# JUDGMENT OF THE COURT
7 May 1987 *

In Case 193/85

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale di Milano (District Court, Milan) for a preliminary ruling in the proceedings pending before that court between

**Cooperativa Co-Frutta Srl**

and

**Amministrazione delle Finanze dello Stato**

on the interpretation of Articles 9, 12 and 95 of the EEC Treaty and Article III of the General Agreement on Tariffs and Trade (GATT),

THE COURT,

composed of: Y. Galmot, President of Chamber, acting as President, C. Kakouris, T. F. O'Higgins and F. Schockweiler (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, U. Everling, K. Bahlmann, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Cooperativa Co-Frutta Srl, the applicant in the main proceedings, by Wilma Viscardini Donà, of the Padua Bar,

the Government of the Italian Republic, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, assisted by Sergio Laporta, Avvocato dello Stato,

* Language of the Case: Italian.

the Commission of the European Communities, by Johannes Føns Buhl, Legal Adviser of the Commission, and Enrico Traversa, a member of its Legal Department,

having regard to the Report for the Hearing and further to the hearing on 17 June 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 16 October 1986,

gives the following

## Judgment

1 By order dated 17 January 1985, which was received at the Court on 21 June 1985, the Tribunale di Milano (District Court, Milan), referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty five questions on the interpretation of Articles 9, 12 and 95 of the EEC Treaty and on Article III of the General Agreement on Tariffs and Trade, hereinafter referred to as 'the GATT'.

2 The questions were raised in proceedings before that court between Cooperativa Co-Frutta Srl, (hereinafter referred to as 'Co-Frutta'), a cooperative engaged in the ripening of bananas, and the Amministrazione delle Finanze dello Stato (State Finance Administration) relating to the recovery of sums levied by way of tax on the consumption of fresh bananas, and more specifically on bananas originating in Colombia which were imported into Italy from the Benelux by Co-Frutta.

3 Since the Tribunale di Milano considered that the case raised questions concerning the interpretation of Community law, it suspended the proceedings pending a preliminary ruling by the Court on the following questions:

'1. Does a charge described as a State consumer tax ('imposta erariale di consumo') which is expressed to be imposed on both imported products and

domestic products but in practice applies only to imported products because, as a result of environmental conditions, there is no domestic production of the product in question (in this case bananas) constitute a charge having an effect equivalent to a customs duty, prohibited by Articles 9 and 12 of the EEC Treaty?

2. Must a charge of that kind be regarded instead as internal taxation within the meaning of Article 95 of the EEC Treaty in view of the fact that, as its name indicates, it is imposed on the consumption of the goods in question and not on the importation thereof, even if it is in fact collected when the goods are cleared through customs and is imposed only on bananas and not on any other kind of fruit?

3. If it is to be regarded as internal taxation, is the charge in question contrary to the second paragraph of Article 95 and as such prohibited, inasmuch as its purpose is to protect other fruit, in particular all fruit grown in Italy?

4. If the matter falls to be considered, must Article 95 be applied only to products originating in the Member States of the Community or also to products which are in free circulation?

5. If Article 95 of the EEC Treaty is held to be inapplicable to products originating in non-member countries, is a charge which is contrary to Article 95 as regards products of the Member States also contrary to Article III of the General Agreement on Tariffs and Trade (GATT) as regards products originating in the territory of the contracting parties to the Agreement?'

4 It appears from the documents before the Court that Italian production of bananas, which is confined to Sicily, amounted to 120 tonnes in 1985 whereas, in the same year, Italy's imports of bananas came to 357 500 tonnes.

5 It also appears from the documents before the Court that Italian tax law provides for a total of 19 consumer taxes, of which three are charged on tropical products, namely on coffee, cocoa and bananas. The other consumer taxes on foodstuffs include the taxes on spirits, beer, sugars, sweeteners, seed-oils and margarine. There are also 10 other consumer taxes on non-foodstuffs, including taxes on manufactured tobacco, matches, methane, and mineral and other oils.

6 Reference is made to the Report for the Hearing for the facts, 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, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

**The first and second questions**

7 The first and second questions are concerned with the distinction between a charge having an effect equivalent to a customs duty, within the meaning of Articles 9 and 12 of the Treaty, and internal taxation within the meaning of Article 95, and are designed to enable the national court to determine which category the tax on the consumption of bananas falls into. It is therefore appropriate to deal with those two questions together.

8 According to established case-law of the Court, the prohibition laid down by Articles 9 and 12 of the Treaty in regard to charges having equivalent effect covers any charge exacted at the time of or on account of importation which, being borne specifically by an imported product to the exclusion of the similar domestic product, has the result of altering the cost price of the imported product, thereby producing the same restrictive effect on the free movement of goods as a customs duty.

9 The essential feature of a charge having an effect equivalent to a customs duty which distinguishes it from an internal tax therefore resides in the fact that the former is borne solely by an imported product as such whilst the latter is borne both by imported and domestic products.

10 The Court has however recognized that even a charge which is borne by a product imported from another Member State, when there is no identical or similar domestic product, does not constitute a charge having equivalent effect but internal taxation within the meaning of Article 95 of the Treaty if it relates to a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products.

11 Those considerations demonstrate that even if it were necessary in some cases, for the purpose of classifying a charge borne by imported products, to equate extremely low domestic production with its non-existence, that would not mean that the levy in question would necessarily have to be regarded as a charge having an effect equivalent to a customs duty. In particular, that will not be so if the levy is part of a general system of internal dues applying systematically to categories of products according to the criteria indicated above.

12 A tax on consumption of the type at issue in the main proceedings does form part of a general system of internal dues. The 19 taxes on consumption are governed by common tax rules and are charged on categories of products irrespective of their origin in accordance with an objective criterion, namely the fact that the product falls into a specific category of goods. Some of those taxes are charged on products intended for human consumption, including the tax on the consumption of bananas. Whether those goods are produced at home or abroad does not seem to have a bearing on the rate, the basis of assessment or the manner in which the tax is levied. The revenue from those taxes is not earmarked for a specific purpose; it constitutes tax revenue identical to other tax revenue and, like it, helps to finance State expenditure generally in all sectors.

13 Consequently, the tax at issue must be regarded as being an integral part of a general system of internal dues within the meaning of Article 95 of the Treaty and its compatibility with Community law must be assessed on the basis of that article rather than Articles 9 and 12 of the Treaty.

14 The first and second questions must therefore be answered in the following terms: a charge described as a consumer tax which is imposed on both imported products and domestic products but in practice applies almost exclusively to imported products because domestic production is extremely small does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 9 and 12 of the EEC Treaty if it is part of a general system of internal dues applied systematically to categories of products in accordance with objective criteria irrespective of the origin of the products. It therefore constitutes internal taxation within the meaning of Article 95.

## The third question

15 The third question put by the national court seeks to establish whether, in the event that the charge in question is to be regarded as internal taxation, it is prohibited under the second paragraph of Article 95 inasmuch it may serve to protect other fruit, in particular fruit typically grown in Italy.

16 It must first be observed that in a judgment given today (Case 184/85 *Commission* v *Italian Republic* [1987] ECR 2013) the Court declared that 'by imposing and maintaining in force a tax on the consumption of fresh bananas which is applicable to bananas from other Member States, and in particular to bananas from the French overseas departments, the Italian Republic has failed to fulfil its obligations under the second paragraph of Article 95 of the EEC Treaty'.

17 The Court assessed the criterion of similarity on which the prohibition set out in the first paragraph of Article 95 is based by considering, on the one hand, a set of objective characteristics of two categories of product, namely bananas and table fruit typically produced in Italy, such as their organoleptic qualities and their water content, and, on the other hand, whether or not the two categories of fruit can satisfy the same consumer needs.

18 The Court found that the characteristics of the two categories of products differed as regards both the organoleptic qualities of the products and their ability to satisfy the same consumer needs. The Court therefore held that those categories of products were not similar for the purposes of Article 95.

19 As the Court pointed out in its judgment of today's date referred to above, where the requirement of similarity prescribed by the first paragraph of Article 95 is not fulfilled, the second paragraph of that article is intended to cover all forms of indirect tax protection in the case of products which, without being similar within the meaning of the first paragraph of Article 95, are nevertheless in competition, even partial, indirect or potential competition, with each other.

20 Consequently, that provision pursues the general objective of securing fiscal neutrality and is designed to prevent a Member State from discriminating against a product imported from another Member State by favouring national products, through its national tax legislation, and thus creating barriers to the free movement of goods between Member States.

21 The Court pointed out in the judgment cited above that bananas afford an alternative choice to consumers of fruit. As a result, bananas must be regarded as being in partial competition with such fruit. Therefore the taxation of bananas must not have the effect of affording indirect protection to table fruit typically grown in Italy.

22 With regard to the protective nature of the tax rules introduced by Law No 986, it was also held in that judgment that those rules are characterized by the fact that the relevant consumer tax does not apply to the most typical Italian-produced fruit. That the tax is protective is underscored by its rate of LIT 525 per kilogram, which is almost half the 1985 import price. That difference in taxation influences the market in the products in question by reducing the potential consumption of the imported products.

23 The third question must therefore be answered in the following terms: the second paragraph of Article 95 of the EEC Treaty precludes the charging of a consumer tax on certain imported fruit where it may protect domestic fruit production.

**The fourth question**

24 The aim of the fourth question is to establish whether Article 95 applies to all products coming from Member States of the Community, including products originating in non-member countries which are in free circulation in the Member States.

25 It is true that, unlike the wording of Article 9 of the Treaty, which expressly refers to products coming from third countries which are in free circulation in Member States, Article 95 refers only to products 'of other Member States'. However, as the Court has consistently held, the first and second paragraphs of Article 95 supplement, within the system of the Treaty, the provisions on the abolition of

customs duties and charges having equivalent effect. Their aim is to ensure free movement of goods between the Member States in normal conditions of competition by the elimination of all forms of protection which result from the application of internal taxation which discriminates against products from other Member States. Accordingly, Article 95 must guarantee the complete neutrality of internal taxation as regards competition between domestic products and products imported from other Member States.

26 Article 95 cannot be interpreted in a manner contrary to the aim indicated above. Under Article 9 (1) of the EEC Treaty the Community is to be based upon a customs union which is to cover all trade in goods and the adoption of a common customs tariff. As the Court pointed out in its judgment of 15 December 1976 (Case 41/76 *Donckerwolcke* [1976] ECR 1921), according to Article 9 (2) the provisions adopted for the liberalization of intra-Community trade apply in identical fashion to products originating in Member States and to products coming from third countries which are in free circulation in the Community in accordance with the requirements laid down by Article 10. In that connection the Court has made it clear that, as regards the free movement of goods within the Community, products which are in free circulation are definitively and wholly assimilated to products originating in Member States.

27 In its judgment of 1 July 1969 (Joined Cases 2 and 3/69 *Sociaal Fonds voor de Diamantarbeiders* [1969] ECR 211), the Court stated that the importance of the prohibitions set out in Articles 9 and 12 of the EEC Treaty is such that, in order to prevent their circumvention by means of various customs and fiscal measures, the Treaty was intended to prevent any possible failure in their implementation. It said that Article 95 was intended to fill in any breaches which a fiscal measure might open in the prohibitions laid down.

28 It follows that any interpretation of Article 95 which precluded it from applying to products in free circulation would lead to a result which would be contrary both to the spirit of the Treaty expressed in Articles 9 and 10 and to the system of the Treaty. Commercial policy with regard to non-member countries falls within the exclusive competence of the Community, subject to the requisite protective measures which may be taken under the conditions laid down in Article 115 of the

Treaty. Consequently, Member States cannot remain free to charge discriminatory taxation on products which originated in non-member countries but are in free circulation in the Community.

29 The fourth question must therefore be answered in the following terms: Article 95 of the EEC Treaty covers all products coming from Member States, including products originating in non-member countries which are in free circulation in the Member States.

30 In view of the answer given to the fourth question there is no need to answer the fifth question.

## Costs

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

On those grounds,

THE COURT,

in reply to the questions referred to it by the Tribunale di Milano by order of 17 January 1985, hereby rules:

**(1) A charge described as a consumer tax which is imposed on both imported products and domestic products but in practice applies almost exclusively to imported products because domestic production is extremely small does not constitute a charge having an effect equivalent to a customs duty on imports within the meaning of Articles 9 and 12 of the EEC Treaty if it is part of a general system of internal dues applied systematically to categories of products**

**in accordance with objective criteria irrespective of the origin of the products. It therefore constitutes internal taxation within the meaning of Article 95;**

**(2) The second paragraph of Article 95 of the EEC Treaty precludes the charging of a consumer tax on certain imported fruit where it may protect domestic production;**

**(3) Article 95 of the EEC Treaty covers all products coming from Member States, including products originating in non-member countries which are in free circulation in the Member States.**

Galmot Kakouris O'Higgins Schockweiler Bosco

Koopmans Due Everling Bahlmann Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 7 May 1987.

P. Heim
Registrar

Y. Galmot
President of Chamber,
acting as President