JUDGMENT OF THE COURT
27 MARCH 1963[1]

Da Costa en Schaake N.V., Jacob Meijer N.V. and Hoechst-Holland N.V. v Nederlandse Belastingadministratie[2] (reference for a preliminary ruling by the Tariefcommissie, Amsterdam)

Joined Cases 28, 29 and 30/62

Summary

1. *Preliminary ruling—National courts or tribunals of last instance—Duty to bring matter before the Court—Extinction in case of a question of interpretation already decided by the Court*
   (EEC Treaty, Article 177)

2. *Preliminary ruling—Jurisdiction of the Court and of national courts*
   (EEC Treaty, Article 177)

3. *Procedure—Preliminary ruling—Question of interpretation already decided by the Court—Fresh reference—Admissibility*
   (EEC Treaty, Article 177; Statute of the Court of Justice of the EEC, Article 20)

1. The obligation imposed by the third paragraph of Article 177 of the EEC Treaty upon national courts or tribunals of last instance may be deprived of its purpose by reason of the authority of an interpretation already given by the Court under Article 177 in those cases in which the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.

2. When giving a ruling within the framework of Article 177, the Court limits itself to deducing the meaning of Community rules from the wording and the spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted.

3. Article 177 always allows a national court or tribunal, if it considers it appropriate, to refer questions of interpretation to the Court again even if they have already formed the subject of a preliminary ruling in a similar case.

In Joined Cases 28, 29 and 30/62

each being a Reference to the Court, under subparagraph (a) of the first paragraph and under the third paragraph of Article 177 of the Treaty

1 — Language of the Case: Dutch.
2 — CMLR

establishing the European Economic Community, by the Tariefcommissie, the Dutch administrative court of last instance in taxation matters, for a preliminary ruling in the actions pending before that court, between

DA COSTA EN SCHAAKE N.V., Amsterdam, represented by H.G. Stibbe and L.F.D. ter Kuile, advocates of Amsterdam (Case 28/62),

JACOB MEIJER N.V., Venlo,
(Case 29/62),

HOECHST-HOLLAND N.V., Amsterdam,
(Case 30/62),

and

NEDERLANDSE BELASTINGADMINISTRATIE, represented by the Inspectors of Customs and Excise at Amsterdam (Case 28/62), at Venlo (Case 29/62) and at Rotterdam (Case 30/62) respectively,

on the following questions:

1. Whether Article 12 of the EEC Treaty has direct application within the territory of a Member State, as is claimed by the applicants, in other words, whether nationals of such a State can, on the basis of the Article, in question, lay claim to individual rights which the courts must protect;
2. In the event of an affirmative reply, whether there has been an unlawful increase in customs duty, or only a reasonable alteration of duties applicable before 1 March 1960, an alteration which, although amounting to an increase from an arithmetical point of view, is, nevertheless, not to be regarded as prohibited under the terms of Article 12,

THE COURT

composed of: A. M. Donner, President, L. Delvaux and R. Rossi (Presidents of Chambers), Ch. L. Hammes, A. Trabucchi (Rapporteur), R. Lecourt and W. Strauß, Judges,

Advocate-General: M. Lagrange
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

(a) *Case 28/62*

On 3 May 1960, Da Costa en Schaake N.V. imported from the Federal Republic of Germany, according to the customs declaration of that date, goods described in the import document as 'Frigen 11/12, No 5050, halogenous derivatives of hydrocarbons, 50 per cent dichlorodifluoromethane, 50 per cent trichlorodifluoromethane'.

According to the decision of 24 June 1960, No 328 B.T. of the Nederlandse Belastingadministratie, the product in question should, at the date of import, have been classified under heading 38.19-b-6 of the tariff of import duties then in force under the Brussels Protocol of 25 July 1958, ratified in the Netherlands by the Law of 16 December 1959.

Heading 38.19-b-6 was worded as follows:

'Chemical products and preparations (including mixtures of natural products) manufactured by the chemical industries or related industries and not mentioned or included elsewhere; residuary products of chemical industries or related industries not mentioned or included elsewhere: b. others:

6. others ... ... 10% 9% e'

On the basis of this, the Nederlandse Belastingadministratie applied an import duty of 10 per cent *ad valorem* to the import in question.

Da Costa en Schaake N.V. appealed to the Tariefcommissie against this decision.

The appellant proposed that the product in dispute be classed under heading 29.02-b-3 which was worded as follows:

'Halogenous derivatives of hydrocarbons:

b. others:

3. others ... ... exempt'.

In support of this, the appellant urged that, in view of the prohibition imposed by Article 12 of the EEC Treaty, the Brussels Protocol of 25 July 1958, concluded by the three Member States of the Benelux Economic Union and approved by the Dutch Law of 16 December 1959, cannot lead to the imposition on the products in dispute of an import duty higher than that which was applied on 1 January 1958, the amount of which was nil.

The Nederlandse Belastingadministratie replied that Article 12 of the EEC Treaty does not have direct application to nationals of the signatory States.

(b) *Case 29/62*

On 14 March 1960 the company Jacob Meijer N.V. imported from the Federal Republic of Germany, according to its customs declaration of that date, bakelite material for electro-technical equipment (so-called 'galvanized boxes'), described in the import document as 'bakelite junction boxes'. According to the decision of 3 September 1960, No 59 B of the Nederlandse Belastingadministratie, the product should have been classified, at the date of import, under heading 39.07-d of the tariff of import duties then in force under the Brussels Protocol of 25 July 1958, ratified in the Netherlands by the Law of 16 December 1959. On 14 March 1960 this heading was worded as follows:

'Products made from substances coming within Nos. 39.01 to 39.06 inclusive:
d. others ... ... 20% 18% e'

Jacob Meijer N.V. appealed to the Tariefcommissie against this decision, submitting that the increase caused by this classification, as compared with the import duty applied to the products in question at the time the EEC Treaty entered into force, was incompatible with Article 12 of that Treaty.

It proposed that the product in question be classified under heading 85.19 which was worded as follows:

'Equipment for the making, breaking, commutation, connexion, control or distribution of and for protection against electric current (cut outs, switches, relays, surge arresters, contact plugs and sockets, junction boxes and connexions, etc); resistances (other than heating resistances), potentiometers and rheostats, automatic voltage regulators with resistance, choke-coil, vibrating reed or motor drive; switchboards and distributing boards excluding telephone switchboards ... ... 10% 9% e'

The Nederlandse Belastingadministratie raised the same objection as in the case of Da Costa en Schaake N.V.

(c) *Case 30/62*

On 12 May 1960 N.V. Rhenus Transportmaatschappij imported from the Federal Republic of Germany powder products described in the customs declaration as 'Asplit CN'.

According to the decision of 16 July 1960, No 585 Tar/1960 of the Nederlandse Belastingadministratie, the product, in question was to be classified at the date of import under heading 38.19-b-6 of the tariff of import duties then in force under the Brussels Protocol of 25 July 1958, concluded by the three Member States of the Benelux Economic Union and approved by the Dutch Law of 16 December 1959. On 12 May 1960 this heading was worded as follows:

'Chemical products and preparations (including those consisting of mixtures of natural products) manufactured by chemical industries or related industries and not mentioned or included elsewhere; residuary products of chemical industries or related industries not mentioned or included elsewhere
b. others:
6. others: ... 10% 9% e'

Hoechst-Holland N.V., in the name of the importing company, appealed to the Tariefcommissie against this decision. Although it raised no objections to the above-mentioned classification of the product in question, Hoechst-Holland N.V. criticized the imposition of the import duty of 9 per cent *ad valorem* in this instance, in view of the fact that on the date when Article 12 of the EEC Treaty entered into force the product in question was exempt from import duty.

The Nederlandse Belastingadministratie replied:

'that Article 12 of the EEC Treaty contained a provision binding only on the Member States of the Community; that the Treaty did not therefore apply automatically and consequently was not directly applicable to ordinary trade; that this point of view was supported by the provision in the first paragraph of Article 170 of the Treaty.'

(d) *In all these cases*

The Tariefcommissie, in its hearings of 22 January and 21 May 1962, whilst holding that the products in question should be classified under the headings indicated by the Belastingadministratie, considered that the arguments of the parties raised a question bearing on the interpretation of the EEC Treaty; it consequently suspended proceedings in the three actions and, in accordance with the third paragraph of Article 177 of

the Treaty, referred to the Court of Justice on 19 September 1962 the two preliminary questions mentioned above.
These decisions of the Tariefcommissie were notified by letters dated 2 October 1962 from the Registrar of the Court to the parties involved in the different cases, to the Member States and to the Commission of the EEC under Article 20 of the Court of Justice of the EEC.
In accordance with this provision, written observations were submitted on the three cases by the appellants in the main actions, by the Commission of the EEC and by the Government of the Federal Republic of Germany.
The Court, by Order of 24 January 1963, considering that the questions of interpretation posed by the Tariefcommissie in the three cases were identical, decided to join these cases for the purposes of the oral procedure and the judgment.
The oral observations of the Commission of the EEC were made at the hearing on 19 February 1963. The Advocate-General delivered his opinion at the hearing on 13 March 1963.

II — Observations presented under the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The observations presented under the second paragraph of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

A—*On the first question*

The *Commission of the EEC* refers on this point to the statement which it lodged in Case 26/62 as well as to its oral observation in that case.[1]
The *Government of the Federal Republic of Germany* considers that Article 12 of the EEC Treaty, which confines itself to setting out rules which the Member States must observe in their legislation, is directed solely at the Member States. The obligation of the Member States resulting from it is accordingly applicable only in relation to the other contracting States. Consequently only these States and the Commission, which has the task of applying it, can derive rights from it.
With regard to the observance by the States of the obligations which arise under Article 12 of the EEC Treaty, their nationals, therefore, in relation to the State authorities, have only such rights as belong to them under the constitutional system of their own State. In fact, since the above-mentioned Article 12 amounts solely to an international obligation, it is exclusively for national law and not for the EEC Treaty to determine the legal consequences to be attributed to a rule of national law which is contrary to that provision. Consequently, faulty compliance with, or a failure to conform to, Article 12 on the part of a State can be made an issue only by the other Member States or by the Commission.
Da Costa en Schaake N.V. maintains that in establishing the Common Market its authors did not restrict themselves to making a body of rules accepted by the Member States only in the context of their mutual relationships, but that they created a community with an independent existence. Objecting to the formulation of the first question put to the Court by the Tariefcommissie in respect of its reference to individual rights, Da Costa en Schaake N.V. asserts that, in order to decide upon the existence of a 'direct application within the territory of a Member State' of the provisions of the Treaty, it is necessary to take other criteria as a basis. It mentions for example that both Article 210

1 — These observations are summarized in the first part of the judgment in Case 26/62.

and Article 177, although not referring directly to the nationals of Member States, certainly apply directly within Member States.

The use of the following criteria is suggested by Da Costa en Schaake N.V. in order to determine the cases in which the national court will act in order to ensure observance of the law in interpreting and applying the Treaty: the provisions at issue must not require action by national legislative authorities or Community institutions; the character or drafting of the provisions including requirements or prohibitions must make evident the fact that there is an obligation sufficiently binding to compel observance of them; these provisions must be set out in a sufficiently concrete manner.

The above appellant claims that all these conditions are fulfilled in the case of Article 12. In fact this provision, because of its content, is applicable without first being put into a concrete form by the national legislation of the Member States. Neither does it require elaboration by the Community legislature, since at the moment of the entry into force of the Treaty all customs duties were identical with the duties applied on 1 January 1957 (Article 14). In addition, although relating not to nationals, but only to national authorities, it constitutes a clear and fundamental rule the infringement of which would conflict with the fundamental principles of the Community, with the result that nationals liable to suffer damage as a result of such infringement must be protected. Lastly, the national court may without difficulty apply Article 12 directly, without taking account of customs duties which have been increased or introduced contrary to the provisions of this Article.

Jacob Meijer N.V. considers that the nationals of Member States can validly base their claims to subjective rights which ought to be protected by the courts upon Article 12.

Hoechst-Holland N.V. points out that nowhere does it appear that the Member States wished to remove the application of Community law from the jurisdiction of national courts, in view of the fact that Article 12 of the EEC Treaty lays down a provision which can as it stands be applied directly and without any action on the part of the national legislature; any person must be able to require its application by the courts, even in respect of national legislative provisions which are inconsistent with this rule.

B—*On the second question*

The *Commission of the EEC* points out that, in the present cases as well as in case 26/62, it is necessary to distinguish —within the framework of the second question—a principal question, for the solution of which it makes reference to its observations in case 26/62, and a secondary question: what is the interpretation of Article 12 of the Treaty which the national court must use in order to decide the duty in force on a specific product at the time of entry into force of the Treaty? Referring in this respect to what it pointed out under II, ad. 2 (a) on page 28 of its statement in Case 26/62, the Commission mentions that in the instance of Cases 28/62 and 29/62, there is no difference of opinion between the parties on the question which law was applied to the goods concerned at the time of the implementation of the Treaty. It was a question, in respect of Case 28/62, of a nil duty and, in respect of Case 29/62, of a duty of 10% *ad valorem*. Consequently, the duty imposed in the first case and the increase imposed in the second are incompatible with Article 12 of the EEC Treaty. With regard to Case 30/62, according to the Commission, it is not possible to see clearly whether the Nederlandse Belastingadministratie accepted the declaration made in the name

of the informant that no customs duty was due on the importation of the product in question before 1 March 1960. As the Tariefcommissie has not yet instituted an independent inquiry to determine the composition and the exact destination of the goods, the Commission considers that at the present moment it is impossible to arrive at an indisputable conclusion as to:

(a) The duty which was to be levied on the product in question in accordance with the old tariff;

(b) The duty which, whether or not consonant with the answer provided to point (a), was *actually* applied at the time of the entry into force of the Treaty, and immediately beforehand.

The Commission considers that it is highly probable that the new arrangement resulted, as from 1 March 1960, in an increase which was incompatible with Article 12 of the Treaty.

Da Costa en Schaake N.V. emphasizes the absolute nature of the obligation of Member States to observe the customs provisions of the Treaty, as is apparent particularly from Article 37 (2); it is impossible to see how any increase whatever in customs duties can be lawful.

Jacob Meijer N.V. points out that the statement in reply, prepared following the examination of the draft of the new Benelux tariff, by the Second Chamber of the States-General indicates that the Dutch Government considers that the prohibition of increases in import duties provided for in Article 12 of the Treaty also applies to increases in import duties resulting from technical changes.

The *German Government,* for its part, mentions that the question whether national rules are inconsistent with the obligation arising under Article 12 cannot depend upon a decision of the Court under Article 177 of the Treaty, because this question is not concerned with the interpretation of the Treaty.

Lastly, the *Commission of the EEC* as well as *Da Costa en Schaake N.V., Jacob Meijer N.V.* and *Hoechst-Holland N.V.* point out that, although it is true that the transposition of the old tariffs into the Brussels nomenclature may sometimes lead to an increase in tariffs, there is nothing to prevent the suppression of a possible increase by subdividing the heading concerned.

C—*On the question whether the references have lost their purpose*

During the oral procedure, the Commission of the EEC maintained that, following the judgment in Case 26/62 given by the Court on 5 February 1963, which decided identical questions, the references in the present case had lost their purpose.

Grounds of judgment

The regularity of the procedure followed by the Tariefcommissie in requesting the Court for a preliminary ruling under Article 177 of the EEC Treaty has not been disputed and there is no ground for the Court to raise the matter of its own motion.

The Commission, appearing by virtue of the provisions of Article 20 of the Statute of the Court of Justice of the EEC, urges that the request should be dismissed for lack of substance, since the questions on which an interpretation is requested from the Court in the present cases have already been decided by the judgment of 5 February 1963 in Case 26/62, which covered identical questions raised in a similar case.

This contention is not justified. A distinction should be made between the obligation imposed by the third paragraph of Article 177 upon national courts or tribunals of last instance and the power granted by the second paragraph of Article 177 to every national court or tribunal to refer to the Court of the Communities a question on the interpretation of the Treaty. Although the third paragraph of Article 177 unreservedly requires courts or tribunals of a Member State against whose decisions there is no judicial remedy under national law—like the Tariefcommissie—to refer to the Court every question of interpretation raised before them, the authority of an interpretation under Article 177 already given by the Court may deprive the obligation of its purpose and thus empty it of its substance. Such is the case especially when the question raised is materially identical with a question which has already been the subject of a preliminary ruling in a similar case.

When it gives an interpretation of the Treaty in a specific action pending before a national court, the Court limits itself to deducing the meaning of the Community rules from the wording and spirit of the Treaty, it being left to the national court to apply in the particular case the rules which are thus interpreted. Such an attitude conforms with the function assigned to the Court by Article 177 of ensuring unity of interpretation of Community law within the six Member States. If Article 177 had not such a scope, the procedural requirements of Article 20 of the Statute of the Court of Justice, which provides for the participation in the hearing of the Member States and the Community institutions, and of the third paragraph of Article 165 of the Treaty, which requires the Court to sit in plenary session, would not be justified. This aspect of the activity of the Court within the framework of Article 177 is confirmed by the absence of parties, in the proper sense of the word, which is characteristic of this procedure.

It is no less true that Article 177 always allows a national court, if it considers it desirable, to refer questions of interpretation to the Court again. This follows from Article 20 of the Statute of the Court of Justice, under which the procedure laid down for the settlement of preliminary questions is automatically set in motion as soon as such a question is referred by a national court.

The Court must, therefore, give a judgment on the present application.

The interpretation of Article 12 of the EEC Treaty, which is here requested, was given in the Court's judgment of 5 February 1963 in Case 26/62. This ruled that:

'1. Article 12 of the Treaty establishing the European Economic Community produces direct effects and creates individual rights which national courts must protect.

2. In order to ascertain whether customs duties or charges having equivalent effect have been increased contrary to the prohibition contained in Article 12 of the Treaty, regard must be had to the duties and charges actually applied by the Member State in question at the date of the entry into force of the Treaty. Such an increase can arise both from a re-arrangement of the tariff resulting in the classification of the product under a more highly taxed heading and from an increase in the rate of customs duty applied.'

The questions of interpretation posed in this case are identical with those settled as above and no new factor has been presented to the Court.

In these circumstances the Tariefcommissie must be referred to the previous judgment.

Costs

The costs incurred by the Commission of the EEC and the Governments of those Member States which submitted observations to the Court are not recoverable, and as these proceedings are in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Tariefcommissie, the decision as to costs is a matter for that Court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the Commission of the European Economic Community;
Upon hearing the opinion of the Advocate-General;
Having regard to Articles 9, 12, 14, 169, 170 and 177 of the Treaty establishing the European Economic Community;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;
Having further regard to its judgment of 5 Feburary 1963 in Case 26/62;

THE COURT

in answer to the question referred to it, for a preliminary ruling, by the Tariefcommissie on 19 September 1962, hereby rules:

1. **There is no ground for giving a new interpretation of Article 12 of the EEC Treaty;**

2. **It is for the Tariefcommissie to decide as to the costs of the present proceedings.**

Donner Delvaux Rossi

Hammes Trabucchi Lecourt Strauß

Delivered in open court in Luxembourg on 27 March 1963.

A. Van Houtte
Registrar

A. M. Donner
President

OPINION OF MR ADVOCATE-GENERAL M. LAGRANGE DELIVERED ON 13 MARCH 1963[1]

Mr President,
Members of the Court,

I

As you know, the three cases, Nos 28, 29 and 30/62, of which I have to give my analysis today, came before us in exactly the same circumstances as Case 26/62, which led to your judgment of 5 February 1963. Now, as then, the Tariefcommissie is referring to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions relating to the interpretation of Article 12 of the Treaty. The questions posed are in the same terms; the written observations presented both by the parties to the main actions and by the Governments and the Commission are the same; finally, no new circumstance has occurred since the judgment, and no new argument has been presented. The only difference from the procedural point of view is that reference was made to the Court by the Tariefcommissie on different dates: 16 August 1962 in Case 26/62 and 19 September 1962 in the three other cases—those which are at present before you. Thus it would seem that you have merely to reply as you did on 5 February last, and to the same effect, for there exists no apparent reason to hold differently.

However, such an approach would imply that the effect of *res judicata* resulting from your judgment of 5 February 1963 does not extend to the present actions; for otherwise you would be required, if not to dismiss the requests of the Tariefcommissie as inadmissible (since they are prior to your judgment), at least to declare them as unfounded by dismissing the cases for lack of grounds. A matter of principle is involved here which is not without importance to the future application of Article 177 and the relationships between the Court of Justice and the national courts which flow from it.

I think that this problem should be resolved by a normal application of the

1 — Translated from the French.