Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

16 July 2015*

(Reference for a preliminary ruling — Regulation (EC) No 1889/2005 — Controls of cash entering or leaving the European Union — Articles 3 and 9 — Obligation to declare — Infringement — Penalties — Proportionality)

In Case C-255/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Kecskeméti Közigazgatási és Munkaügyi Bíróság (Hungary), made by decision of 19 May 2014, received at the Court on 27 May 2014, in the proceedings

Robert Michal Chmielewski

v

Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta (Rapporteur), President of the Chamber, J.-C. Bonichot, A. Arabadjiev, J.L. da Cruz Vilaça and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: I. Illéssy, Administrator,

having regard to the written procedure and further to the hearing on 18 March 2015,

after considering the observations submitted on behalf of:

— the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága, by B. Gyenge, acting as Agent,

— the Hungarian Government, by M.Z. Fehér, G. Koós and M.M. Tátrai, acting as Agents,

— the Belgian Government, by J.-C. Halleux, M. Jacobs and C. Pochet, acting as Agents,

— the Spanish Government, by A. Gavela Llopis, acting as Agent,

— the Italian Government, by G. Palmieri, acting as Agent, and P. Gentili, avvocato dello Stato,

— the European Commission, by L. Grønfeldt and A. Sipos, acting as Agents,

* Language of the case: Hungarian.

after hearing the Opinion of the Advocate General at the sitting on 7 May 2015,

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 65 TFEU and Article 9 of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community (OJ 2005 L 309, p. 9).

2 The request has been made in proceedings between Mr Chmielewski and the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága (customs and finance directorate-general for the region of Dél-Alföld of the National Tax and Customs Office) concerning the fine which was imposed on Mr Chmielewski by the latter for having failed to declare the amount of cash he was carrying at the time of his entry into the territory of the European Union.

Legal context

EU law

3 Recitals 1 to 3, 5, 6 and 13 in the preamble to Regulation No 1889/2005 are worded as follows:

‘(1) One of the Community’s tasks is to promote harmonious, balanced and sustainable development of economic activities throughout the Community by establishing a common market and an economic and monetary union. To that end the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

(2) The introduction of the proceeds of illegal activities into the financial system and their investment after laundering are detrimental to sound and sustainable economic development. Accordingly, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [OJ 1991 L 166, p. 77] introduced a Community mechanism to prevent money laundering by monitoring transactions through credit and financial institutions and certain types of professions. As there is a risk that the application of that mechanism will lead to an increase in cash movements for illicit purposes, Directive 91/308 … should be supplemented by a control system on cash entering or leaving the Community.

(3) At present such control systems are applied by only a few Member States, acting under national legislation. The disparities in legislation are detrimental to the proper functioning of the internal market. The basic elements should therefore be harmonised at Community level to ensure an equivalent level of control on movements of cash crossing the borders of the Community. Such harmonisation should not, however, affect the possibility for Member States to apply, in accordance with the existing provisions of the Treaty, national controls on movements of cash within the Community.

…

(5) Accordingly, cash carried by any natural person entering or leaving the Community should be subject to the principle of obligatory declaration. This principle would enable the customs authorities to gather information on such cash movements and, where appropriate, transmit that information to other authorities. …

(6) In view of its preventive purpose and deterrent character, the obligation to declare should be fulfilled upon entering or leaving the Community. However, in order to focus the authorities' action on significant movements of cash, only those movements of EUR 10 000 or more should be subject to such an obligation. Also, it should be specified that the obligation to declare applies to the natural person carrying the cash, regardless of whether that person is the owner.

…

(13) The powers of the competent authorities should be supplemented by an obligation on the Member States to lay down penalties. However, penalties should be imposed only for failure to make a declaration in accordance with this Regulation.'

4 Under Article 1(1) of that regulation:

'This Regulation complements the provisions of Directive 91/308 … concerning transactions through financial and credit institutions and certain professions by laying down harmonised rules for the control, by the competent authorities, of cash entering or leaving the Community.'

5 Article 3 of that regulation provides:

'1. Any natural person entering or leaving the Community and carrying cash of a value of EUR 10 000 or more shall declare that sum to the competent authorities of the Member State through which he is entering or leaving the Community in accordance with this Regulation. The obligation to declare shall not have been fulfilled if the information provided is incorrect or incomplete.

2. The declaration referred to in paragraph 1 shall contain details of:

…

(e) the provenance and intended use of the cash;

…'

6 Article 4(2) of that regulation provides:

'In the event of failure to comply with the obligation to declare laid down in Article 3, cash may be detained by administrative decision in accordance with the conditions laid down under national legislation.'

7 Article 9(1) of Regulation No 1889/2005 provides:

'Each Member State shall introduce penalties to apply in the event of failure to comply with the obligation to declare laid down in Article 3. Such penalties shall be effective, proportionate and dissuasive.'

Hungarian law

8 Under Paragraph 1 of Law No XLVIII of 2007, implementing Regulation No 1889/2005, in the version applicable to the main proceedings ('Law No XLVIII'), the customs authorities are to have authority to implement Regulation No 1889/2005.

9 Paragraph 3 of Law No XLVIII provides that, for the purposes of monitoring the movement of cash and in order to check compliance with the obligation to declare laid down in Article 3, the customs authorities are to be entitled, in the exercise of their powers as customs authorities, to carry out controls on natural persons, their baggage and their means of transport.

10 Paragraph 5/A(1) of Law No XLVIII provides:

'Any natural person entering or leaving the territory of the European Union who does not fulfil correctly and fully the obligation to declare laid down by Article 3(1) of Regulation [No 1889/2005] in respect of the cash he is carrying as defined in Article 2(2) of [that] Regulation, or who does not fulfil that obligation at all shall, as required by Article 9 of [that] Regulation, pay an on-the-spot fine in [Hungarian forints (HUF)], amounting to:

(a) 10% of the amount held, where the cash sum is EUR 10 000 or more, provided that it is no more than EUR 20 000,

(b) 40% of the amount held, where the cash sum is EUR 20 000 or more, provided that it is no more than EUR 50 000,

(c) 60% of the amount held, where the cash sum is more than EUR 50 000.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

11 On 9 August 2012, Mr Chmielewski entered the territory of Hungary from Serbia, without declaring the amount of cash he was carrying, namely a total amount of EUR 147 492, consisting of 249 150 Bulgarian leva (BGN), 30 000 Turkish lira (TRY) and 29 394 Romanian lei (RON).

12 By decision of 4 October 2013, the Nemzeti Adó- és Vámhivatal Dél-alföldi Regionális Vám- és Pénzügyőri Főigazgatósága ordered Mr Chmielewski to pay an administrative fine of HUF 24 532 000 on the ground that he had failed to comply with the obligation imposed on him under Regulation No 1889/2005 and Law No XLVIII, since he had failed to declare that sum at the time of his entry into the territory of the European Union.

13 Mr Chmielewski brought an action against that decision before the referring court, claiming, inter alia, that the provisions of Law No XLVIII were not compatible with EU law.

14 In those circumstances, the Kecskeméti Közigazgatási és Munkaügyi Bíróság (Administrative and Labour Court, Kecskemét) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the amount of the fine imposed by Paragraph 5/A of Law No XLVIII … implementing Regulation … No 1889/2005 … commensurate with the requirement laid down in Article 9(1) of that Regulation, according to which the penalties imposed by national law must be effective, dissuasive and, at the same time proportionate to the infringement and to the objective pursued?

(2) Does Paragraph 5/A of Law No XLVIII not infringe, as a result of the amount of the fines it provides for, the prohibition on disguised restrictions on the free movement of capital in the [EU] Treaty and in Article 65(3) [TFEU]?'

Consideration of the questions referred

15 By its questions, which should be examined together, the referring court asks, in essence, whether Article 65(3) TFEU and Article 9(1) of Regulation No 1889/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a breach of the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

16 As Regulation No 1889/2005 lays down harmonised rules for the control of movements of cash entering or leaving the European Union, it is necessary to examine the legislation at issue in the main proceedings first of all in the light of the provisions of that regulation.

17 As is apparent from Article 1(1) of Regulation No 1889/2005, read in conjunction with recitals 1 to 3 in the preamble thereto, in the context of promoting harmonious, balanced and sustainable economic development throughout the European Union, that regulation seeks to supplement the provisions of Directive 91/308 by laying down harmonised rules for the control of cash entering or leaving the European Union.

18 In accordance with recitals 2, 5 and 6 in the preamble to Regulation No 1889/2005, the regulation seeks to prevent, discourage and avoid the introduction of the proceeds of illegal activities into the financial system and their investment after laundering by the establishment, inter alia, of a principle of obligatory declaration of such movements allowing information to be gathered concerning them.

19 To that end, Article 3(1) of that regulation lays down an obligation, for any natural person entering or leaving the European Union and carrying an amount of cash equal to or more than EUR 10 000, to declare that amount.

20 Under Article 9(1) of that regulation, each Member State is to introduce penalties to apply in the event of failure to comply with the obligation to declare. According to that provision, the penalties are to be effective, proportionate and dissuasive.

21 In that regard, it should be noted that, according to the Court's settled case-law, in the absence of harmonisation of EU legislation in the field of penalties applicable where conditions laid down by arrangements under such legislation are not complied with, Member States are empowered to choose the penalties which seem to them to be appropriate. They must, however, exercise that power in accordance with EU law and its general principles, and consequently in accordance with the principle of proportionality (see judgments in *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410, paragraph 53, and *Urbán*, C-210/10, EU:C:2012:64, paragraph 23).

22 In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation (see judgments in *Ntionik and Pikoulas*, C-430/05, EU:C:2007:410, paragraph 54, and *Urbán*, C-210/10, EU:C:2012:64, paragraphs 24 and 53).

23 In that context, the Court has stated that the severity of penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality (see judgments in *Asociația Accept*, C-81/12, EU:C:2013:275, paragraph 63, and *LCL Le Crédit Lyonnais*, C-565/12, EU:C:2014:190, paragraph 45).

24 In respect of the dispute in the main proceedings, it should be noted that the effectiveness and dissuasiveness of the penalties provided for in Paragraph 5/A of Law No XLVIII have been contested neither before the referring court nor before this Court.

25 In that context, it suffices to note that penalties such as those at issue in the main proceedings seem to be an appropriate means of attaining the objectives pursued by Regulation No 1889/2005 and of ensuring effective enforcement of the obligation to declare laid down in Article 3 of that regulation, since they are likely to dissuade the persons concerned from breaching that obligation.

26 Moreover, a system under which the amount of the penalties imposed in Article 9 of that regulation varies in accordance with the amount of undeclared cash does not seem, in principle, to be disproportionate in itself.

27 As regards the proportionality of penalties imposed by the legislation at issue in the main proceedings, it should be noted that the amount of the fines is graduated according to the amount of undeclared cash.

28 In contrast to what is maintained by the European Commission, the requirement that the penalties introduced by the Member States under Article 9 of Regulation No 1889/2005 must be proportionate does not mean the competent authorities must take account of the specific individual circumstances of each case.

29 As noted by the Advocate General in points 79 to 81 of his Opinion, under Article 9(1) of that regulation, Member States enjoy a margin of discretion concerning the choice of penalties which they adopt in order to ensure compliance with the obligation to declare laid down in Article 3 of that regulation, provided that a breach of that obligation can be penalised in a simple, effective and efficient way, and without the competent authorities necessarily having to take account of other circumstances, such as intention or recidivism.

30 However, in the light of the nature of the infringement concerned, namely a breach of the obligation to declare laid down in Article 3 of Regulation No 1889/2005, a fine equivalent to 60% of the amount of undeclared cash, where that amount is more than EUR 50 000, does not seem to be proportionate. Such a fine goes beyond what is necessary in order to ensure compliance with that obligation and the fulfilment of the objectives pursued by that regulation.

31 In that regard, it must be noted that the penalty provided for in Article 9 of Regulation No 1889/2005 does not seek to penalise possible fraudulent or unlawful activities, but solely a breach of that obligation.

32 In that context, it should be noted that, as stated in recitals 3 and 15 in the preamble to that regulation, the latter seeks to ensure more effective control of movements of cash entering or leaving the European Union, in order to prevent the introduction of the proceeds of unlawful activities in the financial system, whilst respecting the principles recognised by the Charter of Fundamental Rights of the European Union.

33 It should also be noted that Article 4(2) of Regulation No 1889/2005 provides for the possibility to detain, by administrative decision in accordance with the conditions laid down under national legislation, cash which has not been declared in accordance with Article 3 of that regulation, in order, inter alia, to allow the competent authorities to carry out the necessary controls and checks relating to the provenance of that cash, its intended use and destination. Therefore, a penalty which consists of a fine of a lower amount, together with a measure to detain cash that has not been declared in accordance with Article 3 thereof, is capable of attaining the objectives pursued by that regulation without going beyond what is necessary for that purpose. In this case, it is apparent from the file submitted to the Court that the legislation at issue in the main proceedings does not make provision for such a possibility.

34 In light of the foregoing considerations, it is not necessary to examine whether there exists a restriction within the meaning of Article 65(3) TFEU.

35 In those circumstances, the answer to the questions referred is that Article 9(1) of Regulation No 1889/2005 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a failure to comply with the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

Costs

36 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Second Chamber) hereby rules:

Article 9(1) of Regulation (EC) No 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering or leaving the Community must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, in order to penalise a failure to comply with the obligation to declare laid down in Article 3 of that regulation, imposes payment of an administrative fine, the amount of which corresponds to 60% of the amount of undeclared cash, where that sum is more than EUR 50 000.

[Signatures]