JUDGMENT OF THE COURT
26 OCTOBER 1982 [1]

Senta Einberger v Hauptzollamt Freiburg (reference for a preliminary ruling from the Finanzgericht Baden-Württemberg)

(Customs duties — Smuggled drugs)

Case 240/81

Common Customs Tariff — Customs duties — Application to drugs distributed through illegal channels — Not permissible — Penalties for offences — Powers of Member States

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, regardless of whether the drugs are discovered and destroyed under the control of those authorities or are not detected by them.

This finding is without prejudice to the powers of Member States to take criminal proceedings in respect of contraventions of their drugs laws and to impose appropriate penalties, including fines.

In Case 240/81

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht [Finance Court] Baden-Württemberg for a preliminary ruling in the action pending before that court between

SENTA EINBERGER, Schallstadt-Wolfenweiler,

and

HAUPTZOLLAMT [Principal Customs Office] FREIBURG

1 — Language of the Case: German.

on the interpretation of the Community provisions on the customs union in connection with the unlawful importation of drugs,

THE COURT

composed of: J. Mertens de Wilmars, President, A. O'Keeffe, U. Everling and A. Chloros (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, G. Bosco, T. Koopmans and O. Due, Judges,

Advocate General: F. Capotorti
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, 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 may be summarized as follows:

I — Facts and procedure

1. By a final judgment of the Landgericht [Regional Court] Freiburg of 27 July 1977 Miss Senta Einberger, the plaintiff in the main action, was given a suspended sentence of one year's imprisonment for infringement of the Drugs Law (Betäubungsmittelgesetz).

According to the findings of the Landgericht, Miss Einberger travelled on a number of occasions between the spring and autumn of 1974 to Basel in Switzerland and there sold to a Mr and Mrs Winiger a total of 280 grams of morphine in single lots of between 30 and 100 grams for a price of between SFR 150 and 170 per gram. The morphine was unlawfully brought into the Federal Republic of Germany and was then taken to Switzerland by the plaintiff.

On the basis of Article 57 (2) of the Customs Law (Zollgesetz), the Hauptzollamt Freiburg, the defendant in the main action, considered that the plaintiff should pay import duties on the quantities of drugs referred to in the judgment of the Landgericht, because she had obtained smuggled goods after the liability to pay customs duty had arisen and before it had been extinguished, whilst she knew, or should have known, that the goods in question were subject to customs control.

Consequently, by notice of assessment of 19 January 1978, the Hauptzollamt claimed payment from the plaintiff of import duties in the sum of DM 10 960.30 (DM 5 712 customs duty and DM 5 248.30 turnover tax levied on imports).

The objection lodged by the plaintiff in the main action against the notice of assessment was dismissed and she appealed to the Finanzgericht Baden-Württemberg.

2. Referring to the judgment of the Court of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385, the Finanzgericht Baden-Württemberg, by order of 16 June 1981, requested the Court to give a ruling on the following question:

"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? "

3. In the statement of grounds of the order making the reference, the Finanzgericht mentions that in the judgment of 5 February 1981 cited above the Court held that "the introduction of the Common Customs Tariff no longer leaves a Member State the power to apply customs duties to drugs which have been smuggled in and destroyed as soon as they were discovered but does leave it full freedom to take criminal proceedings in respect of offences committed, with all the attendant consequences, including fines".

The Hauptzollamt claimed that that judgment was not applicable to the present case because the morphine had not been destroyed. However, the Finanzgericht wishes to know whether it is only the destruction of the drug which renders the Common Customs Tariff inapplicable and accordingly precludes any liability to pay customs duties or whether that result is in fact already brought about by the prohibition on importing or marketing the drug.

The Finanzgericht notes that the statement of grounds of the judgment of the Court may be understood as meaning that the Common Customs Tariff concerns only the importation of goods with a view to their lawful use. No duty would be chargeable on imports of goods which would be subject to confiscation and destruction in the event of discovery. However, the grounds of judgment may also be interpreted as meaning that it is the actual destruction of the drugs which precludes or nullifies the subsequent application of the Common Customs Tariff. Moreover, there is no special provision in Community law defining the circumstances in which annulment or preclusion occurs. Should liability to pay duty lapse only when prohibition and destruction coincide, then the question arises whether taking the goods outside the customs territory is to be regarded as equivalent to destruction.

4. The order making the reference was received at the Court Registry on 4 September 1981.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Miss Senta Einberger, the plaintiff in the main action, represented by Rainer Endriss, Rechtsanwalt, Freiburg, and by the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, acting as Agent.

By order of 3 February 1982 the Court decided to join Cases 221/81 and 240/81 for the purpose of the oral procedure.

By order of 1 April 1982 the Court (First Chamber) decided, pursuant to Article 104 (3) of the Rules of Procedure, to grant, as legal aid, assistance for the purpose of facilitating the representation of the plaintiff in the main action.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, it invited the Commission to provide the Court with a description of the laws and regulations and custom practices governing, in each of the Member States,

On the one hand, the illegal importation of drugs the use and marketing of which are strictly forbidden within their territory; and,

On the other hand, the illegal importation of products the marketing of which is not prohibited as such within national territory but which are or have been smuggled into that territory.

The information collected by the Commission from the Member States may be summarized as follows:

The illegal importation of drugs the use and marketing of which are strictly prohibited gives rise to liability to pay customs duties and the levying of import duties in Belgium. Such imports give rise to liability to pay customs duties in the Federal Republic of Germany, Ireland and the Netherlands.

However, in the Federal Republic of Germany, since the judgment of the Court of 5 February 1981 in Case 50/80 cited above, import duties are not levied after discovery of the drugs in the event of their destruction, and there is moreover a presumption that they have been destroyed. In Ireland, the liability to pay customs duties is regarded as extinguished by reason of the fact that unlawfully imported drugs are confiscated and destroyed. In the Netherlands, import duties are levied where the drugs have been consumed and the illegal importation can be proved, but they are not levied in the event of confiscation and destruction.

In Italy, the illegal importation of drugs gives rise to liability to pay customs duties, except in the case of re-export or destruction by official order.

The illegal importation of drugs does not give rise to any liability to pay customs duties in Greece or Luxembourg, where drugs which are discovered are confiscated and destroyed. In Luxembourg, however, liability to pay customs duties arises if the drugs have been consumed.

Finally, the illegal importation of drugs does not give rise to the levying of duties in Denmark, France or the United Kingdom. However, in France, in those cases where illegally imported drugs are not destroyed by official order but are sold, for example to approved laboratories, duties are levied upon such sale. In the United Kingdom, duties are not levied in any case, regardless of whether the offending importer sold, consumed or re-exported the drugs.

The illegal importation of products the marketing of which is not *per se* prohibited gives rise to liability to pay customs duties in all the Member States, except in Greece where illegally imported goods are confiscated.

However, import duties are not levied in Denmark in those cases where the party liable to duty is unknown and the products are destroyed or sold.

In Ireland, import duties are regarded as having been paid where a smuggled product is returned to the person concerned against payment of a sum determined by arrangement and in cases where the product is confiscated and subsequently sold; on the other hand, the liability to pay customs duties is regarded as extinguished if the products are

destroyed by official order or re-exported.

In Luxembourg, products smuggled into the country are as a rule confiscated and sold. Import duties are levied upon the sale if the products are sold with a view to consumption within the country; duties are also levied where the products in question have been consumed.

In the United Kingdom, duties are not levied when the products are confiscated unless they are returned to the importer or sold by official order. On the other hand, duties are levied in the case of sale or re-export by the importer.

II — Summary of the written observations submitted to the Court

Miss Einberger, the plaintiff in the main action, claims that the important factor relevant to the answer to be given to the question submitted lies in paragraph 11 of the judgment of the Court of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385, according to which *ad valorem* customs duty cannot be determined for goods which are such a kind that they may not be put into circulation in any Member State but must on the contrary be seized and taken out of circulation by the competent authorities as soon as they are discovered.

That view shows that, in the case of the importation of drugs curculation of which is prohibited, the factor giving rise to the levy of duties is already lacking. The view that there exists at the outset a factor giving rise to customs duties, which disappears only later in certain circumstances, is therefore erroneous.

The plaintiff in the main action considers that the question whether or not customs duties may be levied must not be left to the random possibility of discovery or destruction or export of the goods or the happening of any or all of those events. In fact, those circumstances have no importance as far as the situation giving rise to the levying of customs duty is concerned.

The *Commission of the European Communities* considers that the decisive criterion to be inferred from the *Horvath* judgment cited above regarding the applicability of the Common Customs Tariff is whether or not the goods in question are of a kind capable of being absorbed into circulation. In the case of drugs, such as heroin and cocaine, importation and marketing are prohibited in all the Member States. The fact that the products must be seized and taken out of circulation is merely the legal consequence to be inferred from the prohibition of putting them into circulation.

That point of view is confirmed by the fact that the other grounds stated by the Court in relation to drugs smuggled into a country and destroyed upon discovery remain valid where, because of the circumstances, destruction is out of the question.

The Commission also refers in particular to the recitals in the preamble to Council Directive 79/623 of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal 1979, L 179, p. 31), and draws attention to the essentially economic nature of import and export duties. Moreover, Article 2 of that directive provides that a customs debt arises in the normal case of customs clearance and in the restrictively listed cases of failure to comply with customs requirements in the narrow sense, such as infringement of

Community provisions regarding customs procedures or the removal of goods liable to import duty from the customs supervision involved in the temporary storage of goods. On the other hand, there is no provision in the directive giving rise to any liability to pay customs duties in a case where there is an absolute prohibition on importation.

The Commission therefore proposes that the question should be answered in the negative. It emphasizes however that its analysis applies solely to the case of drugs the circulation of which is strictly prohibited. Consequently, its conclusion is without prejudice to the more general case of the import of goods in breach of a prohibition on importation, such as for example the importation of handguns in baggage.

III — Oral procedure

At the sitting on 25 May 1982 oral argument was presented by Miss Einberger, the plaintiff in the main proceedings, represented by Rainer Endriss, Rechtsanwalt, Freiburg, by the Government of the French Republic, represented for the purposes of the oral procedure by Alexandre Carnelutti, Secretary for Foreign Affairs, acting as Agent, and by the Commission of the European Communities, represented by its Legal Adviser, Rolf Wägenbaur, acting as Agent, assisted by Ursula Baumann, an expert in the Commission's Customs Union Department.

The Advocate General delivered his opinion at the sitting on 30 June 1982.

Decision

1 By order of 16 June 1981, received at the Court on 4 September 1981, the Finanzgericht [Finance Court] Baden-Württemberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the application of the Common Customs Tariff to smuggled drugs.

2 The dispute in the main proceedings concerns the determination of the customs duties applicable to quantities of morphine which, having been illegally imported into the Federal Republic of Germany, were sold in Switzerland in contravention of the Betäubungsmittelgesetz [German Drugs Law] by the plaintiff in the main proceedings. For those offences she was given a suspended sentence of one year's imprisonment by a German criminal court.

3 The Finanzgericht has raised the question whether the morphine is subject to customs duties under Community law. It points out in that respect that, in its

judgment of 5 February 1981 in Case 50/80 *Horvath* [1981] ECR 385, the Court stated that the introduction of the Common Customs Tariff no longer left a Member State the power to apply customs duties to drugs which had been smuggled in and destroyed as soon as they had been discovered but did leave it full freedom to take criminal proceedings in respect of offences committed.

4 As regards the facts of the case, the Finanzgericht ascertained that the morphine was not manufactured in the Federal Republic of Germany and that the quantity of that product sold by the plaintiff in the main proceedings had been smuggled into German territory in order to be illegally exported to a third country. The Finanzgericht refers to the above-mentioned judgment of the Court and asks whether it is not the prohibition of the importation and marketing of drugs, rather than their destruction, which prevents the application of customs duties and whether, in such circumstances, it is not appropriate to conclude that no customs debt can arise. Only if the Court does not accept that conclusion does the question arise whether removal of the unlawful drugs from the customs territory must be assimilated to destruction of them.

5 Having regard to those considerations, the national court submitted the following question for a preliminary ruling:

"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?"

6 The national court rightly states that the first question which must be answered is whether the unlawful importation into the Community of illegally marketed drugs gives rise to a customs debt. The Court will examine that question first.

7 So phrased, the question does not concern the problem of the unlawful importation of products in general but that of the unlawful importation of drugs.

8 As the Court pointed out in the *Horvath* judgment cited above, drugs such as morphine, heroin and cocaine display special features in so far as their harm-

fulness is generally recognized and their 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.

9 This legal position is in conformity with the Single Convention on Narcotic Drugs, 1961, (United Nations Treaty Series 520, No 7515), to which all the Member States are now parties. In the preamble to that Convention the parties state that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind; 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 adequate provision must be made to ensure the availability of narcotic drugs for such purposes. Pursuant to Article 4 of the Convention the parties are to take all the measures necessary to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

10 As a result, drugs which are not confined within channels of distribution strictly controlled by the competent authorities for use for medical and scientific purposes are subject, by definition, to a total prohibition of importation and distribution in all the Member States.

11 In practice, as soon as such drugs are discovered they are seized and destroyed in accordance with the national drugs laws, except in a number of rare cases where the product seized lends itself to medical or scientific use and is released into controlled channels of distribution, whereupon it becomes subject to customs duties.

12 On the other hand, drugs distributed through illegal channels are not subject to customs duties when they remain within such channels, regardless of whether they are discovered and destroyed or are not detected by the authorities.

13 A customs debt cannot therefore arise upon the importation of drugs which may not be marketed and integrated into the economy of the Community.

The introduction of the Common Customs Tariff, provided for in sub-paragraph (b) of Article 3 of the Treaty, falls within the scope of the objectives assigned to the Community in Article 2 and the guide-lines laid down in Article 29 for the operation of the customs union. Imports of drugs into the Community, which can give rise only to repressive measures, fall wholly outside those objectives and guide-lines.

14 That view is confirmed by the provisions of Regulation (EEC) No 803/68 of the Council of 27 June 1968 on the valuation of goods for customs purposes (Official Journal, English Special Edition 1968 (I), p. 170) and by those of Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt (Official Journal, 1979, L 179, p. 31). The preamble to that directive states specifically that the moment when the customs debt arises must be defined in the light of the economic nature of the duties on imports and in terms of the conditions under which the goods subject to import duties are integrated into the economy of the Community. In such circumstances, no customs debt can arise when drugs are imported through illegal channels of distribution, since they must be seized and destroyed upon discovery instead of being put into circulation.

15 Moreover, there is no justification for making a distinction in that regard between drugs which have not been discovered and those which are destroyed under the control of the competent authorities, since if such a distinction were made the application of customs duties would be subject to the chance of discovery.

16 It is apparent from the foregoing 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.

17 This finding is without prejudice to the powers of Member States to take criminal proceedings in respect of contraventions of their drugs laws and to impose appropriate penalties, including fines.

18 In the light of this answer, it is unnecessary to deal with the other problems raised by the national court.

Costs

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

On those grounds,

THE COURT,

in answer to the question referred to it by the Finanzgericht Baden-Württemberg by order of 16 June 1981, hereby rules:

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.

Mertens de Wilmars O'Keeffe Everling Chloros

Pescatore Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 26 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MRS ADVOCATE GENERAL ROZÈS

(see case 221/81, p. 3692)