court of Justice of the EEC and Article 38(1)(c) of the Rules of Procedure, the Commission must indicate, in any application made under Article 169 of the EEC Treaty, the specific complaints on which the Court is asked to rule and, at the very least in summary form, the legal and factual particulars on which those complaints are based. [31] Under Article 42(2) of the Rules of Procedure, a new plea in law may be introduced only on the conditions set out therein, which are not fulfilled here. Finally, the Commission's reply, particulars of which were given above, to the question from the Court indicates that the Commission does not intend to carry out a detailed comparison of the

27 — Or even that the system applying to the importation of goods is severer than the other.

28 — Application, p. 8, second paragraph, second sentence.

29 — See Opinion of Advocate General Darmon [1988] ECR 1222, at p. 1225, paragraph 15.

30 — Footnote 20 above.

31 — Settled case-law: see judgment in Case C-52/90 *Commission v Denmark* [1992] ECR I 2187, paragraph 17.

two systems. In these circumstances, consideration of this point would amount to examining the validity of the defence arguments of the defendant State, and not the validity of the Commission's complaint.

34. Consequently the Commission's first complaint, to the effect that Article 414 of the Customs Code breaches the principle laid down in the *Drexl* judgment, must be rejected.

II. *Complaint that Article 414 contains no provision which ensures the application of the principles put forward in the* Schul *judgment for determining the amount of the fine in the case of an offence on importation by a private individual*

35. I consider this complaint unfounded, if it is admissible at all. [32] The Commission proceeds on the assumption that the amount of the fine laid down by Article 414 of the Customs Code depends on the amount of the VAT not paid on importation. However, that assumption is incorrect, as the defendant State has rightly pointed out. The fine is in fact equal to the value of the goods on which tax was evaded or up to twice that amount, that is, it depends on the value of the imported goods and not on the amount of VAT due.

III. *Complaint that in the specific case of Mrs Patron the penalty was disproportionate to the amount of tax due*

36. This complaint must be rejected as inadmissible as there was no mention of it in either the pre-litigation procedure or in the application and, furthermore, it has no connection with the claim in the application.

37. For form's sake I should like to point out that this complaint can in no way be regarded as a mere extension of the first complaint which (like the claim in the Commission's application) is based on a comparison between two cases of taxation and concerns essentially the *principle of equal treatment* (of which Article 95 is a specific instance). On the other hand, in this complaint the seriousness of a tax offence (expressed in terms of the unpaid tax) is compared with the severity of the penalty, which amounts to examining the matter by reference to the *principle of proportionality*.

IV. *Complaint concerning Mrs Patron's place of residence*

38. This complaint was first raised in the reply [33] and must therefore be rejected for the same reasons as the previous complaint.

32 — The Court has consistently held that the subject-matter of proceedings under Article 169 *inter alia* is defined by the heads of claim set out in the application (see for example the judgment in Case C-61/90 *Commission* v *Greece* [1992] ECR I-2407, paragraph 9). On this point it should be observed that the wording of the claim in this case covers only the first complaint.

33 — The application states that Mrs Patron imported her car 'temporarily' (p. 4, third paragraph). However, the application contains no clear indication that the Commission seeks a declaration from the Court on this point also.

## C — Conclusion

39. I therefore propose that the Court should:

— dismiss the application;

— order the Commission to pay the costs pursuant to Article 69 of the Rules of Procedure.