OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 22 NOVEMBER 1983 [1]

Mr President,
Members of the Court,

1. In the proceedings for a preliminary ruling to which this Opinion relates the Court is called upon to decide whether Community law allows turnover tax to be levied on a narcotic substance imported by way of contraband which cannot be lawfully marketed and is liable to be confiscated and destroyed by the national authorities.

I shall summarize the facts. By judgment of 27 July 1977 the Landgericht [Regional Court] Freiburg sentenced Miss Senta Einberger, the plaintiff in the main proceedings, to one year's imprisonment, suspended on certain conditions, for infringement of the German Drugs Law (Betäubungsmittelgesetz). Between the spring and autumn of 1974 Miss Einberger went on several occasions from the Federal Republic of Germany to Switzerland where she sold to a Mr and Mrs Winiger at various times and in amounts varying between 30 and 100 grams a total of 280 grams of morphine which had been unlawfully imported into Germany. On 19 January 1978, after that judgment, the Hauptzollamt [Principal Customs Office] Freiburg, the defendant in the main proceedings, served on Miss Einberger a notice of assessment to import duties in a total amount of DM 10 960.30, DM 5712 of which related to customs duties and DM 5 248.30 to turnover tax. Having unsuccessfully objected through administrative channels, Miss Einberger brought an action against the Hauptzollamt before the Finanzgericht [Finance Court] Baden-Württemberg for annulment of the notice of assessment.

By a first order of 16 June 1981, the Finanzgericht referred the following question to this Court: "Since the introduction of the Common Customs Tariff has a Member State been authorized to charge customs duties on drugs which have been smuggled into and subsequently removed from the customs territory of the Community?" The Court replied that "No customs debt arises upon the importation of drugs otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes" (judgment of 26 October 1982, Case 240/81, [1982] ECR 3699).

Demonstrating a laudable attachment to the reference for a preliminary ruling, the same section of the Finanzgericht Baden-Württemberg, namely the Außensenate Freiburg, Second Senate, referred a second question to the Court by order of 29 October 1982. It is worded as follows: "Is the imposition of import turnover tax on drugs compatible with Article 2 (2) of the 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 (Official Journal 1977 L 145, p. 1), if Member States are not permitted to levy customs duty?"

2. A preliminary remark is called for: the legislation which the Finanzgericht asks this Court to interpret was not in force at the material time. In 1974 the

1 — Translated from the Italian.

applicable legislation was the second Council Directive of 11 April 1967 concerning the structure and procedures for application of the common system of value added tax (Official Journal, English Special Edition 1967, p. 16), which was later superseded by the Sixth Directive. For the present purposes, however, the two directives in fact contain practically identical provisions. What the parties have said (and what I shall say) with respect to one is valid also with respect to the other.

3. The Government of the Federal Republic of Germany suggests that the Court should rule that the levying of the tax in question is compatible with Article 2 (b) of the Second Directive. That provision, argues the German Government, draws no distinction between legal and illegal imports, and moreover there are no provisions exempting the latter from the tax. Is there a lacuna? Certainly not. The directive is inspired by the principle that taxes must be fair and that very principle prohibits more favourable tax treatment for unlawful acts. That is confirmed by the objectives of the tax: it is intended to ensure that all goods bear the same burden, regardless of their origin and the channels through which they are distributed, in order to achieve neutrality in competition in international trade and full equalization at the frontier and to give effect to the principle, which generally applies in the field of indirect taxation, according to which indirect taxes are levied in the State of destination.

Furthermore, the German Government continues, the decisions of this Court on customs duties on the import of drugs cannot lead to any other conclusion. The function of the two charges is in fact different: the purpose of customs duty is to protect Community products against imports from non-member countries whereas turnover tax is motivated by fiscal considerations and, as I have just indicated, by the principles of equality and neutrality of competition in trade. The event giving rise to each charge is also different, as is the scope of Community intervention. There has in fact been only one measure harmonizing legislation in the tax sector; the Member States therefore retain the power to tax imports of drugs. Finally, it is not merely legitimate to subject unlawful imports to tax. It is also useful, in order to combat the so-called "underground economy" in the face of which criminal-law measures often prove ineffective.

4. Let me say immediately that I am not convinced by the German Government's argument. This Court has set out certain principles regarding the illegal importation of drugs to which I subscribe entirely and which I consider applicable to the present case. There is no doubt that this case displays a number of special features, but they are not so special as to justify a departure from previous decisions.

Let me recall those principles. The Court concerned itself with smuggled drugs for the first time in its judgment of 5 February 1981 in Case 50/80 *Horvath* v *Hauptzollamt Hamburg-Jonas* ([1981] ECR 385). That case concerned determination of the value for customs purposes of heroin unlawfully brought into the customs territory of the Community,

which was discovered at the frontier between the Netherlands and the Federal Republic of Germany, and was confiscated and destroyed. The Court placed particular emphasis on the nature of the goods, observing that a product such as heroin is not seized and destroyed only because the importer has not complied with customs formalities, but primarily because it is a narcotic whose harmfulness is recognized and whose importation and marketing are "prohibited in all the Member States except in trade which is strictly controlled and limited to authorized use for pharmaceutical and medical purposes" (paragraph 10). The Court then went on to say that where the Common Customs Tariff includes a narcotic substance, "it can only apply to imports of the product which are intended for an authorized use". Indeed it would be absurd if legislation intended to contribute "to the development of international trade and the lowering of barriers to trade" related to the importation of goods "intended for unlawful use and ... withdrawn from circulation as soon as they are discovered" (paragraph 13).

Therefore, the Member States — and this seems to me to be the essence of the judgment — are not entitled to apply customs duties to products whose importation, which is prohibited by the States themselves, is alien to the purposes of the Community and to its policies in relation to duties. Other weapons are available to the national authorities; thus — according to the same judgment — they have "freedom to take criminal proceedings in respect of offences committed [that is, in relation to the import and marketing of the drugs], with all the attendant consequences, including fines" (paragraph 15).

Subsequently, in response to requests for preliminary rulings from two other German courts, this Court reiterated and developed those principles. Thus, the Finanzgericht Düsseldorf asked whether in the case of mere unlawful importation, that is to say without subsequent discovery and destruction, duties may not be levied where it is prescribed that, if discovered, imported drugs are to be confiscated and destroyed (Case 221/81, *Wolf*). For its part, in the first *Einberger* case, already cited, the Finanzgericht Baden-Württemberg asked whether the fact that the imported goods were smuggled was sufficient to preclude the levying of duties even where the narcotic substance had been re-exported from the Community.

In its twin judgments of 26 October 1982 ([1982] ECR 3681 and 3699) the Court repeated that drugs such as morphine, heroin and cocaine display special features "in so far as their harmfulness is generally recognized and their importation and marketing are prohibited in all the Member States", except for pharmaceutical and medical purposes (paragraph 8). Moveover — the Court added — as parties to the Single Convention on Narcotic Drugs, 1961, the Member States themselves state that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind and they declare that they are conscious of their duty to prevent and combat that evil, whilst recognizing that the medical use of narcotic drugs is indispensable for the relief of pain and that the availability of narcotic drugs for such purposes should be ensured. In

consequence, the Court concluded, drugs which have escaped detection are not subject to customs duties: what is decisive is the fact that they are distributed illegally, and certainly not a matter of chance such as the possibility of their being discovered by the authorities (paragraph 15).

5. I believe, as I said earlier, that the Court's judgment will be consistent with those statements only if, as suggested by the plaintiff in the main proceedings, the Commission, and the French Government, it is held that the unlawful importation of narcotic drugs is similarly not subject to turnover tax.

Let us analyse one by one the arguments put forward by the German Government.

The first argument: the Second (or Sixth) Directive applies to all imports and does not distinguish between lawful and unlawful imports or in any way exempt the latter. That observation is correct, but — and this is the point — it could have applied, without amendment, to the Common Customs Tariff in which there are similarly no provisions exempting imports of narcotic drugs. The Court did not take account of that fact or, rather, it attached greater importance to the principle that the goods must be distributed through lawful economic channels. The objection will be raised that the Court took that view because of the particular purposes (development of international trade and removal of obstacles to trade) attributed to the Common Customs Tariff by the relevant Community provisions. Let us therefore examine the purposes of value-added tax in the light of the First Directive (227 of 11 April 1967) on the harmonization of legislation concerning turnover taxes. The first recital in the preamble thereto states that "the main objective of the Treaty is to establish, within the framework of an economic union, a common market within which there is healthy competition and whose characteristics are similar to those of a domestic market". The second recital continues "the attainment of this objective presupposes the prior application in Member States of legislation ... such as will not distort conditions of free competition or hinder the free movement of goods ... within the common market". Consequently, I do not see why the illegal distribution of narcotic drugs, that is to say something which must, as the Court stated, be dealt with by criminal-law provisions, should be less extraneous to those purposes than to those of the Common Customs Tariff.

The second argument: the functions of and the events giving rise to the two charges do not coincide. That observation is likewise not in itself contestable; but to deduce from it that the decisions of the Court regarding the non-payability of duties are not applicable to value-added tax stretch it too far. Thus, whilst it is true that customs duties and value-added tax have different objectives, it is also true that in the case of imports, where both are charges levied at the frontier, the difference is so scant as to be non-existent. This is confirmed by the provision regarding the chargeable event. Pursuant to Article 7 (2) of the Second Directive (or, which comes to the same thing, Article 10 (3) of the Sixth Directive), the Member States may link the chargeable event and the date on which the payment of value-added tax falls due with the chargeable event and the date when payment of customs duties falls due. That is, admittedly, no more than a power, but, as far as I know, all the Member States have made use of it, if only in order to facilitate inspections.

If that is correct, the principle which the Court has laid down regarding customs duties for which the chargeable event is uncertain applies also to value-added tax. In other words, drugs which have escaped control are, in this case too, treated as drugs which have been discovered and destroyed.

The third argument: by contrast with the position regarding customs duties, the Community's powers with regard to value-added tax are restricted to harmonization, so that the Member States remain entitled to tax illegal imports of drugs. I do not agree. In the case both of customs duties and of value-added tax, the basis of the Community provisions is the Treaty and it is of scant importance whether the articles to which they give effect are Articles 18 to 29 or 99 to 100. Both groups of provisions are linked with those laying down basic principles — Articles 2 and 3 — which determine the powers and means of action available to the Community. Moreover, the European rules on value-added tax are exhaustive in character; it is therefore improbable that the Community legislature would have left the Member States scope to intervene to an extent capable of frustrating its harmonizing measures.

The fourth argument: the application of value-added tax to illegal imports of drugs is a more effective means of social control than of criminal law provisions; in any case, the State has an interest in not encouraging the "underground economy", and that economy would be encouraged if huge transfers of wealth linked with the market in drugs escaped turnover tax. This argument has undeniable attractions: but from the ethical and political point of view — and that is the only basis on which it can be assessed — it is rejected by many experts in tax law and finance. Personally, I follow the school of thought which distinguishes between transactions which are prohibited by civil law (prostitution, for example) and those which are prohibited by criminal law. I favour the authorities which tax the former and consider the latter to be irrelevant from the point of view of tax.

6. In view of all the foregoing considerations, I propose that the Court reply as follows to the question submitted by the Finanzgericht Baden-Württemberg by order of 29 October 1982:

The importation of drugs otherwise than through economic channels strictly controlled by the competent authorities for use for medical and scientific purposes is not subject to turnover tax.